Cal Law Trends and Developments

Volume 1967 | Issue 1 Article 15

January 1967

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James E. Leahy

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James E. Leahy, *Constitutional Law*, 1967 Cal Law (1967), http://digitalcommons.law.ggu.edu/callaw/vol1967/iss1/15

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Constitutional Law

by *James E. Leahy**

Restrictions on the political activities of public employees and the application of the statutory ban on obscenity were some of the First Amendment problems presented to the California appellate courts this past year.

Due process also received some attention. The courts were faced with such diverse questions as the regulation of insurance companies doing business in California exclusively by mail, the right to a hearing when the government takes action against an individual, and the taxation of foreign-based aircraft that fly into, out of, and within California.

Reapportionment of an irrigation district, license taxes, and payment for care of a patient at a state mental institution were

* LL.B. 1949, University of North Dakota; LL.M. 1967, New York University. Associate Professor of Law, California Western University, School of Law, San Diego, California. Member, State Bar Association of North Dakota.

The author extends his appreciation to Richard W. Halpern, second-year student at Golden Gate College, School of Law, for assistance in preparation of this article.

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among the problems in the realm of equal protection that confronted the courts.

Bagley and Its Aftermath

FIRST AMENDMENT—Political Rights of Public Employees Upheld

Twice during the past year, the California Supreme Court reexamined the validity of restrictions on political activities of public employees. The first occasion was *Bagley v. Washington Township Hospital District,*[1] which involved the discharge of a nurse's aide for participating in a movement to recall certain directors of the hospital district by which she was employed. She had been hired by the hospital district as a nurse's aide in April, 1960. The record showed that she consistently performed her assigned duties to the complete satisfaction of her superiors. Late in 1963 a number of citizens had become dissatisfied with the policies of the hospital district and commenced a recall campaign against certain of its directors. During her off-duty hours, the nurse's aide participated in the activities of this group. In February, 1964, the hospital administrator issued to all hospital personnel a memo entitled "Political Activities of Public Employees," which stated that participation in political activity by employees, for or against any candidate or ballot measure pertaining to the district, was unlawful and constituted grounds for dismissal. The nurse's aide was called into the hospital administrator's office and asked if she had discontinued her activity in the recall movement. When she replied negatively, her employment was terminated. She thereupon brought suit against the hospital, seeking reinstatement, back wages, and damages.

The second occasion, *Rosenfield v. Malcolm,*[2] involved a doctor employed as an assistant district health officer. While employed by the county, and before attaining civil service status, the doctor became associated with an organization calling itself the Ad Hoc Committee to End Discrimination.

1. 65 Cal.2d 499, 55 Cal. Rptr. 401, 421 P.2d 409 (1966).

2. 65 Cal.2d 559, 55 Cal. Rptr. 505, 421 P.2d 697 (1967).

The county advised him that his continued membership in this organization was incompatible with his employment as a health officer. He indicated his willingness to cease active participation in the committee, but he refused to completely sever his connection with the organization, and was thereupon discharged.

In both these cases the court held that dismissal violated the constitutional rights of the employees as guaranteed by the First Amendment. The court set forth the basis for both decisions by stating its holding in *Bagley:*

> [W]e hold that a governmental agency which would require a waiver of constitutional rights as a condition of public employment must demonstrate: (1) that the political restraints rationally relate to the enhancement of the public service, (2) that the benefits which the public gains by the restraints outweigh the resulting impairment of constitutional rights, and (3) that no alternatives less subversive of constitutional rights are available.[3]

While the *Bagley* decision is not one of first impression in California, it is the first time the court has so clearly spelled out the standards by which governmental action will hereafter be measured.

Pointing toward the result in these two cases was *Fort v. Civil Service Commission,*[4] which concerned the application of a section of the charter of Alameda County. This section prohibited any

> person holding a position in the classified civil service . . . [from taking] part in political management or affairs in any political campaign . . . or in any campaign to adopt or reject any initiative or referendum measure. . . .[5]

3. 65 Cal.2d at 501–502, 55 Cal. Rptr. at 403, 421 P.2d at 411.

4. 61 Cal.2d 331, 38 Cal. Rptr. 625, 392 P.2d 385 (1964).

5. 61 Cal.2d at 333, 38 Cal. Rptr. at 626, 392 P.2d at 386.

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The plaintiff, an employee of Alameda County, had become associated with a political campaign and was dismissed for that reason. Although recognizing that one employed in public service does not have a constitutional right to such employment, the Calfornia Supreme Court pointed out that a "person cannot properly be barred or removed from public employment arbitrarily or in disregard of his constitutional rights."[6] The court made a a thorough analysis of pertinent California and United States Supreme Court decisions and concluded:

> The principles set forth in the recent decisions do not admit of wholesale restrictions on political activities merely because the persons affected are public employees, particularly when it is considered that there are millions of such persons. *It must appear that restrictions imposed by a governmental entity are not broader than are required to preserve the efficiency and integrity of its public service.*[7] (Emphasis added.)

No standards were expressly set forth in *Fort* except the standard emphasized above. However, the court implied that there must be some showing of a compelling public need to sustain provisions as broad as the one in question. No such compelling need had been shown.

The *Bagley* opinion uses *Fort* as a starting point. The court goes on to point out that a government may legitimately withhold benefits from its citizens. But this does not mean that when benefits are granted they can be granted on an arbitrary deprivation of constitutional rights. Once it is recognized that public employment does not deprive the employee of constitutional protection, one has a starting point from which restrictions on his rights can be scrutinized. Although it might be argued that because certain rights are stated in absolute terms in the Bill of Rights, they are absolute,[8] it is clear that they are not always so treated. Even the cherished

6. 61 Cal.2d at 334, 38 Cal. Rptr. at 627, 392 P.2d at 387.

7. 61 Cal.2d at 337–338, 38 Cal. Rptr. at 629, 392 P.2d at 389.

8. See dissenting opinion of Justice Black in Konigsberg v. State Bar of Cal., 366 U.S. at 56, 6 L.Ed.2d at 120, 81 S.Ct. at 1010 (1961).

rights guaranteed by the First Amendment have been subjected to restriction when there was an overriding, compelling public need.[9]

The adoption by the United States Supreme Court of the position that constitutional rights are not absolute presents state courts with the problem of devising some standard by which governmental restriction on those rights can be measured. The standard adopted in *Bagley* appears to be a workable formula. Any such standard should weigh heavily in favor of the individual, and his rights should be considered absolute insofar as it is possible to do so. Although Justice Black might argue that this is still a balancing, which is forbidden by the Constitution, the standard adopted by the California Supreme Court will give considerable protection to the public employee in the exercise of his rights.

The standard places the burden squarely on the government to sustain its action, and this is where the burden clearly ought to be, for the rights protected by the Bill of Rights are guaranteed to the *individual.* The starting point for all discussion of these rights is that they exist, they belong to the individual, and they are protected by the Constitution. When the government contends that it must infringe upon these rights to protect its interests, the government ought to have the burden of proving the necessity for such infringement. What must the government show in order to discharge this burden under the *Bagley* standard? The government first must show "that the political restraints rationally relate to the enhancement of the public service. . . ."[10] Any restraint that is not rationally related to the benefit to be gained by the government would, of course, be arbitrary and violate the fundamental due process standard that has been the basis of many United States Supreme Court decisions.[11]

Next it must show "that the benefits which the public gains by the restraints outweigh the resulting impairment of

9. See e.g., Konigsberg v. State Bar of Cal., 366 U.S. 36, 6 L.Ed.2d 105, 81 S.Ct. 997 (1961); Reynolds v. United States, 98 U.S. (8 Otto) 145, 25 L.Ed. 244 (1878).

10. 65 Cal.2d at 501, 55 Cal. Rptr. at 403, 421 P.2d at 411 (1966).

11. See Wieman v. Updegraff, 344 U.S. 183, 97 L.Ed. 216, 73 S.Ct. 215 (1952).

constitutional rights. . . ."[12] If weighing we must do, then certainly in order to tip the scales in favor of the government the benefits to the public must outweigh the detriment to the individual. While the standard adopted does not indicate precisely to what extent the public gain must outweigh the individual's detriment, the opinion uses such language as "manifestly outweighs"[13] and "compelling public interest."[14]

Finally, the government must show that "no alternatives less subversive of constitutional rights are available."[15] That this criterion should be part of any standard that attempts to define the limits on government action against its employees follows again from the adoption of the basic premise that public employment does not deprive the employee of his constitutional rights. By starting from this point, it is incumbent on the government to devise means of reaching the result it desires by searching out and evaluating all available alternatives before adopting any regulations that infringe on the employee's rights. Once it adopts a restriction, the government should bear the responsibility of showing that there are no less restrictive alternatives that would accomplish the desired result.

The standard enunciated in the *Bagley* case, and affirmed in *Rosenfield,* speaks of "political restraints," since these two cases involve the exercise of an individual's right to engage in political activity. It would appear, however, that the court was concerned not only with government restriction on political activities as involved in *Bagley* and *Rosenfield,* but also with government infringement on other constitutional rights. Several cases illustrating this conclusion will be discussed.

FIRST AMENDMENT—"Filthy Speech" Banned on Campus

That the *Bagley* test will apply in other areas is borne out by its application in *Goldberg v. Regents of University of*

12. 65 Cal.2d at 501–502, 55 Cal. Rptr. at 403, 421 P.2d at 411 (1966).

13. 65 Cal.2d at 506, 55 Cal. Rptr. at 407, 421 P.2d at 415.

14. 65 Cal.2d at 507, 55 Cal. Rptr. at 408, 421 P.2d at 415.

15. 65 Cal.2d at 502, 55 Cal. Rptr. at 403, 421 P.2d at 411.

California.[16] Several students had been suspended and dismissed for participating in the so-called filthy speech rallies on the Berkeley campus of the University of California. Protesting the arrest of a nonstudent who had displayed a sign on the campus containing a "filthy" word, the students involved had used the same "filthy" word, as well as other language generally not acceptable as conversation in polite society. After disciplinary action had been taken against the students following a hearing before a special ad hoc committee at the university, the students sought a writ of mandate to compel their reinstatement to the university. They contended that the action of the university was an unconstitutional limitation on their First Amendment rights, that the regulation was unconstitutionally vague, and that they had been denied procedural process. The superior court entered a judgment dismissing the petition. Upon appeal to the Court of Appeal for the First District, the decision was affirmed.

The significance of the decision lies in Justice Taylor's approach to the problem. He pointed out that whether attendance at publicly financed institutions of higher education is a right or privilege is of no import. What is important is the determination that attendance at such an institution is of great value to the individual, and should be regarded as a benefit somewhat analogous to that of public employment. A *Bagley*-type standard is therefore the appropriate standard for the analysis of students' rights. *Goldberg* does not state the test as clearly as does the *Bagley* case, and although Justice Taylor does a good job of deciding the *Goldberg* case within the framework of the test he enunciates, it would appear that the *Bagley* test is more specific and would require the court to make a more searching inquiry into the relative merits of the restrictions on the individual's rights.[17]

16. 248 Cal.App.2d 867, 57 Cal. Rptr. 463 (1967).

17. Mention should also be made of Belshaw v. City of Berkeley, 246 Cal. App.2d 493, 54 Cal. Rptr. 727 (1966). In this case, the appellate court upheld a lower court writ of mandamus that vacated a 30-day suspension of a fireman from a city fire department. The city, acting under its personnel rules and regulations, suspended the fireman for writing a letter to the local newspaper concerning salary differences between firemen and policemen. The court held that the comments made by the plaintiff represented nothing more than an

FOURTH AMENDMENT—Receipt of Welfare Benefits Cannot Be Conditioned on Waiver of Rights

The California Supreme Court applied the *Bagley* test in *Parrish v. Civil Service Commission*[18] to determine whether the receipt of welfare benefits may be conditioned on a waiver of rights embodied in the Fourth Amendment. In November, 1962, the Board of Supervisors of Alameda County ordered the county welfare director to initiate a series of unannounced early morning searches of the homes of welfare recipients for the purpose of detecting the presence of unauthorized males. Because they lacked experience in this type of investigation, the social workers involved received special instructions. They were to work in pairs, one member surveying the back door while the recipient's own social worker presented himself at the front door and sought admittance. Once inside, he would proceed to the rear door and admit his companion. Together the two would conduct a thorough search of the entire dwelling, giving particular attention to beds, closets, bathrooms, and other possible places of concealment. No search warrants were obtained, nor were any probable cause criteria used to establish which homes were to be searched. The majority of homes searched were under no suspicion whatever. Parrish was one of the social workers chosen to participate in the first wave of raids. He submitted a letter to his superiors declaring that he would not participate because of his conviction that such searches were illegal. He was thereafter discharged for insubordination.

The court decided that the *Bagley* test was the appropriate one, for it applies whenever "the conditions annexed to the enjoyment of a public-conferred benefit require a waiver of rights secured by the Constitution. . . ."[19] The court then found that these searches did not meet the third part of the

exercise of his constitutionally protected right of free speech, for which, in the absence of a showing that his conduct impaired the public service, he could not properly be punished. (246 Cal. App.2d at 498.) The court did not have the benefit of the *Bagley* case on which to base its decision, but did take its cue from the *Fort* case.

18. 66 Cal.2d 260, 57 Cal. Rptr. 623, 425 P.2d 223 (1967).

19. 66 Cal.2d at 271, 57 Cal. Rptr. at 630, 425 P.2d at 230.

Bagley test because the county chose not only to search homes where fraud was suspected, but also homes where fraud was not suspected. The court concluded that any benefit to the county by indiscriminate searches was speculative at best and must yield to the right of innocent persons to be secure in their homes. Alternative methods were available to the county to search out fraud in the welfare program. Having applied the *Bagley* test to determine that the unannounced searches of the unsuspicious homes of welfare recipients were invalid, the court next held that the county could not discharge a welfare worker for refusal to participate in these searches where the reason for his refusal was that he thought that they were illegal.

FOURTEENTH AMENDMENT—Due Process: To Wear a Beard Is Liberty

The Court of Appeal for the Second District also applied the *Bagley* test to uphold the nonpolitical right of a high school teacher to wear a beard. In *Finot v. Pasadena City Board of Education*,[20] a teacher was transferred to home teaching because, contrary to administrative policy, he insisted on wearing a beard. Believing that there was correlation between a student's appearance and his behavior, school authorities contended that if a teacher were to wear a beard, the male students would be encouraged to imitate him. With a writ of mandamus, the teacher tried to force the school authorities to reassign him to classroom teaching. The writ was denied in the superior court, but the Court of Appeal reversed, holding that the teacher was denied due process of law. It found that wearing a beard was not a privilege, that it was not within the purview of the Fourth Amendment guarantee to be secure in one's person, and that the ban on beards was not a denial of equal protection. The due process clause of the Fourteenth Amendment, however, was found to give a teacher the right to wear a beard. It was "one of

20. 250 Cal. App.2d 189, 58 Cal. Rptr. 520 (1967).

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[those] constitutionally unnamed but constitutionally protected personal liberties."[1]

After determining that a constitutional right was involved, the next problem was to determine to what extent the government (school authorities) could infringe on it as a condition for teaching in the public schools. For an answer to this question the court turned to *Bagley* and the three-part standard enunciated there. As to the first part, the court pointed out that *"as a matter of actual experience,"*[2] there was no showing that wearing the beard disrupted or impaired classroom discipline; it was merely the opinion of the principal that the beard would render the rule against student beards more difficult to enforce. The court, however, agreed that this was a rational basis for the rule; therefore, part one of the test was satisfied. However, the benefit to the public did not outweigh the impairment of the individual rights, and reasonable alternatives were available. The restriction on teachers wearing beards, therefore, violated due process.[3]

FIRST AMENDMENT—Obscenity: What Is It?

This First Amendment problem arose in *Landau v. Fording*.[4] The trial court found "Un Chant d'Amour," a film written and directed by Jean Genet, depicting acts of sexual perversion in a prison, to be obscene within the meaning of Penal Code section 311(a).[5] The Court of Appeal affirmed a

1. 250 Cal. App.2d at 198, 58 Cal. Rptr. at 526.

2. 250 Cal. App.2d at 200, 58 Cal. Rptr. at 527.

3. 250 Cal. App.2d at 201, 58 Cal. Rptr. at 528.

4. 245 Cal. App.2d 820, 54 Cal. Rptr. 177 (1966), *aff'd mem.*, 388 U.S. 456, 18 L.Ed.2d 1317, 87 S.Ct. 2109 (1967); the dicta implying that "pandering" is a part of the offense proscribed by Penal Code § 311.2 was specifically overruled in People v. Noroff, 67 Cal.2d —, 63 Cal. Rptr. 575, 433 P.2d 479 (1967). The court in *Noroff* stated that Penal Code § 311.2 does not apply to matters produced solely for the personal enjoyment of the creator or as a means for the improvement of his artistic technique. But the discussion above on the standard of obscenity still seems applicable.

5. Section 311(a) of the California Penal Code reads as follows:

"Obscene" means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters

lower court's ruling that since a film was obscene within the statutory definition, any showing of it would be in violation of the Penal Code.

The statutory definition had been amended in 1961 to conform to the United States Supreme Court's mandate in *Roth v. United States.*[6] The test of obscenity laid down in *Roth* is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[7] A comparison of the *Roth* test with the definition contained in the Penal Code indicates that they are not identical. Even assuming, however, that the Penal Code definition does meet the *Roth* test, three Justices of the United States Supreme Court have, since *Roth,* restated the test in more specific terms. In *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts,*[8] the test was restated to include the establishment of three standards that must all be met:

> (a) the dominant theme of the material taken as a whole [must appeal] to a prurient interest in sex; (b) the material [must be] patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material [must be] utterly without redeeming social value.[9]

Comparing this test with the *Roth* test, significant change is evident.[10] The *Roth* test requires only that the material have a dominant theme that appeals to prurient interests when viewed in the context of contemporary community standards. Neither the criterion of "patently offensive" nor of

and is matter which is utterly without redeeming social importance.

6. 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (1957).

7. 354 U.S. at 489, 1 L.Ed.2d at 1509, 77 S.Ct. at 1311.

8. 383 U.S. 413, 16 L.Ed.2d 1, 86 S.Ct. 975 (1966).

9. 383 U.S. at 418, 16 L.Ed.2d at 6, 86 S.Ct. at 977.

10. It must be pointed out, however, that only three Justices—Warren, Brennan, and Fortas—joined in the *Memoirs* opinion.

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"utterly without redeeming social value," as required by *Memoirs,* enters into the *Roth* test.[11] Regardless of the background on which the *Memoirs* test is founded, there are three parts to the test, and material alleged to be obscene must be measured against all three parts.

Returning to the *Landau* case, it is apparent that while Justice Taylor refers to the *Memoirs* case, he does not apply the three-part test, but applies the *Roth* test as codified in the Penal Code. Justice Taylor then tests the film against the "social importance" provision in the statute and concludes: "[I]n our opinion, the production does nothing more than depict a number of disjointed scenes treating sex in a shocking, morbid and shameful manner and is devoid of artistic merit."[12] To bolster its conclusion that the film was objectionable, the court used the approach approved in *Ginzburg v. United States,*[13] and found that the film had been commercially exploited, with substantial sums of money being earned by its showing.

The United States Supreme Court granted *certiorari* in the *Landau* case and, in a *per curiam* decision, affirmed the decision of the California appellate court. Although Justices Warren, Brennan, Clark, Harlan, and White voted to affirm, Justices Black, Douglas, Stewart, and Fortas would have reversed. While one can only speculate as to why the Justices voted as they did in affirming the *Landau* case, one does wonder about the positions of Justices Warren and Brennan. The appellate court did not apply the three-part test that was approved by Justices Warren, Brennan, and Fortas in *Memoirs.* Completely absent from the Penal Code and from Justice Taylor's opinion is any reference to part (b) of the *Memoirs* test, that is, whether the material was "patently offensive." Justice Fortas voted to reverse the *Landau* case,

11. Even in Jacobellis v. Ohio, 378 U.S. 184, 12 L.Ed.2d 793, 84 S.Ct. 1676 (1964), although Justice Brennan stated that "obscenity is excluded from the constitutional protection only because it is 'utterly without redeeming social value,'" he does not explicitly amend the *Roth* test. No indication is given where the "patently offensive" part of the test arose.

12. 245 Cal. App.2d at 829, 54 Cal. Rptr. at 183.

13. 383 U.S. 463, 16 L.Ed.2d 31, 86 S.Ct. 942 (1966).

and it may be that he concluded that neither the Penal Code nor Justice Taylor's opinion correctly states the *Memoirs* test.

FOURTEENTH AMENDMENT—DUE PROCESS—Generally

One of the basic tenets of constitutional law is:

> [T]he courts will not nullify laws enacted under the police power unless they are manifestly unreasonable, arbitrary or capricious, having no real or substantial relation to the public health, safety, morals or general welfare.[14]

On several occasions this past year, claims of manifest unreasonableness were rejected by the California courts. The courts found valid as against this attack a charge by a city of 2 cents per ton for each ton hauled by trucks weighing 27,000 pounds or over;[15] price maintenance provisions of the Alcoholic Beverage Control Act;[16] and the prohibition against physicians and surgeons having any proprietary interest in a pharmacy.[17] The basic position taken was that it was for the legislature to make such decisions, even though it might be debatable whether a statute really satisfies a public need.

The Supreme Court of California dealt also with several other specific due process problems. In *People v. United National Insurance Co.*,[18] it upheld state regulation of the insurance transactions of foreign insurance companies having no agents or offices in California, but doing business in California with California residents exclusively by mail. The

14. Ratkovich v. City of San Bruno, 245 Cal. App.2d at 879, 54 Cal. Rptr. at 338–339. See also Ferguson v. Skrupa, 372 U.S. 726, 10 L.Ed.2d 93, 83 S.Ct. 1028, 95 A.L.R.2d 1347 (1963); Olsen v. Nebraska, 313 U.S. 236, 85 L.Ed. 1305, 61 S.Ct. 862, 133 A.L.R. 1500 (1941).

15. Ratkovich v. City of San Bruno, 245 Cal. App.2d 870, 54 Cal. Rptr. 333 (1966). See discussion in McKinstry, STATE AND LOCAL GOVERNMENT, in this volume.

16. 36 Cal. Bus. & Prof. Code §§ 24749–24757; Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control, 65 Cal.2d 349, 55 Cal. Rptr. 23, 420 P.2d 735 (1966).

17. Magan Med. Clinic v. Cal. St. Bd. of Med. Examiners, 249 Cal. App.2d 124, 57 Cal. Rptr. 256 (1967). See Brandel, BUSINESS ASSOCIATIONS, in this volume.

18. 66 Cal.2d 577, 58 Cal. Rptr. 599, 427 P.2d 199 (1967), *appeal dismissed*, — U.S. —, 19 L.Ed.2d 562, 88 S.Ct. 506 (1967).

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Insurance Commissioner sought to enjoin three foreign insurance companies from carrying on their mail order business until they complied with section 700 of the Insurance Code and obtained a certificate of authority. Two of the companies mailed application forms to prospective purchasers. When these forms were completed and returned to the companies, policies were issued at the home offices and sent to the applicants. The third company sent a pre-endorsed policy to the California resident, together with an application. When the applicant returned the application and the first premium, the policy became effective.

The court recognized that, in the McCarran Act,[19] Congress had conferred on the states the authority to regulate and tax the business of insurance, even though the United States Supreme Court had earlier held that such business was interstate commerce. But since state regulation is nevertheless subject to due process, the court had to look to pre-McCarran decisions for guidelines of due process in this type of case. It isolated two separate yet consistent trends of decision. The first is exemplified by a trilogy of cases[20] that emphasized the *place of making a contract* sought to be taxed or regulated, and held that if the activities relevant to the making and carrying out of such a contract occurred outside the taxing or regulating state, an attempt to tax or regulate it would be in violation of due process. The second trend is exemplified by two later cases that laid emphasis on the *contacts*[1] with the regulating state arising from the transactions involved and the interest of the state in these transactions. The latter trend indicates that if a state has sufficient interests and contacts, regulation of the transactions does not violate due process.

19. 15 U.S.C. §§ 1011–1015.

20. Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 82 L.Ed. 673, 58 S.Ct. 436 (1938); St. Louis Cotton Compress Co. v. Arkansas, 260 U.S. 346, 67 L.Ed. 297, 43 S.Ct. 125 (1922); Allgeyer v. Louisiana, 165 U.S. 578, 41 L.Ed. 832, 17 S.Ct. 427 (1897).

1. See Hoopeston Canning Co. v. Cullin, 318 U.S. at 319, 87 L.Ed. at 783, 63 S.Ct. at 606, 145 A.L.R. at 1119 (1943); Osborn v. Ozlin, 310 U.S. 53, 84 L.Ed. 1074, 60 S.Ct. 758 (1940).

In *United National* the court used the reasoning of the second trend and held that the interests of, and the contacts with, the state arising from a mail order business were sufficient to give California a substantial interest in the transactions. The transactions, therefore, do not violate the due process mandate of the Fourteenth Amendment. Further, the decision is in accord with a recent Wisconsin case,[2] which was also dismissed on appeal to the United States Supreme Court for want of a substantial federal question.

This writer submits that the decision of the California court is not even in conflict with the United States Supreme Court decisions representing the first trend, since these cases dealt with either the state's power to tax or the imposition of criminal sanctions, and not with the state's power to regulate. The power to regulate falls within the police power of the state and should not depend on a technical determination of where a contract is made, but rather on the sum total of the facts leading up to the eventual placing of the insurance in force.[3]

The due process issue was again raised in *In re Halko*.[4] In a proceeding for a writ of *habeas corpus,* the court upheld the right of the state to quarantine a person with a contagious and infectious disease for an indefinite period, provided that there is reasonable cause to suspect that a threat to public health and safety exists.

The petitioner had been found to have active pulmonary tuberculosis and had been confined to a hospital after being served with a quarantine order of isolation. Petitioner deserted the hospital and was later convicted of violating section 3351 of the Health and Safety Code. While in jail, petitioner was again served with an order of isolation because of his tuberculosis, and was returned to the hospital. By successive isolation orders, served at 6-month intervals, the petitioner was confined to the hospital for approximately 18 months.

2. Ministers Life & Cas. Union v. Haase, 30 Wis.2d 339, 141 N.W.2d 287 (1966), *appeal dismissed,* 385 U.S. 205, 17 L.Ed.2d 301, 87 S.Ct. 407 (1966).

3. See Hoopeston Canning Co. v. Cullin, 318 U.S. at 319, 87 L.Ed. at 783, 63 S. Ct. at 606, 145 A.L.R. at 1119 (1943).

4. 246 Cal. App.2d 553, 54 Cal Rptr. 661 (1966).

Halko contended that these consecutive orders of quarantine and isolation, issued "without means of questioning and judicially determining" the conclusion of the health officer, resulted in "continually depriving one of his liberty," and that therefore, section 3285 "is unconstitutional in that it deprives this petitioner of his liberty without due process of law."[5]

The court sustained the right of the state under its police power to protect the health and safety of its citizens. The court pointed out that the legislature is given broad discretion in determining what measures are necessary for the protection of such interests, the determination of which diseases are infectious and contagious, and the adoption of appropriate measures for preventing their spread.[6]

While this decision follows prevailing law,[7] the petitioner did raise the due process question, whether the discretionary decision of the health officer should not at some time be subject to judicial review.[8] Since it appears from the decision that a person quarantined in California can secure such a judicial review by using a writ of *habeas corpus,* the due process requirement is satisfied.

During the past year, the Court of Appeal added another case to the growing list of cases that authorize summary suspension of licenses before the licensee is given a hearing. In *Stewart v. County of San Mateo,*[9] the licensee had a permit to operate a private patrol service within the county. This permit was summarily revoked by the sheriff.[10] In an action for declaratory judgment that the ordinance under which his permit had been revoked was invalid, the revocation was upheld. The general rule in California has been:

5. 246 Cal. App.2d at 554, 54 Cal. Rptr. at 662.

6. 246 Cal. App.2d at 557, 54 Cal. Rptr. at 663.

7. 25 AM JUR, *Health* (1st ed § 38 at 315).

8. See Note, *Due Process for All—Constitutional Standards for Involuntary Civil Commitment and Release,* 34 U. OF CHI. L. REV. 663 (1967).

9. 246 Cal. App.2d 273, 54 Cal. Rptr. 599 (1966).

10. San Mateo City Ord. Code § 5620.8 provides in part: "The sheriff shall revoke any permit issued hereunder when in his opinion the permittee is violating any of the provisions of this chapter or of the Private Investigator and Adjuster Act."

> [B]ecause of reasons of justice and policy, a statute, unless it expressly provides to the contrary, will be interpreted to require a hearing in license revocation proceedings where it contemplates a quasi-judicial determination by the administrative agency that there be cause for the revocation.[11]

The California Supreme Court, however, has held that due process is not violated by a summary suspension or revocation of a license where the action of the administrative agency is then subject to judicial review. This summary procedure, when justified by a compelling public interest, is consistent with the position of the United States Supreme Court.[12] In *Stewart,* the court, recognizing that the right to engage in legitimate employment is an individual freedom secured by the due process clauses of the Federal and State Constitutions, concluded that the public interest is served by the summary procedure as long as the licensee may secure a hearing by appeal to the board. It said, "We are persuaded that because the role of a private patrol officer is akin to that of peace officers, it bears a sensitive relationship to the public interest."[13] Although the court did not expressly say so, it implied that the hearing accorded the licensee by the board was one in which the licensee was allowed to present evidence in opposition to the revocation of his license.

But if due process requires that a person be given a hearing before some action can be taken against him, does it require that the hearing must be before the agency that takes the action? This unusual question arose in the case of *O'Reilly v. Board of Medical Examiners.*[14] The petitioner, O'Reilly, was a licensed osteopath and therefore subject to control by the Board of Osteopathic Examiners. Charges were filed with the board against him, alleging that he had violated sec-

11. 246 Cal. App.2d at 283, 54 Cal. Rptr. at 605.

12. Bourjois, Inc. v. Chapman, 301 U.S. 183, 81 L.Ed. 1027, 57 S.Ct. 691 (1937). See also Note, *Automobiles: Constitutionality of Safety Responsibility Laws,* 39 CAL. L. REV. 123 (1951).

13. 246 Cal. App.2d at 288, 54 Cal. Rptr. at 608.

14. 66 Cal.2d 381, 58 Cal. Rptr. 7, 426 P.2d 167 (1967).

tion 2392 of the Business and Professions Code.[15] An appointed hearing officer, after holding a hearing in accordance with the statutory requirements,[16] recommended disciplinary action against the petitioner. In the interim, the petitioner elected to be licensed by the Board of Medical Examiners, and he was granted a physician's and surgeon's certificate. Shortly thereafter, the Board of Medical Examiners ratified the proceedings that had taken place before the Board of Osteopathic Examiners and adopted the decision of the hearing officer. No additional hearing had been given to the petitioner. The lower court and the Supreme Court affirmed the decision of the Board of Medical Examiners, and held that there had been no violation of due process in this procedure. As a basis for its decision, the Supreme Court stated, "due process is not interested in mere technical formalism. It is the substance that is determinative of whether due process has been afforded."[17]

The fact that neither the Board of Osteopathic Examiners nor the Board of Medical Examiners heard the evidence was not fatal.[18] The board that decides the matter, however, must itself consider the evidence presented to the hearing officer. As long as the board makes the final decision after an independent review of the record, it is not precluded from adopting the hearing officer's recommendation. Thus it would appear that the California Supreme Court's answer in the *O'Reilly* case is correct.

Right v. Privilege—Attendance at State Institutions of Higher Learning

In *Goldberg v. Regents of the University of California,*[19] the question whether an interest is a right or privilege was

15. This section prohibits the employment of an unlicensed practitioner in the practice of any system or mode of treating the sick or afflicted.

16. Cal. Gov't. Code, §§ 11503, 11505 and 11509.

17. 66 Cal.2d at 384, 58 Cal. Rptr. at 9, 428 P.2d at 606.

18. See Morgan v. United States, 298 U.S. 468, 80 L.Ed. 1288, 56 S.Ct. 906 (1936); Cooper v. State Bd. of Med. Examiners, 35 Cal.2d 242, 217 P.2d 630, 18 A.L.R.2d 593 (1950).

19. 248 Cal. App.2d 867, 57 Cal. Rptr. 463 (1967).

held not to be determinative of whether a hearing is necessary before an interest can be restricted. This approach more accurately reflects the true spirit of due process than the classification of interests as privileges or rights. Due process is concerned with justice and fair play, which require that when the government seeks to revoke or restrict an interest of an individual, the individual should have an opportunity to be heard before the action becomes final. There may be times when the interest of the public requires that the action be taken first, but as indicated in the cases reviewed above, where the action depends upon factual determinations, the individual should be allowed to participate in the ultimate determination of those facts.

FOURTEENTH AMENDMENT—DUE PROCESS—Taxation: "In Flight" Time Is Taxable

A due process question of first impression in California, and one involving an area in which the United States Supreme Court has not yet spoken, was dealt with in *Zantop Air Transport v. County of San Bernardino.*[20] The question concerned the use of "in flight" time in an apportionment formula used to levy an *ad valorem* property tax on the plaintiff's flight equipment.

The plaintiff was an airline company based in Detroit, Michigan, but operating aircraft in and out of and within California. The county tax assessor had devised a formula to tax the flight equipment, which included not only the ground time in the county but also time "in flight" within California, when the planes were coming into and leaving the state. The assessor had also used one-half of the "in flight" time for flights between bases within the state. The plaintiffs conceded that under *Braniff Airways, Inc. v. Nebraska State Board of Equalization,*[1] their aircraft were subject to an *ad*

20. 246 Cal. App.2d 433, 54 Cal. Rptr. 813 (1966).

1. 347 U.S. 590, 98 L.Ed. 967, 74 S.Ct. 757 (1954). Braniff's home base was in Minnesota. It had 18 scheduled stops in Nebraska, all of short duration. It had hired depot space and services as business required, but had no storage or repair facilities. A Nebraska statute imposed an *ad valorem* property tax on the flight equipment of all regularly scheduled planes, appor-

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valorem property tax on a properly apportioned basis. However, neither *Braniff* nor any other United States Supreme Court or California appellate court case had considered "in flight" time in an apportionment formula.

There should be no constitutional defect in the allocation formula used in the instant case. The three factors that have influenced the United States Supreme Court in taxation apportionment cases have been: (1) whether the property has acquired a taxable situs elsewhere;[2] (2) whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the state; and (3) whether the tax constitutes an unreasonable burden on interstate commerce.[3]

These tests were met in the *Zantop* case. No other state could tax the "in flight" time in California, and the airline did enjoy benefits and protections from the county, not only while on the ground but during flight over the land subject to the jurisdiction of the taxing authority. Further, the tax did not appear to be an unreasonable burden on interstate commerce.

FOURTEENTH AMENDMENT—EQUAL PROTECTION—Apportionment: Irrigation Districts Do Not Govern

The equal protection clause also received its share of attention this year. Such diverse problems as reapportionment, taxation, and liability for the care of mental patients came under scrutiny.

tioned by a formula having three ratios: (1) ratio of arrivals and departures to that of the previous year; (2) ratio of revenue tons handled at state airports to that of all airports; and (3) ratio of revenue collected within the state to total revenue for the same period. The Supreme Court held that the situs issue devolves into whether 18 stops per day is sufficient contact with Nebraska to sustain that state's power to levy an apportioned *ad valorem* tax, and said that the basis of jurisdiction is the habitual employment of the property within the state. Nebraska affords protection during such stops, and these regular landings were clearly a benefit to appellant. The court, therefore, held that Nebraska had sufficient contact to impose the tax.

2. See Northwest Airlines v. Minnesota, 322 U.S. 292, 88 L.Ed. 1283, 64 S.Ct. 950, 153 A.L.R. 245 (1944).

3. See Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 93 L.Ed. 585, 69 S.Ct. 432 (1949).

The California Court of Appeal for the Fifth District, in *Thompson v. Board of Directors*,[4] had to plow new ground to reach a decision on the question of the reapportionment of an irrigation district. The district is governed by a board consisting of five members, and is divided into five divisions; one director is elected from each division. These divisions had not been modified for over 30 years.

The respondents had unsuccessfully petitioned the appellant Board of Directors to redraw the division lines so that there would be less disparity in the distribution of the population among the five divisions. They then petitioned the Superior Court of Stanislaus County to do so. The trial judge granted judgment for respondents and issued a writ of mandate directing the redrawing of boundary lines. The irrigation district appealed from this order. Although the California Supreme Court required the reapportionment of county supervisorial districts[5] 2 years ago, it has not yet spoken on the question of apportionment of special districts such as the one involved in this case. Nor could the Court of Appeal find help from the United States Supreme Court, where the apportionment cases have all been concerned with either state legislative or congressional reapportionment.[6]

Operating in this vacuum, the court devised a test of its own:

> [I]f the principal purpose of a district is to provide a service or services which can be and are sometimes provided by a private or quasi-public corporation (such as a public utility company), and if in the accomplishment of this purpose it does not exercise general powers of government, it is not subject to the "one man, one vote"

4. 247 Cal. App.2d 587, 55 Cal. Rptr. 689 (1967).

5. Wiltse v. Board of Supervisors, 65 Cal.2d 314, 54 Cal. Rptr. 320, 419 P.2d 440 (1966); Miller v. Board of Supervisors, 63 Cal.2d 343, 46 Cal. Rptr. 617, 405 P.2d 857 (1965).

6. The cases of Sailors v. Board of Ed., 387 U.S. 105, 18 L.Ed.2d 650, 87 S.Ct. 1549 (1967), involving a county school board, and Dusch v. Davis, 387 U.S. 112, 18 L.Ed.2d 656, 87 S.Ct. 1554 (1967), involving an election of city councilmen, did not require the United States Supreme Court to state whether the "one man, one vote" doctrine extended below the legislative level.

> rule. If, however, its principal purpose is to govern or if its functions are primarily governmental in nature, or if not governmental in nature they are accomplished by the exercise of general powers of government, it meets the test, and the doctrine is applicable.[7]

Applying this test to an irrigation district, the court concluded that the district fell within the first part of the test and therefore was not subject to the "one man, one vote" requirement.[8]

While it can be suggested that since irrigation districts are creatures of the legislature, they should properly be apportioned, it appears that the test devised by the Court of Appeal is a reasonable one. The test is somewhat broader than a mere search for an answer to the question whether the body is performing a legislative function. Although the court does not give explicit guidelines for determining whether a body's "principal purpose is to govern," it is possible that some special bodies, which do not have legislative powers, may be said to perform other governmental functions. Thus the courts that adopt this test will have to decide whether to reapportion a body that assesses, levies, or collects taxes; grants a franchise; or provides such services as fire protection, police protection, or maintenance of park and recreational areas.

EQUAL PROTECTION—Taxation

The *Estate of Rogers*[9] raised an interesting equal protection problem in a taxation case. The taxpayer was required to pay an inheritance tax on one-half the value of joint tenancy property, the purchase price of which came from quasi-community property. The husband and wife had come to California from Ohio in 1955, bringing with them certain

7. 247 Cal. App.2d at 592, 55 Cal. Rptr. at 692.

8. Although the population criterion was not unconstitutional, the board's abuse of discretion justified the trial court's action requiring it to change boundaries. See also McKinstry, STATE AND LOCAL GOVERNMENT, in this volume.

9. 245 Cal. App.2d 101, 53 Cal. Rptr. 572 (1966). Although this decision is dated Sept. 21, 1966, it has been included in the survey because the decision was modified on Oct. 13, 1966, before it became final. See Estate of Rogers, 53 Cal. Rptr. 572 (1966) for modification.

funds that represented the husband's earnings prior to their move. These funds, although conceded to be the husband's separate property, became quasi-community property after the couple settled in this state. The husband used the funds to purchase various parcels of real estate, taking the title in joint tenancy with his wife. She had not furnished any part of the consideration for these purchases. The wife died in 1964, and the husband petitioned the superior court to establish the fact of the wife's death and to determine whether any inheritance tax was payable.

The superior court found that section 13672 of the Revenue and Taxation Code, which controlled this factual situation, violated the equal protection clauses of the California and the United States Constitutions. The Court of Appeal disagreed. Section 13672 states in essence that where joint tenancy property is purchased from quasi-community property funds, one-half the value of the property shall be taxed in the estate of the first joint tenant to die, as if that joint tenant had contributed one-half of the consideration for the purchase thereof.

This in itself raised no constitutional question, but such a question is raised when one considers that section 13671 of the same code, which relates to joint tenancies generally, allows the surviving joint tenant to prove that the deceased did not contribute any part of the consideration for the acquisition of the joint tenancy.[10] When he does so, no tax is levied. Further, under section 13671.5, [i]f a husband and wife place community property in their joint names, the joint tenancy shall be treated as if it were community property.[11] As community property, the interest of the deceased joint tenant spouse is not subject to being taxed.[12]

In reaching its decision in *Rogers,* the appellate court seemed to place emphasis on the fact that the legislature "attempted, in certain areas, to assimilate the rights of the nonacquiring spouse in property acquired during a marriage

10. 245 Cal. App.2d at 104, 53 Cal. Rptr. at 574.

11. 245 Cal. App.2d at 104, 53 Cal. Rptr. at 574.

12. Cal. Rev. & Tax. Code § 13551.

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elsewhere to the rights of California domiciliaries."[13] The court reasoned that because the legislature had tried to give quasi-community property owners the same benefits as community owners, the taxpayer here should not complain because he has not received any such benefits from this legislation. However, the court overlooked the fact that what had been taxed was an interest in joint tenancy property that passed from the deceased to the survivor, and, no matter what the source of the funds, the survivor received that interest from the decedent by operation of law. The interest that passed to the survivor is the same interest, whether the funds were from separate property, community property, or quasi-community property. The legislature has exempted from taxation that interest in two of these three situations, as pointed out above. Section 13672, therefore, is construed to treat this surviving joint tenant differently from the other surviving joint tenants, yet there is no showing of any rational basis for this different treatment.

In another taxation case, *Willingham Bus Lines, Inc. v. Municipal Court,*[14] a charter bus company found no relief from the Supreme Court. At issue was a tax that is levied by the City of San Diego on the business of furnishing charter buses for hire. The tax was based on the gross receipts received by the bus operator, adjusted to the mileage the buses run in the city. Taxicabs, sightseeing buses, autos for hire, all paid a flat license fee, as did charter boats, sightseeing boats, and charter airplanes.

The taxpayer had contended that this classification violated the equal protection clause, and the Court of Appeal agreed. That court stated:

> We are unable to draw a distinction with relevant difference between appellant and the other closely related passenger-carrying businesses enumerated in the ordinance and taxed on a different basis.[15]

13. 245 Cal. App.2d at 109, 53 Cal. Rptr. at 577.

14. 66 Cal.2d 893, 59 Cal. Rptr. 618, 428 P.2d 602 (1967).

15. 248 A.C.A. 1, 5, 56 Cal. Rptr. at 94 (1967).

This argument did not impress the Supreme Court, however, and because the plaintiff could not show that "these disparate formulae for taxation work a concrete hardship upon charter bus lines,"[16] it had to pay the tax under the city's formulae, although others similarly situated paid only a flat license fee.

In *Web Service Co. v. Spencer*,[17] another taxpayer also alleged discriminatory treatment and lost. The taxpayer owned a number of coin-operated washing machines and driers, which he had located in motels, apartment houses, and trailer courts. On December 31, 1963, he owned 693 machines at 261 locations. Under the Anaheim Municipal Code, the business of coin-operated machines, such as that owned by the taxpayer, was subject to a tax of $1 per machine annually. However, the person conducting such a business had the option to pay the tax based on his gross receipts, which were taxed on a prescribed graduated scale, with a minimum of $25 for each separate location.

The city contended that the taxpayer was operating at 261 different locations, and therefore he would be required to pay the minimum tax of $25 for each location if he chose to use the alternate, gross receipts method of paying the tax. The taxpayer brought a writ of mandamus to require the issuance of one license to cover all of his machines. He argued that even though he had machines at a number of locations, he should be treated no differently than a laundromat operator who has as many as 30 machines at one location. The laundromat operator, by being faced with only a minimum tax of $25 for his location, even though having 30 or more machines there, was in a position to compare the gross receipts tax and the per machine tax, and take his choice. The taxpayer in this case had no such choice available, because of the city's insistence that he pay the minimum tax of $25 for each location.

The superior court agreed with the taxpayer that the interpretation of the ordinance by the city discriminated against him and therefore violated the equal protection clause. The

16. 66 Cal.2d at 897, 59 Cal. Rptr. at 621, 428 P.2d at 604.

17. 252 Cal. App.2d 891, 61 Cal. Rptr. 493 (1967).

Court of Appeal found otherwise. It pointed out that while the result will place in one classification a route operator such as the taxpayer in this case, and a laundromat operator in another, there does appear to be a reasonable basis for such classification. The court noted that the city council may have been aware that the operations of route operators and laundromat operators differ, and that the gross receipts computation alone would not afford a basis on which to equate the tax burden between the two types of operations. The court concluded by holding that the ordinance

> meet[s] the requirement that the classification or measure of tax used shall be reasonably related to the objective of the legislation, viz., the taxable event; do[es] not unlawfully discriminate against the route operator; do[es] not impose a tax in an amount that is confiscatory or as a subterfuge to eliminate competition . . .[18]

Thus it appears that the court did test the tax and its application to the taxpayer against a measurable standard in finding that there was no violation of the equal protection clause. Equal protection has no meaning unless there are some standards beyond which the legislature cannot go. While equal protection standards may be vague and uncertain, and subject to different application by different individuals, there nevertheless ought to be some standards, and the courts ought to apply them in each case. This was done by the Court of Appeal in *Web Service,* but not by the Supreme Court in *Willingham.*

FOURTEENTH AMENDMENT—EQUAL PROTECTION —Care for Patients in State Mental Institutions

One final equal protection problem, the determination of the obligation of the estate of a deceased husband to pay for care of a wife who had previously been committed to a state mental institution, was presented to two courts of appeal. Both reached identical results. The obligation was upheld

18. 252 Cal. App.2d at 902–903, 61 Cal. Rptr. at 501.

19. 246 Cal. App.2d 24, 54 Cal Rptr. 432 (1966).

in *Department of Mental Hygiene v. O'Connor*[19] and in *Department of Mental Hygiene v. Kolts.*[20]

Prior to 1967, section 6650 of the Welfare and Institutions Code defined those persons obligated to pay for such care. It read, in part, as follows:

> The husband, wife, father, mother, or children of a mentally ill person . . ., and the administrators of their estates, . . . shall be liable for his care, support, and maintenance in a state institution of which he is an inmate. The liability of such persons and estates shall be a joint and several liability. . . .[1]

It was the contention of the representatives of the estates of the husbands in both cases that a prior case, *Department of Mental Hygiene v. Kirchner,*[2] had held section 6650 to be unconstitutional, and that thereby no liability existed. In *Kirchner,* the Supreme Court of California held that it was a denial of equal protection under the California Constitution[3] to charge an adult child, under section 6650, with the cost of his parent's care while the parent was a patient in a state mental hospital. It was a denial of equal protection to select one particluar class of persons for a species of taxation with no rational basis to such classification.

In both *O'Connor* and *Kolts,* the appellate courts concluded that *Kirchner* did not hold section 6650 to be unconstitutional per se, but only that classification that made the adult child liable for the parent's care. On this basis, then, the courts were able to discuss the liability of the husband under the statute. Both courts found the liability of the husband to stand on a different footing than the liability of the adult child.

20. 247 Cal. App.2d 154, 55 Cal. Rptr. 437 (1966).

1. § 6650 was repealed, Stats. 1967, c. 1667, § 36.5, p. —, and replaced by § 7275 of the same code. Stats. 1967, c. 1667, § 40, p. —. The pertinent part of § 7275 is substantially the same as § 6650.

2. 60 Cal.2d 716, 36 Cal. Rptr. 488, 388 P.2d 720 (1964), *vacated,* 380 U.S. 194, 13 L.Ed.2d 753, 85 S.Ct. 871 (1964); *reiterated on remand* 62 Cal.2d 586, 43 Cal. Rptr. 329, 400 P.2d 321 (1965).

3. Cal. Const., Art. I, §§ 11 and 21.

The court in *O'Connor* reached its decision by stating that although a husband has a legal obligation to support his wife, evidenced by history and statutes, there is no common-law basis to impose liability on a child to support his parent. The *Kolts* court took the same position, and traced the common-law liability of the husband to support the wife. While these cases do not raise or settle any unusual constitutional issues, they are worthy of note, for they limit *Kirchner* to factual situations wherein the person sought to be found responsible has no common-law or other statutory obligation to support the patient to whom the care is given.

CONCLUSION

In assessing the appellate courts' handling of these various questions, it is apparent that the constitutional rights of public employees were carefully preserved.

Obscenity again underwent judicial scrutiny, but it appears that until the United States Supreme Court can agree upon a test for obscenity, other courts and legislatures will have to do the best they can with the standards previously enunciated.

In the cases involving due process clauses, while some of the questions were novel, it appears that the appellate courts gave the matters fair consideration. Their decisions were consistent with the basic tenet that government action, when tested against the due process clause, must not be unreasonable or arbitrary, and must be reasonably related to the objective sought to be accomplished by the action.

By adopting its own test of whether the "one man, one vote" rule ought to apply to local government units, the Court of Appeal for the Fifth District steered a middle course between those who argue that all elected government units should be apportioned, and those who say that the rule should apply only to those units exercising legislative powers.

When the court determines that a tax does not violate the equal protection clause, it should reach that conclusion by measuring the legislative classification againt a definite standard. To merely say that there need not be absolute

equality, as the Supreme Court did in *Willingham,* is not a sufficient answer to such a constitutional issue. In *Willingham* the court upheld the tax without discussing why the tax was not a discriminatory classification, whereas in *Web Service* the appellate court, even though upholding the tax, did apply a standard and made a case for the classification.

A reasonable classification was also found in the cases that raised the issue of statutory liability for care of a patient at a state mental institution. Here again, the classification was tested and found constitutionally acceptable.