

9/15/59

First Supplement to Memorandum 75-59

Subject: Report on Unconstitutional Statutes

Attached to this supplement as Exhibit I (green pages) is a draft of the Commission's Report on Unconstitutional Statutes which will be printed in the Annual Report. In addition to the seven decisions of the California Supreme Court holding statutes of this state unconstitutional which are summarized in Exhibit I, an eighth case, Schwalbe v. Jones, 14 Cal.3d 1, 534 P.2d 73, 120 Cal. Rptr. 585 (1975), held the California automobile guest statute (Veh. Code § 17158) as amended in 1973 to be unconstitutional. However, a rehearing has been granted in that case. The former opinion is therefore superseded. 6 B. Witkin, California Procedure, Appeal § 603, at 4529 (2d ed. 1971).

Respectfully submitted,

Robert J. Murphy III  
Graduate Legal Assistant

EXHIBIT I

ANNUAL REPORT 1975

REPORT ON STATUTES REPEALED BY IMPLICATION  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The Commission shall recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the State or the Supreme Court of the United States.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(1) One decision of the Supreme Court of California indicating that a statute of this state has been repealed by implication has been found.<sup>2</sup>

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

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1. This study has been carried through 95 S. Ct. 2683 (Advance Sheets, No. 19, August 1, 1975) and 15 Cal.3d 39a (Advance Sheets, No. 24, September 2, 1975).
  2. Repeal by implication occurs when a statutory enactment, although making no express reference to a prior statute on the same subject, is clearly inconsistent with the prior statute and cannot be reconciled with it. See 45 Cal. Jur.2d, Statutes §§ 77-79, at 595-598 (1958).
  3. *Faretta v. California*, \_\_\_ U.S. \_\_\_, 95 S. Ct. 2525 (1975), reversed a California grand theft conviction where the trial court had refused the defendant's request to represent himself. The Court announced a constitutional right of self-representation. California by statute denies the right of self-representation in capital cases. See Penal Code §§ 686(2), 686.1, 859, 987. *Faretta*, a noncapital case, did not hold these sections unconstitutional, but that is the clear import of the decision.

*Breed v. Jones*, \_\_\_ U.S. \_\_\_, 95 S. Ct. 1779 (1975), held on federal habeas corpus that a California juvenile was once placed in jeopardy by a juvenile adjudicatory hearing and could not be later tried as an adult for the same offense. In so doing, however, the Court invalidated no statute.

(3) Seven decisions of the Supreme Court of California holding statutes of this state unconstitutional have been found.

<sup>5</sup>  
Gould v. Grubb, in holding unconstitutional a charter provision of the City of Santa Monica giving preferential ballot position to incumbents seeking reelection, noted that "the state statutes providing preferential ballot position to incumbents have been repealed" by Government Code Section 89000,<sup>6</sup> which forbids such preference.<sup>7</sup> Preferential ballot position has been afforded to incumbents by Elections Code Sections 10202 (state, district, or county elections) and 22870 (municipal elections). Since these sections are inconsistent with Government Code

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4. Three other California Supreme Court decisions imposed constitutional qualifications on the application or administration of state statutes without invalidating any statutory language: United Farm Workers of America v. Superior Court, 14 Cal.3d 902, \_\_\_ P.2d \_\_\_, \_\_\_ Cal. Rptr. \_\_\_ (1975) (held, temporary restraining order affecting substantial free speech interests may not issue ex parte under Code of Civil Procedure Section 527 unless applicant shows reasonable, good faith effort to afford opposing party or counsel notice and opportunity to be heard); In re Shapiro, 14 Cal.3d 711, 537 P.2d 888, 122 Cal. Rptr. 768 (1975) (held, due process requires prompt disposition of parole revocation proceedings where California parolee is convicted and imprisoned in another jurisdiction for crime committed while on parole); In re Rodriguez, 14 Cal.3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975) (held, although life-maximum penalty provision of Penal Code Section 288 was not unconstitutional on its face, its administration by Adult Authority under Indeterminate Sentence Law resulting in 22 years' imprisonment in this case constituted cruel and unusual punishment under California Constitution))

5. 14 Cal.3d 661, 536 P.2d 1337, 122 Cal. Rptr. 377 (1975).

6. Gould v. Grubb, 14 Cal.3d 661, 667 n.5, 536 P.2d 1337, \_\_\_ n.5, 122 Cal. Rptr. 377, 380 n.5 (1975).

7. Government Code Section 89000 provides: "Any provision of law to the contrary notwithstanding, the order of names of candidates on the ballot in every election shall be determined without regard to whether the candidate is an incumbent." This section was enacted as part of the "Political Reform Act of 1974," see Govt. Code § 81000, a statewide initiative measure (Proposition 9) approved at the June 4, 1974, primary election, effective January 7, 1975.

Section 89000, they are repealed by implication.<sup>8</sup>

Santa Barbara School District v. Superior Court,<sup>9</sup> held that Education Code Section 1009.6, which provided that "[n]o public school student shall, because of his race, creed, or color, be assigned to or be required to attend a particular school,"<sup>10</sup> was unconstitutional as applied to school districts manifesting either de jure or de facto racial segregation.

In re Lisa R.<sup>11</sup> held that Evidence Code Section 661, which creates a presumption that the child of a married woman is a legitimate child of that marriage and allows the presumption to be disputed by a class of persons which does not include the natural father, is an unconstitutional denial of the natural father's right under the due process clause to show his parentage.<sup>12</sup>

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8. Although Proposition 9 expressly repealed numerous provisions of the Elections Code, Sections 10202 and 22870 were not among them. Thus, the repeal is a repeal by implication. By Chapter \_\_\_\_ of the Statutes of 1975, Sections 10200 through 10343 are repealed and replaced by new Sections 10200 through 10234 which eliminate incumbent ballot preference for state, district, and county elections and replace it with a rotating alphabetical system or a chance drawing. [Note: This is contained in AB 1961, enactment of which appears likely.]
  9. 13 Cal.3d 315, 530 P.2d 605, 118 Cal. Rptr. 637 (1975).
  10. Education Code Section 1009.6 was adopted as an initiative measure at the general election of November 7, 1972. Santa Barbara School Dist. v. Superior Court, 13 Cal.3d 315, 322, 530 P.2d 605, 611, 118 Cal. Rptr. 637, 643 (1975). Any legislative repeal or amendment, therefore, must be resubmitted to the voters. Cal. Const., Art. 4, § 24(c).
  11. 13 Cal.3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975).
  12. By Chapter \_\_\_\_, Statutes of 1975, operative July 1, 1976, Evidence Code Section 661 is repealed and its rebuttable presumption is revised and reenacted in new Civil Code Section 7004(a)(1). The unconstitutionally restrictive limitation of Section 661 on the class of persons permitted to establish paternity is considerably broadened in new Civil Code Section 7006, and would include the person claiming to be the natural father in In re Lisa R., 13 Cal.3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975). [Note: This is contained in SB 347, enactment of which appears likely.]

In the companion cases of People v. Feagley,<sup>13</sup> and People v. Bonneville,<sup>14</sup> the California Supreme Court held unconstitutional the provisions of Welfare and Institutions Code Section 6321, authorizing involuntary commitment of a mentally disordered sex offender upon a three-fourths verdict of the jury, as being in conflict with the equal protection clauses of the United States and California Constitutions and the due process clause and the implied requirement of the California Constitution of a unanimous jury verdict for a criminal conviction.<sup>15</sup> The Feagley case further held that the portions of Welfare and Institutions Code Sections 6316 and 6326 authorizing indefinite confinement in a prison setting of a mentally disordered sex offender were unconstitutional under the cruel and unusual punishment clauses of the United States and California Constitutions.<sup>16</sup>

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13. 14 Cal.3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975).

14. 14 Cal.3d 384, 535 P.2d 404, 121 Cal. Rptr. 540 (1975).

15. In a third companion case, People v. Burnick, 14 Cal.3d 306, 535 P.2d 352, 121 Cal. Rptr. 488 (1975), the court held that in mentally disordered sex offender proceedings, Welfare and Institutions Code Section 6321 ("[t]he trial shall be had as provided by law for the trial of civil causes . . .") and Evidence Code Section 115 ("[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence") allowed for a burden of proof heavier than the civil standard to be established by judicial decision, and that the criminal standard of proof (beyond reasonable doubt) was constitutionally compelled by the due process clauses of the United States and California Constitutions. Accord, People v. Bonneville, 14 Cal.3d 384, 386, 535 P.2d 404, 405, 121 Cal. Rptr. 540, 541 (1975). By such construction, the court in Burnick was able to sustain the constitutionality of these two sections. See People v. Burnick, 14 Cal.3d at 314, 535 P.2d at 357, 121 Cal. Rptr. at 493.

16. In People v. Feagley, 14 Cal.3d 338, 347-348, 535 P.2d 373, 378-379, 121 Cal. Rptr. 509, 514-515 (1975), the court in dictum cast doubt on the constitutionality of other provisions of the Welfare and Institutions Code affording various procedural safeguards to a mentally disordered sex offender found amenable to treatment, and denying such safeguards to those found not amenable to treatment. The court observed that "the most glaring example of legislative discrimination" was in the selective denial of a jury trial, under Section 6318, to those found not amenable to treatment, and that the unconstitutionality of such discrimination is "obvious." 14 Cal.3d at 348, 535 P.2d at 378-379, 121 Cal. Rptr. at 514-515. The court noted that "[t]here are other examples" of such discrimination in Welfare and Institutions Code Sections 6317 (periodic progress reports) and 6327 (hearing to review factual justification for continued confinement). 14 Cal.3d at 348 n.7, 535 P.2d at 378-379 n.7, 121 Cal. Rptr. at 514-515 n.7.

Beaudreau v. Superior Court<sup>17</sup> held unconstitutional Government Code Sections 947 and 951, the provisions of the California Tort Claims Act which require the filing of an undertaking for costs by the plaintiff upon demand in an action against a public entity (Section 947) or a public employee or former public employee (Section 951), in that the absence of a statutory provision for a prior hearing on the merits of the plaintiff's claim or on the reasonableness of the amount of the undertaking results in a taking of the plaintiff's property without due process of law.

In re Edgar M.<sup>18</sup> held that the portion of Welfare and Institutions Code Section 558, which provides that a minor's application for a rehearing after proceedings before a juvenile court referee under the Juvenile Court Law shall be "deemed denied" if not acted upon by a judge within the statutory time period, is unconstitutional under Article VI, Section 22, of the California Constitution, which restricts juvenile court referees to the performance of subordinate judicial duties.<sup>19</sup>

Dupuy v. Superior Court<sup>20</sup> carved out an exception to the unqualified California constitutional provision prohibiting issuance of the court's process

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17. 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975).

18. 14 Cal.3d 727, 537 P.2d 406, 122 Cal. Rptr. 574 (1975).

19. The court construed Welfare and Institutions Code Section 558 to require that "applications which would be 'deemed denied' under the section's literal wording be instead granted as of right . . . ." 14 Cal.3d at 737, 537 P.2d at 413, 122 Cal. Rptr. at 581. However, the effect of the decision is to render the literal wording of the statute invalid.

20. 15 Cal.3d 23, \_\_\_ P.2d \_\_\_, \_\_\_ Cal. Rptr. \_\_\_ (1975).

against the state to prevent collection of any tax,<sup>21</sup> holding that the taxpayer has a federal constitutional right to enjoin a tax sale of his property pending an administrative hearing.<sup>22</sup>

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21. Cal. Const. Art. XIII, § 32, formerly Art. XIII, § 15. See Dupuy v. Superior Court, 15 Cal.3d 23, 27 n.5, \_\_\_ P.2d \_\_\_, \_\_\_ n.5, \_\_\_ Cal. Rptr. \_\_\_, \_\_\_ n.5 (1975).
22. Since the anti-injunction provision of the California Constitution is "plain and unambiguous," Dupuy v. Superior Court, 15 Cal.3d 23, 35, P.2d \_\_\_, \_\_\_, \_\_\_ Cal. Rptr. \_\_\_, \_\_\_ (1975)(dissenting opinion), and "must yield to the paramount provisions of the United States Constitution, "id. at 31, \_\_\_ P.2d at \_\_\_, \_\_\_ Cal. Rptr. at \_\_\_, the anti-injunction provision is to that extent unconstitutional.