

9/28/77

Memorandum 77-69

Subject: Unconstitutional Statutes

Attached to this memorandum is a draft of the report on statutes repealed by implication or held unconstitutional which is to be included in the Annual Report. Carolyn Carter, a third-year law student at Stanford, did the basic work on this draft.

Respectfully submitted,

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STAFF DRAFT

REPORT ON STATUTES REPEALED BY IMPLICATION  
OR HELD UNCONSTITUTIONAL

Section 10331 of the Government Code provides:

The commission shall recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the State or the Supreme Court of the United States.

Pursuant to this directive, the Commission has made a study of the decisions of the Supreme Court of the United States and of the Supreme Court of California handed down since the Commission's last Annual Report was prepared.<sup>1</sup> It has the following to report:

(1) No decision of the Supreme Court of the United States holding a statute of the state repealed by implication has been found.<sup>2</sup>

(2) Two decisions of the Supreme Court of California held statutes of this state repealed by implication.

In Governing Board of Rialto Unified School District v. Mann,<sup>3</sup> the court held that the enactment of Health and Safety Code Section 11361.7(b), which prohibits any public entity from revoking any rights of an individual on the basis of a pre-1976 marijuana possession offense where certain conditions are met, "worked a direct repeal" of Education Code Section

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1. This study has been carried through 97 S. Ct. 2995 (Adv. Sh. No. 18A, July 15, 1977) and 19 Cal.3d 834 (Adv. Sh. No. 25, Sept. 15, 1977).
  2. One Supreme Court decision declared a California Statute preempted, in some applications, by federal law.

In Jones v. Rath Packing Co., 97 S. Ct. 1305 (1977), the court examined the applicability of Business and Professions Code Section 12211 and implementing regulations, which deal with the validity of net weight labeling on packaging, to commodities subject to federal inspection and net weight labeling regulation (Wholesome Meat Act provisions in the case of meat, and Federal Food, Drug and Cosmetic Act provisions and Fair Packaging and Labeling Act provisions in the case of flour). The court held that, in the case of meat, the applicable federal statutes preempted the California statute and regulations and that, in the case of flour, the enforcement of the California statute and regulations would prevent accomplishment of the purpose of the federal law.

3. 18 Cal.3d 819, 558 P.2d 1, 135 Cal. Rptr. 526 (1977).

13403(h),<sup>4</sup> which allows dismissal of teachers convicted of felonies or of any crimes involving moral turpitude, to the extent that Section 13403(h) permitted the dismissal of teachers convicted of marijuana possession.

In In re Thierry S.,<sup>5</sup> the court held that Welfare and Institutions Code Section 625(a), which permits warrantless misdemeanor arrests of juveniles based on reasonable cause, was impliedly repealed by Welfare and Institutions Code Section 625.1 which permits such arrests only when the offense takes place in the presence of the arresting officer.

(3) No decision of the Supreme Court of the United States holding a statute of this state unconstitutional has been found.

(4) Five decisions of the Supreme Court of California held statutes of this state unconstitutional.<sup>6</sup>

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4. Section 13403(h) was superseded by Education Code Sections 44932(h) (applicable to elementary and secondary school teachers) and 87732(h) (applicable to community college teachers) which contain identical language. See 1976 Cal. Stats. Ch. 1010 (operative April 30, 1977).
  5. 19 Cal.3d 727, 566 P.2d 610, 139 Cal. Rptr. 708 (1977).
  6. Several other California Supreme Court decisions have constitutional impact on state statutes without a clear holding of unconstitutionality.

Three decisions imposed constitutional qualifications on the application of state statutes without invalidating any statutory language:

In In re Dewing, 19 Cal.3d 54, 560 P.2d 375, 136 Cal. Rptr. 708 (1977), the court held that 1976 Cal. Stats., Ch. 1070, § 7, amending Penal Code Section 17(b)(2), operated as an ex post facto law and therefore violated the United States Constitution (Art. I, § 9, Cl. 3) and the California Constitution (Art. I, § 9) when it was applied to persons already in custody of the Youth Authority. Prior to the amendment of Section 17, an offense which could be either a misdemeanor or a felony was automatically considered a misdemeanor in setting the time for detention in the Youth Authority. The new statute allows the misdemeanor sentence to apply only if the offense in the specific instance was designated a misdemeanor at the time the defendant was bound over to the Youth Authority. Applying that statute to persons already in Youth Authority detention would have the effect of adding two years to their sentences; therefore, the new law could not apply to those persons.

In In re Roger S., 19 Cal.3d 655, 556 P.2d 997, 139 Cal. Rptr. 861 (1977), the court held that procedures established by the Department of Health under Welfare and Institutions Code Section

In Hardie v. Eu,<sup>7</sup> the court held unconstitutional the limitations on amounts that may be spent to further circulation of state initiative petitions provided in Government Code Sections 85200-85202, finding that these limitations violate rights of freedom of speech and freedom of association guaranteed by the First Amendment to the United States Constitution.

In Rockwell v. Superior Court,<sup>8</sup> the court held that the provisions in Penal Code Sections 190-190.3 imposing a mandatory death penalty for certain categories of first-degree murder are unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution

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6000(b) for the admission of minors 14 years of age or older to state hospitals did not properly recognize the right under the due process clauses of the California and United States Constitutions to a precommitment hearing.

In Newland v. Board of Governors, 19 Cal.3d 705, 556 P.2d 254, 139 Cal. Rptr. 620 (1977), the court held that the requirement of Education Code Section 13220.16(b) that an applicant for a teaching credential who is a convicted sex offender obtain a certificate of rehabilitation cannot constitutionally be applied to deny a misdemeanant a credential. Since Penal Code Section 4852.01 provides that felons but not misdemeanants may apply for certificates of rehabilitation, the requirement of a certificate of rehabilitation was held to deny misdemeanants the equal protection of the laws.

One decision declared state tax regulations unconstitutional. In Estate of Fasken, 19 Cal.3d 412, 563 P.2d 832, 138 Cal. Rptr. 276 (1977), the court analyzed a portion of the Administrative Code (Tit. 18, Ch. 2.5, Subch. 1, Reg. 13441-13442), which prescribes the manner of calculating additional state inheritance tax to pick up any excess federal estate tax credit under Revenue and Taxation Code Sections 13441 and 13442. The court found the regulations to be unconstitutional, infringing jurisdictional limitations under federal due process concepts, and the court prescribed an alternative way of calculating the "pick-up" tax.

One decision identified a court order as unconstitutional. In Allen v. Superior Court, 18 Cal.3d 520, 557 P.2d 65, 134 Cal. Rptr. 774 (1976), the court held that a trial court order compelling a criminal defendant to release the names of his witnesses violated the right against self-incrimination under the California and United States Constitutions.

7. 18 Cal.3d 371, 556 P.2d 301, 131 Cal. Rptr. 201 (1976).

8. 18 Cal.3d 420, 556 P.2d 1101, 134 Cal. Rptr. 650 (1976).

because they do not provide for consideration of mitigating circumstances nor do they specify detailed guidelines as to the relevance of such evidence.

In Serrano v. Priest,<sup>9</sup> the court held that the new state school financing scheme<sup>10</sup> violates the equal protection provisions of the California Constitution<sup>11</sup> because, under this scheme, the adequacy of educational opportunity depends upon the suspect classification of district wealth.

In Arp v. Worker's Compensation Appeals Board,<sup>12</sup> the court held that Labor Code Section 3501(a), which allows widows, but not widowers, a conclusive presumption of dependency in connection with spousal death benefits, violates the equal protection provisions of the United States and California Constitutions. The court did not extent the presumption of dependency to widowers but held that all applicants would have to establish proof of dependency under Labor Code Section 3502 until the Legislature provides otherwise.

In People v. Thomas,<sup>13</sup> the court held that Welfare and Institutions Code Section 3108, which provides for a three-fourths jury decision in involuntary commitment proceedings, violates the due process and unanimous verdict provisions of the California Constitution. The court also held that due process requires the standard of proof in all involuntary commitment proceedings under Welfare and Institutions Code Sections 3050, 3051, 3106.5, and 3108 to be proof beyond a reasonable doubt.

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9. 18 Cal.3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976).

10. See 1972 Cal. Stats., Ch. 1406; 1973 Cal. Stats., Ch. 208. These measures were enacted in response to an earlier phase of this case. See Serrano v. Priest, 5 Cal.3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

11. Cal. Const., Art. I, § 7, Art. IV, § 16. The new school financing system was held not to violate the equal protection clause of the United States Constitution.

12. 19 Cal.3d 395, 563 P.2d 849, 138 Cal. Rptr. 293 (1977).

13. 19 Cal.3d 630, 566 P.2d 228, 139 Cal. Rptr. 594 (1977).