Inter-Journal Writing Competition
for Journal Membership

Competition Rules and Instructions
with Accompanying Information on UC Hastings' Law Journals

START: May 10, 2018
DEADLINE: May 21, 2018
Emailed by 5 p.m. PST

INTRODUCTION: Thank you for participating in the Inter-Journal Writing Competition. Each year, journal editors use the Competition to evaluate first-year candidates for journal membership during their second year of law school.

BE SURE TO REVIEW CAREFULLY THE ENCLOSED INFO FOR EACH JOURNAL.

The Competition is designed to assess these skills:

(1) legal reasoning and analysis;
(2) writing ability and style;
(3) proper citation and formatting.

Each journal weighs these factors to varying levels in evaluating Competition entries. In addition, each journal may consider other criteria, such as grades or a personal statement.

For more information on the journals at UC Hastings, see pages 9 through 16 of this packet.

Although you have thirteen (12) days to complete your Competition entry, we estimate that it should take only four or five days to complete. However, please be aware that the issues presented are taken from areas of substantive law that are not included in the first-year curriculum. Please allow adequate time to familiarize yourself with these materials, and ONLY these materials.

Please read all of the instructions and rules before beginning.

Table of Contents

For any questions or concerns regarding the Inter-Journal Writing Competition procedures or rules, email to ijwc@uchastings.edu.

Please do not consult anyone else or solicit their assistance, student or not, about any aspect of the completion and delivery of IJWC entries.

You received an Inter-Journal Writing Competition Number in your uchastings.edu email. You must identify yourself **by your Competition Number only** on all your entries in the Inter-Journal Writing Competition. To fail to do so is to risk disqualification.

Your Competition Number was emailed to you at your uchastings.edu account email account.

The journals are expected to begin extending invitations about the first of July 2018. The results of the Inter-Journal Writing Competition will be posted at http://www.uchastings.edu/academics/journals/index.html and will be emailed to all rising 2Ls.

Please respond to all the membership offers may you receive, yes or no, by August 10, 2018, 5 p.m.

Join one journal only.

All rules will be enforced, and any violation may result in disqualification.

Memo regarding 2L journal members and student notes

All 2L journal members write notes for grades and academic credit. A note is an article of legal scholarship addressing some aspect of the law, its application, development, etc. Student-written notes are a basic part of the journals publishing program at Hastings. The relevant Academic Regulations can be found under VIII.C. 2601 thru 2612: http://www.uchastings.edu/about/admin-offices/academic-dean/docs/AcadRegs-16-17.pdf

Student notes are annually reviewed by the journal editors for publication. There is no limit to the number of student notes a journal may publish in a given year. In some cases additional academic credit is awarded to the author for the publication of a student note. A student note, generally, is 25 pages long and has 100 footnotes.

Not only is a published note of value to the resume of a newly minted J.D., but the editorial process of preparing the note for publication – the rewriting and refining of the text, working closely with other student editors, etc. – is a very important part of the journal experience.

The reading and writing, researching and editing, working in small teams and working with clients (i.e., the authors) are the sorts of skills and activities you will use throughout your career wherever you go to practice the law, whatever area of the law you practice in.

Law journal is one of the longest standing traditions of the American law school experience. The first law review was founded in the United States was the *University of Pennsylvania Law Review*, in 1852. That students are the editors of American law journals is singular among civilized nations, and a remarkable learning experience for the students themselves.

2L students who do not fulfill the note requirement for their journal can receive a NOT PASS on their transcript for journal.

2L students disinclined to write a note for journal are advised to avoid joining any journal.

Please also note: Some, if not all, journals charge membership dues.

Instructions — *Read Very Carefully!*

These instructions will guide you step-by-step through the Competition process.

Step 1. Read the Competition Rules

Read the enclosed Competition Rules very carefully. The Rules will be strictly enforced, and any deviation from the Rules may result in disqualification.

Step 2. Read the Materials

Read all of the Competition Facts and Materials in this packet, and then complete the assignment in compliance with the Rules.

Step 3. Prepare and Submit Your Entries

Identify yourself by Competition Number only. **DO NOT INCLUDE YOUR NAME ON COMPETITION ENTRIES.**

Using only your uchastings.edu email account, email entries to ijwc@uchastings.edu. One email per journal.

Complete your Memorandum and Tech Editing Assignment in MS Word. Save your Memo and your Tech Edit as separate Word Docs. For your Tech Edit, be sure to follow the detailed instructions for preserving your anonymity on page [x]. Attach these two items and any Personal Statement (if required) into a SINGLE SEPARATE EMAIL for each individual journal. Then, **using your uchastings.edu email account**, send each email to **ijwc@uchastings.edu** with one of the following appropriate SUBJECT LINES:

HBLJ Submission COMP # XXX	CMT Submission COMP # XXX
CLQ Submission COMP # XXX	HICLR Submission COMP # XXX
HLJ Submission COMP # XXX	HRPLJ Submission COMP # XXX
HSTLJ Submission COMP # XXX	HELJ Submission COMP # XXX
WLJ Submission COMP # XXX	

Note: Replace the Xs with your Competition Number.

If a Personal Statement is required by a particular journal, please save it as a separate Word Doc while continuing to identify yourself ONLY by your Competition Number. Attach the Word Doc with your Memo and Tech Edit to a single email.

Using your uchastings.edu email account (No Gmail, no Hotmail, etc.), send all <u>submission</u> emails to:
ijwc@uchastings.edu

Step 4. Mail Signed Grade Release Form
This form authorizes the Records Office to distribute your first-year grades to the editors of journals that examine grades as part of their evaluation of entries. You need only submit **one copy** of this form, and must mail it to:

O'Brien Center for Scholarly Publications
UC Hastings College of the Law
200 McAllister St.
San Francisco, CA 94102-4978

REMINDER: Use your uchastings.edu email account to email entries to ijwc@uchastings.edu.

Writing Competition Rules

Rule 1. Follow the Rules to complete the Tech Edit portion of the competition. To complete the Memo, write an objective memorandum of law addressing the issues raised by the Facts and Materials. Do not discuss any other issues. Explore the Memo assignment objectively; however, you must also resolve each issue definitively, to the extent possible under the facts of this case. Consider the reader of your Memo to be very familiar with the Facts and Materials, so DO NOT INCLUDE a separate statement of facts in your Memo.

Rule 2. Use only the Facts and Materials provided in this packet and your Bluebook. While you are not required to use all of the enclosed sources in your Memo, you are **not permitted** to rely on any outside sources.

- **Do Not** look up any of the cases on Lexis, Westlaw, or any other online or hardcopy database.
- **Do Not** work with anyone else, student or not, on the composition, proofreading, or completion of the Memo, or the emailing of your entries.
- **Do Not** reveal to anyone, student or not, your Competition Number.
- **Do Not** reveal in your Personal Statement or any other materials your participation on or affinity with any UC Hastings student organization.
- **Do Not** reveal in your Personal Statement or any other materials your participation on or affinity with any personal or scholastic activity or information that may identify you.
- **Do Not** contact the journals directly. If you have questions or concerns, email only **scholarp@uchastings.edu**.

You may NOT cite or otherwise make reference to any sources not contained in this packet. If a source in this packet (a "primary source") makes reference to another source (a "secondary source"), you may not make direct reference to the secondary source unless the secondary source is also contained in this packet. You may make reference to the primary source and parenthetically indicate the secondary source, provided you are in full compliance with Bluebook.

You may NOT use, adopt, or rely on the reasoning, conclusion, or mode of analysis of any source not contained in this packet. This includes, but is not limited to, any knowledge you may have of this area of law. You are to rely only on the materials provided for your reasoning and analysis. You must read all of the enclosed Facts and Materials even if they seem familiar to you, or you are familiar with one of the issues involved. The materials have been specifically modified for the purposes of this Competition, and may or may not reflect the actual state of the law. Do not assume a case stands for a certain proposition just because it appears similar to another case you have encountered. Do not make presumptions about the facts or holding of a case. Assume the cases are presented in their entirety and were decided in the jurisdiction indicated.

You may only rely on the facts provided to you in this packet. Do NOT assume any facts not given to you. If you believe there is an ambiguity in the Facts and Materials which would affect your conclusion, discuss how your conclusion depends on the ambiguity. Do not, however, resolve the ambiguity by fabricating additional facts.

Rule 3. Formatting of the writing assignment, the Memo, must be in accordance with the following:

- Six to eight (6-8) pages. There is no minimum number of pages.
- No footnotes or endnotes.
- Typeface must be 12 point ordinary Roman (Plain Text) or Underlined. This includes, but is not limited to, headings, body text, citations and page numbers.
- Choice of font may be `Courier`, `Courier New`, Times New Roman, or other similar font.
- 8½ x 11 inch (standard letter size) pages for your document file.
- One (1) inch margins on all sides (left, right, top, and bottom).
- Left justification (a ragged right alignment).
- Double-spaced text. Headings and footers, if used, should be single-spaced.
- Your Competition Number must be at the top of the first page of your Memo, and nowhere else.

For any other formatting questions, please consult the Bluebook's BLUE PAGES for practitioners and law clerks.

Rule 4. Citations. All citations must be formatted according to the BLUE PAGES for practitioners and law clerks (not the WHITE PAGES which will ONLY be used for the Tech Edit). The Bluebook is the only permissible outside source pursuant to Rule 2 above. Do not use any other source for citation format, including any citation references that may be contained in these materials. Do not rely on the citations as they appear in the sources (or even within cases) for accuracy. The citation formats in this packet were intentionally altered to test your citation skills.

Rule 5. Honor Code. You are not permitted to communicate with any other person, student or nonstudent, (with the exception of Tom McCarthy of Scholarly Publications) about any aspect of the Competition, the completion of the Memo, the Tech Edit, or the delivery of the entries, until midnight on May 23, 2017 – including, but not limited to, substance, organization, style, or form of the Memo or Tech Edit answers. Your entry must be entirely your own work product. No other person may review or revise your Memo or Tech Edit answers. Violation of this rule will be considered to be as serious as cheating on an examination and will subject a student to disciplinary action by the University. Revealing your Competition Number to any person, student or not, will be treated likewise. Please see the Honor Code Memorandum from the Associate Academic Dean for more information, on page 3.

Rule 6. In order to participate on a law journal, the Academic Regulations require that 2Ls have a minimum GPA of 2.20. Moot Court or LW&R are prerequisites.

Please respond to all the membership offers may you receive, yes or no, by August 10, 2018, 5 p.m.

Join one journal only.

Honor Code MEMORANDUM

from Associate Academic Dean Jeffrey Lefstin

Date: May 1, 2017
To: Participants in Inter-Journal Writing Competition
From: Jeffrey Lefstin, Associate Academic Dean
Re: Honor Code for Inter-Journal Writing Competition

This Memo is intended to inform you of the policy of the College concerning the consequences of violating the Rules of the Inter-Journal Writing Competition.

The nine journals explicitly prohibit any participant in the Competition from talking with any other person about any aspect of the writing problem or the participant's entry. By entering the Competition, each student agrees to work individually and to submit a product that reflects only that student's efforts.

Violation of this rule will be considered to be as serious as cheating on an examination and will subject a student to disciplinary action pursuant to the Student Conduct and Discipline Regulations.[1] Depending on the circumstances, various penalties may be imposed on any student found cheating. Expulsion and suspension are the most serious sanctions.[2]

Alternatively, a letter of reprimand may be placed in the student's file summarizing the problem and findings.[3] This letter may be transmitted to the Committee of Bar Examiners for its review when it evaluates the character and fitness of an applicant for the Bar.

For more information, please consult the U.C. Hastings Academic Regulations: Student Conduct and Discipline sections 50.00-53.00.

1. See U.C. Hastings College of the Law, Academic Regulations (2015-2016): Student Conduct Code § 50.00 et seq., available at https://uchastings.edu/about/admin-offices/academic-dean/docs/AcadRegs-15-16.pdf.
2. *Id.* at § 52.00.
3. *Id.*

Grade Release Form — Instructions

Immediately following this page is a Grade Release Form, which is designed to obtain the following information: (1) A summer address for all Inter-Journal Writing Competition participants; and (2) a release that will permit the Records Office to distribute your first-year grades and section rank to the editors in chief of journals that use grades as part of the evaluation of entries. You need to send only one copy of this form. One copy of the Grade Release Form must be mailed to:

O'Brien Center for Scholarly Publications
UC Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102-4978

All participants must complete the top half of the Grade Release Form (fill in your Competition Number and name and summer address). If you wish to release your grades to the journals that use grades as a membership criteria, you must complete and sign the bottom portion as well. Note that if you do not complete the bottom half of the form (the grade release), you will not be considered for a position on a journal based solely, or in part, on your grades. Those applicants who wish to be considered only through the Writing Competition need not sign the bottom portion, but must still submit the form with their address.

Scholarly Publications Grade Release Form

One copy of this form must be completed and mailed to:

O'Brien Center for Scholarly Publications
UC Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102-4978.

All Writing Competition entrants must complete the following:

Writing Competition # _____

Name (Please print): _____
Last *First* *Middle Initial*

Address: _____
Number and street *City* *ZIP*

Grade Release Form

All Writing Competition entrants who wish to apply to the Hastings journals that review grades as part of their membership selection criteria must complete this section.

Please read the following information before signing this form:

I, (print)_____, hereby give permission to the Hastings Records Office to release my class and section rank to the Editors in Chief of COMM/ENT, HICLR, HLJ, HWLJ, and STLJ, and any other UC Hastings law journal that considers grades as part of their criteria for membership.

I understand that this release applies only to the participant selection process of the above mentioned Scholarly Publications.

Signature and Date: _____

Hastings Business Law Journal

JOURNAL'S GENERAL STATEMENT

Hastings Business Law Journal ("*HBLJ*") is ranked within the top ten commercial law journals in the country and ahead of business law journals at N.Y.U., Northwestern, and Georgetown. Numerous state and federal court decisions have cited our articles, including the California, Delaware and Texas state supreme courts and the U.S. Supreme Court. Our articles have also been cited in more than 350 other academic articles. In addition, some of *HBLJ*'s past symposiums have featured prominent law professors, SEC officials, and general counsels from companies such as Apple and Google. Finally, our current alumni base includes partners at several of the American Lawyer Top 100 firms and in-house counsel at Facebook, Cisco, and various tech startups.

MEMBER SELECTION PROCESS

To be considered for a position on *HBLJ*, please submit the Inter-Journal Writing Competition ("IJWC") materials and an optional personal statement. We will evaluate your application based on your IJWC submission, your grades, and the information you provide in your personal statement. Personal statements provide us with insight into your experience and personality. While your personal statement does not need to contain obvious "business experience," it must explain your interest in *HBLJ* and in business law. The optional personal statement may not exceed 250 words. Remember to use your competition number, not your name, in all submissions to *HBLJ*.

DUTIES OF NEW MEMBERS

2L journal members are paramount to *HBLJ*'s success. As *HBLJ* publishes a high-quality product, your primary responsibilities will be reviewing sources and editing. 2L members may contribute to various *HBLJ*-related functions including: planning symposiums, assisting in article selections, and organizing alumni events. Each 2L will write a Note on a current business law topic of their choosing; and the best notes will be published. In addition to the scholastic endeavors, 2L members will have the opportunity to participate in both social and networking events with current and past *HBLJ* members, Hastings' alum, and Bay Area business professionals.

Hastings Business Law Journal wishes you the best of luck in the Inter-Journal Writing Competition!

Hastings Communications & Entertainment Law Journal

SUMMARY OF MEMBER SELECTION PROCESS

Second-year members are chosen through a weighing of performance in the Writing Competition and grades. We also provide students with the opportunity of submitting a statement of interest if they would like to. However, this is not mandatory. The statement of interest is intended to help the Comm/Ent Editorial Board decide between students who may have equal scores. Also, please DO NOT use your name for any of the documents required. We would like to keep this process as fair as possible.

JOURNAL'S GENERAL STATEMENT

Comm/Ent is the nation's premier law journal dedicated to the scholarly publication of literature addressing the intellectual property, sports, communications, and entertainment industries. With an outstanding reputation among practitioners and academics, *Comm/Ent* is consistently ranked among the top five journals in the nation within our focus area. Our journal explores the important legal questions associated with the changing trends in communication and entertainment, and it has effectively done so since the journal's inception in 1976.

Recent *Comm/Ent* articles have encompassed a vast array of legal issues relating to radio and television broadcasting, film, sports, labor, cable television, music recordings, copyrights, trademarks, patents, the First Amendment, satellite communications, computer technology, the Internet, advertising, telecommunications, and commercial speech.

Comm/Ent takes tremendous pride in producing an annual symposium. Our symposium attracts the leading practitioners and litigators in the fields of IP, communications, and entertainment law, and provides attendees with a fantastic opportunity to

network. For example, a prominent commissioner of the Federal Communications Commission, Rachelle Chong, got her start as *Comm/Ent*'s former Editor-in-Chief.

As a *Comm/Ent* member, you will be essential to the success of the journal. Members' responsibilities include: examining articles and student notes to ensure proper citations, making substantive and technical edits to pieces in preparation for publication, assist in planning the annual symposium, and generally supporting the senior editors at their request on various projects. Additionally, each member writes a "note" on a cutting-edge issue on the law within the scope of the journal's focuses, and the best of these will be published in an upcoming issue.

Comm/Ent produces a high-quality product while maintaining a relaxed and flexible atmosphere for members. We are dedicated to making the second-year membership a useful, rewarding, and "entertaining" experience. *Comm/Ent* has developed a strong online presence that benefits all members, while providing the legal community with a new, useful service. We strongly encourage each member to contribute ideas, time, and their focus to the needs of the journal.

The *Comm/Ent* Editorial Board wishes you the best of luck in the Inter-Journal Writing Competition, and we hope to have you on our team next year.

Hastings Constitutional Law Quarterly

SUMMARY OF MEMBER SELECTION PROCESS

Hastings Constitutional Law Quarterly (CLQ) is excited to invite rising 2Ls to apply who are interested in constitutional law issues, willing to work hard to produce a high-quality journal, and enjoy working on a diverse team.

Applicants to CLQ must complete the inter-journal write-on technical edit and writing assignment. CLQ will grade the components according to the established rubric and will pay particularly close attention to the persuasive use of legal authority, organization, flow, and clarity.

Applicants may also submit an **optional 300-word statement**. Applicants should succinctly describe their interest in constitutional law (based on lived experience, curiosity/passion for a topic, work experience, etc.). The optional statements will be graded separate from the write-on requirements and points earned from the statement will be added to your composite score.

JOURNAL'S GENERAL STATEMENT

CLQ is the country's oldest scholarly publication devoted exclusively to constitutional law and is consistently ranked in the top ten for constitutional law journals in the United States. CLQ publishes four issues a year, with the primary goal of publishing innovative and timely articles exploring issues arising under federal and state constitutions. Associate Justice Stevens has cited to pieces of scholarship from CLQ on numerous occasions, including his partial dissent in *Citizens United v. Federal Elections Commission*, 558 U.S. 310 (2010).

In 2017-2018, CLQ endeavors to lead public and scholarly discourse in the constitutional concepts that have the potential to affect everyone in America during the Trump presidency. CLQ plans to hold events on presidential powers, the right to freedom of speech, immigration reform, healthcare, and states' rights, to name a few. CLQ will also seek to raise student voices, such as through blog posts on Medium.com or by organizing cross dialogue with members from multiple student groups, such as the Federalist Society, American Constitution Society, and National Lawyers Guild.

Second-year members will primarily serve as Staff Editors, contributing to the vital function of editing pieces of scholarship for each issue of the journal. Staff Editors will also be mentored by a 3L Senior Editor as they draft a law review note, presenting a novel legal argument on a constitutional topic of their choosing. Second-year members will also have opportunities to be a part of affinity groups on current topics of interest in the public sphere (e.g., Immigration, Freedom of the Press, etc.),

attend CLQ talks and panel discussions, and social events with alumni and community leaders.

We look forward to welcoming you to the CLQ family!

Hastings Environmental Law Journal

(formerly Hastings West-Northwest Journal of Environmental Law and Policy)

INTER-JOURNAL WRITING COMPETITION ENTRY INSTRUCTIONS

Hastings Environmental Law Journal (*HELJ*) has two options for students applying:

1) Email your Writing Competition Entry and your Mandatory Personal Statement as per the IJWC Rules.

2) Email a writing sample, the technical edit portion of the Writing Competition Entry, and the Mandatory Personal Statement as per the IJWC Rules. The writing sample may be an LWR memo or previous research paper.

For both options, do not write your name anywhere on your entry or personal statement.

HELJ will grant a 10-day extension of the Competition deadline for good cause; email such requests to ijwc@uchastings.edu in advance of the IJWC deadline May 23, 2017.

MANDATORY PERSONAL STATEMENT

The personal statement should describe why you are interested in joining an environmental law journal, any experience you may have had with environmental issues, and any work done on scholarly publications in the past. Experience with environmental issues can only help in the selection process, but is not required. All that is necessary is strong interest and dedication. Maximum length is one to two pages.

HELJ actively seeks to maintain a high level of diversity in its membership. Candidates who have overcome significant disadvantage may also describe the nature of that disadvantage and relevant experience or perspective gained thereby.

SELECTION PROCESS

GPA is given minimal consideration beyond the 2.2 minimum.

Quality of writing and degree of interest demonstrated in the personal statement will be important selection criteria. However, serious effort and quality in the completion of the memorandum portion of the writing competition is required.

The two primary selection criteria for *HELJ* members are writing ability (including composition, editing and Bluebooking skills) and an interest in the broad topical area of environmental law. The required personal statement is an opportunity to express your reasons for wanting to be a *HELJ* member and is given considerable weight. Beyond a 2.2 minimum GPA requirement, *HELJ* does not take grades into account. The environmental statutory class is not a prerequisite for joining our journal. All those who have any interest in *HELJ* are encouraged to apply.

JOURNAL'S GENERAL STATEMENT

HELJ continue the Hastings traditions of creating a legal forum for both academics and practitioners in areas of environmental law and policy. With a broader focus, *HELJ* will be home to all aspects of environmental policy and legal issues, and will focus on scholarship regarding the most current issues from across the private, public, and nonprofit sectors. This journal will focus on creating a community of environmental scholars here at Hastings, and connecting them with the greater environmental community beyond. With articles and essays from a range of authors, including practicing attorneys, policy-makers, law students and professors, resource managers, scientists, citizen groups, and activists, *HELJ* will lead the way in identifying the most problematic issues in environmental law and policy and creating innovative solutions.

EVENTS

HELJ will host events periodically through the year. Past events have included several symposiums: "Surviving Climate Change: Adaptation and Innovation," "Smart Growth: How Smart Is It?," "Environmental Audits: Privileged Information or Privileged Violations?," "Beyond Takings: Pragmatic Solutions for Resolving the Conflicts Between Property Rights," and "Environmental Regulations and Adaptive Management and Market Incentives: Tools for the Next Millennium." The coming year will focus more on creating and implementing smaller, more frequent events that connect Hastings students with the greater environment community to provide for targeted networking opportunities.

The *HELJ* Editorial Board wishes you the best of luck in the Inter-Journal Writing Competition.

Hastings International and Comparative Law Review

PERSONAL STATEMENT [OPTIONAL]

Because *Hastings International and Comparative Law Review* (*HICLR*) has a particular focus, we seek candidates with an inter-national interest or background. While international experience is not required, we do consider whether a candidate has an interest in international issues and concerns. You may choose to submit a personal statement describing those experiences that are relevant to your international interests and/or what you hope to contribute to *HICLR*. Please write a minimum of 1 double spaced page, and submit your personal statement with your Writing Competition Number only.

SELECTION PROCESS

HICLR selects new members based on: (1) Tech Edit section of the Inter-Journal Writing Competition, (2) one writing sample from LW&R or Moot Court, and (3) a "statement of purpose" on why you want to join HICLR.

Note: HICLR does not require any international course or work experience, nor does it require members to take any international or comparative courses.

JOURNAL'S GENERAL STATEMENT

Founded in 1976, *HICLR* is one of the few law reviews devoted exclusively to the discussion of contemporary original ideas pertaining to international and comparative law.

International law transcends national boundaries and governs relations among public and private international actors. Comparative law is the comparison of legal systems. These fields include: international trade and business transactions; international litigation; politics; treaties; international institutions such as the UN and WTO; intellectual property; immigration; human rights; environment; criminal law and procedure; tax policies; ethics and labor relations.

HICLR staff members will receive significant training and gain experience in all areas of the journal — selecting and editing articles, essays, and notes for publication; technical production and work with the authors and publishers; and planning and execution of our annual Symposium. Networking with *HICLR* alumni, international scholars and practitioners will also be available.

HICLR seeks members who will bring unique perspectives based upon experiences abroad or strong interests in international issues. *HICLR* members will learn from the editors and from one another throughout the year. In addition to publishing a high quality law review, and all the hard work and creativity attendant thereto, members will have fun and make career connections. With social and networking events throughout the year, being a *HICLR* member will mean a well-rounded journal experience that includes training, teambuilding, and professional development through Hastings alumni.

Members will also write a note of publishable quality on an inter-national or comparative law topic, under the guidance of a 3L mentor. One advantage to writing a note in comparative law is that it can concern any substantive field of law. The journal is committed to working with every member to produce excellent, relevant, publishable articles; *HICLR* publishes as many eligible member notes as possible, giving *HICLR* staff the highest probability of publication. This is an excellent opportunity to hone one's writing skills and publish work in an internationally circulated and cited journal.

The *HICLR* Editorial Board wishes you the best of luck in the Inter-Journal Writing Competition.

Hastings Law Journal

SELECTION PROCESS

To be eligible to join *Hastings Law Journal* (*HLJ*), students must submit a writing competition application.

Invitations will be extended according to the following allocation estimates:

1) The top five students from each section are invited to join on the basis of their GPA.*
2) Twenty students are invited on the basis of their writing competition scores.
3) Sixteen students are invited on the basis of a composite of their writing competition scores and their GPA.
4) Students may be invited through the Intellectual Diversity Program, described below.

***Please note that a student invited based on GPA must still submit a writing competition application.*

JOURNAL'S GENERAL STATEMENT

Since 1949, *HLJ* has published scholarly articles, essays, and student Notes on a broad range of legal topics. With close to ninety members, *HLJ* publishes six issues each year, reaching a large domestic and international audience. *HLJ* works with legal scholars nationwide, and received the honor of being ranked the No. 2 Law Journal in the country, as voted by authors during the 2014-2015 year. Here at home, UC Hastings awarded *HLJ* "Student Organization of the Year" for the 2014-2015 membership.

In addition to producing scholarly legal publications, *HLJ* hosts two symposiums each year focused on cutting-edge legal issues, provides ample networking opportunities to socialize with decades of *HLJ* alumni, offers job search assistance, and provides resources for coursework and bar preparation to its members. Although *HLJ* members dedicate an appreciable amount of time and effort to the *Journal*, membership is not all work and no play. *HLJ* hosts a variety of social events for members throughout the year. For example, the Journal members attended *HLJ*'s annual Giants game, celebrated multiple Issue Release Parties hosted at local SF venues by *HLJ*, cheered on Golden State in the Skyroom at the Warriors Watch Party, engaged in a little friendly competition through *HLJ*'s Fantasy Football League, and drafted brackets for March Madness and The Bachelor.

Second-year members contribute to the Journal in a variety of areas, including editing articles, Notes, and SCOCAblog, technical production of legal works ready for publication, and in preparation and execution of Symposia and other alumni events.

One of the most challenging and satisfying aspects of second-year membership is the completion of a student Note with the opportunity for publication. What is a Note you ask? A student Note is a piece of legal scholarship similar to the law review articles authored by professors and other legal professionals. Each second-year member investigates an area of interest in the law, selects a novel topic on a developing issue in that area, and with the assistance of a the *Journal*'s Notes staff and a third-year mentor, the second-year member refines their topic to compose a written work of publishable quality. One of the unique things about *HLJ* is that students are in no way limited with respect to what topic they choose to write on. *HLJ* publishes works in a wide variety of legal fields, extending its reach to new audiences, and further diversifying the *Journal*. Therefore, students are very much encouraged to choose any area of law they feel passionate about.

Thank you for your interest, *HLJ* wishes you the best of luck in the Inter-Journal Writing Competition!

Hasting Law Journal – Special Admissions

PURPOSE OF THE SPECIAL ADMISSIONS PROGRAM

The *HLJ* Special Admissions Program recognizes the great individual effort required to overcome economic and social disadvantage. The purpose of the Special Admissions Program is to increase interest in *HLJ* among those who have effectively been denied participation in the past. *HLJ* also seeks to diversify the membership of *HLJ* and broaden its spectrum of perspectives on legal scholarship through the program.

INSTRUCTIONS

To be considered for *HLJ* membership through its Special Admissions, please type your answers in MS Word, and limit your answers to three (3) double-spaced, typed pages or 750 words; then COPY AND PASTE below your memorandum email entry to *HLJ*.

NOTE: Special Admissions Program applications are separate and distinct from the general Competition; you are required to fulfill each of the general Competition and the Special Admissions Program applications separately while still using the same written entry. Include the Special Admissions Application with your general Competition application, but do not attach the Special Admissions Essay to the Competition entry.

SPECIAL ADMISSIONS ESSAY

INSTRUCTIONS: Please read the following eleven (11) questions, and consider carefully only those that apply to you. In an essay format, use your answers to those questions to illustrate why your particular set of experiences makes you an excellent candidate for a staff editor position with *HLJ*.

1. Identify and describe the community(ies) in which you resided from birth to age of college entry.
2. What was (were) the occupation(s) of the person(s) who raised you? Please provide description if necessary.
3. What was (were) the educational background(s) of the person(s) who raised you?
4. Who were the members of your household from the time of your birth to age of college entry? Please include extended family and others.
5. Describe your early education experiences. Please include elementary and junior high school.
6. Describe the financial situation of the family in which you were raised, from birth to age of college entry. Please include sources of income, income estimates, number of wage earners and number of dependents, and any unusual expenses.
7. Were you employed prior to college? Please indicate where, how, and the number of hours worked.
8. Were you employed during college? Please indicate where, how, and the number of hours worked.
9. Please list your source(s) of financial support in college by approximate percentage:
   Family_____ Employment _____ Loans _____
   Grants / Scholarships _____ Other Assistance _____
10. Did you have to work during your first year of law school?
11. What was your occupation before entering law school?

Hastings Race and Poverty Law Journal

SUBMISSION REQUIREMENTS

1. Tech edit
2. Answer this question in 250 words or less: What is social justice?
3. Personal statement about why you want to join HRPLJ in 250 words or less.

SELECTION PROCESS

GPA is given minimal consideration beyond the 2.2 minimum requirement. Your degree of interest as articulated in the Personal Statement is our primary consideration for selection to the *Hastings Race and Poverty Law Journal*. We will also

look to past experience in public interest activities as evidenced by your Personal Statement. Finally, we weigh the quality of your writing as exhibited in the writing competition memorandum and editing assignments.

Thank you for applying to the *Hastings Race and Poverty Law Journal*. We appreciate your interest in our *Journal* and look forward to reviewing your application. *HRPLJ* embraces diversity in its various forms, including race, socioeconomic status, gender, sexual orientation, ability, and religion.

JOURNAL'S GENERAL STATEMENT

Hastings Race and Poverty Law Journal is dedicated to promoting and inspiring discourse in the legal community regarding issues of race, poverty, social justice and the law. This Journal is committed to addressing disparities in the legal system. We create an avenue for compelling dialogue on the subject of the growing marginalization of racial minorities and the economically disadvantaged. It is our hope that the legal theories addressed in this Journal will prove useful in remedying the structural inequalities facing our communities.

In addition to publishing two issues annually, *Hastings Race and Poverty Law Journal* hosts a number of dynamic panels and symposia on such topics as "'What's the G?:' Gentrification and the Myth of Fair Housing," and "21st Century Civil Rights: Community Empowerment and Participation," bringing to Hastings such speakers as Brendon Woods, Alameda County Public Defender, Monica Ramirez, Special Assistant Attorney General with the California Department of Justice, Cephus "Uncle Bobby" Johnson, Founder of the Love Not Blood Campaign, and Jane Kim, Supervisor for San Francisco District 6.

The *HRPLJ Editorial Board* wishes you the best of luck in the Inter-Journal Writing Competition.

Hastings Science and Technology Law Journal

GENERAL STATEMENT

The *Hastings Science & Technology Law Journal* (*STLJ*) is a multidisciplinary journal created to enrich the discourse at the nexus of science, technology, and the law. Specifically, *STLJ* focuses on the exciting legal issues surrounding startups, intellectual property, data privacy, biotechnology, clean technology, and health policy, while exploring the implications of technological advances on traditional legal fields, such as contracts, antitrust, and tax.

Partnered with the Institute for Innovation Law, *STLJ* publishes twice a year. Recent articles have discussed the publicity rights of American astronauts, new approaches to worker classification in an on-demand economy, ANDA reverse payments and the post-*Actavis* landscape, and software innovation in a patent assertion entity world.

This year, *STLJ* co-hosted a symposium entitled, "Programming the Law: Privacy, Security, and Innovation" featuring panelists from LinkedIn, Facebook, and the Federal Trade Commission. *STLJ* also regularly collaborates with on-campus organizations such as the Startup Legal Garage, and the Hastings Intellectual Property Association.

DUTIES AND RESPONSIBILITIES OF STLJ 2L MEMBERS

2L members are an important part of our team. As a Staff Editor, 2Ls will have the opportunity to participate in all aspects of production including: Planning our annual symposium, editing articles, planning social events, and assisting in the acquisition of new articles. 2Ls will also have the opportunity to write a "Note," which may be selected for publication.

INTER-JOURNAL WRITING COMPETITION ENTRY INSTRUCTIONS

Applicants to *STLJ* must submit the following:

1. Inter-Journal Writing Competition Memo
2. Inter-Journal Writing Competition Edits
3. **OPTIONAL** Personal Statement

- **Format:** Times New Roman, double-spaced, one-inch margins, two pages maximum or 500 words. Include your writing competition number on the upper right corner of all pages.
- **Instructions:** Please describe why you want to be on *STLJ*. Appropriate topics include educational background, work experience, personal interests, or career goals related to the fields of science or technology.

Please note that a science background is ***NOT*** required for selection. We are interested in applicants who demonstrate sound writing skills and a keen interest in our journal's subject matter. You are encouraged to convey such interests in a personal statement.

Hastings Science & Technology Law Journal looks forward to reviewing your entry! We wish you the best of luck.

Hastings Women's Law Journal

INTER-JOURNAL WRITING COMPETITION ENTRY INSTRUCTIONS

Hastings Women's Law Journal (HWLJ) has two options for applying:

1) Submit your competition entry (i.e. competition memo and technical editing assignment) and a short personal statement on why you wish to join HWLJ. The personal statement is to be no more than one paragraph (250 words).

2) Submit a writing sample of your choice, technical editing assignment, and a short personal statement on why you wish to join HWLJ (i.e. one paragraph, no more than 250 words). The writing sample may be an LWR memo or Moot Court brief.

Please note that no matter which option you choose your name may not appear on your application entry. All application entries must be in sent in single MS Word document attached to an email sent to ijwc@uchastings.edu.

HWLJ MISSION STATEMENT

Since 1989, the *Hastings Women's Law Journal* has provided a forum for voices outside the traditional scope of legal academic scholarship. We offer and maintain an inclusive space for feminism, race theory, queer theory, multiculturalism, animal rights, disability rights, language rights, international human rights, children's rights, criminal defendants' rights, victims' rights, criminal justice reform, among others.

This perspective embraces difference and celebrates diversity. HWLJ enhances the school's academic diversity and contributes to scholarly thought by publishing articles and student notes that present a critical perspective of traditional legal discourse. We strongly believe that the law is a solution for the ills of the human condition, not merely a means of gaining and preserving privilege and position. To that end, HWLJ is a progressive law journal that offers women and men the opportunity to work on provocative legal issues through a "traditional" journal experience.

COMMITTEES:

HWLJ is comprised of various committees on which members serve. This helps members get more involved with the day-to-day running of the journal and allows for more interaction with various members. The hands-on experience cultivates leadership skills and helps members determine what editorial board roles they will take on the following year.

COMMUNITY:

HWLJ hosts a variety of informal get-togethers and events throughout the year, providing opportunities for the exchange of thoughts and ideas. In addition to our social events, we also provide our members with ample networking opportunities by holding special panels and giving them an opportunity to participate in local community activities and volunteer work. We welcome new members of all backgrounds to participate on this high-caliber journal, used by academics and practitioners alike, to advance provocative and contemporary legal scholarship.

Hastings Women's Law Journal wishes you the best of luck in the Inter-Journal Writing Competition.

TECH EDIT INSTRUCTIONS

Welcome to the editing portion of the Inter-Journal Writing Competition. You will edit a section from a hypothetical law review article. Please read these instructions *very* carefully, as failure to do so may make you ineligible for consideration.

- You are required to make both **substantive edits** (spelling and grammar edits within the body of the article *and* the text within footnotes) and **technical edits** (Bluebook edits to the footnotes).

- The Bluebook edits must be in accordance with the Bluebook's **WHITE PAGES** (NOT the Practitioner's BLUE PAGES found in the front of the Bluebook).

- The ***only*** permissible source you may use is the Bluebook.
  - Do not rely on the sources from the writing assignment for citation formatting help. These sources were intentionally altered to test your citation skills.

- You may either complete the editing assignment in Microsoft Word using track changes, or handwrite all edits. Regardless, **you must ensure that your identity remains anonymous.**
  - If you choose to complete the editing assignment through Microsoft Word, make sure to remove your name from the comment bubbles. By default, the track changes will display your name.
    - Please see the instructions on the following page on "How to anonymously use track changes in Microsoft Word" for further guidance.
    - Failure to remain anonymous may make you ineligible for consideration.
  - If you choose to handwrite the editing assignment, you must scan and convert the handwritten document into a PDF when you are finished editing. Your handwriting must be legible to be considered.

- Title the editing assignment: EDITING_COMPXXX, replacing XXX with your competition number (i.e. EDITING_COMP123 if your assigned competition number is 123).
  - **Do *not* include your name in the title of your saved tech edit assignment.**

How to *anonymously* use track changes in Microsoft Word:

- Word Mac 2011:
  - To delete your name from the comment bubble in Microsoft Word, go to Word! Preferences! under **"Output and Sharing,"** click "Track Changes"! under "Balloons," unclick the "Include review, time stamp, and action buttons" option.

- Word 2007:
  - To change the reviewer's name! click the "Review" tab! Click the button labeled "Track Changes" On the drop-down menu that appears, click "Change User Name"! Change the name in the field marked "User name" and change the initials in the field marked "Initials." You can use an anonymous name or simply write in your competition number! click "Ok."

- If neither of these instructions work:
  - Google "how to remove personal information in Microsoft Word track changes" and find instructions that do work.

How to change font to small caps:

- To change font to small caps, highlight the text you wish to alter, go to "Format" > "Font" and under "Effects" check the box that says "Small caps" and click "Ok." If for some reason you are unable to locate the "Small caps" feature, highlight the text in yellow that you believe should be in small caps. If you're completing the editing portion by hand, indicate the text you believe should be in small caps.

FINAL CHECKLIST

- **Remove your name from Microsoft Word track change bubbles**
- **Do not include your name in the title of the document**
- **Title the editing assignment: EDITING_COMPXXX, replacing XXX with your competition number (i.e. EDITING_COMP123 if your assigned competition number is 123)**
- **Upload completed tech edit portion**

TECH EDIT ASSIGNMENT

I. A Note On Healthcare Reform: No Funding for Abortion Provisions Should Not be Enacted.

"The ability of woman to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives".[1] Yet, antiabortion activists has imbedded several recent healthcare reform bills with provisions that threaten to frustrate access to both contraceptive and abortion services and are vehemently campaigning for the passage of those bills.[2]

For example the American health care act (AHCA), which was passed by the US House of Representatives (the House) on May 4 contained provisions from the No Taxpayer Funding for Abortion and Abortion Insurance Full Disclosure Act of 2017 (the 2017 No Funding Act) and it's predecessor, the No Taxpayer Funding for Abortion Act of 2011 (the 2011 No Funding Act).[3] The 2011 No Taxpayer Funding Act had previously passed in the House but ultimately had died on the senate floor[4] The 2017 No Funding Act seems to of suffered the same fate as the senate hasn't touched it in months, but the two act's so-called "No Funding" provisions, have been incorporated in to every Obamacare replacement bill proposed by conservatives in congress.[5]

The No Funding provisions threatens reproductive choice in a comprehensive way: They target Planned Parenthood, a major provider of family planning services and the nation's largest abortion provider, for defunding.[6] They are intended to have discourage private insurers from offering standard coverage for abortions not sanctioned under the bill—namely, abortions of pregnancies not arising out of rape or incest, and not necessary to save the life of the mom—by banning such plans from all subsidized insurance markets.[7] Farther more, they are designed to discourage small group employers from providing there employees with Plans that cover non-sanctioned abortions by baring employers who chose to provide such plans from claiming tax credits intended to offset the costs of providing insurance plans for their employee.[8] Similar, they are calculated to

---

[1] *Planned Parenthood of Southeastern Pennsylvania, et al. v. Casey*, 112 U.S. 833 at 856 (1992) (plurality opinion).
[2] *See e.g.*, Press Release, Marjorie Dannefelser, SBA List President, SBA List Celebrates House Passage of Health Care Bill with Two Critical Pro-life Provisions (April 4, 2017) (on file with author)
[3] *Compare* American Health Care Act of 2017, H.R. 1628, 115th Cong. (2017) *with* No Taxpayer Funding for Abortion and Abortion Insurance Full Disclosure Act of 2017, H.R. 7, 115th Cong. (2017) *and* No Taxpayer Funding for Abortion Act, H.R. 3, 112th Cong. (2011-2012).
[4] *See* No Taxpayer Funding for Abortion Act, H.R. 3, 112th Cong. (2011-2012).
[5] *Compare* Graham-Cassidy-Heller-Johnson Amendment 115th Cong. (2017), available at https://www.cassidy.senate.gov/imo/media/doc/LYN17752.pdf, *and* Better Care Reconciliation Act of 2017, S. 270, 115th Cong. (2017) *and* Obamacare Repeal Reconciliation Act of 2017, *and* Health Care Freedom Act of 2017 *with* No Taxpayer Funding for Abortion and Abortion Insurance Full Disclosure Act of 2017, H.R. 7, 115th Cong. (2017) *and* No Taxpayer Funding for Abortion Act, H.R. 3, 112th Cong. (2011-2012) (each of the healthcare reform bills includes a provision that threatens to defund Planned Parenthood and only the Health Care Freedom Act of 2017 lacks provisions that bar individuals and small group employers from claiming tax credits to offset the costs of purchasing insurance plans that cover non-sanctioned abortions).
[6] *See e.g.*, H.R. 1628, 115th Cong. §103 (2017), https://www.congress.gov/bill/115th-congress/house-bill/1628 (providing that "no Federal funds . . . may be made available . . . for payments to a prohibited entity" and further expressing that a prohibited entity is one that, *inter alia*, provides abortions other then those necessary to save the life of the mother or to terminate pregnancies that "result from an act of rape or incest."). Not only does Planned Parenthood fall within the bill's definition of "prohibited entity"; it is *the only* entity that falls within the definition. *See, e.g.*, H.R. Rep. No. 115-52 at 59 (2017) ("[O]nly Planned Parenthood . . . would be effected.").
[7] *See e.g.*, American Health Care Act of 2017, H.R. 1628, 115th Cong. § 202-203 (2017).
[8] Id. See also NPR Healthcare In 2017, 11 December 2017 (via Audible)

discourage individuals from maintaining abortion coverage by denying insurance subsidy's to individuals that elect to maintain abortion coverage.[9]

Additionally, the No Funding provisions are duplicative. The Hyde Amendment ("Hyde Amendment") already prohibits government dollars from being used to fund abortions directly, however, the pro-life movement assert that subsidizing persons and entities that use their own funds for abortion-related activities is indirectly supporting abortion because "Money is fungible."[10] This notion—the fungibility principle—underlies demands to enact the No Funding provisions.

As too Planned Parenthood, the fungibility principal holds that every government dollar gave to Planned Parenthood for the provision of family planning services "frees up" a private dollar that is then available to cover the costs of abortion services or advance Planned Parenthood's abortion rights agenda.[11] But if Planned Parenthood is excluded from receiving funds for for the provision of family planning services, many low income woman will not have access to contraceptives.[12] Thus, defunding Planned Parenthood will impede contraceptive access, likely causing an increase in unintended pregnancies and a bigger demand for abortion services.

For now, the Republican Party seem to have lose the political support needed to pass any of the proposed healthcare reform bills[13] However, the prolific and enduring nature of the No Funding provisions, witch are appearing both in and outside of healthcare reform bills, exhibits antiabortion lobbyists' undying desire to see those provisions enacted.[14]

---

[9] COX, CYNTHIA, ET. AL, HENRY J. KAISER FAMILY FOUNDATION, HOW AFFORDABLE CARE ACT REPEAL AND REPLACE PLANS MIGHT SHIFT HEALTH INSURANCE TAX CREDITS (March 10, 2017), available at https://www.kff.org/health-reform/issue-brief/how-affordable-care-act-repeal-and-replace-plans-might-shift-health-insurance-tax-credits.

[10] *See e.g.*, 144 CONG. REC. 49, 3680 (Apr. 24, 1998) (statement of Sen. Nickles).

[11] *See* Mary Ziegler, *Sexing Harris: the law and politics of the movement to defund Planned Parenthood*, 60 BUFFALO LAW REVIEW 701, 702 (2012). *See also* Susan A. Cohen, What's Behind the Antiabortion Campaign Over 'Fungibility'?, GUTTMACHER REPORT ON PUBLIC POLICY, 1, 1-2 (June 1998), available at https://www.guttmacher.org/sites/default/files/pdfs/pubs/tgr/01/3/gr010301.pdf

[12] See, e.g., Sabrina Dasani, OPINION., low income women depend on Planned Parenthood, Jun. 14, 2011, New York Times, at A11.

[13] *See e.g.*, Dylan Scott, *The Simple Reason the Senate Republican Health Care Bill Died*, VOX (July 18, 2017, 8:10 AM), https://www.vox.com/policy-and-politics/2017/7/18/15987262/senate-health-care-bill-dead-why. *See also* Donald Trump (@realDonaldTrump), Twitter (June 17, 2017, 6:17 PM), https://twitter.com/realdonaldtrump/status/887134287350439936?lang=en

[14] Interview with Elizabeth Ellis, Administrative Director, Planned Parenthood in San Francisco, California (Sept. 15, 2017).

TECHNICAL EDIT REPORT

Please use the chart below to list your changes to each footnote and what, if any, Bluebook rule you used to do so.

Please feel free to add as many rows as necessary to complete the assignment.

FN #	Original	Altered	BB Rule

- - - - - END TECHNICAL EDIT ASSIGNMENT - - - - -

THE FACTS

Donnie Trumpet lives in Ramona, California. Donnie has always been somewhat of an entrepreneur, dabbling in various real estate ventures and business partnerships and perfecting the art of the deal. Unfortunately, most of his ventures have failed miserably (he really should have just left his money in a low yield bond). Donnie recently became a co-owner of Main Street Bar, a local watering hole. Like most other residents, Donnie has a love for the outdoors and a passion for riding and hunting. Donnie chooses to live on the outskirts of town so he can manage a small working farm and tend to his horse and cattle.

One night, Donnie rode into town and found the bar packed full of townspeople. Donnie tied his horse, Pence, to a post and sauntered into his establishment, beaming with pride at the full house. Donnie was greeted with a drink from the bartender and began chattering with a rather fetching young lady. Feeling boisterous from his newfound business success, Donnie found a surge of confidence with each drink he ordered. He was a little nervous about sitting with such a beautiful woman, and proceeded to drink a bit more than usual to stave off any anxiety. By "last call", Donnie was feeling quite inebriated, so much so, that he forgot the woman's name and she left the bar in a huff. Donnie was feeling too good to worry about it, but had the good sense to know he should probably go home. Donnie said goodnight to the bartender and staff, and started out the door. He saddled up Pence and left toward home.

Steph, a friend of Donnie's, saw Donnie weaving back and forth across the road on his horse. Steph shouted Donnie's name, and he turned around to look at her, almost falling off the horse in the process. Steph ran up to the horse and grabbed the reins, pulling Pence and his rider over to the sidewalk. Steph tried to help Donnie off the horse, but he succeeded in putting so much weight on her that he dropped them both to the ground.

"Donnie, you're riding like a crazy person! Are you drunk?" Steph asked. "What, me?" replied Donnie, "Darlin' you know I ain't been drunk in years!"

Steph wasn't convinced. "You shouldn't be riding in this condition. Here, put your arm around me and we'll go home," Steph said and she tried to help Donnie up.

"Don't you worry, Steph, Darlin', I'm just fine; the greatest. You git on home and Pence and I'll be right behind you," Donnie said as he grabbed for the reins, stumbled, and fell back onto the sidewalk.

Just then, a voice shouted "Hey, you! Stop right there!"

Steph could not see where the voice was coming from, but it sounded like the town Sheriff, Jeffrey Stations. Steph was afraid, and did not want to get into any trouble on account of her drunken employer. She ran

off into the shadows, leaving Donnie behind on the sidewalk, with his trusty steed.

It was indeed Sheriff Jeffrey, who had been dispatched to the area on a call from one of the neighbors. Jeffrey had seen Donnie weaving on the horse, and had also witnessed the interaction between Steph and Donnie (though he was too far away at the time to actually hear their conversation). As Jeffrey approached Donnie, Donnie had pulled himself together enough to climb back onto his horse and began to adjust the reins once more. Jeffrey had known Donnie for many years, so he spoke to him informally and tried to coax him down from the horse:

Jeffrey: "Donnie – why don't you get off that horse and come down and talk to me for a minute?"

Donnie: "Aw, Jeff. How ya doin' buddy? I got to get home to Steph – ol' Pence here is gettin' a bit tired."

Jeffrey: "That's fine, Donnie. But I think we should chat for a moment first. Can you get down off the horse for me?"

Donnie: "C'mon, Jeff, let's talk tomorrow, OK? I've got to get home now."

Jeffrey: "No, Donnie. I think you should step down from the horse. Get off the horse now, that's an order."

Donnie: "Who ya think you're talkin' to, huh? I am a very important, very smart person! I ain't takin' no orders from you, so shut your trap you nasty man!"

Donnie shook his hand vigorously at Jeffrey during his statements, causing a bulge in Donnie's pocket to catch Jeffrey's eye. As Jeffrey looked closer, he could make out the outline of a long cylindrical object in Donnie's pocket. Donnie's face was red with anger as he pointed and glared at Jeffrey. Jeffrey knew that Donnie was an avid hunter, and was concerned Donnie might be carrying a gun in his pocket. Jeffrey put his hand on his own gun, and looked sternly at Donnie.

Jeffrey: "Donnie, this is the last time I am going to tell you. I mean it. Get down off that horse, now."

Donnie: "Well, for Pete's sake! Aren't you a serious one? No problem, ol' Jeff. I'll be down in a sec."

Donnie chuckled and tried his best to dismount the horse without falling down onto Jeffrey – or the side walk again. He managed to land on both feet, breathing a big sign of relief as he stood up to face Jeffrey. As Donnie signed, Jeffrey noticed the smell of alcohol on his breath.

Jeffrey: "Donnie, have you been drinking tonight?" Donnie: "Aw, well . . . maybe a little bit . . . but I'm fine, really."

Jeffrey asked Donnie to turn around and patted him down. When Jeffrey got to Donnie's waist, he felt the hard object he had spotted earlier in his pocket. After wrapping his hand around the object and manipulating it, Jeffrey realized it was not the gun he had suspected. Jeffrey could feel through the thin layer of Donnie's coat that the object was actually a glass bottle of some kind. Jeffrey could smell the strong odor emanating from the pocket, and suspected the bottle was alcohol. Jeffrey pulled the object out of Donnie's pocket to reveal an uncapped, half-drunk bottle of illegally imported hair-growing absinthe.

Jeffrey shook his head at Donnie. "I'm sorry to do this old pal," he said. Then Jeffrey said Donnie his rights and arrested him. Jeffrey also confiscated the bottle of absinthe.

The Distinct Attorney, Bob Nueller, charged Donnie with Driving Under the Influence of Alcohol pursuant to Ramona Vehicular Code § 1940. During the trial, Sheriff Jeffrey testified about "pulling Donnie over," performing the pat-down search and finding the bottle of absinthe. Bob also produced the bottle at trial, arguing for its admissibility as contraband (violating Ramona's open container law). The defense objected to the admissibility of the bottle as evidence, arguing that the bottle was confiscated in an illegal search and seizure. The trial judge overruled the objection and allowed the absinthe bottle to be admitted into evidence.

Steph Banter was subpoenaed by the prosecution to testify regarding her opinion on Donnie's intoxication. Steph testified to seeing Donnie swerve back and forth on the horse and told the court about her conversation with Donnie. When the prosecution asked for Steph's opinion as to whether she thought Donnie was drunk on the night of his arrest, the defense objected, arguing that Steph did not have the necessary expertise to testify as to whether Donnie was intoxicated.

The trial judge overruled the objection and allowed Steph's testimony to be admitted. Steph replied that she indeed believed Donnie was drunk that night.

Donnie's defense attorney filed an appeal, which has now reached the California Court of Appeal under the case name *McDonald v. Davis*.

MEMO WRITING ASSIGNMENT

You are a law clerk for Judge Chamberlain Haller, California Court of Appeals. Judge Haller has asked you to write a memo giving your analysis in regarding to the following:

Judge Haller would like you to address the following issues from the trial:

1. Was Donnie properly charged and convicted under the vehicular statute for riding a horse while intoxicated?

2. Was Jeffrey's pat-down search and seizure of the bottle lawful?

3. Was Steph's testimony regarding her opinion that Donnie was drunk admissible?

Judge Haller asks you not to consider any hearsay issues in regard to Steph's testimony, and to focus solely on her opinion about Donnie's intoxication on the night in question.

Judge Haller expects your recommendation about whether to affirm, reverse, or remand the case to the trial court for further proceedings. Your response should be written in memorandum form with a minimum of six (6) and maximum of ten (10) pages, double spaced, and appropriately cited. Judge Haller is fully knowledgeable on the facts and has requested you omit the traditional summary of facts and instead immediately address the legal issues.

RESEARCH MATERIALS

California Vehicle Code and Penal Code

California Vehicle Code § 23152. Driving under influence; blood alcohol percentage; presumptions

(a) It is unlawful for a person who is under the influence of any alcoholic beverage to drive a vehicle.

(b) It is unlawful for a person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

California Vehicle Code § 21200.5. Riding under influence of alcohol and drugs; chemical tests; punishment

Notwithstanding Section 21200, it is unlawful for any person to ride a bicycle upon a highway while under the influence of an alcoholic beverage or any drug, or under the combined influence of an alcoholic beverage and any drug. Any person arrested for a violation of this section may request to have a chemical test made of the person's blood, breath, or urine for the purpose of determining the alcoholic or drug content of that person's blood pursuant to Section 23612, and, if so requested, the arresting officer shall have the test performed. A conviction of a violation of this section shall be punished by a fine of not more than two hundred fifty dollars ($250).

California Vehicle Code § 670. Vehicle

A “vehicle” is a device by which any person or property may be propelled, moved, or drawn upon a highway, excepting a device moved exclusively by human power or used exclusively upon stationary rails or tracks.

California Vehicle Code § 360. Highway

“Highway” is a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel. Highway includes street.

California Vehicle Code § 467. Pedestrian

(a) A “pedestrian” is a person who is afoot or who is using any of the following:

(1) A means of conveyance propelled by human power other than a bicycle.

(2) An electric personal assistive mobility device.

(b) “Pedestrian” includes a person who is operating a self-propelled wheelchair, motorized tricycle, or motorized quadricycle and, by reason of physical disability, is otherwise unable to move about as a pedestrian, as specified in subdivision (a).

California Penal Code § 647

Except as provided in paragraph (5) of subdivision (b) and subdivision (l), every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

(f) Who is found in any public place under the influence of intoxicating liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor, drug, controlled substance, or toluene, in a condition that he or she is unable to exercise care for his or her own safety or the safety of others, or by reason of his or her being under the influence of intoxicating liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor, drug, or toluene, interferes with or obstructs or prevents the free use of any street, sidewalk, or other public way.

---

11 Cal. App. 4th. 1374

Court of Appeal, Sixth District, California.

The PEOPLE, Plaintiff and Respondent,

v.

James Douglas LIVELY, Defendant and Appellant.

No. H009307.

|

Nov. 9, 1992.

|

Review Denied Feb. 18, 1993.

Opinion

COTTLE, Acting Presiding Justice.

After his motion to suppress evidence (Pen.Code, § 1538.5) was denied, defendant James Douglas Lively pleaded guilty to one count of driving while having .08 percent or higher blood alcohol (Veh.Code, § 23152, subd. (b)) and one count of driving while his license was suspended (Veh.Code, § 14601.2, subd. (a)). Defendant also admitted allegations that within the past seven years he suffered four prior convictions for violating Vehicle Code section 23152, subdivision (a), one prior conviction for violating Vehicle Code section 23152, subdivision (b), and three prior convictions for violating Vehicle Code section 14601.2, subdivision (a). A third count for driving under the influence of alcohol (Veh.Code, § 23152, subd. (a)) was dismissed pursuant to a negotiated plea. Defendant was sentenced to 16 months in state prison.

On appeal, defendant contends his breath test results should have been suppressed because warrantless misdemeanor arrests are permissible only if the offense is committed in the officer's presence (***1377** Pen.Code, § 836, subd. 1) and the officer who arrested defendant for *driving* under the influence of alcohol did not see him drive. (*Mercer v. Department of Motor Vehicles* (1991) 53 Cal.3d 753, 280 Cal.Rptr. 745, 809 P.2d 404.) The trial court found that defendant could have been arrested for public intoxication (Pen.Code, § 647, subd. (f)), which occurred in the officer's presence, and on that basis could have been required to submit to a breath test. We agree, notwithstanding an arguably inconsistent position taken by the appellate department of the Los Angeles Superior Court in *People v. Engleman* (1981) 116 Cal.App.3d Supp. 14, 172 Cal.Rptr. 474. Accordingly we shall affirm the judgment.

FACTS

As Francis Groce was backing into his driveway at 3074 Woodmont Drive in San Jose at 9:15 p.m. on May 10, 1991, he noticed defendant sitting alone in a car across the street. From his kitchen window about five minutes later, Groce saw defendant's vehicle "started up, went to one end of the street, pulled in a driveway, backed up, came down to the other end of the street, made a U-ball." Defendant then "pulled back where he was parked the first time. Sit [*sic*] there for a little bit, then he started up again, and he pulled about two houses down. There was another parked vehicle, he pulled up behind it, stopped there, sit their [*sic*] for a few minutes, backed up, then back down, turned around in the same driveway, turned. So he drove slowly down the curve, went down and made another U-turn and then turned all the way around without stopping this time, drove all the way up, made an [*sic*] U-turn in the driveway, came all the way back, then he parked across the street again where he first parked." Groce became suspicious and called police.

Officer Wong responded to a dispatch call of "suspicious person in a ... white over blue Dodge Plymouth, dark-type vehicle" on Woodmont Drive. When he saw the vehicle, which was legally parked, Wong asked the defendant who was in the driver's seat behind the steering wheel "to step out of the vehicle ... to make sure he didn't have any weapons." As defendant was getting out of the car, Wong noticed signs of intoxication: "slurred speech; red, ****370** bloodshot eyes; he was staggering when he was walking; and he had an odor of alcohol on his breath." Wong felt the engine, which was warm, and noticed keys in the ignition. He administered various field sobriety tests, including the nystagmus test, balancing test, and finger dexterity test, and determined that defendant was intoxicated. He had no doubt defendant was "quite impaired."

When Wong asked for identification, defendant produced his driver's license, which proved to be suspended. At that point, Wong arrested defendant for driving under the influence of alcohol. Breathalyzer tests revealed ***1378** blood alcohol levels of .28 and .29 percent. At the station, Wong learned that defendant had five prior convictions for driving under the influence.

DISCUSSION

[1] [2] [3] Penal Code section 836, subdivision 1, permits a warrantless arrest for a misdemeanor only when the officer "has reasonable cause to believe that the person to be arrested has committed a public offense *in his presence*." (Emphasis added.) Misdemeanor "drunk driving" (Veh.Code, § 23152) occurs in the officer's presence if the officer personally observes the arrestee (1) driving (2) a vehicle (3) while under the influence of intoxicants, or having .08 percent alcohol in the blood.[1] Driving means any

volitional movement of the vehicle. (Mercer v. Department of Motor Vehicles, supra, 53 Cal.3d 753, 756, 280 Cal.Rptr. 745, 809 P.2d 404.) Where, as here, the officer does not personally observe the driving element of the offense, a warrantless arrest for drunk driving is invalid. (Padilla v. Meese (1986) 184 Cal.App.3d 1022, 1027, 229 Cal.Rptr. 310.)

[4] [5] The issue we address is whether the arrest can be justified on the ground that *another* public offense was committed in Officer Wong's presence: to wit, public intoxication in violation of Penal Code section 647, subdivision (f).[2] This offense is complete if the arrestee is (1) intoxicated (2) in a public place and *either* (3) is unable to exercise care for his own safety or the safety ***1379** of others *or* (4) interferes with ****371** or obstructs or prevents the free use of any street, sidewalk or public way.

[6] In the present case, the first two elements are met (defendant was intoxicated and was in a public place[3]) and the fourth element is inapplicable (defendant was not obstructing free use of the streets). Thus, a valid warrantless arrest for public intoxication hinges on whether the third element is met.

Defendant asserts "there is no evidence in the record to show that Appellant was unable to exercise care for his own safety or the safety of others. (Penal Code section 647(f).) The requirement that explicit facts be in the record in order for the court to make such a finding is mandated by People v. Rich [(1977) 72 Cal.App.3d 115, 122, 139 Cal.Rptr. 819] and People v. Engleman, supra, 116 Cal.App.3d Supp. 14, 172 Cal.Rptr. 474.... [T]his aspect of Engleman has been cited with approval by the California Supreme Court in Mercer v. Department of Motor Vehicles, supra. Mercer is binding on this court." (Emphasis omitted.)

Defendant points to the factual similarity between Engleman and the instant case. In Engleman, the defendant was found asleep at the steering wheel of his car, parked with the engine running, on the shoulder of a highway. It took police officers two minutes to wake him up. The officers noticed signs of intoxication and saw an open beer can on the dashboard of the car. They administered field sobriety tests, which defendant failed, and then arrested him for driving under the influence of alcohol. A breath test was subsequently taken. On appeal defendant argued the officers' observations of him, the field sobriety tests, and the breath test were products of an unlawful arrest in that he did not drive his car in the presence of officers and therefore could not validly be arrested for drunk driving.

The appellate department of the superior court held there was no reason to suppress the officers' observations and field sobriety test results because these were taken prior to defendant's illegal arrest. On the other hand, it was error to admit the breath test results into evidence because they were products of an illegal arrest.

***1380** The court explicitly rejected the People's attempt to justify the evidence on the basis that defendant could have been arrested for illegal parking, having an open container of an alcoholic beverage in the vehicle, or "being plain drunk." The first two offenses, the court noted, would not justify a breath test. Being "plain drunk" would justify a breath test, "[b]ut the facts in our record show no justification for such an arrest under Penal Code section 647, subdivision (f). The settled statement says, 'No evidence was presented as to defendant's ability to care for his own safety or the safety of others.' That is a necessary element of a plain drunk arrest. (People v. Rich (1977) 72 Cal.App.3d 115, 122, 139 Cal.Rptr. 819 [parallel citation].) While the facts of our case are similar to those in People v. Kelley, supra, 3 Cal.App.3d 146 [83 Cal.Rptr. 287], the Kelley opinion states that, '[T]he circumstances indicated that prompt and efficient police action was necessary for the defendant's safety, as well as that of the public.' Thus the record in Kelley supported all the elements of Penal Code sections 647, subdivision (f) whereas our record is lacking in the element of ability to care for oneself, etc." (People v. Engleman, supra, 116 Cal.App.3d Supp. at p. 19, 172 Cal.Rptr. 474.)

We disagree. The facts as recited in Engleman clearly justified an arrest for public intoxication. The defendant was intoxicated; his motor skills were impaired; and he was behind the steering wheel of a car parked with the engine running on the shoulder of a highway. These circumstances posed a clear threat both to defendant and to the public.

While the court in Engleman attempted to distinguish its facts from those in People ****372** v. Kelley (1969) 3 Cal.App.3d 146, 83 Cal.Rptr. 287[4] on the ground that in Kelley "efficient police action was necessary for the defendant's safety, as well as that of the public," (id., at p. 150, 83 Cal.Rptr. 287) we see no meaningful distinction. One reason "efficient police action was necessary" was because the defendant in Kelley was intoxicated and behind the steering wheel of a potentially deadly instrumentality. As the Kelley court observed in the very next sentence, Kelley's "apparent condition threatened even greater danger if he were allowed to move his vehicle." (Id., at p. 150, 83 Cal.Rptr. 287.) Likewise the defendant's condition in Engleman threatened danger if he were allowed to move his vehicle.

Nevertheless, the Engleman court concluded that its record, unlike the record in Kelley, was "lacking in the element of ability to care for oneself, ***1381** etc." (Engleman, supra, 116 Cal.App.3d Supp. at p. 19, 172 Cal.Rptr. 474.) In this respect Engleman considered its facts similar to those in People v. Rich (1977) 72 Cal.App.3d 115, 139 Cal.Rptr. 819. In Rich, a police officer noticed the defendant inside a " 'Mom and Pop' " market. The defendant's speech was slow, his eyelids drooped, his head hung low, and he swayed. The officer arrested him for public intoxication, and a search of his person yielded a red balloon containing heroin. After the trial court granted the defendant's motion to suppress evidence, the People appealed. The Court of Appeal reversed. Although the arrest under Penal Code section 647,

subdivision (f) was improper because the "described symptoms indicated only that defendant was under the influence of an opiate, and not that he was incapacitated as a result," the defendant could have been arrested for being under the influence of an opiate in violation of Health and Safety Code section 11550 and could have been searched on that basis. (Id., at p. 122, 139 Cal.Rptr. 819.)

We believe the Engleman court's reliance on Rich is misplaced. The defendant in Rich was not behind the steering wheel of a car; thus, the court did not need to consider the destructive potential of a motor vehicle at the hands of an intoxicated person. There was no other evidence that he posed a threat to himself or others. The facts in Engleman and in the present case are more analogous to those in Kelley. In our view whenever a person *so intoxicated that his motor skills are impaired* is found as a potential driver behind the steering wheel of a car, this constitutes evidence the person is unable to exercise due care for his safety or the safety of others.

Defendant also purports to rely on Mercer v. Department of Motor Vehicles, supra, 53 Cal.3d 753, 280 Cal.Rptr. 745, 809 P.2d 404. However, that opinion supports our conclusion that an intoxicated person behind the steering wheel of a car, with keys in the ignition, is unsafe to himself and others in his way. In Mercer, the defendant was found slumped over the steering wheel of his car. His seat belt was fastened, the car lights were on, and the engine was running. As here, the car was legally parked against the curb of a residential street. The officer had to rock on the car to wake up the defendant. "[W]hen Mercer 'finally [came] around, he started pulling gears [on the manual transmission] as if ... in his mind, he was already driving or about ready to drive.' " (Id., at p. 757, 280 Cal.Rptr. 745, 809 P.2d 404.) Eventually, he ceased attempting to drive and rolled down his window. At that point, the officer detected a heavy odor of alcohol and asked Mercer to exit the vehicle. Mercer stumbled to the sidewalk. The officer noticed slurred speech and red, watery eyes. He arrested Mercer without a warrant for driving under the influence of alcohol. Mercer refused to take a chemical test, and his license was revoked. (Veh.Code, §§ 13353, 23157.) The Supreme ****373** Court held that because the officer who arrested Mercer did not see his vehicle move, Mercer was not lawfully arrested for a violation of ***1382** Vehicle Code section 23152, subdivision (a), and thus could not be subjected to the license revocation provisions of Vehicle Code sections 13353 and 23157.

At two points in the opinion, however, the court noted that Mercer could have been arrested for public intoxication. Specifically, the court stated: "[T]he Court of Appeal (and the DMV as well) appears to have overlooked the fact that the officer did not have to wait for Mercer to move his vehicle before making an arrest. On these facts, Mercer could have been arrested for attempted drunk driving (People v. Garcia (1989) 214 Cal.App.3d Supp. 1, 5 [262 Cal.Rptr. 915] [parallel citation]) or public intoxication (Pen.Code, § 647, subd. (f); see People v. Engleman, supra, 116 Cal.App.3d Supp. 14, 19, [172 Cal.Rptr. 474] and cases cited), and thereafter—pursuant to Schmerber, supra, 384 U.S. 757 [86 S.Ct. 1826, 16 L.Ed.2d 908]—he could have been forced to submit to a chemical test, *regardless* whether he met the separate requirements of section 23157 (i.e., 'lawful arrest' for a violation of §

23152).” (Mercer, supra, 53 Cal.3d at pp. 762–763, 280 Cal.Rptr. 745, 809 P.2d 404.) Later on in a footnote, the Mercer court again observed that “[o]n these facts it appears Mercer violated Penal Code section 647, subdivision (f), because (i) he was intoxicated in a public place (see People v. Kelley (1969) 3 Cal.App.3d 146, 150, fn. 2 [83 Cal.Rptr. 287] [parallel citation]) *and* (ii) he was unable to exercise care for his own safety or the safety of others (see People v. Engleman, supra, 116 Cal.App.3d Supp. 14, 19, [172 Cal.Rptr. 474] and cases cited).” (Id., 53 Cal.3d at p. 769, fn. 25, 280 Cal.Rptr. 745, 809 P.2d 404.)

In Mercer, the defendant was intoxicated, at the helm of a vehicle, and with the capability of putting the vehicle in motion. No *additional* evidence was presented as to defendant’s ability to care for his own safety or the safety of others. The facts were identical in Engleman, with one additional twist: the settled statement said, “ ‘No evidence was presented as to defendant’s ability to care for his own safety or the safety of others.’ ” (People v. Engleman, supra, 116 Cal.App.3d Supp., at p. 19, 172 Cal.Rptr. 474.) However, the facts as recited provided evidence of the defendant’s inability to care for his own or others’ safety: he was behind the steering wheel of a car; the motor was running; therefore, he had the present ability to drive the car; he was intoxicated; he could not pass field sobriety tests; and an open beer can was observed on the dashboard. The claim in the settled statement that “ ‘[n]o evidence was presented’ ” (ibid.) on the issue of defendant’s incapacity can only mean that no *additional* evidence was presented other than the facts as recited.

In an arrest for public intoxication, the totality of circumstances must be considered in determining whether the intoxicated person can exercise care for his or her own safety or the safety of others. An inebriated person behind ***1383** the wheel of a car or power boat or plane or train poses a greater danger to himself or herself and others than the same person lying on a park bench. Under the facts of this case, defendant could properly have been arrested for public intoxication. His blood alcohol level was almost four times the legal limit. He was unable to walk without staggering. His speech was slurred, his eyes bloodshot, his balance and his motor skills were impaired. Behind the wheel of a car, he was a danger to himself and others.

The judgment is affirmed.

34 Cal. 3rd 227

Supreme Court of California,

In Bank.

Richard Joseph BURG, Plaintiff and Appellant,

v.

The MUNICIPAL COURT For the SANTA CLARA JUDICIAL DISTRICT OF SANTA CLARA COUNTY, Defendant and Respondent;

The PEOPLE, Real Party in Interest and Respondent.

S.F. 24622.

|

Dec. 22, 1983.

|

Rehearing Denied Jan. 20, 1984.

Opinion

MOSK, Justice.

Richard Joseph Burg, hereafter defendant, appeals from a judgment denying his petition for a writ of prohibition. He contends that ***231** Vehicle Code section 23152, subdivision (b),[1] fails to give constitutionally adequate notice of the conduct it prohibits, and that the municipal court erred in overruling his demurrer to that effect. We conclude that section 23152, subdivision (b), ****734** is constitutional, and therefore affirm the judgment.

Defendant was arrested at 2:25 in the morning of March 27, 1982, for violation of section 23152, subdivision (a) (driving while under the influence of alcohol). A chemical test administered 50 minutes later revealed a blood alcohol content of 0.23 percent. He was charged with violating section 23152, subdivision (b), i.e., driving a vehicle while having 0.10 percent or more, by weight, of alcohol in one's body. The complaint also alleged a prior conviction of former section 23102, subdivision (a) (driving while under the influence of alcohol).

Defendant demurred on the ground that section 23152, subdivision (b), gives constitutionally inadequate notice of the conduct proscribed. The municipal court overruled his demurrer, and defendant sought a

writ of prohibition in the superior court. The petition was denied on the merits, and this appeal followed.[2]

I. *Background*

A. The Problem

Eighty years ago an editorialist complained, "Inebriates and moderate drinkers are the most incapable of all persons to drive motor wagons. The general palsy and diminished power of control of both the reason and the senses are certain to invite disaster in every attempt to guide such wagons." (26 Q.J. Inebriety (1904) 308, 309.) In the ensuing decades motor vehicles have become faster, heavier, and ubiquitous, with proportionately tragic consequences to the victims of drinking drivers. Nearly half of the traffic deaths in California between 1976–1980 involved drinking drivers. (Cal. Highway Patrol, 1980 Ann.Rep., Fatal & Injury Motor Vehicle Traffic Accidents, p. 2, tables 1a, 1b, and p. 58, tables 6a, 6b.) Nearly one-quarter of all traffic accidents resulting in injury involved the use of alcohol. (Id. at p. 3, tables 1c, 1d, and p. 58, tables 6a, 6b.) Traffic deaths in the United States exceed 50,000 annually, and approximately one-half of those fatalities are alcohol-related. (U.S.Dept.Transp., 1977 Highway Safety Act Rep., Appen. A–9, table A–1; cf. Jones & Joscelyn, Alcohol and Highway ***232** Safety 1978: A Review of the State of Knowledge (U.S.Dept. of Transp.1978) pp. 11–26.)

The drunk driver cuts a wide swath of death, pain, grief, and untold physical and emotional injury across the roads of California and the nation. The monstrous proportions of the problems have often been *****147** lamented in graphic terms by this court and the United States Supreme Court. (See Taylor v. Superior Court (1979) 24 Cal.3d 890, 898–899, 157 Cal.Rptr. 693, 598 P.2d 854) [quoting U.S.Dept.Health, Ed. & Welf., 3d Special Rep.U.S.Cong. on Alcohol and Health (1978)]; South Dakota v. Neville (1983) ––U.S. ––––, ––––, 103 S.Ct. 916, 920, 74 L.Ed.2d 748 [describing the "tragic frequency" of the "carnage caused by drunk drivers"]; Mackey v. Montrym (1979) 443 U.S. 1, 17–18, 99 S.Ct. 2612, 2620–2621, 61 L.Ed.2d 321. As observed in Breithaupt v. Abram (1957) 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448, "[t]he increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield." (Id. at p. 439, 77 S.Ct. 408, 1 L.Ed.2d 448.) Indeed, in the years 1976 to 1980 there were many more injuries to California residents in alcohol-related traffic accidents than were suffered by the entire Union Army during the Civil War, and more were killed than in the bloodiest year of the Vietnam War. (Compare Cal. Highway Patrol, 1980 Ann.Rep., Fatal & Injury Motor Vehicle Traffic Accidents, p. 2, tables 1a, 1b, 1c, 1d, and p. 58, tables 6a, 6b, with Statistical Abstract of U.S. (103d ed. 1982) p. 361, tables 598, 599.) Given this setting, our observation that "[d]runken drivers are extremely dangerous people" (Taylor v. Superior Court, supra, 24 Cal.3d 890, 899, 157 Cal.Rptr. 693, 598 P.2d 854) seems almost to understate the horrific risk posed by those who drink and drive.

****735** *B. The Legislative Response*

In response to this continuing problem, in the past decade most states enacted additional legislation supplementing existing "driving under the influence" statutes and fashioned after what has been termed the "Scandinavian model." (Ross, Deterring the Drinking Driver (1982) pp. 21–70; Ross, *The Scandinavian Myth: The Effectiveness of Drinking-and-Driving Legislation in Sweden and Norway* (1975) 4 J. Legal Stud. 285; Snortum, *Alcohol Impaired Driving in Norway and Sweden: Another Look at "The Scandinavian Myth"* (forthcoming) (Issue 1, 1984) 6 Law & Pol'y Q. ——; Snortum, *Controlling the Alcohol-Impaired Driver in Scandinavia and the U.S.: Simple Deterrence and Beyond* (forthcoming) (Issue 2, 1984) 12 J.Crim.Just. ——; Votey, *Scandinavian Drinking-Driving Control: Myth or Intuition?* (1982) 11 J. Legal Stud. 93.) These statutes—which are most frequently subdivisions of a general "driving and alcohol" statute—define the substantive offense not by the subjective term "driving under the influence," but instead as the act of driving with a specified blood alcohol level. (Macdonald & Wagner, Rep., Nat. Study of Preliminary ***234** Breath Test (PTB) and Illegal per se Laws (U.S.Dept. of Transp.1981) (Executive Summary) p. xv.) Under these laws, proof of being "under the influence" is unnecessary. The statutes represent a legislative determination that public safety is endangered when a person ****736** drives a motor vehicle while having a specified percentage (typically 0.10) or more by weight of alcohol in his blood.

II. Section 23152, Subdivision (b)

Although under section 23152, subdivision (b), it is no longer necessary to prove that the defendant was in fact under the influence, the People still must prove beyond a reasonable doubt that at the time he was driving his blood alcohol exceeded 0.10 percent. (People v. Lujan, supra, 141 Cal.App.3d Supp. 15, 22, 192 Cal.Rptr. 109 [the People must prove beyond a reasonable doubt that the defendant was driving a vehicle in any area open to the public, and his blood-alcohol level was 0.10 percent or more at the time ***236** of the alleged offense]; accord, Greaves v. State (Utah 1974) 528 P.2d 805, 807–808; Coxe v. State (Del.1971) 281 A.2d 606, 607; State v. Gerdes, supra, 252 N.W.2d 335, 336; Van Brunt v. State (Alaska App.1982) 646 P.2d 872, 873; cf. State v. Basinger (1976) 30 N.C.App. 45, 226 S.E.2d 216, 219.)[10]

*****150** III. *Constitutional Issues*

A. Police Power

We have previously observed that "the area of driving is particularly appropriate for extensive legislative regulation, and that the state's traditionally broad police power authority to enact any measure which reasonably relates to public health or safety operates with full force in this domain." (Hernandez v. Department of Motor Vehicles (1981) 30 Cal.3d 70, 74, 177 Cal.Rptr. 566, 634 P.2d 917; accord, Escobedo v. State of California (1950) 35 Cal.2d 870, 876, 222 P.2d 1 ["usage of the highways is subject to reasonable regulation for the public good"]; Watson v. Division of Motor Vehicles (1931) 212 Cal. 279, 283, 298 P. 481 [legislative power to regulate travel over highways for general welfare is extensive, and may be exercised in any reasonable manner]; Mackey v. Montrym, supra, 443 U.S. 1, 17, 99 S.Ct. 2612, 2620, 61 L.Ed.2d 321 [state has great leeway in adopting summary procedures to protect public ****738** health and safety from drunk drivers]; State v. Melcher (1982) 33 Wash.App. 357, 655 P.2d 1169, 1170 [all presumptions favor legislation that promotes public health and safety and is rationally related to regulation of drinking drivers]; cf. Hale v. Morgan (1978) 22 Cal.3d 388, 398, 149 Cal.Rptr. 375, 584 P.2d 512.)

***237** **[1] [2]** "The wisdom of the legislation is not at issue in analyzing its constitutionality, and neither the availability of less drastic remedial alternatives nor the legislative failure to solve all related ills at once will invalidate a statute." (Hale v. Morgan, supra, at p. 398, 149 Cal.Rptr. 375, 584 P.2d 512.) Surely the regulation of drinking drivers in a state that experienced 338,344 arrests for "drunk driving" in 1982[11] is well within the legitimate police power of the Legislature. (Accord, State v. Franco, supra, 639 P.2d 1320, 1324 [upholding legislation analogous to § 23152, subd. (b)]; Greaves v. State, supra, 528 P.2d 805, 807 [same]; Roberts v. State (Fla.1976) 329 So.2d 296, 297 [same]; State v. Basinger (1976) 30 N.C.App. 45, 226 S.E.2d 216, 218–219 [same].) Scientific evidence and sad experience demonstrate that any driver with 0.10 percent blood alcohol is a threat to the safety of the public and to himself. (Gray, Attorney's Textbook of Medicine (3d ed. 1983) ¶¶ 133.52–133.52(3) [all individuals suffer impairment at 0.10 percent blood-alcohol content]; State v. Franco, supra, 96 Wash.2d 816, 639 P.2d 1320, 1322 [abundant scientific evidence that at 0.10 percent blood alcohol all persons are significantly affected and will have lost at least one-quarter of their normal driving ability]; People v. Lewis (1983) 148 Cal.App.3d 614, 617, 196 Cal.Rptr. 161; People v. Schrieber (1975) 45 Cal.App.3d 917, 924, 119 Cal.Rptr. 812; People v. Lachman (1972) 23 Cal.App.3d 1094, 1098, 100 Cal.Rptr. 710; People v. Perkins (1981) 126 Cal.App.3d Supp. 12, 21, 179 Cal.Rptr. 431; Greaves v. State, supra, 528 P.2d 805, 807; Coxe v. State (Del.1971) 281 A.2d 606, 607; Oversight into the Administration of State and Local Court Adjudication of Driving While Intoxicated: Hearings Before Subcom. on Courts of Sen. Com. on the Judiciary, 97th Cong., 1st Sess. (1981) Serial No. J–97–79, pp. *****151** 99–101 [hereinafter Hearings Before Subcom. on Courts] [statement of Dr. Roger P. Maickel, noting that typically vision impairment begins at 0.03–0.08 percent blood alcohol and becomes significant in all subjects at 0.10 percent; reaction-time impairment begins at 0.04 percent; judgment of distance, dimensions and speed at 0.08 percent; coordination and memory at 0.10 percent].) Section 23152, subdivision (b), represents a legislative determination to that effect. (Accord, Greaves v. State, supra, 528 P.2d 805, 807; Coxe v. State, supra, 281 A.2d 606, 607; State v. Gerdes, supra, 252 N.W.2d 335, 335–336; State v. Clark (1979)

286 Or. 33, 593 P.2d 123, 126; State v. Basinger, supra, (1976) 30 N.C.App. 45, 226 S.E.2d 216, 218; People v. Fox (N.Y.Just.Ct.1976) 87 Misc.2d 210, 382 N.Y.S.2d 921, 925–926; cf. Erickson v. Municipality ***238** of Anchorage (Alaska App.1983) 662 P.2d 963, 969–970, fn. 3.) Indeed, the available scientific information would support an even lower figure. (Hurst, *Estimating the Effectiveness of Blood Alcohol Limits* (1970) 1 Behav. Research Highway Safety 87; Ross, Deterring the Drinking Driver (1982) pp. 2–3; Jones & Joscelyn, Alcohol and Highway Safety 1978, op. cit. supra, pp. 35–50; Hearings Before Subcom. on Courts, supra, pp. 99–101; Gray, Attorneys' Textbook of Medicine (3d ed. 1983) ¶¶ 133.52–133.52(3).) At least two states and several foreign countries have established standards between 0.05 percent and 0.08 percent.[12] We have ****739** no difficulty concluding that the 0.10 percent figure fixed by section 23152, subdivision (b), is rationally related to exercise of the state's legitimate police power. (Roberts v. State, supra, 329 So.2d 296, 297.)

The very fact that he has consumed a quantity of alcohol should notify a person of ordinary intelligence that he is in jeopardy of violating the statute. (Accord, *Fuenning v. Superior Court*, supra, ["it requires more than a small amount of alcohol to produce a .10% BAC [blood-alcohol content]. Those who drink a substantial amount of alcohol within a relatively short period of time are given clear warning that to avoid possible criminal behavior they must refrain from driving." (Fn. omitted.)]; cf. People v. Perkins, supra, 126 Cal.App.3d Supp. 12, 21, 179 Cal.Rptr. 431.) Although this factor alone sustains our determination that the statute provides adequate warning to potential violators, we find some further support in this regard from the existence for over 15 years of an analogous "0.10 percent" rebuttable presumption of being under the influence of alcohol pursuant to section 23155 and its *****154** predecessor, section 23126.[19] Considering also today's heightened level of public awareness regarding the problem, we cannot believe that any person who drives after drinking would be unaware of the possibility that his blood-alcohol level might equal or exceed the statutory standard. ***242** (Greaves v. State, supra, 528 P.2d 805, 808; LaFave & Scott, Criminal Law (1972) § 11, p. 86, text and cases cited in fns. 28–29; Note, The Void-for-Vagueness Doctrine in the Supreme Court (1960) 109 U.Pa.L.Rev. 67, 87, fn. 99.) If, in the exceptional case, a person experiencing the symptoms of alcohol ingestion[20] failed to be aware of them, the most probable reason would be depression of the brain function caused by the alcohol itself. "Fair notice," however, has not been interpreted as requiring the overcoming of such a self-induced obstacle. (Cf. Williford v. State (Alaska App.1982) 653 P.2d 339, 342; Morgan v. Municipality of Anchorage (Alaska App.1982) 643 P.2d 691, 692.)

[6] Furthermore, a statute " ' "will be upheld if its terms may be made reasonably ****742** certain by reference to other definable sources." ' " (County of Nevada v. MacMillen (1974) 11 Cal.3d 662, 673, 114 Cal.Rptr. 345, 522 P.2d 1345, and cases cited.) Charts are readily available to the public that show with reasonable certainty the number of different alcoholic beverages necessary for a particular individual to reach a blood-alcohol level of 0.10 percent. For example, the 1982 California Driver's Handbook, issued by the Department of Motor Vehicles and available in English and five foreign languages free of charge to any driver, contained a blood alcohol estimation chart on the inside of its front cover, together with the admonition: "Keep this booklet in the glove compartment of your vehicle.

It will help you many times." (Cal.Driver's Handbook (Cal.Dept.Motor Veh.1982) p. 2.) The current handbook contains a significant discussion of the 0.10 percent law, and concludes with the highlighted admonition that "[t]he average size person (160 pounds) can reach a .10 BAC [blood-alcohol content] with as few as three or four average drinks (or beers) in one hour." (Cal. Driver's Handbook (Cal.Dept.Motor Veh.1983) p. 40.) Although it is true that even with use of a chart a person may err in his estimate and thereby violate the statute, this fact does not render the statute invalid. "[T]he law is full of instances where a man's fate depends on his estimating rightly ... some matter of degree." (Nash v. United States, supra, 229 U.S. 373, 377, 33 S.Ct. 780, 781, 57 L.Ed. 1232.) We are aware of none that has been declared unconstitutional for that reason.

We decline to frustrate the Legislature's clear and legitimate purpose in enacting the statute involved here. (People v. Vis (1966) 243 Cal.App.2d 549, 555, 52 Cal.Rptr. 527, and cases cited; cf. Winters v. New York (1948) 333 U.S. 507, 535, 68 S.Ct. 665, 679, 92 L.Ed. 840 [dis. opin. of Frankfurter, J.].) We conclude that under both the federal and state Constitutions, section 23152, subdivision (b), provides adequate notice of the ***243** conduct proscribed, and is not void for vagueness. (Grayned v. City of Rockford, supra, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222; People v. Mirmirani, supra, 30 Cal.3d 375, 382, 178 Cal.Rptr. 792, 636 P.2d 1130.)[21]

The judgment is affirmed.

234 Cal.App.3d Supp. 6

Appellate Department, Superior Court, Los Angeles County, California.

The PEOPLE, Plaintiff and Respondent,

v.

Dorothy GARCIA, Defendant and Appellant.

Crim. A. 27238.

|

Aug. 22, 1989.

Opinion

HINZ, Judge.

Appellant was convicted of attempted driving under the influence (Pen.Code, § 664; Veh.Code, § 23152, subd. (a)). The sole issue raised on appeal is whether this offense exists under California law.

We first consider the language and intent of the penal statutes governing attempted crimes. Pursuant to Penal Code section 664,[1] "Every person who attempts to commit *any crime,* but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows: ..." (Italics added.) Section 1159 provides as follows: "The jury, or the judge if a jury trial is waived, may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, *or of an attempt to commit the offense.*" (Italics added.) (See People v. Meyer (1985) 169 Cal.App.3d 496, 506, 215 Cal.Rptr. 352.) These sections clearly apply to attempted crimes that are not specifically made punishable by provisions of the Penal Code.

Construction of the language of sections 664 and 1159 is governed by section 4. Section 4 provides that the provisions of the Penal Code "are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice." The "fair import" of the phrase "any crime" as used in section 664 is that the provision is not limited in its ***8** application to crimes made punishable by the Penal Code. Section 1159 likewise contains no language limiting its application to crimes made punishable by the Penal Code.

The attempt provision is equally applicable, for example, to crimes made punishable by the Health and Safety Code. In People v. Siu (1954) 126 Cal.App.2d 41, 271 P.2d 575, the defendant was convicted of an attempt to violate Health and Safety Code section 11500 (now Health and Saf.Code, § 11350), possession of narcotics. In People v. Meyer, supra, 169 Cal.App.3d 496, 215 Cal.Rptr. 352, the defendant was convicted of an attempted violation of Health and Safety Code section 11104 (sale of methylamine). The attempt statute also applies to violations of the Vehicle Code. For example, in People v. Lesara (1988) 206 Cal.App.3d 1304, 254 Cal.Rptr. 417 and In re Curt W. (1982) 131 Cal.App.3d 169, 182 Cal.Rptr. 266, the defendants were convicted of attempted unlawful taking of a vehicle.

In People v. Meaders (1983) 148 Cal.App.3d 1155, 1159, 197 Cal.Rptr. 1, the court succinctly stated the purpose of the attempt statute as follows: "And it cannot be doubted that the purpose of the law of attempt is both to penalize conduct which would have been harmful if not fortuitously prevented, and to permit intervention by law enforcement personnel before the harm has occurred."

****917** Some states have made attempted driving under the influence a crime by specific statute. (See, e.g., Kan.Stat.Ann. § 8–1567 (1987); Me.Rev.Stat.Ann. tit. 29, § 1312 (West Supp.1988); Md.Transp.Code Ann. tit. 21, § 21–902 (Michie 1957–1987); N.H.Rev.Stat.Ann. § 265:82 (Supp.1988); Vt.Stat.Ann. tit. 23, § 1201 (1987).) The statutes of these states establish that there is no legal infirmity in punishing attempted driving under the influence.

Cases from other jurisdictions also support the existence of the crime of attempting to drive while under the influence. (See, generally, 61A C.J.S., Motor Vehicles, § 630, pp. 356–357; 7A Am.Jur.2d, Automobiles & Highway Traffic, § 300, p. 484; Annot. (1956) 47 A.L.R.2d 570, 590, § 8.) The most instructive case is Commonwealth v. Underkoffler (1938) 32 Pa.D. & C. 183. In this Pennsylvania case, defendant was charged with the offense of operating a motor vehicle while under the influence of alcohol. The defendant was found not guilty of this offense, but guilty of an attempt to commit the offense.

The court held that the attempt statute was "very broad in its terms and includes *all* felonies and misdemeanors." (Underkoffler, supra, 32 Pa.D. & C. at p. 183, italics added.) The court observed, "No reason has been ***9** pointed out to the court why this particular misdemeanor should be exempted from the provisions of that act. We have found no decision, nor even any intimation, in any reported case that any felony or misdemeanor is exempt from its provisions. A separate indictment or count charging attempt is not required: [citation]." (Id. at pp. 183–184.)

The officers first saw appellant's vehicle stopped in the number one or fast lane with its flashers on. The officer asked appellant what was wrong, but she did not respond. He noticed that her car was rolling backwards and told her to put the brake on. Appellant just stared out of the window of her automobile as she was rolling backwards. Appellant was trying to start the vehicle. The car was in neutral, and the engine was turning over. The vehicle continued to roll as she attempted to start the car. The officer told her to put the brake on a second time. At that point appellant put the gear shift into the park position and the car immediately stopped.

Based on her poor performance on the field sobriety tests at the scene, the officer formed the opinion that appellant was under the influence. The two breath tests each registered a reading of .13 percent. Based on appellant's conduct, all the tests and the officer's opinion, it is clear that she was under the influence. Finally, appellant testified that if she had started the car, she would have driven it home.

[2] [3] With respect to the element of "driving," "a 'slight movement' of the vehicle constitutes direct evidence that the vehicle was being 'driven.' [Citation.]" (People v. Wilson (1985) 176 Cal.App.3d Supp. 1, 8, 222 Cal.Rptr. 540.) Two police officers testified that appellant's vehicle rolled fifteen to twenty feet in their presence. This was sufficient evidence that appellant "drove" the vehicle.

There was also circumstantial evidence that appellant drove the car to the location in which it was found by the arresting officer. "[T]he element of 'driving' may ... be established at trial through circumstantial evidence.... [Citations.]" (Wilson, supra, 176 Cal.App.3d Supp. at p. 9, 222 Cal.Rptr. 540.)

***5** In People v. Wilson, supra, police officers found the defendant's vehicle parked at an angle on the shoulder of a freeway. A portion of the vehicle was in the number ****918** three lane of the freeway. The engine was running, the lights were on, and the vehicle was in park. Defendant, the sole occupant of the vehicle, was asleep behind the steering wheel. The court found there was sufficient circumstantial evidence that defendant drove the vehicle to the location in which it was found. (176 Cal.App.3d Supp. at pp. 7–8, 222 Cal.Rptr. 540.)

In People v. Hanggi (1968) 265 Cal.App.2d Supp. 969, 70 Cal.Rptr. 540, the defendant was found "seated in his automobile, which was located roughly in the center of a street, across both the east and westbound lanes at an angle. Defendant was seated in the driver's seat clutching the steering wheel and apparently unconscious. The engine of the vehicle was running and the headlights were on. No other persons were about." (Id. at p. Supp. 971, 70 Cal.Rptr. 540.) The court found "that there was ample evidence from which the jury could have inferred that the defendant had been driving his vehicle...." (Id. at p. Supp. 972, 70 Cal.Rptr. 540.)

Similarly, in the present case, appellant, the sole occupant of the vehicle, was found seated behind the steering wheel. The vehicle was located in the number one or fast lane. Appellant had the key in the ignition, the gear in neutral, and was attempting to start the car. The engine was continually turning over. This was sufficient evidence from which the jury could have inferred that appellant drove the vehicle to the location at which it was found by the arresting officer.

In conclusion, we observe that appellant's conviction of *attempted* driving under the influence is a more lenient determination than might otherwise have been the result.

In concluding that attempted driving under the influence is a California crime, we are not unmindful that there might be troublesome questions which will have to be resolved in later cases. In some instances there might be anomalous results.

For instance, driving under the influence is a general intent crime, making it unnecessary that there should exist an intent to violate the law. All that is necessary is that a person must intentionally do that which the law declares to be a crime. An attempt on the other hand requires a specific intent to commit the crime. (People v. Franquelin (1952) 109 Cal.App.2d 777, 783, 241 P.2d 651.) We can envision a situation in which a person who is mildly under the influence would be capable of forming the requisite specific intent to commit attempted driving under the influence, but a person who is severely intoxicated would be incapable of forming such intent.

The judgment is affirmed.

Drunken Motor Cab Driver, Morning Post, September 11, 1897.

At Marlborough-street Police-court yesterday George Smith, aged 25, of Portnall-road, Harrow-road, was charged by the police with being drunk while in charge of a motor car, of which he was the licensed driver. Police-constable Russell, 247 C, stated that at a quarter to one that morning he saw Smith in Bond-street in charge of a motor-car – a four-wheeled electric cab. Suddenly the vehicle swerved from one side of the road to the other, and ran across the footway into 165, New Boud-street, breaking the water pipe and the heading of the window. Thinking that the driver was unable to manage the vehicle, witness asked himt o get down from the box, and finding that he was drunk, took him to Vine-street Police-station. He then denied being drunk, and the divisional surgeon was sent for, who certified that he was drunk.

Prisoner: How fast was I going?

Constable: I should think about eight miles an hour.

Prisoner: At the time I was going up an incline, and could not have been going six miles an hour. The fastest these cars can travel is eight miles an hour.

Mr. De Rutzen: You are not charged with driving furiously, but with being drunk. What about that?

Prisoner: I have nothing to say to that. I admit having had two or three glasses of beer. I am very sorry. It is the first time I have been charged with being drunk in charge of a cab.

Mr. De Rutzen (looking at the list of convictions sent from Scotland Yard): You appear to have been charged here with being drunk.

Prisoner: Yes, but that was not when in charge of a cab.

Mr. De. Rutzen: You motor-car drivers ought to be very careful, for if anything happens to you – well, the police have a very happy knack of stopping a runaway horse, but to stop a motor is a very different thing. There will be a fine of 20s.

INTER-JOURNAL WRITING COMPETITION

WRITING ASSIGNMENT

CALIFORNIA EVIDENCE CODE:

ARTICLE 1. Expert and Other Opinion Testimony Generally [800 - 805]
(Article 1 enacted by Stats. 1965, Ch. 299.)

§ 800. If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:

(a) Rationally based on the perception of the witness; and

(b) Helpful to a clear understanding of his testimony.

(Enacted by Stats. 1965, Ch. 299.)

§ 801. If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

(Enacted by Stats. 1965, Ch. 299.)

§ 802. A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based.

(Enacted by Stats. 1965, Ch. 299.)

803.

The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such case, the witness may, if there remains a proper basis for his opinion, then state his opinion after excluding from consideration the matter determined to be improper.

(Enacted by Stats. 1965, Ch. 299.)

§ 804.

(a) If a witness testifying as an expert testifies that his opinion is based in whole or in part upon the opinion or statement of another person, such other person may be called and examined by any adverse party as if under cross-examination concerning the opinion or statement.

(b) This section is not applicable if the person upon whose opinion or statement the expert witness has relied is (1) a party, (2) a person identified with a party within the meaning of subdivision (d) of Section 776, or (3) a witness who has testified in the action concerning the subject matter of the opinion or statement upon which the expert witness has relied.

(c) Nothing in this section makes admissible an expert opinion that is inadmissible because it is based in whole or in part on the opinion or statement of another person.

(d) An expert opinion otherwise admissible is not made inadmissible by this section because it is based on the opinion or statement of a person who is unavailable for examination pursuant to this section.

(Enacted by Stats. 1965, Ch. 299.)

§ 805. Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.

(Enacted by Stats. 1965, Ch. 299.)

INTER-JOURNAL WRITING COMPETITION

WRITING ASSIGNMENT

THE SOURCES:

113 S.Ct. 2130

Supreme Court of the United States

MINNESOTA, Petitioner,

v.

Timothy DICKERSON.

No. 91–2019.

|

Argued March 3, 1993.

|

Decided June 7, 1993.

Opinion

Justice WHITE delivered the opinion of the Court.

In this case, we consider whether the Fourth Amendment permits the seizure of contraband detected through a police officer's sense of touch during a protective patdown search.

I

On the evening of November 9, 1989, two Minneapolis police officers were patrolling an area on the city's north side in a marked squad car. At about 8:15 p.m., one of the officers observed respondent leaving a 12–unit apartment building on Morgan Avenue North. The officer, having previously responded to complaints of drug sales in the building's hallways and having executed several search warrants on the premises, considered the building to be a notorious "crack house." According to testimony credited by the trial court, respondent began walking toward the police but, upon spotting ***369** the squad car and making eye contact with one of the officers, abruptly halted and began walking in the opposite direction. His suspicion aroused, this officer watched as respondent turned and entered an alley on the other side of the apartment building. Based upon respondent's seemingly evasive actions and the fact that he had just left a building known for cocaine traffic, the officers decided to stop respondent and investigate further.

The officers pulled their squad car into the alley and ordered respondent to stop and submit to a patdown search. The search revealed no weapons, but the officer conducting the search did take an interest in a small lump in respondent's nylon jacket. The officer later testified:

> "[A]s I pat-searched the front of his body, I felt a lump, a small lump, in the front pocket. I examined it with my fingers and it slid and it felt to be a lump of crack cocaine in cellophane." Tr. 9 (Feb. 20, 1990).

The officer then reached into respondent's pocket and retrieved a small plastic bag containing one fifth of one gram of crack cocaine. ****2134** Respondent was arrested and charged in Hennepin County District Court with possession of a controlled substance.

Before trial, respondent moved to suppress the cocaine. The trial court first concluded that the officers were justified under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), in stopping respondent to investigate whether he might be engaged in criminal activity. The court further found that the officers were justified in frisking respondent to ensure that he was not carrying a weapon. Finally, analogizing to the "plain-view" doctrine, under which officers may make a warrantless seizure of contraband found in plain view during a lawful search for other items, the trial court ruled that the officers' seizure of the cocaine did not violate the Fourth Amendment:

> "To this Court there is no distinction as to which sensory perception the officer uses to conclude that the material ***370** is contraband. An experienced officer may rely upon his sense of smell in DWI stops or in recognizing the smell of burning marijuana in an automobile. The sound of a shotgun being racked would clearly support certain reactions by an officer. The sense of touch, grounded in experience and training, is as reliable as perceptions drawn from other senses. 'Plain feel,' therefore, is no different than plain view and will equally support the seizure here." App. to Pet. for Cert. C–5.

His suppression motion having failed, respondent proceeded to trial and was found guilty.

On appeal, the Minnesota Court of Appeals reversed. The court agreed with the trial court that the investigative stop and protective patdown search of respondent were lawful under *Terry* because the officers had a reasonable belief based on specific and articulable facts that respondent was engaged in criminal behavior and that he might be armed and dangerous. The court concluded, however, that the officers had overstepped the bounds allowed by *Terry* in seizing the cocaine. In doing so, the Court of Appeals "decline [d] to adopt the plain feel exception" to the warrant requirement. 469 N.W.2d 462, 466 (1991).

The Minnesota Supreme Court affirmed. Like the Court of Appeals, the State Supreme Court held that both the stop and the frisk of respondent were valid under *Terry*, but found the seizure of the cocaine to be unconstitutional. The court expressly refused "to extend the plain view doctrine to the sense of touch" on the grounds that "the sense of touch is inherently less immediate and less reliable than the sense of sight" and that "the sense of touch is far more intrusive into the personal privacy that is at the core of the [F]ourth [A]mendment." 481 N.W.2d 840, 845 (1992). The court thus appeared to adopt a categorical rule barring the seizure of any contraband detected by an officer through the sense of touch during a patdown search for weapons. The court further noted that "[e]ven if we recognized a 'plain feel' exception, ***371** the search in this case would not qualify" because "[t]he pat search of the defendant went far beyond what is permissible under *Terry*." *Id.*, at 843, 844, n. 1. As the State Supreme Court read

the record, the officer conducting the search ascertained that the lump in respondent's jacket was contraband only after probing and investigating what he certainly knew was not a weapon. See *id.*, at 844.

[1] We granted certiorari, 506 U.S. 814, 113 S.Ct. 53, 121 L.Ed.2d 22 (1992), to resolve a conflict among the state and federal courts over whether contraband detected through the sense of touch during a patdown search may be admitted into evidence.[1] We ****2135** now affirm.[2]

***372** II

A

The Fourth Amendment, made applicable to the States by way of the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Time and again, this Court has observed that searches and seizures " 'conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.' " *Thompson v. Louisiana*, 469 U.S. 17, 19–20, 105 S.Ct. 409, 410, 83 L.Ed.2d 246 (1984) (*per curiam*) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967) (footnotes omitted)); *Mincey v. Arizona*, 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290 (1978); see also *United States v. Place*, 462 U.S. 696, 701, 103 S.Ct. 2637, 2641, 77 L.Ed.2d 110 (1983). One such exception was ***373** recognized in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), which held that "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot...," the officer may briefly stop the suspicious person and make "reasonable inquiries" aimed at confirming or dispelling his suspicions. *Id.*, 392 U.S., at 30, 88 S.Ct., at 1884; see also *Adams v. Williams*, 407 U.S. 143, 145–146, 92 S.Ct. 1921, 1922–1923, 32 L.Ed.2d 612 (1972).

****2136** **[2] [3]** *Terry* further held that "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," the officer may conduct a patdown search "to determine whether the person is in fact carrying a weapon." 392 U.S., at 24, 88 S.Ct., at 1881. "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence...." *Adams, supra*, at 146, 92 S.Ct., at 1923. Rather, a protective search—permitted without a warrant and on the basis of reasonable suspicion less than probable cause—must be strictly "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Terry, supra*, at 26, 88 S.Ct., at 1882; see also *Michigan v. Long*, 463 U.S. 1032, 1049, and 1052, n. 16, 103 S.Ct. 3469, 3480–3481, and 3482, n. 16, 77 L.Ed.2d 1201 (1983); *Ybarra v. Illinois*, 444 U.S. 85, 93–94, 100 S.Ct. 338, 343–344, 62 L.Ed.2d 238 (1979). If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed. *Sibron v. New York*, 392 U.S. 40, 65–66, 88 S.Ct. 1889, 1904, 20 L.Ed.2d 917 (1968).

[4] These principles were settled 25 years ago when, on the same day, the Court announced its decisions in *Terry* and *Sibron.* The question presented today is whether police officers may seize nonthreatening contraband detected during a protective patdown search of the sort permitted by *Terry.* We think the answer is clearly that they may, so long as the officers' search stays within the bounds marked by *Terry.*

***374** B

We have already held that police officers, at least under certain circumstances, may seize contraband detected during the lawful execution of a *Terry* search. In *Michigan v. Long, supra,* for example, police approached a man who had driven his car into a ditch and who appeared to be under the influence of some intoxicant. As the man moved to reenter the car from the roadside, police spotted a knife on the floorboard. The officers stopped the man, subjected him to a patdown search, and then inspected the interior of the vehicle for other weapons. During the search of the passenger compartment, the police discovered an open pouch containing marijuana and seized it. This Court upheld the validity of the search and seizure under *Terry.* The Court held first that, in the context of a roadside encounter, where police have reasonable suspicion based on specific and articulable facts to believe that a driver may be armed and dangerous, they may conduct a protective search for weapons not only of the driver's person but also of the passenger compartment of the automobile. 463 U.S., at 1049, 103 S.Ct., at 3480–3481. Of course, the protective search of the vehicle, being justified solely by the danger that weapons stored there could be used against the officers or bystanders, must be "limited to those areas in which a weapon may be placed or hidden." *Ibid.* The Court then held: "If, while conducting a legitimate *Terry* search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances." *Id.,* at 1050, 103 S.Ct., at 3481; accord, *Sibron,* 392 U.S., at 69–70, 88 S.Ct., at 1905–1906 (WHITE, J., concurring); *id.,* at 79, 88 S.Ct., at 1910 (Harlan, J., concurring in result).

[5] The Court in *Long* justified this latter holding by reference to our cases under the "plain-view" doctrine. See *Long, supra,* at 1050, 103 S.Ct., at 3481; see also *United States v. Hensley,* 469 U.S. 221, 235, 105 S.Ct. 675, 683–684, 83 L.Ed.2d 604 (1985) (upholding plain-view seizure in context ***375** of *Terry* stop). Under that doctrine, if police are lawfully in a position from which they view an object, if its incriminating character ****2137** is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant. See *Horton v. California,* 496 U.S. 128, 136–137, 110 S.Ct. 2301, 2307–2308, 110 L.Ed.2d 112 (1990); *Texas v. Brown,* 460 U.S. 730, 739, 103 S.Ct. 1535, 1541–1542, 75 L.Ed.2d 502 (1983) (plurality opinion). If, however, the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object—*i.e.,* if "its incriminating character [is not] 'immediately apparent,' " *Horton, supra,* 496 U.S., at 136, 110 S.Ct., at 2308—the plain-view doctrine cannot justify its seizure. *Arizona v. Hicks,* 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987).

[6] [7] [8] [9] We think that this doctrine has an obvious application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search. The rationale of the plain-view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has

been no invasion of a legitimate expectation of privacy and thus no "search" within the meaning of the Fourth Amendment—or at least no search independent of the initial intrusion that gave the officers their vantage point. See *Illinois v. Andreas*, 463 U.S. 765, 771, 103 S.Ct. 3319, 3324, 77 L.Ed.2d 1003 (1983); *Texas v. Brown*, *supra*, at 740, 103 S.Ct., at 1542. The warrantless seizure of contraband that presents itself in this manner is deemed justified by the realization that resort to a neutral magistrate under such circumstances would often be impracticable and would do little to promote the objectives of the Fourth Amendment. See *Hicks*, *supra*, at 326–327, 107 S.Ct., at 1153; *Coolidge v. New Hampshire*, 403 U.S. 443, 467–468, 469–470, 91 S.Ct. 2022, 2028–2029, 2040, 29 L.Ed.2d 564 (1971) (opinion of Stewart, J.). The same can be said of tactile discoveries of contraband. If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure ***376** would be justified by the same practical considerations that inhere in the plain-view context.[3]

[10] [11] The Minnesota Supreme Court rejected an analogy to the plain-view doctrine on two grounds: first, its belief that "the sense of touch is inherently less immediate and less reliable than the sense of sight," and second, that "the sense of touch is far more intrusive into the personal privacy that is at the core of the [F]ourth [A]mendment." 481 N.W.2d, at 845. We have a somewhat different view. First, *Terry* itself demonstrates that the sense of touch is capable of revealing the nature of an object with sufficient reliability to support a seizure. The very premise of *Terry*, after all, is that officers will be able to detect the presence of weapons through the sense of touch and *Terry* upheld precisely such a seizure. Even if it were true that the sense of touch is generally less reliable than the sense of sight, that only suggests that officers will less often be able to justify seizures of unseen contraband. Regardless of whether the officer detects the contraband by sight or by touch, however, the Fourth Amendment's requirement that the officer have probable cause to believe that the item is contraband before seizing it ensures against excessively speculative seizures.[4] The ***377** court's second concern—that touch is more intrusive into privacy than is ****2138** sight—is inapposite in light of the fact that the intrusion the court fears has already been authorized by the lawful search for weapons. The seizure of an item whose identity is already known occasions no further invasion of privacy. See *Soldal v. Cook County*, 506 U.S. 56, 66, 113 S.Ct. 538, ——, 121 L.Ed.2d 450 (1992); *Horton*, *supra*, at 141, 110 S.Ct., at 2310; *United States v. Jacobsen*, 466 U.S. 109, 120, 104 S.Ct. 1652, 1660, 80 L.Ed.2d 85 (1984). Accordingly, the suspect's privacy interests are not advanced by a categorical rule barring the seizure of contraband plainly detected through the sense of touch.

III

[12] It remains to apply these principles to the facts of this case. Respondent has not challenged the finding made by the trial court and affirmed by both the Court of Appeals and the State Supreme Court that the police were justified under *Terry* in stopping him and frisking him for weapons. Thus, the dispositive question before this Court is whether the officer who conducted the search was acting within the lawful bounds marked by *Terry* at the time he gained probable cause to believe that the lump in respondent's jacket was contraband. The State District Court did not make precise findings on this point, instead finding simply that the officer, after feeling "a small, hard object wrapped in plastic" in respondent's pocket, "formed the opinion that the object ... was crack ... cocaine." App. to Pet. for Cert. C–2. The ***378** District Court also noted that the officer made "no claim that he suspected this object

to be a weapon," *id.*, at C–5, a finding affirmed on appeal, see 469 N.W.2d, at 464 (the officer "never thought the lump was a weapon"). The Minnesota Supreme Court, after "a close examination of the record," held that the officer's own testimony "belies any notion that he 'immediately' " recognized the lump as crack cocaine. See 481 N.W.2d, at 844. Rather, the court concluded, the officer determined that the lump was contraband only after "squeezing, sliding and otherwise manipulating the contents of the defendant's pocket"—a pocket which the officer already knew contained no weapon. *Ibid.*

[13] Under the State Supreme Court's interpretation of the record before it, it is clear that the court was correct in holding that the police officer in this case overstepped the bounds of the "strictly circumscribed" search for weapons allowed under *Terry*. See *Terry*, 392 U.S., at 26, 88 S.Ct., at 1882. Where, as here, "an officer who is executing a valid search for one item seizes a different item," this Court rightly "has been sensitive to the danger ... that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will." *Texas v. Brown*, 460 U.S., at 748, 103 S.Ct., at 1546–1547 (STEVENS, J., concurring in judgment). Here, the officer's continued exploration of respondent's pocket after having concluded that it contained no ****2139** weapon was unrelated to "[t]he sole justification of the search [under *Terry:*] ... the protection of the police officer and others nearby." 392 U.S., at 29, 88 S.Ct., at 1884. It therefore amounted to the sort of evidentiary search that *Terry* expressly refused to authorize, see *id.*, at 26, 88 S.Ct., at 1882, and that we have condemned in subsequent cases. See *Michigan v. Long*, 463 U.S., at 1049, n. 14, 103 S.Ct., at 3480–3481; *Sibron*, 392 U.S., at 65–66, 88 S.Ct., at 1904.

[14] Once again, the analogy to the plain-view doctrine is apt. In *Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987), this Court held invalid the seizure of stolen stereo equipment found by police while executing a valid search for other evidence. Although ***379** the police were lawfully on the premises, they obtained probable cause to believe that the stereo equipment was contraband only after moving the equipment to permit officers to read its serial numbers. The subsequent seizure of the equipment could not be justified by the plain-view doctrine, this Court explained, because the incriminating character of the stereo equipment was not immediately apparent; rather, probable cause to believe that the equipment was stolen arose only as a result of a further search—the moving of the equipment—that was not authorized by a search warrant or by any exception to the warrant requirement. The facts of this case are very similar. Although the officer was lawfully in a position to feel the lump in respondent's pocket, because *Terry* entitled him to place his hands upon respondent's jacket, the court below determined that the incriminating character of the object was not immediately apparent to him. Rather, the officer determined that the item was contraband only after conducting a further search, one not authorized by *Terry* or by any other exception to the warrant requirement. Because this further search of respondent's pocket was constitutionally invalid, the seizure of the cocaine that followed is likewise unconstitutional. *Horton*, 496 U.S., at 140, 110 S.Ct., at 2309–2310.

IV

For these reasons, the judgment of the Minnesota Supreme Court is

Affirmed.

INTER-JOURNAL WRITING COMPETITION

WRITING ASSIGNMENT

Caloroso v. Hathaway, 122 Cal App 4th 922

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

September 28, 2004, Filed

B170132

JOSEPHINE CALOROSO et al., Plaintiffs and Appellants, v. LARRY HATHAWAY, Defendant and Respondent.

Prior History:

[***1] APPEAL from a judgment of the Superior Court of Los Angeles County, No. EC034434, Laura A. Matz, Judge.

Disposition:

Judgment affirmed; costs awarded.

[256] GRIMES, J.***—

BACKGROUND

This appeal presents the question whether the trial court correctly determined as a matter of law that a private landowner owed no duty to pedestrians to either warn them of a trivial defect in his walkway or to repair it. Plaintiffs/appellants Josephine Caloroso and Joseph Caloroso seek reversal of a grant of summary judgment in favor of defendant/respondent Larry Hathaway (Hathaway) in this premises liability and loss of consortium case that arose when Mrs. Caloroso tripped over a slight crack in a walkway in front of Hathaway's home. In the complaint, the Calorosos alleged that individual concrete slabs of **[***2]** walkway were cracked, jagged, and depressed, and constituted a dangerous condition. They further alleged that Hathaway's failure to repair the crack and failure to warn about the dangerous condition caused the accident.

Hathaway moved for summary judgment on the ground that he owed no duty to plaintiffs because the risk of injury was trivial, the injury was not foreseeable, and he had no notice of a dangerous condition. The accident occurred on a dry and sunny morning. The elevation difference along the edge of the crack ranged from zero to either 0.4 or seven-sixteenths of one inch. Mrs. Caloroso testified at her deposition that she tripped when her shoe got caught on the elevated part of the walkway. She was looking straight ahead at the time of the fall, not down at the walkway. There was no evidence concerning other accidents on the walkway.

The Calorosos argued that other circumstances besides the size of the crack demonstrate that the defect was not trivial, the existence of a crack in the walkway next to a large tree is foreseeable, and Hathaway's violation of a building code and industry standard for safe walkways established that he owed a nondelegable duty to warn of the **[***3]** danger or repair the crack. The Calorosos relied largely on the declaration of an expert witness, Brad Avrit (Avrit), a civil engineer. Avrit testified that the elevation difference was seven-sixteenths of one inch at one point, and the 1994 Uniform Building Code and 1996 ASTM Standard Practice for Safe Walking Surfaces prohibit height differentials greater than one-quarter of one inch absent a ramp or slope. Avrit also declared that other factors besides the size of the crack made the walkway dangerous, including the location and irregular shape of the crack, the interplay between bright sunlight and shadows, and the shadow of an adjacent tree that fell across the crack and made the area dark.

[*926] Hathaway objected to Avrit's declaration on the grounds of lack of foundation and speculation, and because the matters addressed by Avrit were improper subjects of expert opinion. The trial court sustained Hathaway's objections to Avrit's declaration, noting that the court in *Fielder v. City of Glendale* (1977) 71 Cal. App. 3d 719 [139 Cal. Rptr. 876] found it was unnecessary to have an expert witness opine whether the defect was trivial. After considering the evidence regarding **[***4]** the "height of the crack and all of the surrounding circumstances," the trial court found that the defect was trivial as a matter of law and granted the summary judgment motion.

Judgment was entered for Hathaway and this timely appeal followed. The Calorosos **[**257]** argue on appeal that the trial court improperly sustained Hathaway's objections to Avrit's declaration, and that there are triable issues of material fact as to whether the defect in Hathaway's walkway together with other circumstances created a dangerous condition. We affirm the judgment.

DISCUSSION

I

The Standard of Review and the "Trivial Defect Defense" Generally

On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]" (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 [100 Cal. Rptr. 2d 352, 8 P.3d 1089].) In ruling on the motion, the court must consider all of the evidence and all of the inferences reasonably drawn therefrom, and must view such evidence and such inferences in the light most favorable to the opposing party. **[***5]** (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 [107 Cal. Rptr. 2d 841, 24 P.3d 493].)

A defendant moving for summary judgment has met his burden of showing that a cause of action has no merit if he has shown that one or more elements of the cause of action cannot be established, or that there is a complete defense to that cause of action. Once the defendant has met that burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or defense. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 849; Code Civ. Proc., § 437c, subd. (o)(2).)

Here, Hathaway sought summary judgment on the ground that he owed no duty to the Calorosos because the defect in the sidewalk was trivial **[*927]** as a matter of law. It is well established that a property owner is not liable for damages caused by a minor, trivial or insignificant defect in property. (*Whiting v. City of National City* (1937) 9 Cal.2d 163 [69 P.2d 990].) Courts have referred to this simple principle as the "trivial defect defense," although it is not an affirmative defense but rather an aspect of duty that plaintiff **[***6]** must plead and prove. The "trivial defect defense" is available to private, nongovernmental landowners. (*Ursino v. Big Boy Restaurants* (1987) 192 Cal. App. 3d 394, 398–399 [237 Cal. Rptr. 413].) As the *Ursino* court stated, "persons who maintain walkways, whether public or private, are not required to maintain them in an absolutely perfect condition." (*Ibid*.) The question presented on this appeal is not whether Hathaway established a complete defense, but whether plaintiffs showed there is a triable issue as to whether there was a dangerous condition of the walkway that Hathaway had a duty to repair.

The decision whether the defect is dangerous as a matter of law does not rest solely on the size of the crack in the walkway, since a tape measure alone cannot be used to determine whether the defect was trivial. A court should decide whether a defect may be dangerous only after considering all of the circumstances surrounding the accident that might make the defect more dangerous than its size **[**258]** alone would suggest. (*Fielder v. City*

of Glendale, supra, 71 Cal. App. 3d at p. 734.) Aside from the size of the defect, the court should consider whether **[***7]** the walkway had any broken pieces or jagged edges and other conditions of the walkway surrounding the defect, such as whether there was debris, grease or water concealing the defect, as well as whether the accident occurred at night in an unlighted area or some other condition obstructed a pedestrian's view of the defect.

It was undisputed that the difference in elevation created by the crack in Hathaway's walkway was less than half an inch at the highest point. Many decisions have held that sidewalk defects greater than this were trivial as a matter of law. (See cases cited in *Barrett v. City of Claremont* (1953) 41 Cal.2d 70, 74 [256 P.2d 977] [elevations ranging from three-fourths **[***8]** inch to one and one-half inches found minor] and in *Fielder v. City of Glendale, supra*, 71 Cal. App. 3d at p. 724, fn. 4 [same].) Thus, the defect here should also be deemed trivial as a matter of law, unless there is disputed evidence that other conditions made the walkway dangerous.

[*928] II

Avrit's Declaration and the Lack of a Triable Issue of Material Fact Regarding the "Trivial Defect Defense"

Evidence Code section 801, subdivision (a),provides that the opinion of an expert witness is limited to testimony "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." An appellate court may not disturb the trial court's ruling on the admissibility of opinion evidence absent an abuse of discretion. **(** *Westbrooks v. State of California* (1985) 173 Cal. App. 3d 1203, 1210 [219 Cal. Rptr. 674].) **[***9]** Here, the trial court did not abuse its discretion in sustaining Hathaway's objections to the expert declaration of Brad Avrit.

In *Fielder v. City of Glendale*, *supra*, 71 Cal. App. 3d 719, 732, the appellate court reversed a judgment rendered by a jury in favor of plaintiff on the ground that the defect in the sidewalk that caused plaintiff's injury was trivial as a matter of law. In the majority opinion, the court disregarded the testimony of plaintiff's expert that the defect was dangerous, reasoning that "there is no need for expert opinion. It is well within the common knowledge of lay judges and jurors just what type of a defect in a sidewalk is dangerous." (*Ibid*.)

Here, the trial court did not abuse its discretion in finding that, in this case, no expert was needed to decide whether the size or irregular shape of the crack rendered it dangerous. The photographs of the crack submitted by both sides demonstrate that the crack is minor and any irregularity in shape is minimal. In *Davis v. City of Pasadena* (1996) 42 Cal.App.4th 701, 705 [50 Cal. Rptr. 2d 8], the court stated that, regardless of whether a witness can be found to opine on the subject of a dangerous **[***10]** condition, the court must independently evaluate the circumstances. The Calorosos' counsel acknowledged at the hearing of the summary judgment

motion that, although Avrit declared the crack was irregularly shaped, the court could judge this for itself. We conclude that the expert testimony and photographs regarding the size and shape of the crack **[**259]** do not create a triable issue whether there was a substantial risk of injury.

The court properly found no foundation for Avrit's opinion that noncompliance with certain building codes and standards made the crack dangerous. Avrit failed to indicate that these codes and standards have been accepted as the proper standard in California for safe sidewalks. Moreover, there is no indication regarding whether such codes apply to existing walkways as opposed to new construction. Notably, the Calorosos presented evidence that the crack predated both the code and the standard. Accordingly, the court **[*929]** properly excluded Avrit's opinion that Hathaway's noncompliance with certain building codes and standards creates a triable issue whether the condition was dangerous.

The Calorosos' reliance on *Johnson v. City of Palo Alto* (1962) 199 Cal. App. 2d 148 [18 Cal. Rptr. 484] **[***11]** is misplaced. The plaintiff in *Johnson* tripped over a sidewalk crack at 9:30 at night. The shadows from overhead trees made the sidewalk even darker. (*Id.* at pp. 150–152.) Thus, in *Johnson*, the evidence of poor lighting together with other circumstances was sufficient to defeat the city's motion for summary judgment. Here, the accident occurred midmorning, and Mrs. Caloroso testified the sun was “so bright.” When asked if the sun affected her vision, initially she testified that it “probably did.” Moments later, when asked again if the sun affected her view of the walkway, she testified, “I don't think so.” Drawing all inferences favorably to Mrs. Caloroso, we assume that bright, dappled light blinded her view of the crack. Nonetheless, the inescapable fact is the crack at its greatest was less than one-half inch, and the disputed issues about light and shadow in the circumstances of this case are immaterial.

Where reasonable minds can reach only one conclusion—that there was no substantial risk of injury—the issue is a question of law, properly resolved by way of summary judgment. (*Ursino v. Big Boy Restaurants*, *supra*, 192 Cal. App. 3d at p. 397.) **[***12]** The evidence does not support the conclusion that reasonable minds could differ regarding whether the risk of injury was trivial. Despite their contentions regarding various aggravating conditions, the Calorosos failed to demonstrate that there is any triable issue of material fact as to whether Hathaway owed them a duty to warn of danger or repair the walkway.

It is impossible to maintain heavily traveled surfaces in perfect condition. Minor defects such as the crack in Hathaway's walkway inevitably occur, and the continued existence of such cracks without warning or repair is not unreasonable. Thus, Hathaway is not liable for this accident irrespective of the question whether he had notice of the condition. (See, e.g., *Ursino v. Big Boy Restaurants, supra*, 192 Cal. App. 3d at p. 398 [“The duty of care imposed on a property owner, even one with actual notice, does not require the repair of minor defects”]; *Barrett v. City of Claremont, supra*, 41 Cal.2d at p. 73.) The trial court properly concluded that the defect was trivial as a matter of law, and summary judgment was appropriate.

[*930] DISPOSITION

The judgment is affirmed. Respondent shall **[***13]** recover his costs on appeal.

INTER-JOURNAL WRITING COMPETITION

WRITING ASSIGNMENT

People v. Mixon, 129 Cal. App. 3d 118

Court of Appeal of California, Fifth Appellate District

February 24, 1982

Crim. No. 4727

Reporter

129 Cal App 3 d 118 * | 180 Cal. Rptr. 772 ** | 1982 Cal. App. LEXIS 1310 ***

THE PEOPLE, Plaintiff and Respondent, v. DONALD MIXON, Defendant and Appellant

Subsequent History:

[*1]** A petition for a rehearing was denied March 17, 1982, and appellant's petition for a hearing by the Supreme Court was denied April 21, 1982.

Disposition:

The judgment is affirmed.

Opinion

[*124] **[**774]** Appellant seeks reversal of the judgment entered upon his conviction for robbery **[***2]** (Pen. Code, § 211) and use of a firearm in **[**775]** the commission of the offense (Pen. Code, § 12022.5). Appellant raises the following issues: the trial court erred in permitting police officers to identify appellant as one of the persons depicted in a surveillance photograph of the robbery; motions to dismiss (Pen. Code, §§ 995, 1118.1) were improperly denied; defense counsel's failure to object to the officers' identification testimony on Evidence Code section 352 grounds deprived appellant of effective assistance of counsel; and the court improperly sentenced appellant to the upper base term.

Facts

On October 26, 1978, Jeffrey Bottorff was working at a self-service gas station located at West and McKinley Avenues in Fresno. At approximately 2 a.m., while Bottorff was inside the cashier's booth, two males approached the booth on foot. One of the men (subject one) **[*125]** asked for cigarette change. When Bottorff turned to the cash register, the men entered the booth and subject one, standing to Bottorff's left, announced a robbery. Subject two, standing behind Bottorff, showed the latter a gun. Both subjects wore knit ski caps.

As Bottorff removed money from the **[***3]** cash register, he activated a surveillance camera which photographed the robbers. The camera was "tripped" by removing cash from a certain part of the register drawer. He gave the man one $ 10 bill, three $ 5 bills, and about twenty-five $ 1 bills. The cash included the "trip" currency. Subject one grabbed the money and asked where the "big bills" were. Bottorff pointed to the safe and said he did not have a key. Subject one struck Bottorff in the face and shouted, "Shoot him, shoot him, shoot him." The robbers then fled on foot.

Because subject one "did all the talking" and Bottorff had conversed with him face-to-face, Bottorff positively identified him from police mug shots. However, because subject two always stood behind Bottorff or behind subject one, Bottorff could only testify as to the height, build, and clothes of subject two. He stated that appellant was "similar in height and body build" to subject two. Although he testified that subject two had long sideburns, he later stated that this conclusion came from the surveillance photos he was shown and that he had no recollection of the sideburns the night of the robbery. Bottorff could not identify appellant as subject **[***4]** two from mug shots or in person.

Later on the day of the robbery, Fresno Police Officers William Brown and Kirkus Burks were shown the surveillance photographs taken at the gas station. Both officers identified appellant in one of the photographs. The photograph, introduced at trial as People's exhibit 1, is a downward shot revealing the left profile of the subject. Because, however, the subject is wearing a ski cap pulled below the earlobes, the photograph depicts the subject's face from only the middle of the nose down. The surveillance photograph of appellant, which was somewhat dark because of the lighting conditions, depicted an individual who had no moustache and whose sideburns were bushy and extended below the area of the mouth. At the time of the trial appellant had a moustache and his sideburns had been trimmed. A booking photograph of appellant (People's exhibit 7a) was taken under good lighting conditions at the time of the arrest on the day of the robbery. Appellant's full face and full left profile were depicted in the booking photograph. Appellant had no moustache but did have long, bushy sideburns.

[*126] Brown identified the subject in the other surveillance **[***5]** photos as a Kevin Sams. Brown had seen Sams and appellant together on several prior occasions.

The officers drove to an area the suspects were known to frequent and observed them at a gas station putting gas in a car Brown had "seen driven before." Appellant and Sams were arrested. Although he was not certain, Burks

believed a knit cap was found in the car; the cap was, however, never booked into evidence. Burks found currency in appellant's possession.

Officer Kenneth Brocks searched appellant at the police station and found $ 33 in **[**776]** currency loose in appellant's left rear pocket. The cash consisted of a $ 10 bill, a $ 5 bill, and several $ 1 bills. Brocks had a record of serial numbers of the currency used to trip the surveillance camera at the robbed gas station. The numbers of the currency taken from appellant did not match any of the "trip" currency. Brocks noticed nothing unusual about the money. He placed the currency in an envelope, wrote appellant's name on the envelope, and booked it into the evidence locker.

Shortly before trial, Brocks "double-checked" the serial numbers on the bills. He noticed that the words "West and McKinley" -- the address of **[***6]** the gas station -- were written in ink in a corner of one of the $ 1 bills. He had not seen the writing the first time he examined the bills, but to his knowledge, no one had ever taken the bills out of the evidence locker. Jeffrey Bottorff -- the gas station attendant -- had at times seen his supervisors write on bills, but did not know what they wrote and could not identify having seen the marked bill before.

At the police station, appellant told Officer Brocks he had been at an all-night party the night of the robbery. He stated that the party was on Elm Avenue, but could not recall exactly where. Kevin Sams was also at the party, and neither had left at any time.

In his defense, appellant called as witnesses Gregory Sams, appellant's distant cousin, Jerry Green, a friend of appellant for about two months prior to his arrest, and Mack Yancy, appellant's grandfather, all of whom testified that the person depicted in the surveillance photo did not appear to be appellant. All three stated that appellant at times wore long sideburns, but could not recall whether he had them at the time of the robbery.

[*127] Discussion

I

Appellant's primary contention is that the trial **[***7]** court erred in allowing Officers Brown and Burks to identify appellant as a subject partially depicted in one of the surveillance photos. Succinctly stated, he urges that (1) the prosecution laid an inadequate foundation as to the officers' knowledge of appellant's appearance; and (2) the testimony invaded the jury's province because the officers were no more capable than the jurors to render an opinion whether appellant was the person depicted in the photo.

Evidence Code section 800 limits nonexpert opinion testimony to "such an opinion as is permitted by law, including but not limited to an opinion that is: [para.] (a) Rationally based on the perception of the witness; and [para.] (b) Helpful to a clear understanding of his testimony." Admission of lay opinion testimony is within the

discretion of the trial court and will not be disturbed "unless a clear abuse of discretion appears." (*People* v. *Willis* (1939) 30 Cal.App.2d 419, 423 [86 P.2d 670]; see also *People* v. *Otis* (1959) 174 Cal.App.2d 119, 127-128 [344 P.2d 342]; *United States* v. *Butcher* (9th Cir. 1977) 557 F.2d 666, 669 [abuse of discretion standard under Fed. Rules Evid., rule 701].) **[***8]** Identity is a proper subject of nonexpert opinion (*People* v. *Perry* (1976) 60 Cal.App.3d 608, 612 [131 Cal.Rptr. 629]), but cases have recognized certain prerequisites to the admissibility of photographic identification testimony, particularly when such testimony comes from law enforcement officers.

The first case discussing the propriety of identifying a criminal defendant in surveillance photographs was *People* v. *Perry, supra*, 60 Cal.App.3d 608. In that case, a surveillance film was taken of a robbery at a company cashier's window. As in the present case, although he could give a general description, the clerk could not positively identify one of the two robbers. (*Id*., at pp. 610-611.) In *Perry*, one day after the robbery, an Officer Brown was shown the photograph of the defendant and was able to identify Perry as the second robber, based upon his recollection of Perry's appearance from numerous prior street contacts and upon the "abnormal" appearance of one of Perry's eyes. (*Id*., at p. 610.)

[777]** At trial, Brown repeated his identification of Perry as one of the robbers depicted in the film. Moreover, the trial court allowed several **[*128]** **[***9]** additional witnesses who knew Perry to view the film and render an opinion as to the second robber's identity. The witnesses included Perry's apartment house manager who testified that the subject in the film appeared to be Perry; Perry's former employer who testified that the blowup photos of the film resembled defendant but was not defendant; defendant's parole officer who testified that the photo depicted defendant; and defendant's brother who testified that the photograph was not of his brother. (*Id*., at p. 611.) An ophthalmologist was permitted to view the film and discuss the apparent eye abnormality of the defendant. Finally, another police officer identified Perry in the film by comparing a still photograph with the film. (*Id*., at pp. 611-612.) Perry objected only to the testimony of Officer Brown and the parole officer.

The lay opinion identifications were upheld on appeal. The court first noted that under Evidence Code section 800 such testimony need only be based on personal perception of the witness; the witness need not have witnessed the crime itself. (*Id*., at p. 613.) The court then stated: "The witnesses each predicated their identification opinion **[***10]** upon their prior contacts with defendant, their awareness of his physical characteristics on the day of the robbery, and their perception of the film taken of the events. Evidence was introduced that defendant, prior to trial, altered his appearance by shaving his moustache. The witnesses were able to apply their knowledge of his prior appearance to the subject in the film. Such perception and knowledge was not available directly to the jury. The opinions of the witnesses were sufficiently based upon personal knowledge to permit their introduction; the question of the degree of knowledge goes to the weight rather than to the admissibility of the opinion." (*Perry, supra*, 60 Cal.App.3d 608, 613; italics added.) The court dismissed appellant's contention that allowing the lay opinion testimony "invades the province of the trier of fact." Analogizing to Evidence Code section 1416, which allows a witness to identify a person's handwriting based upon personal knowledge, the court concluded that the opinion testimony "is submitted to the trier of fact only as an aid in arriving at the ultimate decision" regarding "the identity of the culprit and the defendant's guilt or innocence." **[***11]** (*Id*., at pp. 614, 615.)

Perry thus requires two predicates for the admissibility of lay opinion testimony as to the identity of persons depicted in surveillance photographs: (1) that the witness testify from personal knowledge of the defendant's appearance at or before the time the photo was taken; and (2) that the testimony aid the trier of fact in determining the crucial identity issue.

[*129] Federal cases interpreting rule 701 of the Federal Rules of Evidence have expressed the latter requirement as one of "helpfulness": the identification or comparison made must be one the jury could not adequately have made for itself. (*United States* v. *Robinson* (2d Cir. 1976) 544 F.2d 110, 113; see also *United States* v. *Ingram* (10th Cir. 1979) 600 F.2d 260, 261.) Furthermore, although *Perry* does not discuss the issue, and there are no other California cases in point which do, federal cases have expressed another concern where the lay identification testimony comes from law enforcement officials: that such testimony will "increase the possibility of prejudice to the defendant in that he [is] presented as a person subject to a certain degree of police **[***12]** **[**778]** scrutiny." (*United States* v. *Butcher*, *supra*, 557 F.2d 666, 669.) Exclusion is thus warranted if the prejudicial effect of such testimony outweighs its probative value. (*Id*., at p. 670; *United States* v.*Young Buffalo* (9th Cir. 1979) 591 F.2d 506, 513; *United States* v. *Calhoun* (6th Cir. 1976) 544 F.2d 291, 296.) The Ninth Circuit Court of Appeals in *Butcher* expressed this caveat: ". . . use of lay opinion identification by policemen or parole officers is not to be encouraged, and should be used only if no other adequate identification testimony is available to the prosecution." (*Butcher*, *supra*, 557 F.2d at p. 670.)

[*13]** Applying these principles to the case at bench, the first issue is whether the prosecution established an adequate personal knowledge foundation for the identification testimony of Officers Brown and Burks. At a hearing held outside the jury's presence, the officers testified as to their past acquaintance with appellant. Brown could not pinpoint the exact number of years he had been aware who appellant was, but had seen him "on numerous occasions" in the 10 years Brown had been on the force. He had been within speaking distance of appellant "several times" and had become familiar with appellant's features, but had never actually conversed with him. Brown had seen appellant as recently as two weeks before the robbery. When shown the surveillance photographs the day of the robbery, he studied them "just momentarily" before concluding that appellant was one of the depicted robbers. When asked if there were any distinctive characteristics in the photograph, he stated: "There was to me. There may not have been to anybody else, but there are some characteristics that right away gave **[*130]** me the identity of who it was." Defense counsel read Brown his preliminary hearing testimony **[***14]** that he had only known appellant for a year or less, and had had face-to-face contact with him only once, at a point two weeks prior to the robbery.

Burks, also testifying out of the presence of the jury, stated he became acquainted with appellant about eight years prior to the hearing **[***15]** and had seen him "quite a few" times since then. Burks had been appellant's counselor at CYA. He had spoken to appellant face-to-face quite a few times, for periods up to two hours. Burks "possibly" had seen appellant a couple of months prior to the robbery, but did not, for example, know of appellant's particular features -- e.g., hair style or facial hair -- the day preceding the robbery. He had not seen appellant very often in the year preceding the robbery. When shown the surveillance photos, Burks "automatically" and without doubt concluded that appellant was depicted. Even though the subject's cap was pulled down below the ears, Burks could recognize appellant's mouth, nose, cheek, chin, and sideburn features. He also knew that appellant was one of "very few" sets of twins on Fresno's west side.

In view of the foregoing, it is clear that the officers possessed requisite personal knowledge of appellant's appearance. Both had had numerous prior contacts with appellant; the fact that Brown had never conversed with appellant is not controlling. Brown saw appellant within two or three weeks prior to the robbery, and although this was apparently Brown's only "face-to-face" contact with appellant, Brown had over the years familiarized himself with appellant's features through street contacts. Burks, appellant's counselor at CYA, had known appellant for up to 10 years, and had had several conversations with him for periods up to 2 hours. Despite the fact that he had not seen appellant very frequently in the year preceding the robbery, and had last seen him perhaps two or three months before the robbery, he was undeniably familiar with appellant's features. The case is similar to *United States* v. *Butcher, supra* [***16] , 557 F.2d 666, wherein the identifying witnesses' contacts with the defendant had ended four months prior to a photographed [**779] robbery. (*Id*., at p. 667.) The court noted a problem whether the witnesses knew how the defendant looked at the time of the robbery, **[*131]** and defendant's appearance at trial more closely resembled his appearance at the time of the robbery. (*Id*., at p. 669.) The court nonetheless upheld the trial court's decision to allow the testimony. (*Id*., at p. 670.) Moreover, the present case is distinguishable in that appellant had shortened his sideburns and grown a moustache between arrest and trial. His appearance at the time of the robbery was thus more consonant with the officers' prior perception than it was with his appearance at trial.

Both officers had had ample prior contact with appellant. Both identified him unequivocally and without hesitation. "[The] question of the degree of knowledge goes to the weight rather than to the admissibility of the opinion." (*Perry, supra*, 60 Cal.App.3d 608, 613.) We thus reject appellant's argument that insufficient foundation was laid for the testimony.

The next issue is whether the **[***17]** testimony would have aided the jury's identification of the man depicted in People's exhibit 1. In *Perry*, the witnesses' testimony was helpful to the jury because "[the] witnesses were able to apply their knowledge of [the defendant's] prior appearance to the subject in the film," perception and knowledge which were "not available directly to the jury." (*Perry, supra*, 60 Cal.App.3d at p. 613.) Further guidance is gleaned from *Butcher, supra*, 557 F.2d 666, wherein the court was concerned that the jury could have made the identification, by comparing defendant to the photographs taken, because "[no] evidence was submitted that the photographs did not clearly depict the robber, or that defendant's appearance had so radically changed that additional identification evidence was necessary." (*Id*., at p. 669.)

In the present case, the surveillance photograph was not a clear depiction of the subject, and appellant had changed his appearance before trial. The officers thus could offer aid to the jury as to the identity of the second robber. As appellant asserts, the photograph taken of appellant the day of his arrest -- which was the same day the robbery occurred -- **[***18]** was admitted, and the jury thus had evidence of his appearance the day of the robbery. However, the officers' testimony was nonetheless helpful in that their previously acquired familiarity with appellant's features could aid identification of the partially depicted subject in the surveillance photo. Moreover, a "mug shot" reveals its subject in only two poses in a particular lighting; the officers -- particularly **[*132]** Officer Burks -- had seen appellant in a variety of contexts both indoors and outdoors and could aid the jury in identifying the person in the surveillance photo, taken at a downward angle in somewhat weaker lighting and of a partially obscured subject. Further, the jury took both the surveillance and arrest photos, along with the other exhibits, into the jury room and could easily have made the comparison suggested by appellant.

State v. *Jamison* (1980) 93 Wn.2d 794 [613 P.2d 776], cited by appellant, is not to the contrary. That case merely held that special knowledge of a witness as to a defendant's appearance at the time a surveillance photo was taken is not *in itself* sufficient to support identification testimony: the jury can simply compare **[***19]** the photo with the defendant, who is in the jury's presence, and decide for itself the identification issue. (93 Wn.2d at p. 799 [613 P.2d at p. 779].) The court, however, continued: "In reaching this conclusion, however, we do not suggest that opinion testimony of identification based on knowledge of a defendant's appearance at or near the time of taking a surveillance photograph necessarily is inadmissible. Where such knowledge can actually assist the jury in correctly understanding matters that are not within their common experience, such opinion testimony is admissible. Here there was no evidence that, for example, the photographs failed to clearly or accurately depict the robber, or that defendant's appearance had changed or had **[**780]** been altered prior to trial or that he had certain peculiarities not readily comparable under trial conditions." (*Ibid.*; see also *State* v. *Carbone* (1981) 180 N.J.Super. 95 [433 A.2d 827]; *State* v. *Demouchet* (La. 1977) 353 So.2d 1025.) Because such evidence was present in the case before us, the officers' testimony assisted the jury and was properly admitted on this point. The jury was properly instructed that it **[***20]** was not required to accept the opinion testimony but was to merely give it the weight to which it felt the opinion was entitled (CALJIC No. 2.81); the court further instructed on the factors to consider in judging the believability of a witness and the weight to be given that witness (CALJIC No. 2.20). The court did not abuse its discretion in allowing the evidence on this basis.

The final step is to determine whether the prejudice attending use of such testimony outweighed its probative value. As noted previously, there is a danger that when law enforcement officers testify about the bases of their acquaintance with defendant's appearance, defendant could be presented as subject to a degree of police scrutiny. The **[*133]** danger of prejudice is dissipated, however, where foundational facts supporting the officers' knowledge are established outside the jury's presence. **(** *United States* v. *Butcher*, *supra*, 557 F.2d 666, 670.)

In this case, the foundational facts were established in a hearing held outside the jury's presence. (Evid. Code, § 402, subd. (b).) During trial, however, the officers were asked how long they had known appellant and whether they could recognize **[***21]** his features. Defense counsel never objected to these questions, and in fact attempted to impeach the officers by further probing the degree of their prior contacts with appellant. Counsel thus made a tactical choice to allow the testimony so that he could attempt to reveal to the jury an insufficient basis for the officers' identification.

Moreover, the potential for prejudice was further diminished by the testimony itself in this case. During cross-examination, Officer Brown testified as follows:

"Q. You say you had seen Donald before that time; is that right?

"A. Yes.

"Q. But you had never spoken to him; is that right?

"A. That's right.

"Q. And in fact you had never had any face to face contact with him or personal contact?

"A. That's correct.

"Q. Is it correct that the only time you had seen him is sometime that you had driven by and seen him on the street or when he drove by in a car and you were on the street?

"A. I guess you would say that. *It's just kind of like in a passing occurrence*. I would be doing something and he would be doing something. *It wasn't that I was looking for him or anything like that*." (Italics added.) The testimony simply indicated [***22] that Officer Brown had seen appellant on the street during patrol. There was no evidence that police scrutiny had focused on this particular individual.

[*134] Officer Burks testified that he had been a police officer for six and one-half years. On direct examination, he testified that he had known appellant for "approximately 10 years." On cross-examination, Burks stated that he had had conversations with the defendant "over seven years ago." The jury was not told the subject of these conversations, nor the fact that they had taken place in the California Youth Authority when Officer Burks was a parole officer. Since the conversations took place before Officer Burks joined the Fresno Police Department, there was nothing to indicate to the jury that the conversations had anything to do with defendant's involvement in criminal activity. At the close of cross-examination, after reaffirming his close contact with appellant years before, the testimony was as follows:

"Q. But isn't it correct that in at least the past two or three years, you have had **[**781]** very little contact with Donald other than to see him on the street?

"A. True." Once again, the testimony of Officer **[***23]** Burks did nothing more than indicate that the officer had seen appellant on the street and was acquainted with his appearance.

Even if defendant had been depicted as someone under police scrutiny, the possible prejudice resulting therefrom would not in itself be sufficient to disturb the trial court's discretion to admit otherwise probative evidence. (See *Butcher, supra*, 557 F.2d at p. 670.) Because of its concern for the possible prejudicial effect of law enforcement testimony, the federal approach expressed in *Butcher* seems to be a proper refinement of the holding of *People* v. *Perry*. Thus, as has already been stated, ". . . use of lay opinion identification by policemen or parole officers is not to be encouraged, and should be used only if no other adequate identification testimony is available to the prosecution." (*Butcher, supra*, 557 F.2d at p. 670; italics added.)

This opinion should not be interpreted to stand for the proposition that if non-law enforcement testimony is available, law enforcement identification testimony must be excluded. The trial courts, in weighing possible prejudice, must determine if the non-law enforcement testimony available **[***24]** is "adequate." The prosecution should not be forced to rely on testimony that is weak simply because it comes from an individual not involved in law enforcement. The trial judge maintains the discretion to determine if the prejudicial effect of the officer's testimony substantially **[*135]** outweighs its probative value **(**Evid. Code, § 352), and such a discretionary ruling will be overturned only if there is a clear abuse of discretion.

The trial court in this case did not abuse its discretion in allowing the officers' lay opinion testimony.

II

Appellant next urges that his motion to set aside the information (Pen. Code, § 995) and motion for acquittal (Pen. Code, § 1118.1) should have been granted due to insufficient evidence. Neither contention is persuasive.

Penal Code section 995 requires that an information be set aside if the defendant has been committed without reasonable or probable cause. "'Probable cause is shown if a man of ordinary caution or prudence could entertain a strong suspicion of guilt of the accused, and if some rational ground exists for an assumption of guilt the indictment [or information] will not be set aside.'" (*People* v. *Backus* (1979) [***25] 23 Cal.3d 360, 387 [152 Cal.Rptr. 710, 590 P.2d 837].)

In reviewing on appeal a challenge to an indictment or information, a court "may not substitute its judgment for that of the grand jury or magistrate in determining the sufficiency of the evidence and must draw all reasonable inferences in support of the indictment or information." (*Id*., at p. 391.) Thus, "'. . . if there is some evidence to support the information, the court will not inquire into its sufficiency.'" (*People* v. *Patino* (1979) 95 Cal.App.3d 11, 25 [156 Cal.Rptr. 815], quoting *Rideout* v. *Superior Court* (1967) 67 Cal.2d 471, 474 [62 Cal.Rptr. 581, 432 P.2d 197].)

At appellant's preliminary hearing, Jeffrey Bottorff, the gas station cashier, testified much as has already been indicated in the factual summary. Moreover, Officer Brown identified appellant in the surveillance photograph, thus generating a strong suspicion that appellant had participated in the robbery. As discussed in the previous section, Brown's identification testimony was competent. Even if it had not been, Bottorff's testimony in conjunction with the presence of the surveillance photograph alone could have established **[***26]** a rational basis for holding appellant to answer the charges in the information. Appellant's motion to set aside the information was, therefore, properly denied.

[*136] Penal Code section 1118.1 requires that the trial court enter judgment of acquittal upon the defendant's motion "if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal." The trial court **[**782]** must therefore apply the same test utilized by an appellate court in reviewing the sufficiency of evidence to sustain a judgment of conviction. (*People* v. *Wong* (1973) 35 Cal.App.3d 812, 828 [111 Cal.Rptr. 314].) That is, "the court must review the whole record in the light most favorable to the [prosecution] to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People* v. *Johnson* (1980) 26 Cal.3d 557, 578 [162 Cal.Rptr. 431, 606 P.2d 738].)

The evidence presented at appellant's trial met this test. The police officers positively and unequivocally identified appellant **[***27]** as the person depicted in the surveillance photograph of the robbery. Moreover, the jury could be -- and was -- given the surveillance photographs to examine in their deliberations. Bottorff's testimony, though insufficient in itself to place appellant at the scene of the crime, constituted further circumstantial evidence of guilt. Finally, a dollar bill taken from appellant upon his arrest bore the words "West and McKinley," the address of the robbed gas station. The trial judge had before him more than enough evidence that the issue of appellant's guilt should be given to the jury.

The denial of appellant's Penal Code section 1118.1 motion was proper.

III

Appellant next asserts that his trial counsel's failure to object to the officers' identification testimony on Evidence Code section 352 grounds deprived him of effective assistance of counsel. As appellant notes, defense counsel below made no fewer than five separate objections to the prosecution's use of the officers' identification testimony. The objections were made at the following stages: when the testimony was originally introduced at the preliminary examination; at a hearing held on appellant's motion to set aside **[***28]** the information; at the pretrial foundational hearing; prior to the testimony of Officer Brown; and in a **[*137]** motion to strike the testimony of Officers Brown and Burks following their testimony. Appellant urges, however, that defense counsel's failure to object to the testimony on Evidence Code section 352grounds -- i.e., that the probative value of the testimony was substantially outweighed by its prejudicial effect -- deprived appellant of effective representation. This argument is meritless.

In raising a claim of ineffective assistance of counsel, an appellant must show that (1) "trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates . . .," and (2) "counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense." (*People* v. *Pope* (1979) 23 Cal.3d 412, 425 [152 Cal.Rptr. 732, 590 P.2d 859, 2 A.L.R.4th 1].) If the record on appeal contains any explanation for the challenged aspect of representation, "the court must inquire whether the explanation demonstrates that counsel was reasonably competent and acting as a conscientious, diligent advocate." (*Ibid*.) Where the **[***29]** record sheds no light on why counsel acted or failed to act in the manner challenged, an ineffective assistance claim must fail "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . ." (*Id*., at p. 426.)

The record in this case sheds some light on why trial counsel failed to expressly raise an Evidence Code section 352 motion to exclude the officers' testimony. As noted previously, a trial court's decision to admit or exclude lay opinion identification testimony is a matter of discretion. At the pretrial foundational hearing held in this case, defense counsel strenuously and diligently appealed to the trial judge to exclude the officers' testimony, stating, at various points, that it would be a "dangerous procedure," that the trial would "degenerate horribly," and that a "gross injustice" would result if the court allowed the identification testimony given the limited extent of the officers' prior acquaintance with appellant. In concluding that the testimony **[**783]** would be admissible, the

court balanced these assertions against the prosecution's assertion that the officers' testimony would **[***30]** be highly probative and crucial to the People's case. Having failed in his efforts to invoke the court's discretion to exclude the evidence, defense counsel could justifiably have believed that an Evidence Code section 352 motion would be superfluous: it was quite obvious the trial court felt the probative value of the testimony outweighed its prejudicial effect. In no conceivable **[*138]** way can it be said that trial counsel failed to act as a competent and diligent advocate in attempting to exclude the testimony.

Appellant further asserts that trial counsel's **[***31]** failure to object to the officers' testimony concerning their prior contacts with appellant denied appellant effective representation. It has been noted that allowing police officers to testify as to their prior acquaintance with a defendant creates potential prejudice by presenting defendant as one subject to a certain degree of police scrutiny. (See *United States* v. *Butcher, supra*, 557 F.2d 666, 669.) However, trial counsel's failure to object was almost certainly "an informed tactical choice" (*Pope, supra*, 23 Cal.3d at p. 425): by allowing the officers to testify as to the bases for their ability to identify appellant, defense counsel preserved his ability to undermine the identifications through cross-examination. The officers' identifications were the key prosecution evidence in the case, and trial counsel justifiably felt it imperative to present to the jury the true extent of the officers' previous contacts with appellant. Counsel, in fact, did cross-examine the officers on this subject. In this way, counsel diligently attempted to impeach the officers' identifications.

Appellant received fully competent representation at trial. Indeed, it is difficult to **[***32]** conceive how counsel could have done anything else humanly possible to keep the identification testimony from the jurors. The ineffective assistance argument is precisely the type of second-guessing decried by the Supreme Court in *People* v. *Pope, supra*, 23 Cal.3d 412, 426.

IV

The trial court did misstate the evidence in sentencing appellant to five years imprisonment, the upper base term for robbery. The court stated its reasons for the upper base term as follows: "A victim was particularly vulnerable working late at night at a self-service gas station. The defendant has previously been engaged in and currently has been engaged in a pattern of violent conduct which indicates a serious danger to society. The defendant's actions involved threat of bodily **[*139]** harm and he did strike the victim in the face with his fist in the incident offense. That his past performance on probation and juvenile probation and CYA parole has been unsatisfactory. The defendant's previous and prior convictions and/or adjudications are numerous and appear to be increasingly serious." (Italics added.) The court found no circumstances in mitigation. (*Ibid.*) At trial, cashier Jeffrey **[***33]** Bottorff testified that appellant's companion, and not appellant, had struck him in the face during the course of the robbery. Appellant therefore urges the case should be remanded for resentencing.

Although the court erred in describing the evidence, in view of the other aggravating factors listed by the trial court it is not reasonably probable a different base term would have been imposed in the absence of error. The present case is similar to *People* v. *Boerner* (1981) 120 Cal.App.3d 506 [174 Cal.Rptr. 629], in which the trial

court had improperly considered the defendant's leadership role in the commission of a crime in imposing the upper base term for attempted robbery. (*Id*., at p. 509.) The sentence was, however, upheld because the trial court had noted numerous other aggravating factors in imposing the upper term: the extreme vulnerability of the victims, the dangerous nature of appellant's conduct, his criminal record of increasing seriousness, his probation status when he committed the crime, and his being a danger to society. (*Id*., at p. 510.) Likewise, in the present case, the factors listed by the court clearly indicate the sentence would not change **[***34]** upon remand. The court below noted the vulnerability of the victim, the threat of bodily harm appellant imposed, his past unsatisfactory performance on probation and juvenile probation, and his numerous and increasingly serious prior convictions.

Because there is not a reasonable probability appellant's sentence would have been different in the absence of the court's error in describing the evidence, remand for resentencing would be pointless.

The judgment is affirmed.

INTER-JOURNAL WRITING COMPETITION

WRITING ASSIGNMENT

88 S.Ct. 1868

Supreme Court of the United States

John W. TERRY, Petitioner,

v.

STATE OF OHIO.

No. 67.

|

Argued Dec. 12, 1967.

|

Decided June 10, 1968.

Opinion

Mr. Chief Justice WARREN delivered the opinion of the Court.

This case presents serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances.

Petitioner Terry was convicted of carrying a concealed weapon and sentenced to the statutorily prescribed term of one to three years in the penitentiary.[1] Following ***5** the denial of a pretrial motion to suppress, the prosecution introduced in evidence two revolvers and a number of bullets seized from Terry and a codefendant, Richard Chilton,[2] by Cleveland Police Detective Martin McFadden. At the hearing on the motion to suppress this evidence, Officer McFadden testified that while he was patrolling in plain clothes in downtown Cleveland at approximately 2:30 in the afternoon of October 31, 1963, his attention was attracted by two men, Chilton and Terry, standing on the corner of Huron Road and Euclid Avenue. He had never seen the two men before, and he was unable to say precisely what first drew his eye to them. However, he testified that he had been a policeman for 39 years and a detective for 35 and that he had been assigned to patrol this vicinity of downtown Cleveland for shoplifters and pickpockets for 30 years. He explained that he had developed routine habits of observation over the years and that he would 'stand and watch people or walk and watch people at many intervals of the day.' He added: 'Now, in this case when I looked over they didn't look right to me at the time.'

His interest aroused, Officer McFadden took up a post of observation in the ****1872** entrance to a store 300 to 400 feet ***6** away from the two men. 'I get more purpose to watch them when I seen their movements,' he testified. He

saw one of the men leave the other one and walk southwest on Huron Road, past some stores. The man paused for a moment and looked in a store window, then walked on a short distance, turned around and walked back toward the corner, pausing once again to look in the same store window. He rejoined his companion at the corner, and the two conferred briefly. Then the second man went through the same series of motions, strolling down Huron Road, looking in the same window, walking on a short distance, turning back, peering in the store window again, and returning to confer with the first man at the corner. The two men repeated this ritual alternately between five and six times apiece—in all, roughly a dozen trips. At one point, while the two were standing together on the corner, a third man approached them and engaged them briefly in conversation. This man then left the two others and walked west on Euclid Avenue. Chilton and Terry resumed their measured pacing, peering and conferring. After this had gone on for 10 to 12 minutes, the two men walked off together, heading west on Euclid Avenue, following the path taken earlier by the third man.

By this time Officer McFadden had become thoroughly suspicious. He testified that after observing their elaborately casual and oft-repeated reconnaissance of the store window on Huron Road, he suspected the two men of 'casing a job, a stick-up,' and that he considered it his duty as a police officer to investigate further. He added that he feared 'they may have a gun.' Thus, Officer McFadden followed Chilton and Terry and saw them stop in front of Zucker's store to talk to the same man who had conferred with them earlier on the street corner. Deciding that the situation was ripe for direct action, Officer McFadden approached the three men, identified ***7** himself as a police officer and asked for their names. At this point his knowledge was confined to what he had observed. He was not acquainted with any of the three men by name or by sight, and he had received no information concerning them from any other source. When the men 'mumbled something' in response to his inquiries, Officer McFadden grabbed petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing. In the left breast pocket of Terry's overcoat Officer McFadden felt a pistol. He reached inside the overcoat pocket, but was unable to remove the gun. At this point, keeping Terry between himself and the others, the officer ordered all three men to enter Zucker's store. As they went in, he removed Terry's overcoat completely, removed a .38-caliber revolver from the pocket and ordered all three men to face the wall with their hands raised. Officer McFadden proceeded to pat down the outer clothing of Chilton and the third man, Katz. He discovered another revolver in the outer pocket of Chilton's overcoat, but no weapons were found on Katz. The officer testified that he only patted the men down to see whether they had weapons, and that he did not put his hands beneath the outer garments of either Terry or Chilton until he felt their guns. So far as appears from the record, he never placed his hands beneath Katz' outer garments. Officer McFadden seized Chilton's gun, asked the proprietor of the store to call a police wagon, and took all three men to the station, where Chilton and Terry were formally charged with carrying concealed weapons.

On the motion to suppress the guns the prosecution took the position that they had been seized following a search incident to a lawful arrest. The trial court rejected this theory, stating that it 'would be stretching the facts beyond reasonable comprehension' to find that Officer ***8** McFadden had had probable ****1873** cause to arrest the men before he patted them down for weapons. However, the court denied the defendants' motion on the ground that Officer McFadden, on the basis of his experience, 'had reasonable cause to believe * * * that the defendants were conducting themselves suspiciously, and some interrogation should be made of their action.' Purely for his own protection, the court held, the officer had the right to pat down the outer clothing of these men, who he had reasonable cause to believe might be armed. The court distinguished between an investigatory 'stop' and an arrest, and between a 'frisk' of the outer clothing for weapons and a full-blown search for evidence of crime. The frisk, it held, was essential to the proper performance of the officer's investigatory duties, for without it 'the answer to the police officer may be a bullet, and a loaded pistol discovered during the frisk is admissible.'

[1] After the court denied their motion to suppress, Chilton and Terry waived jury trial and pleaded not guilty. The

court adjudged them guilty, and the Court of Appeals for the Eighth Judicial District, Cuyahoga County, affirmed. State v. Terry, 5 Ohio App.2d 122, 214 N.E.2d 114 (1966). The Supreme Court of Ohio dismissed their appeal on the ground that no 'substantial constitutional question' was involved. We granted certiorari, 387 U.S. 929, 87 S.Ct. 2050, 18 L.Ed.2d 989 (1967), to determine whether the admission of the revolvers in evidence violated petitioner's rights under the Fourth Amendment, made applicable to the States by the Fourteenth. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). We affirm the conviction.

I.

[2] [3] [4] [5] The Fourth Amendment provides that 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.' This inestimable right of ***9** personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs. For, as this Court has always recognized,

'No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.' Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891).

We have recently held that 'the Fourth Amendment protects people, not places,' Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967), and wherever an individual may harbor a reasonable 'expectation of privacy,' id., at 361, 88 S.Ct. at 507, (Mr. Justice Harlan, concurring), he is entitled to be free from unreasonable governmental intrusion. Of course, the specific content and incidents of this right must be shaped by the context in which it is asserted. For 'what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.' Elkins v. United States, 364 U.S. 206, 222, 80 S.Ct. 1437, 1446, 4 L.Ed.2d 1669 (1960). Unquestionably petitioner was entitled to the protection of the Fourth Amendment as he walked down the street in Cleveland. Beck v. State of Ohio, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964); Rios v. United States, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688 (1960); Henry v. United States, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959); United States v. Di Re, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948); Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). The question is whether in all the circumstances of this on-the-street encounter, his right to personal security was violated by an unreasonable search and seizure.

****1874** We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity—issues which have never before been squarely ***10** presented to this Court. Reflective of the tensions involved are the practical and constitutional arguments pressed with great vigor on both sides of the public debate over the power of the police to 'stop and frisk' —as it is sometimes euphemistically termed—suspicious persons.

On the one hand, it is frequently argued that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount

of information they possess. For this purpose it is urged that distinctions should be made between a 'stop' and an 'arrest' (or a 'seizure' of a person), and between a 'frisk' and a 'search.'[3] Thus, it is argued, the police should be allowed to 'stop' a person and detain him briefly for questioning upon suspicion that he may be connected with criminal activity. Upon suspicion that the person may be armed, the police should have the power to 'frisk' him for weapons. If the 'stop' and the 'frisk' give rise to probable cause to believe that the suspect has committed a crime, then the police should be empowered to make a formal 'arrest,' and a full incident 'search' of the person. This scheme is justified in part upon the notion that a 'stop' and a 'frisk' amount to a mere 'minor inconvenience and petty indignity,'[4] which can properly be imposed upon the ***11** citizen in the interest of effective law enforcement on the basis of a police officer's suspicion.[5]

On the other side the argument is made that the authority of the police must be strictly circumscribed by the law of arrest and search as it has developed to date in the traditional jurisprudence of the Fourth Amendment.[6] It is contended with some force that there is not—and cannot be—a variety of police activity which does not depend solely upon the voluntary cooperation of the citizen and yet which stops short of an arrest based upon probable cause to make such an arrest. The heart of the Fourth Amendment, the argument ****1875** runs, is a severe requirement of specific justification for any intrusion upon protected personal security, coupled with a highly developed system of judicial controls to enforce upon the agents of the State the commands of the Constitution. Acquiescence by the courts in the compulsion inherent ***12** in the field interrogation practices at issue here, it is urged, would constitute an abdication of judicial control over, and indeed an encouragement of, substantial interference with liberty and personal security by police officers whose judgment is necessarily colored by their primary involvement in 'the often competitive enterprise of ferreting out crime.' Johnson v. United States, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948). This, it is argued, can only serve to exacerbate police-community tensions in the crowded centers of our Nation's cities.[7]

[6] [7] In this context we approach the issues in this case mindful of the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street. The State has characterized the issue here as 'the right of a police officer * * * to make an on-the-street stop, interrogate and pat down for weapons (known in street vernacular as 'stop and frisk').'[8] But this is only partly accurate. For the issue is not the abstract propriety of the police conduct, but the admissibility against petitioner of the evidence uncovered by the search and seizure. Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct. See Weeks v. United States, 232 U.S. 383, 391—393, 34 S.Ct. 341, 344, 58 L.Ed. 652 (1914). Thus its major thrust is a deterrent one, see Linkletter v. Walker, 381 U.S. 618, 629—635, 85 S.Ct. 1731, 1741, 14 L.Ed.2d 601 (1965), and experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere 'form of words.' Mapp v. Ohio, 367 U.S. 643, 655, 81 S.Ct. 1684, 1692, 6 L.Ed.2d 1081 (1961). The rule also serves another vital function—'the imperative of judicial integrity.' ***13** Elkins v. United States, 364 U.S. 206, 222, 80 S.Ct. 1437, 1447, 4 L.Ed.2d 1669 (1960). Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

[8] The exclusionary rule has its limitations, however, as a tool of judicial control. It cannot properly be invoked to

exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections. Moreover, in some contexts the rule is ineffective as a deterrent. Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life. Moreover, hostile confrontations are not all of a piece. Some of them begin in a friendly enough manner, only to take a ****1876** different turn upon the injection of some unexpected element into the conversation. Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime.[9] Doubtless some ***14** police 'field interrogation' conduct violates the Fourth Amendment. But a stern refusal by this Court to condone such activity does not necessarily render it responsive to the exclusionary rule. Regardless of how effective the rule may be where obtaining convictions is an important objective of the police,[10] it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.

[9] Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain,[11] will not be ***15** stopped by the exclusion of any evidence from any criminal trial. Yet a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime. No judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us. Nothing we say today is to be taken as indicating approval of police conduct outside the legitimate investigative sphere. Under our decision, courts still retain their traditional responsibility to guard against police conduct which is over-bearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials. And, of course, our approval of legitimate and restrained investigative conduct undertaken ****1877** on the basis of ample factual justification should in no way discourage the employment of other remedies than the exclusionary rule to curtail abuses for which that sanction may prove inappropriate.

Having thus roughly sketched the perimeters of the constitutional debate over the limits on police investigative conduct in general and the background against which this case presents itself, we turn our attention to the quite narrow question posed by the facts before us: whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest. ***16** Given the narrowness of this question, we have no occasion to canvass in detail the constitutional limitations upon the scope of a policeman's power when he confronts a citizen without probable cause to arrest him.

II.

[10] [11] [12] Our first task is to establish at what point in this encounter the Fourth Amendment becomes relevant. That is, we must decide whether and when Officer McFadden 'seized' Terry and whether and when he conducted a 'search.' There is some suggestion in the use of such terms as 'stop' and 'frisk' that such police conduct is outside

the purview of the Fourth Amendment because neither action rises to the level of a 'search' or 'seizure' within the meaning of the Constitution.[12] We emphatically reject this notion. It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search,' Moreover, it is simply fantastic to urge that such a procedure ***17** performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity.'[13] It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.[14]

[13] [14] The danger in the logic which proceeds upon distinctions between ****1878** a 'stop' and an 'arrest,' or 'seizure' of the person, and between a 'frisk' and a 'search' is twofold. It seeks to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen. And by suggesting a rigid all-or-nothing model of justification and regulation under the Amendment, it obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation.[15] This Court has held in ***18** the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. Kremen v. United States, 353 U.S. 346, 77 S.Ct. 828, 1 L.Ed.2d 876 (1957); ***19** Go-Bart Importing Co. v. United States, 282 U.S. 344, 356—358, 51 S.Ct. 153, 158, 75 L.Ed. 374 (1931); see United States v. Di Re, 332 U.S. 581, 586—587, 68 S.Ct. 222, 225, 92 L.Ed. 210 (1948). The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible. Warden v. Hayden, 387 U.S. 294, 310, 87 S.Ct. 1642, 1652 (1967) (Mr. Justice Fortas, concurring); see e.g., Preston v. United States, 376 U.S. 364, 367—368, 84 S.Ct. 881, 884, 11 L.Ed.2d 777 (1964); Agnello v. United States, 269 U.S. 20, 30—31, 46 S.Ct. 4, 6, 70 L.Ed. 145 (1925).

The distinctions of classical 'stop-and-frisk' theory thus serve to divert attention from the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of the particular ****1879** governmental invasion of a citizen's personal security. 'Search' and 'seizure' are not talismans. We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'

[15] [16] In this case there can be no question, then, that Officer McFadden 'seized' petitioner and subjected him to a 'search' when he took hold of him and patted down the outer surfaces of his clothing. We must decide whether at that point it was reasonable for Officer McFadden to have interfered with petitioner's personal security as he did.[16] And in determining whether the seizure and search were 'unreasonable' our inquiry ***20** is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.

III.

[17] [18] [19] If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether 'probable cause' existed to justify the search and seizure which took place. However, that is not the case. We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, see e.g., Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); Beck v. State of Ohio, 379 U.S. 89, 96, 85 S.Ct. 223, 228, 13 L.Ed.2d 142 (1964); Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961), or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances, see, e.g., Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967) (hot pursuit); cf. Preston v. United States, 376 U.S. 364, 367—368, 84 S.Ct. 881, 884, 11 L.Ed.2d 777 (1964). But we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.[17]

Nonetheless, the notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in this context. In order to assess the reasonableness of Officer McFadden's conduct as a general proposition, it is necessary 'first to focus upon ***21** the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails.' ****1880** Camara v. Municipal Court, 387 U.S. 523, 534—535, 536—537, 87 S.Ct. 1727, 1735, 18 L.Ed.2d 930 (1967). And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.[18] The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.[19] And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts ***22** available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? Cf. Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); Beck v. State of Ohio, 379 U.S. 89, 96—97, 85 S.Ct. 223, 229, 13 L.Ed.2d 142 (1964).[20] Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. See, e.g., Beck v. Ohio, supra; Rios v. United States, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688 (1960); Henry v. United States, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959). And simple "good faith on the part of the arresting officer is not enough.' * * * If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police.' Beck v. Ohio, supra, at 97, 85 S.Ct. at 229.

[20] [21] Applying these principles to this case, we consider first the nature and extent of the governmental interests involved. One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. It was this legitimate investigative function Officer McFadden was discharging when he decided to approach petitioner and his companions. He had observed Terry, Chilton, and Katz go Through a series of acts, each of them perhaps innocent ****1881** in itself, but which taken together warranted further investigation. There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything

suspicious about people ***23** in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover, are made to be looked in. But the story is quite different where, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternately along an identical route, pausing to stare in the same store window roughly 24 times; where each completion of this route is followed immediately by a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly; and where the two men finally follow the third and rejoin him a couple of blocks away. It would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further.

The crux of this case, however, is not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious behavior, but rather, whether there was justification for McFadden's invasion of Terry's personal security by searching him for weapons in the course of that investigation. We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. ***24** Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives.[21]

In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

We must still consider, however, the nature and quality of the intrusion on individual rights which must be accepted if police officers are to be conceded the right to search for weapons in situations where probable cause to arrest for crime is lacking. Even a limited search of the ****1882** outer clothing for weapons constitutes a severe, ***25** though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience. Petitioner contends that such an intrusion is permissible only incident to a lawful arrest, either for a crime involving the possession of weapons or for a crime the commission of which led the officer to investigate in the first place. However, this argument must be closely examined.

Petitioner does not argue that a police officer should refrain from making any investigation of suspicious circumstances until such time as he has probable cause to make an arrest; nor does he deny that police officers in properly discharging their investigative function may find themselves confronting persons who might well be armed and dangerous. Moreover, he does not say that an officer is always unjustified in searching a suspect to discover weapons. Rather, he says it is unreasonable for the policeman to take that step until such time as the situation evolves to a point where there is probable cause to make an arrest. When that point has been reached, petitioner would concede the officer's right to conduct a search of the suspect for weapons, fruits or instrumentalities of the crime, or 'mere' evidence, incident to the arrest.

[22] [23] There are two weaknesses in this line of reasoning however. First, it fails to take account of traditional

limitations upon the scope of searches, and thus recognizes no distinction in purpose, character, and extent between a search incident to an arrest and a limited search for weapons. The former, although justified in part by the acknowledged necessity to protect the arresting officer from assault with a concealed weapon, Preston v. United States, 376 U.S. 364, 367, 84 S.Ct. 881, 883, 11 L.Ed.2d 777 (1964), is also justified on other grounds, ibid., and can therefore involve a relatively extensive exploration of the person. A search for weapons in the absence of probable cause to ***26** arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. Warden v. Hayden, 387 U.S. 294, 310, 87 S.Ct. 1642, 1652, 18 L.Ed.2d 782 (1967) (Mr. Justice Fortas, concurring). Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a 'full' search, even though it remains a serious intrusion.

[24] [25] A second, and related, objection to petitioner's argument is that it assumes that the law of arrest has already worked out the balance between the particular interests involved here—the neutralization of danger to the policeman in the investigative circumstance and the sanctity of the individual. But this is not so. An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows.[22] The protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person. It does not follow that because an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusions short of an arrest. Moreover, a perfectly reasonable apprehension of danger may arise long before the officer is possessed of ****1883** adequate information to justify taking a person into custody for ***27** the purpose of prosecuting him for a crime. Petitioner's reliance on cases which have worked out standards of reasonableness with regard to 'seizures' constituting arrests and searches incident thereto is thus misplaced. It assumes that the interests sought to be vindicated and the invasions of personal security may be equated in the two cases, and thereby ignores a vital aspect of the analysis of the reasonableness of particular types of conduct under the Fourth Amendment. See Camara v. Municipal Court, supra.

[26] Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. Cf. Beck v. State of Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 226, 13 L.Ed.2d 142 (1964); Brinegar v. United States, 338 U.S. 160, 174—176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949); Stacey v. Emery, 97 U.S. 642, 645, 24 L.Ed. 1035 (1878).[23] And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. Cf. Brinegar v. United States, supra.

IV.

[27] We must now examine the conduct of Officer McFadden in this case to determine whether his search and seizure of petitioner were reasonable, both at their inception ***28** and as conducted. He had observed Terry, together with Chilton and another man, acting in a manner he took to be preface to a 'stick-up.' We think on the facts and circumstances Officer McFadden detailed before the trial judge a reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior. The actions of Terry and Chilton were consistent with McFadden's hypothesis that these men were contemplating a daylight robbery—which, it is reasonable to assume, would be likely to involve the use of weapons—and nothing in their conduct from the time he first noticed them until the time he confronted them and identified himself as a police officer gave him sufficient reason to negate that hypothesis. Although the trio had departed the original scene, there was nothing to indicate abandonment of an intent to commit a robbery at some point. Thus, when Officer McFadden approached the three men gathered before the display window at Zucker's store he had observed enough to make it quite reasonable to fear that they were armed; and nothing in their response to his hailing them, identifying himself as a police officer, and asking their names served to dispel that reasonable belief. We cannot say his decision at that point to seize Terry and pat his clothing for weapons was the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment; the record evidences the tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so.

[28] [29] [30] The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all. The Fourth Amendment proceeds as much by limitations upon the ***29** scope of governmental ****1884** action as by imposing preconditions upon its initiation. Compare Katz v. United States, 389 U.S. 347, 354—356, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967). The entire deterrent purpose of the rule excluding evidence seized in violation of the Fourth Amendment rests on the assumption that 'limitations upon the fruit to be gathered tend to limit the quest itself.' United States v. Poller, 43 F.2d 911, 914, 74 A.L.R. 1382 (C.A.2d Cir. 1930); see, e.g., Linkletter v. Walker, 381 U.S. 618, 629—635, 85 S.Ct. 1731, 1741, 14 L.Ed.2d 601 (1965); Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); Elkins v. United States, 364 U.S. 206, 216—221, 80 S.Ct. 1437, 1446, 4 L.Ed.2d 1669 (1960). Thus, evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation Warden v. Hayden, 387 U.S. 294, 310, 87 S.Ct. 1642, 1652, 18 L.Ed.2d 782 (1967) (Mr. Justice Fortas, concurring).

[31] We need not develop at length in this case, however, the limitations which the Fourth Amendment places upon a protective seizure and search for weapons. These limitations will have to be developed in the concrete factual circumstances of individual cases. See Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 1912, 20 L.Ed.2d 917 decided today. Suffice it to note that such a search, unlike a search without a warrant incident to a lawful arrest, is not justified by any need to prevent the disappearance or destruction of evidence of crime. See Preston v. United States, 376 U.S. 364, 367, 84 S.Ct. 1642, 1652, 18 L.Ed.2d 782 (1964). The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.

[32] The scope of the search in this case presents no serious problem in light of these standards. Officer McFadden patted down the outer clothing of petitioner and his two companions. He did not place his hands in their pockets or under the outer surface of their garments until he had ***30** felt weapons, and then he merely reached for and removed the guns. He never did invade Katz' person beyond the outer surfaces of his clothes, since he discovered nothing in his patdown which might have been a weapon. Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. He did not conduct a general exploratory search for whatever evidence of criminal activity he might find.

V.

[33] [34] We conclude that the revolver seized from Terry was properly admitted in evidence against him. At the time he seized petitioner and searched him for weapons, Officer McFadden had reasonable grounds to believe that petitioner was armed and dangerous, and it was necessary for the protection of himself and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized. The policeman carefully restricted his search to what was appropriate to the discovery of the particular items which he sought. Each case of this sort will, of course, have to be decided on its own facts. We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and ****1885** others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. ***31** Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

Affirmed.

INTER-JOURNAL WRITING COMPETITION

WRITING ASSIGNMENT

People v. McAlpin, 53 Cal 3rd 1289

Supreme Court of California

July 18, 1991

No. S010577

THE PEOPLE, Plaintiff and Respondent, v. BRUCE **McALPIN**, Defendant and Appellant

Prior History:

[*1]** Superior Court of Santa Clara County, No. 116671, John A. Flaherty, Judge.

Disposition:

The judgment of the Court of Appeal is affirmed.

[*1294] [384]** Defendant appeals from a judgment convicting him of nonviolent lewd conduct with a child under the age of 14. (Pen. Code, § 288, subd. (a).) He complains of a number of evidentiary rulings by the trial court. As will appear, we conclude that the principal rulings were correct, and the incorrect rulings were not prejudicial on the entire record of this case. **[***2]** We therefore affirm the judgment.

Defendant met Anita M. at a church dance in April 1985 and began dating her. Anita, who was divorced, had three children: Stephanie (then age 8), Valerie (then age 7), and Isaac (then age 1). Sunday, June 9, 1985, was Stephanie's ninth birthday. About noon on that day, defendant, Anita, and her children went shopping for birthday gifts for Stephanie. Next they **[*1295]** drove to defendant's house, and after looking at Stephanie's gifts they all lay down together on a large bed in defendant's bedroom to watch television. It was hot, and the children were lightly clothed; the girls wore short "jumper" suits. Anita soon left with Isaac to sit on the floor, and eventually took him outside to play. Defendant remained lying on the bed between the two girls, facing Stephanie.

Stephanie testified that defendant began touching her while her mother was tending to Isaac, and "When my mom would turn around to look at the T.V. or so or somewhere close where he was, he'd stop." The touching continued after her mother took Isaac outside, and Stephanie described the events in detail. On direct examination she

testified that "At first [it] was around my **[***3]** pants and then around the elastic part of my underwear." At different times defendant used either his fingers or his whole hand. Stephanie continued, "Then it was inside my underwear," against her skin. Finally, Stephanie testified that defendant put his finger "inside . . . my vagina" and also touched "my chest." Stephanie testified she knew it was wrong for defendant to touch her in this way, but she did not move away at first because she was scared. After a few minutes, however, she told defendant she had to go to the bathroom; instead, she went directly to her mother and told her what defendant had done.

On cross-examination Stephanie not only adhered to her description of defendant's conduct, but gave additional details in response to defense counsel's questions. For example, she explained precisely how defendant touched her when his hand reached the cuff of her suit, illustrating her testimony both by gesture and by reference to a photograph of her taken in that suit on that day. She also reiterated that she did **[**385]** not call out during the touching, but that as defendant moved his hand closer to her vagina she **[*1296]** became "scareder and scareder." On redirect **[***4]** examination she testified that she did not know what to do when defendant began touching her. And when the prosecutor asked her if she had any other feeling about the experience, she replied, "Sad."

[*5]** Anita corroborated much of her daughter's testimony. She stated that Stephanie emerged from defendant's bedroom about 10 minutes after she had left with Isaac. According to Anita, Stephanie "came out of the house a little in a hurry and looked at me with an expression that I've never seen on her face before. . . . She looked sick. And she had tears in her eyes." Anita asked what was the matter; at first Stephanie was "pretty choked up with crying" and said that defendant was "bothering" her. When pressed to say how he was "bothering" her, Stephanie "stuttered around with it and finally said, 'Well, he put his hand in my private.'" Anita immediately went inside and confronted defendant, demanding an explanation. Defendant, however, "denied having any idea what was wrong," and went back to whatever he was doing at the time. Anita testified, "I was lost for words" and "I went into shock. I didn't know what to do." She told defendant that maybe she should "just go home," but he suggested instead that they all get something to eat. They went to a restaurant for dinner; at the restaurant Stephanie was quiet and withdrawn, and in the restroom she again talked to her mother about **[***6]** the event.

Anita acknowledged that she dated defendant once more a week or two later, and that she did not report the matter to the police. She did, however, discuss it with her mother, who knew defendant. Shortly thereafter Anita also saw defendant with a mutual friend on a rafting trip sponsored by her church group, and at that time she told the friend about the incident. On redirect examination Anita was asked why she went out with defendant once more after Stephanie told her what had happened, and she replied, "It's in my personality or character, if you will, to sit on the fence until you have enough information to actually point your finger and accuse somebody of something that is that extreme and emotional and traumatic." She also stressed that she had "los[t] a baby and a husband," the latter through divorce, in the year preceding these events.

[*7]** In June 1986 Stephanie reported the incident to authorities at her school, and the police were notified.

Defendant took the stand and denied the charge. His version of the events leading up to the molestation was the same as that of Stephanie and **[*1297]** her mother, except that he insisted it all occurred one day earlier. With regard to the touching, he told a very different story. First he acknowledged that while they were lying together on

his bed he put his right arm on Stephanie's thigh. Then he claimed that after Anita left the room with Isaac, Stephanie "started moving her left arm over next to my genitals." Defendant testified that he "grabbed her arm and said, 'don't touch me there'"; that Stephanie left the **[**386]** room and Anita returned soon thereafter; that he and Anita discussed the incident in private; that he told Anita, "Your daughter touched me where she shouldn't have been"; that Anita replied, "yeah, I can believe that. She's pretty aggressive at times"; and that he and Anita then calmly told Stephanie not to let it happen again.

Defendant was allowed to introduce evidence of his standing in the community. Counsel began the case for the defense by eliciting **[***8]** without objection a full statement of defendant's education and employment history: thus defendant testified he had served four years in the Navy; had attended two colleges; had been trained as an electronics technician; had worked first for the Atari Company; had then taken a job with IBM; had worked for six years for IBM, where he became a "senior manufacturing method specialist"; and at the time of trial was a "technical analyst" in "product development" at IBM.

Defendant was also permitted to call two character witnesses on his behalf. The first, Vicki Daybell, was a clerk in the Alameda Superior Court; she was divorced and had a small daughter. She had dated defendant for four or five months, and had stayed in contact with him thereafter. Ms. Daybell testified that in the course of dating defendant she came to know his circle of friends, and from that experience she learned he has an excellent reputation for truth and veracity in the community. As Ms. Daybell testified, "They all regard him very highly . . . [f]or being very honest."

The second witness, Robert Tarkanian, had known defendant for some 11 years. Their friendship began when they were in college together, and **[***9]** continued when they both went to work for IBM. Tarkanian thus came to know defendant's circle of friends on the job, and testified that "He's well respected within the corporation," i.e., among his fellow workers. The witness further testified that on a trip to Texas with defendant they stayed in defendant's family home, and "I was very proud to meet his parents." When asked about defendant's reputation among his fellow workers, Tarkanian reiterated that "He's very well respected." And the witness agreed in particular that defendant has "a high reputation among his fellow workers for truth and veracity."

In rebuttal the prosecution called Debbie Hill. Like Anita, Ms. Hill was a single parent whom defendant had dated. She was also the woman whom **[*1298]** Anita testified she spoke with on a rafting trip shortly after these events. Ms. Hill testified that when Anita spoke with her on the topic she was "extremely upset" and told her what had happened between defendant and Stephanie. According to Ms. Hill, Anita explained that "I wanted to let you know because you have children and you do see him." On cross-examination Ms. Hill testified she was shocked and thereafter "monitored" **[***10]** defendant's interaction with her children because she was afraid.

The jury returned a guilty verdict after 45 minutes' deliberation. The Court of Appeal affirmed the ensuing judgment of conviction, and we granted review.

I

Defendant first contends the trial court abused its discretion in allowing opinion testimony by an expert witness. (Evid. Code, § 801.) The prosecutor proposed to call Police Officer Jeffrey Miller as an expert on child molestation investigations. Defense counsel examined Officer Miller at length on voir dire. It appeared from such examination that the witness had received from 350 to 400 hours of specialized training in such topics as juvenile and adolescent psychology, physical, sexual or emotional abuse of children, intervention in family crisis situations, investigation of child abuse charges, behavioral responses of child abuse victims, and the dynamics of child abuse offenders. Officer Miller received his training not only from law enforcement personnel but also from physicians, social workers, probation officers, school administrators, attorneys and judges. The witness put his training to use on a daily basis in his work as the juvenile investigator **[***11]** for his local police department, and in that capacity he had investigated over 100 cases of child abuse or molestation **[**387]** during the preceding 4 years. He had also taught and spoken extensively on the topic, and had testified several times as an expert witness.

The prosecutor declared that she intended to ask Officer Miller, on the basis of his training and experience, (1) whether a parent might not report a known child molestation, and if so, why; and (2) whether there is a profile of a "typical" child molester. Defense counsel voiced a rambling and confused objection. The trial court interpreted the objection to state three **[*1299]** separate grounds, and overruled it on each ground: "On this matter the Court's going to rule this witness be allowed to testify as an expert. I am satisfied, number one, he does possess the qualifications from the extensive voir dire. Number two, I think it is relevant and, number three, to the extent that the objection is under **[**Evidence Code section] 352 I think the probative value of this testimony in light of the facts of this case outweighs its prejudicial nature."

[*12]** Officer Miller then gave his testimony on the two questions propounded by the prosecutor. First, he listed a number of reasons why a parent might not report a known child molestation, including the fear of breaking up the marriage or harming relations with other family members, a sense of shame or failure as a parent, a psychological refusal to accept the fact of the molestation, or a reluctance to damage the reputation of the alleged offender when the latter is someone of good standing in the community (e.g., a schoolteacher or a businessman). In conclusion, Officer Miller testified that it would not be unusual for a parent to refrain from reporting a child molestation until actually confronted with the fact by a law enforcement agency.

On the second question, Officer Miller testified there is no profile of a "typical" child molester; rather, such an individual can be of any social or financial status, any race, any age, any occupation, any geographical origin, and any religious belief or no religious belief at all. Finally, Officer Miller testified that such offenders can also be persons of good or even impeccable reputations in the community.

Opinion testimony by an expert witness **[***13]** is admissible if it is, inter alia, "Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact" (Evid. Code, §

801, subd. (a)). The Court of Appeal was of the view that neither branch of Officer Miller's testimony assisted the jury, and hence that neither should have been admitted. Defendant agrees, and adopts that conclusion.

We disagree. The governing rules are well settled. First, the decision of a trial court to admit expert testimony "will not be disturbed on appeal unless a manifest abuse of discretion is shown." (*People* v. *Kelly* (1976) 17 Cal.3d 24, 39 [130 Cal.Rptr. 144, 549 P.2d 1240], and cases cited.) Second, "the admissibility of expert opinion is a question of degree. The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission; if that were the test, little expert **[*1300]** opinion testimony would ever be heard. Instead, the statute declares that even if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would 'assist' the jury. It will be excluded **[***14]** only when it would add nothing at all to the jury's common fund of information, i.e., when 'the subject of inquiry is one of such common **[**388]** knowledge that men of ordinary education could reach a conclusion as intelligently as the witness'" (*People* v. *McDonald* (1984) 37 Cal.3d 351, 367 [208 Cal.Rptr. 236, 690 P.2d 709, 46 A.L.R.4th 1011]). As will appear, on this record the trial court could well determine that both aspects of Officer Miller's testimony would assist the jury in at least some degree.

A

We begin with Officer Miller's testimony that it is not unusual for a parent to refrain from reporting a known molestation of his or her child. The People draw a helpful analogy to expert testimony on common stress reactions of rape victims ("rape trauma syndrome"), which may include a failure to report, or a delay in reporting, the sexual assault. In *People* v. *Bledsoe* (1984) 36 Cal.3d 236, 248-251 [203 Cal.Rptr. 450, 681 P.2d 291], we held that such testimony is inadmissible when offered to prove that the complaining witness has in [***15] fact been raped. But we recognized, as other courts had held (*Delia S.* v. *Torres* (1982) 134 Cal.App.3d 471, 478-480 [184 Cal.Rptr. 787]), that such testimony is admissible to rehabilitate the complaining witness when the defendant impeaches her credibility by suggesting that her conduct after the incident -- e.g., a delay in reporting -- is inconsistent with her testimony that she was raped. We reasoned that "in such a context expert testimony on rape trauma syndrome would play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths." (36 Cal.3d at pp. 247-248.)

An even more direct analogy may be drawn to expert testimony on common stress reactions of children who have been sexually molested ("child sexual abuse accommodation syndrome"), which also may include the child's failure to report, or delay in reporting, the abuse. In a series of decisions the Courts of Appeal have extended to this context both the rule and the exception of *People* v. *Bledsoe*, *supra*, 36 Cal.3d 236: **[***16]** i.e., expert testimony on the common reactions of child molestation victims is not admissible to prove that the complaining witness has in fact been sexually abused; it is admissible to rehabilitate such witness's credibility when the defendant suggests that the child's conduct after the incident -- e.g., a delay in reporting -- is inconsistent with his or her testimony claiming molestation. (*People* v. *Bowker* (1988) 203 Cal.App.3d 385, 390-394 [249 Cal.Rptr. 886]; *People* v. *Gray* (1986) 187 Cal.App.3d 213, 217-220 [231 Cal.Rptr. 658]; *People* v. *Roscoe* (1985) 168 Cal.App.3d 1093, 1097-1100 [215 **[*1301] Cal.Rptr. 45].)** "Such expert testimony is needed to disabuse jurors

of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children's seemingly self-impeaching behavior. [para.] The great majority of courts approve such expert rebuttal testimony." (Myers et al., *Expert Testimony in Child Sexual Abuse Litigation* (1989) 68 Neb. L. Rev. 1, 89, fn. omitted [***17] (hereafter Myers).)

In the case at bar the challenged expert testimony dealt with the failure not of the child victim, but of the child's parent, to report the molestation. Yet the foregoing rules appear equally applicable in this context. The prosecution did not seek to [***18] introduce Officer Miller's evidence for the purpose of proving that Stephanie was in fact molested, but to rehabilitate the corroborating testimony of Anita, her mother. On direct examination Anita had corroborated Stephanie's claim of sexual abuse by testifying to the effect that when Stephanie emerged from defendant's bedroom and said he had molested her, Anita had believed her: for example, Anita testified that when she subsequently broke off her relationship with defendant it was "Because [**389] I knew what Stephanie had told me was true." On cross-examination, defendant sought to impeach Anita's credibility by strongly implying that her behavior after the alleged incident was inconsistent with that of a mother who believed her daughter had been molested. Thus when Anita admitted she had sexual intercourse with defendant a week later, defense counsel twice asked rhetorically, "Is that how you believe Stephanie?" And counsel asked the same question when Anita conceded she did not report the molestation to the police even though she knew it was a criminal act. **5**

[***19] [*1302] Most jurors, fortunately, have been spared the experience of being the parent of a sexually molested child. Lacking that experience, jurors can rely only on their intuition or on relevant evidence introduced at trial. It is reasonable to conclude that on the basis of their intuition alone many jurors would tend to believe that a parent of a molested child, naturally concerned for the welfare of the child and of other children, would promptly report the crime to the authorities, just as a parent would be likely to do if the child complained of someone who had beaten him or stolen his pocket money. Yet here the prosecution had evidence to the contrary -- the expert opinion of Officer Miller that in fact it is not at all unusual for a parent to refrain from reporting a known child molestation, for a number of reasons. Such evidence would therefore "assist the trier of fact" (Evid. Code, § 801, subd. (a)) by giving the jurors information they needed to objectively evaluate Anita's credibility. **6** And the evidence was clearly relevant (*id.*, § 210) because it tended to rehabilitate the testimony of Anita as a corroborating witness. **7** It follows that the trial court did [***20] not abuse its discretion in admitting the challenged testimony.

B

Much of the foregoing analysis also applies **[***21]** to Officer Miller's expert testimony that there is no profile of a "typical" child molester, and that such persons are found instead in all walks of life. On this point it is reasonable to conclude that many jurors would tend to rely not so much on their personal intuition but on the widespread public image of the child molester as an old man in shabby clothes who loiters in playgrounds or schoolyards and lures unsuspecting children into sexual contact by offering them candy or money. As numerous studies by behavioral professionals have shown, this stereotype is deeply ingrained in the public consciousness: "The layperson imagines the child offender to be a stranger, an old man, insane or retarded, [**390] alcohol or drug addicted, sexually frustrated and impotent or sexually jaded, and looking for 'kicks.' He is 'gay' and

recruiting little boys into homosexuality or he is 'straight' and responding to the **[*1303]** advances of a sexually provocative little girl. . . . He is sometimes regarded as a brutal sex fiend or as a shy, passive, sexually inexperienced person. He is oversexed or he is undersexed; and so on. These are popular notions appealing in their simplicity -- even **[***22]** if they are self-contradicting -- and they offer the advantage of making the child offender as different and unlike the ordinary person -- ourselves, our parents, our children, our relatives, friends, and teachers -- as possible." (Groth, *Patterns of Sexual Assault Against Children and Adolescents*, in Sexual Assault of Children and Adolescents (Burgess et al. edits. 1978) pp. 3-4 (hereafter Groth); accord, Cerkovnik, *The Sexual Abuse of Children: Myths, Research, and Policy Implications* (1985) 89 Dick. L. Rev. 691, 692-694.)

This stereotype, [***23] however, is false. The same studies report that in most cases the child molester is not in fact a stranger to his victim, is not an old man, is not an alcoholic, is not mentally retarded, and is not homosexual. A recent major study of paraphiliacs -- the class of sexual deviants that includes child molesters -- found that their ages ranged from 13 to 76, with a mean age of 31.5 years; many were well educated; almost 65 percent were employed; they "came from a broad spectrum of socioeconomic levels," with almost one-quarter earning over $ 25,000 per year; their religious affiliations were various; and, in sum, they were "a very heterogeneous group." (Myers, *supra*, 68 Neb. L. Rev. 1, 130.) "Thus, it is appropriate to conclude that under the current state of scientific knowledge, there is no profile of a 'typical' child molester." (*Id*. at p. 142.)

[*24]** In the case at bar Officer Miller was prepared to give expert testimony to the foregoing effect. Such testimony would therefore "assist the trier of fact" (Evid. Code, § 801, subd. (a)) by giving the jurors information they needed to objectively evaluate the People's evidence. Of course, to be admissible the testimony also had to be relevant. (*Id*., § 350.) But "the trial court is vested with wide discretion in determining relevance" under the Evidence Code. (*People* v. *Green* (1980) 27 Cal.3d 1, 19 [164 Cal.Rptr. 1, 609 P.2d 468].) Defendant fails to show an abuse of such discretion. Although Officer Miller's testimony was admitted during the prosecution's case-in-chief, the jurors already knew much about defendant at that point, and what they **[*1304]** knew did not fit the stereotype. They knew defendant was not a stranger to the victim: the first witness in the trial, Stephanie's mother, had testified that she dated defendant for several months before the crime took place, and that Stephanie knew him through that relationship. From the same witness's testimony that she had had sexual intercourse with defendant, [***25] the jurors could reasonably infer he was not a homosexual. And the jurors could obviously see for themselves that he was not an old man. In these circumstances the court did not abuse its discretion in finding that the proposed expert testimony of Officer Miller was relevant at the time it was offered. (Cf. *People* v. *Sanchez*, *supra*, 208 Cal.App.3d 721, 735-736 [evidence on child sexual abuse accommodation syndrome admissible in People's **[**391]** case-in-chief because issue had been raised by earlier testimony of prosecution witnesses].)

II

Defendant next contends the trial court abused its discretion in limiting the scope of his character evidence. As noted above, the court allowed defense character witnesses Daybell and Tarkanian to testify that defendant had an excellent reputation for truth and veracity in the relevant community. The court disallowed additional character evidence on a different topic -- **[***26]** defendant's sexuality -- offered by three witnesses whom defendant did

not identify by name. Two of these witnesses were women who had dated defendant for approximately six months, had been sexually intimate with him during that period, and thereafter had continued their friendship with him; each also had a daughter of her own. The third witness was a close male friend from defendant's college days who had often double-dated with him and had met many of the women defendant dated.

The record of what these witnesses would actually have said is unsatisfactory. Rather than putting the witnesses on the stand and asking them specific questions, defense counsel presented their proposed testimony by means of a written offer of proof. Although the procedure is proper, in this case much of the wording of counsel's offer of proof was ambiguous or conclusory, and counsel did not further explain it at the hearing. The trial court interpreted the offer in order to rule on it; the court's interpretation was reasonable, and counsel apparently accepted it. We shall therefore be guided by that interpretation in the discussion that follows.

The proposed testimony of defendant's additional character **[***27]** witnesses may conveniently be grouped into two categories.

[*1305] A

First, all three witnesses proposed to testify that in their opinion defendant is not a "sexual deviant." The male character witness would have based this opinion on his observations of defendant's assertedly normal sexual conduct with adult women. The women character witnesses would have based their opinions to this effect on two sources: (1) their assertedly normal personal sexual experiences with defendant, and (2) their observations of defendant's conduct with their daughters during the period of their relationship. The trial court disallowed this testimony primarily on the ground that the question whether a person is a sexual deviant can only be answered by expert testimony. Although we need not go so far, on a related ground we will agree with the ruling in part and disagree with it in part.

Evidence Code section 1101, subdivision (a), declares the general rule that "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct [***28] on a specified occasion." Section 1102 of the same code (hereafter section 1102) provides the exception that defendant here sought to invoke: "In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is: [para.] (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character." This exception allows a criminal defendant to introduce evidence, either by opinion or reputation, of his character or a trait of his character that is "relevant to the charge made against him." (Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (1966 ed.) § 1102, p. 12.) Such evidence is relevant if it is inconsistent with the offense charged -- e.g., honesty, when the charge is theft -- and hence may support an inference that the defendant is unlikely to have committed the offense. In appropriate cases, such circumstantial evidence "may be enough to raise a reasonable doubt in the mind of the trier of fact concerning the defendant's guilt." (*Id*. at p. 13; see also *Michelson* v. *United States* (1948) 335 U.S. 469, 476 [93 L.Ed. 168, 174, 69 S.Ct. 213].) **[***29]**

[392]** We recently held that a defendant charged with child molesting may introduce such character evidence by means of opinion testimony of an *expert* witness. (*People* v. *Stoll* (1989) 49 Cal.3d 1136 [265 Cal.Rptr. 111, 783 P.2d 698] (hereafter *Stoll*).) Following our decision in *People* v. *Jones* (1954) 42 Cal.2d 219, 222-225 [266 P.2d 38], we held in *Stoll* that in a child molestation case (1) the fact that the defendant is not a sexual deviant is a relevant character trait within the meaning of section 1102, and (2) the statute allows a defendant to prove that trait by the opinion testimony of an **[*1306]** expert witness. (49 Cal.3d at pp. 1152-1155.) It is true that nothing we said in *Stoll*limited such opinion testimony to that of an expert; nevertheless, our analysis in *Stoll* points the way for us today.

After concluding that lack of sexual deviance is a character trait subject to proof by opinion testimony, we turned in *Stoll* to the specific rules for admitting such testimony. The **[***30]** Evidence Code sets forth those rules in its sections 800 (lay opinion testimony) and 801 (expert opinion testimony). In *Stoll* (49 Cal.3d at pp. 1153-1154) we read the latter provision into section 1102, and inquired whether expert opinion testimony concerning a defendant's lack of sexual deviance relates to a subject beyond the ordinary experience of the triers of fact (Evid. Code, § 801, subd. (a)) and is based on sources on which experts may reasonably rely (*id*., subd. (b)).

Following *Stoll*, we now read Evidence Code section 800 into section 1102 and inquire whether lay opinion testimony concerning a defendant's lack of sexual deviance satisfies the requirements of the former. Evidence Code section 800 limits lay opinion testimony to an opinion that is "(a) Rationally based on the perception of the witness; and (b) Helpful to a clear understanding of his testimony." (See fn. 11.) Our focus is on the requirement of subdivision (a) of this statute. **[***32]** The meaning of subdivision (a) is clear: "A witness who is not testifying as an expert may testify in the form of an opinion *only if the opinion is based on* **[***31]** *his own perception*." (Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (1966 ed.) § 800, p. 376, italics added.) As the drafters acknowledge (*ibid*.), this was also the common law rule. (See, e.g., *Stuart* v. *Dotts* (1949) 89 Cal.App.2d 683, 686-687 [201 P.2d 820]; *Manney* v. *Housing Authority* (1947) 79 Cal.App.2d 453, 459 [180 P.2d 69].) (See fn. 12.) In this context, moreover, the drafters define "perception" as the process of acquiring knowledge "through one's senses" (Evid. Code, § 170), i.e., by personal observation.

[*1307] The cases allowing lay opinion testimony uniformly note that it was based on the witness's personal observation. Thus in *Jordan* v.*Great Western Motorways* (1931) 213 Cal. 606, 612 [2 P.2d 786], this court reasoned: "Over objection of counsel, plaintiff was allowed to testify as to the speed of the bus and [her driver's] **[***33]** automobile. We find no error in the trial court's ruling. A person *having the opportunity* **[**393]** *to observe* the speed of a moving vehicle is qualified to give his opinion as to such speed, and his previous experience or lack of experience goes to the weight rather than to the competency of the testimony. [Citations.] [para.] Nor do we find error in the ruling permitting a lay witness to testify regarding the condition of plaintiff's health. Lay witnesses *having the requisite opportunity for observation*may testify as to the health of another." (Italics added.)

In *Kline* v. *Santa Barbara etc. Ry. Co*. (1907) 150 Cal. 741, 750 [90 P. 125], this court held admissible lay opinion testimony as to the extent of an accident victim's pain and suffering: "It does not require an expert to tell whether a person suffers. The appearance of a person who suffers severely is sufficient to manifest his condition to any one of ordinary intelligence and experience. These witnesses had all *observed her, had heard her groans and complaints*, and were competent to give an opinion as to her suffering." (Italics added.)

In *People* v. *Manoogian* (1904) 141 Cal. 592 [75 P. 177], **[***34]** this court held admissible lay opinion testimony as to whether the defendant was acting rationally or irrationally. The court reasoned that the questions asked of the witnesses on this topic "did not call for the opinion of the witnesses as to the mental sanity of the defendant, but for *the result of their observations* at the various times they came in contact with him, as to his appearance in the respects suggested." (*Id*. at p. 595, italics added.) Summing up, the court reiterated that such questions "simply call for the result of *the observation of the witness* as to the manner or conduct of such person at a certain time." (*Id*. at pp. 597-598, italics added.)

In *Healy* v. *Visalia etc. R.R. Co*. (1894) 101 Cal. 585 [36 P. 125], a woman was thrown from a railroad car when it derailed and a fellow passenger was asked for his lay opinion as to whether an average person could have withstood the force of the accident. This court held the question admissible, reasoning that it "did not call for an opinion from [the witness] depending upon [***35] facts which he had subsequently learned, but he was asked to describe the effect of the concussion or jar caused by the car leaving the track, as one of the facts out of which the injury had arisen, and which *he* ***[*1308]*** *had personally observed and felt*. [para.] . . . Such testimony is competent upon the same principle that permits evidence showing the strength or force of a blow, the distance at which a sound can be heard, or the direction from which it comes, the speed of a horse, the degree of cold or heat, or of light or darkness. In any such instance a witness *who had a personal experience or knowledge of the sensation* is competent to testify, although his answer is only his opinion of the matter." (*Id*. at pp. 589-590, italics added.)

In *People* v. *Ravey* (1954) 122 Cal App 2 d 699, 703 [265 P. 2 d 154], the court held admissible lay opinion testimony as to whether the defendant was intoxicated, reasoning that "the question of whether a person was intoxicated is not necessarily a matter of expert testimony, as any layman can give his opinion *based upon his own observation* **[***36]** ." (Italics added.) And in *People* v. *Williams* (1988) 44 Cal.3d 883, 914 [245 Cal.Rptr. 336, 751 P.2d 395], the defendant complained that a detective and a jailer in whose custody he had spent time gave nonexpert testimony "that in their opinion defendant was not 'strung out' [i.e., intoxicated by drugs] when they observed him." In a well-considered dictum we found no reason to distinguish lay opinion on drug-induced intoxication from the settled rule allowing such opinion on alcohol-induced intoxication. (*Id*. at pp. 914-915.)

By contrast, when a lay witness offers an opinion that goes beyond the facts the witness personally observed, it is held inadmissible. Thus in *Kinsey* v. *Pacific Mutual Life Ins. Co*. (1918) 178 Cal. 153 [172 P. 1098], the plaintiff's decedent died while bathing in the surf, and in plaintiff's action on decedent's life insurance policy the issue was whether the cause of death was accidental drowning or heart failure arising from a preexisting condition. Defendant **[**394]** insurance company **[***37]** called as witnesses the lifeguards who assisted in rescuing the decedent's body from the water and in attempting to resuscitate him. The defendant asked these witnesses

questions eliciting "their opinion *based upon their observation* of deceased as to whether the death of deceased was due to drowning." (*Id*. at p. 156, italics added.) The trial court excluded the testimony, and this court found no abuse of discretion in the ruling: "The evidence, while perhaps showing that these witnesses were skilled in the methods of rescuing drowning persons from the water, fails to show that they had any knowledge, gained by experience or otherwise, upon which, *from their observation of the appearance* of the body of deceased, they were as a matter of law entitled to testify to their opinions as to the cause of the death of deceased." (*Ibid*., italics added.)

In the case at bar we apply this rule to the proposed testimony of defendant's three additional character witnesses that in their opinion defendant is not a "sexual deviant," i.e., in the words of defendant's offer of proof, "a person of lustful or lewd conduct with children." The proposed **[***38]** **[*1309]** opinion testimony of the male character witness to this effect was not based on personal observation of defendant's "conduct with children"; under the foregoing cases, therefore, the trial court did not abuse its discretion in disallowing his testimony. To the extent that the same opinion of the women character witnesses was based on their private sexual experiences with defendant rather than on their observation of his behavior with their daughters, the trial court could disallow it for the same reason.

The opinion of the women character witnesses, however, was also based on their observation of defendant's conduct with **[***39]** their daughters. According to the offer of proof, the women proposed to testify that in the course of their relationship with defendant they observed his conduct with their daughters and saw no unusual behavior either by defendant or by their daughters, and that it is their opinion, based on those personal perceptions, that defendant is not a person given to lewd conduct with children. Because the latter conclusion of the witnesses was based on their direct observation of defendant's behavior with their daughters, it was both a proper subject of lay opinion testimony and relevant to the charge of child molestation. Indeed, the People do not contend otherwise. Rather, the People claim the testimony was inadmissible on a wholly different ground, i.e., that its admission would have violated the rule against proving a character trait of the accused by means of specific acts. (*People* v. *Cordray* (1962) 209 Cal.App.2d 425, 439-440 [26 Cal.Rptr. 42]; see Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (1966 ed.) § 1102, pp. 13-14.) The trial court so ruled and the Court of Appeal agreed, but we do not.

A fair reading of the offer **[***40]** of proof shows that the women witnesses would not have limited their testimony to specific instances in which defendant had the opportunity to, but did not, molest their daughters. Instead, the witnesses proposed to testify that they observed defendant's behavior with their children throughout the course of their relationship with him, and their opinion that he is not a person given to lewd conduct with children arose from that experience as a whole. Thus viewed, the proffered testimony was intended to prove the relevant character trait not by specific acts of "nonmolestation," but by the witnesses' opinion of that trait based on their long-term observation of defendant's course of consistently normal behavior **[*1310]** **[**395]** with their children. (See fn. 15.) The trial court should have allowed such testimony.

[*41]** B

The offer of proof also included proposed testimony by the women character witnesses to the effect that (1) defendant has a reputation in the community for "normalcy in his sexual tastes" and (2) in their opinion defendant is a person of "high moral character." As to these two items, however, the record is even more unsatisfactory than the record of the testimony thus far discussed. The quoted phrases are patently ambiguous, each having several plausible meanings. Yet defense counsel did not explain either of these items at the hearing. Perhaps because of their obvious vagueness, the trial court did not discuss them either; and although we must infer that the court impliedly disallowed both items, there is no record of the reasons for that ruling. Our review of their admissibility will therefore be brief.

We begin with the proposed testimony that defendant has a reputation for "normalcy in his sexual tastes." In the present context that quaintly genteel phrase can reasonably be taken to mean either that defendant has a reputation for being sexually attracted to adult women or that he does *not* have a reputation for being sexually attracted to young girls. We need not reach **[***42]** the question of its relevance under the former construction, however, because under the latter construction the proposed testimony is relevant to a charge of child molestation. Evidence that a defendant does *not* have a bad reputation for a relevant character trait is admissible as tending to show that he has a good reputation for that trait. (*People* v. *Hoffman* (1926) 199 Cal. 155, 161 [248 P. 504]; *People* v. *Castillo* (1935) 5 Cal.App.2d 194, 198 [42 P.2d 682], and cases cited; see also *Michelson* v. *United States, supra*, 335 U.S. 469, 478 [93 L.Ed. 168, 175].) And under either construction the testimony is not objectionable on the ground discussed in a preceding **[*1311]** portion of this opinion, because it is evidence of reputation rather than lay opinion. "Reputation is not what a character witness may *know* about defendant. Reputation is the estimation in which an individual is held; in other words, the character imputed to an individual rather than what is actually known of him either by the witness or others." **[***43]** (*People* v. *McDaniel* (1943) 59 Cal.App.2d 672, 676 [140 P.2d 88].) The rule that lay opinion testimony must be based on the witness's personal observation thus does not apply to reputation testimony, and indeed the Evidence Code imposes no such requirement. The trial court should therefore have allowed this testimony.

We turn to the proffered opinion of the witnesses that defendant is a person of "high moral character." In the context of the offer of proof we construe the word "moral" in this phrase to refer to *sexual* morality. Thus construed, "moral character" is a trait that is relevant to a sex offense charge, including the present prosecution for child molesting. We are cited to no California decision that squarely so holds, but such evidence has routinely been admitted in trials for sex offenses without drawing adverse comment by reviewing courts. (See, e.g., *People* v. *Wrigley* (1968) 69 Cal.2d 149, 153-154 [70 Cal.Rptr. 116, 443 P.2d 580]; **[**396]** *People* v. *White* (1954) 43 Cal.2d 740, 744 [278 P.2d 9]; *People* v. *Jones, supra*, 42 Cal.2d 219, 222; [***44] *People* v. *Hurd* (1970) 5 Cal.App.3d 865, 880 [85 Cal.Rptr. 718]; *People* v.*Ray* (1960) 187 Cal.App.2d 182, 187 [9 Cal.Rptr. 678]; *People* v. *Rucker* (1960) 186 Cal.App.2d 342, 346 [9 Cal.Rptr. 1]; *People* v. *Spigno*(1957) 156 Cal.App.2d 279, 283 [319 P.2d 458].) Again, therefore, the trial court should have allowed this testimony.

III

The court's error in excluding the foregoing three additional items of character testimony is governed by the standard of prejudice prescribed both by Constitution (art. VI, § 13) and by statute (Evid. Code, § 354), and explained in *People* v. *Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243]. (See, e.g., *Stoll, supra*, 49 Cal.3d 1136, 1161-1163 [applying *Watson* test]; *People* v. *Bledsoe, supra*, 36 Cal.3d 236, 251-252 [same].)

[*45]** **[*1312]** Although each case turns on its own facts, we may profitably compare the question before us with our prejudice analysis in *Stoll, supra*, 49 Cal.3d 1136, in which we held reversible under the *Watson* test the exclusion of similar character testimony in a child molestation case. We stressed in *Stoll* certain facts that might well have undermined the jury's confidence in the stories of the child witnesses: in their testimony four of the children contradicted key parts of each other's account of the event, four admitted they had lied at the preliminary hearing, two admitted they had lied at trial, and prior statements by five of the children contradicted parts of their testimony. (*Id*. at p. 1162.) In the case before us there were no such contradictions or admitted untruths in Stephanie's testimony, nor did the defense suggest any persuasive motive for Stephanie to lie repeatedly, over a period of more than two years, to her mother, to the police, and to the jury.

We may also compare the case at bar with *People* v. *Jones, supra*, 42 Cal.2d 219, **[***46]** a pre-*Watson* case in which we likewise held reversible the exclusion of such character testimony. In *Jones* we stressed that the testimony of the child witness was partially impeached and that there was evidence she had a bad reputation for truth and veracity. (*Id*. at p. 226.) Here Stephanie's testimony was not impeached in any way, and her reputation for truth and veracity was untarnished. Nor is this a case such as *People* v. *Castillo, supra*, 5 Cal.App.2d 194, 198, in which the reviewing court described the victim's story as "weirdly improbable." There is nothing inherently implausible about Stephanie's testimony.

In addition, it is not unlikely that the jury would have given less weight to the lay testimony excluded here than to the expert opinion excluded in *Stoll* and *Jones*; while that difference does not affect its admissibility, it may affect its weight for purposes of prejudice analysis. Indeed, even while providing for its admissibility the drafters of the Evidence Code concede that reputation testimony, the traditional means of proving character, is "the least **[***47]** reliable" form of such evidence and is "little more than accumulated hearsay." (Cal. Law Revision **[**397]** Com. com., 29B West's Ann. Evid. Code (1966 ed.) § 1102, p. 13.)

Finally, although defendant seeks to characterize the evidence in this case as evenly balanced (see *People* v. *Castillo, supra*, 5 Cal.App.2d 194, 199), a review of the transcript shows it was not merely "her word against his": to have acquitted defendant, the jury would have had to believe not only that Stephanie was lying, but that Anita was lying as well. For example, Anita's testimony describing her confrontation with defendant after Stephanie **[*1313]** reported the molestation to her did not depend on the truth of that report -- on that topic Anita was not simply repeating the report -- yet it differed dramatically from defendant's version of the confrontation; to that extent at least, Anita and defendant cannot both have been telling the truth. In these circumstances, the speed with which the jury reached its verdict -- after only 45 minutes of deliberation -- implies that to the triers of fact the case may not have been as close as defendant now speculates. **[***48]**

For all these reasons, after a full review of the record we cannot conclude that it is reasonably probable that a verdict more favorable to defendant would have been reached in the absence of this error. (*People* v. *Watson*, *supra*, 46 Cal.2d 818, 836.)

The judgment of the Court of Appeal is affirmed.

Footnotes

1. "Q. [By defense counsel.] What was he doing? You said he was touching that portion of your pants? A. Yes. He was -- he was rubbing on -- around the edges of the cuffs.
"Q. So he would be touching along that cuff area which is shown in that photograph? A. Yes.

   "Q. And you're saying that was -- A. No. He would be sticking his hands up around there.

   "Q. Underneath? A. Yeah.

   "Q. And would he be touching the cuff or would he be touching you? A. Me and the cuff.

   "Q. And so it would be somewhat like this. How? A. Yeah. Well, like this.

   "Q. Touching inside of the cuff or touching your leg? A. Touching the cuff like this and then my leg.

   "Q. And moving it around inside, you're saying? A. Yes.

   "Q. And --

   "Ms. Blake [the prosecutor]: For the record the young lady raised her hand and moved it back and forth from her right to her left side.

   "The Court: All right."

   At the time of trial Stephanie was 11 years old and in sixth grade.

2. At this point it was apparently late in the afternoon; Anita subsequently testified that the children had not eaten anything since breakfast, and they were hungry.

3. In its entirety, defense counsel's objection was as follows: "My objection to this kind of testimony is this. We have a rule of evidence indicating that when you have hearsay evidence coming in and the question is is the probative value outweighing the prejudicial effect of that kind of testimony. In examining this kind of testimony we have really not scientific evidence but studies being applied. Meaning on one case this happened, on another case this happened, this case happened. And so the responses are like this. All we're doing is Nancy reacted this way, Jane reacted this way. Twelve people can think about that any way. All they're doing there is through some form of a witness which has some form of scientific credence reinforcing the testimony that only human beings can be child molesters. That's totally unreliable. And that's one of the criterias which you determine whether you have this kind of testimony and I am saying

this is unreliable testimony, it is not any scientific studies involved. To be able to substantiate taking expert testimony in this field."

4. Accord, *People* v. *Harlan* (1990) 222 Cal.App.3d 439, 449-450 [271 Cal.Rptr. 653]; *People* v. *Stark* (1989) 213 Cal.App.3d 107, 115-117 [261 Cal.Rptr. 479]; *People* v. *Bergschneider* (1989) 211 Cal.App.3d 144, 158-160 [259 Cal.Rptr. 219]; *People* v. *Sanchez*(1989) 208 Cal.App.3d 721, 733-737 [256 Cal.Rptr. 446]; *People* v. *Bothuel* (1988) 205 Cal.App.3d 581, 586-589 [252 Cal.Rptr. 596]; and *People* v. *Luna* (1988) 204 Cal.App.3d 726, 734-737 [250 Cal.Rptr. 878].

5. The following colloquy took place on cross-examination:

"Q. [By defense counsel.] Now, you've testified in answer to [the prosecutor's] question this relationship broke off because you knew what Stephanie had said is true, isn't that what you said? A. Yes.

"Q. Knowing this to be true as you indicate you never did take steps to go to the police, did you? A. No, I didn't.

"Q. You understood that that kind of action was illegal and a criminal act, did you not? A. I don't think I fully thought of all that was involved.

"Q. Did you understand that it was a criminal act?

"A. Yes.

"Q. You didn't go to the police did you? A. No.

"Q. It was only when confronted by an outside agency that you began to carry out steps with regard to this matter; isn't that correct? A. Yes.

"Q. And that was roughly a year and a half later; isn't that correct? A. A year.

"Q. *Are you indicating to us this is the manner in how you reacted when you believed what Stephanie had said?* A. *Yes*." (Italics added.)

6. The evidence is of assistance to the jury even though the mental health profession has not -- or not yet -- formally labeled it as a "syndrome." (See *People* v. *Bowker, supra*, 203 Cal.App.3d 385, 392, fn. 8. ["An expert has little need to refer to the syndrome in order to testify that a particular type of behavior is not inconsistent with a child having been abused."].)

7. The relevance of the evidence is not undermined by the fact that some of the reasons given by Officer Miller for a parent's failure to report seem not to apply in the case at bar, e.g., a fear of breaking up a marriage or harming another family member. Other reasons he gave may well apply here, e.g., a sense of shame or failure as a parent, or a psychological refusal to accept the fact of the molestation. The latter, indeed, is strongly suggested by Anita's testimony on the point.

8. "In the mind of the public a child molester is many things: a desperate, pitiful individual, such as Peter Lorre portrayed in the 1931 film classic, *M*; a dangerous, anonymous psychopath who snatches unsuspecting children from playgrounds and grabs headlines in newspapers; and the lecherous, 'dirty old man' popularized in *Hustler* magazine's 'Chester the Molester' cartoons." (de Young, The Sexual Victimization of Children (1982) p. 114.)

9. Thus Groth reports that 80 percent of the child molesters in his study committed their first offense by the age of 30, and all had done so before reaching 40; the majority knew their victims at least casually; the majority did not abuse alcohol; there is "no significant difference in intelligence between child offenders and the general population"; and the offenders who also had adult sexual relations were heterosexual. (Groth, *supra*, at p. 4.)

10. At the time of trial defendant was 36 years old.

11. The requirement of subdivision (b) of section 800 is not at issue here. The purpose of that subdivision is to determine when a lay witness may supplement or illustrate his factual testimony by drawing therefrom his own conclusion or inference, i.e., his opinion: under the Evidence Code that opinion need only be "helpful" -- rather than necessary -- to understanding the witness's testimony. (See Tent. Recommendation and Study Relating to the Uniform Rules of Evidence, art. VII, Expert and Other Opinion Testimony (Mar. 1964) 6 Cal. Law Revision Com. Rep. (1964) pp. 931-935.) But under section 1102 no such factual testimony is permitted in any event: the defendant's character may be proved only by "opinion" or "reputation." (Compare Evid. Code, § 1103 [evidence of "specific instances of conduct" is admissible to show character of *victim* in similar circumstances].)

12. The contrast, of course, is with opinion testimony by an expert, which may be based on information furnished to the expert by others, provided only that it is the kind of information on which experts may reasonably rely. (Evid. Code, § 801, subd. (b).) As succinctly put in *Manney* v. *Housing Authority*, *supra*, 79 Cal.App.2d 453, 459-460, "For a nonexpert to be competent to give an opinion . . . he must be testifying about facts that he has personally observed; but the expert . . . may give his opinion, although he did not personally observe the facts, basing his opinion upon the facts testified to by other witnesses [and] put to him in the form of hypothetical questions."

13. If, in a child molestation case, a lay character witness with opportunity to observe were to testify *only* that in his or her opinion the defendant's sexual behavior with adult women was normal, a different question might be presented. We do not reach that question in the case at bar, because like the trial court we do not construe the offer of proof to present such testimony.

14. The proffered testimony is thus distinguishable from the hypothetical suggested by the trial court, viz., "it's like saying, well, this defendant is charged with robbing a bank and I have a witness who saw him walk past a bank a week before without robbing it."

15. The trial court also excluded this testimony under Evidence Code section 352, ruling that its probative value would be outweighed by the time it would take to introduce it and the confusion it would cause.

Although the trial court is vested with wide discretion in making that determination, we agree with defendant that its discretion was abused in the particular circumstances of the case at bar. Here the trial in its entirety consumed very little time: the People's complete case-in-chief took less than four hours, and defendant put on his entire defense in less than ninety minutes. The character testimony of witnesses Daybell and Tarkanian was very brief, and there is no reason why this additional character testimony could not have been likewise; nor was extensive cross-examination likely, because defendant had no criminal record. Second, this character testimony was limited to the main issue in the case, i.e., whether defendant committed the lewd act that Stephanie described; it would not have raised any new question, such as, for example, the possibility that a third person committed the act. Its admission thus would not have created a "substantial danger . . . of confusing the issues" within the meaning of Evidence Code section 352.

16. Defendant contends the error is reversible per se because it assertedly deprived him of certain fundamental rights under the California Constitution and because its effect is impossible to assess. The cases on which he relies for this rule, however, reveal its inapplicability to the error here committed. In *People* v. *Joseph* (1983) 34 Cal.3d 936, 945-948 [196 Cal.Rptr. 339, 671 P.2d 843], we held reversible per se the trial court's erroneous denial of a competent defendant's motion to represent himself in a capital case. In *People* v. *Bigelow* (1984) 37 Cal.3d 731, 744-746 [209 Cal.Rptr. 328, 691 P.2d 994, 64 A.L.R.4th 723], also a capital case, we held reversible per se the trial court's erroneous failure to exercise its discretion to appoint advisory counsel to assist a defendant acting in propria persona who had shown himself incompetent to serve as his own attorney. The present evidentiary error in excluding certain additional items of character testimony does not remotely approach the gravity of such denials of the fundamental right to counsel, nor is its effect impossible to assess.