TORTS—NEGLIGENCE—VIOLATION OF POLICE DEPARTMENT INTERNAL REGULATION CREATES REBUTTABLE PRESUMPTION OF NEGLIGENCE UNDER STATE EVIDENCE STATUTE. *Peterson v. City of Long Beach*, 24 Cal. 3d 238, 594 P.2d 477, 155 Cal. Rptr. 360 (1979). Responding to a radio call erroneously reporting a burglary in progress, a Long Beach officer shot and killed a suspect fleeing from the scene.[1] The victim's parents brought this wrongful death action against the officer and the City of Long Beach on the theory that the officer "acted negligently and unreasonably in firing to prevent the escape."[2] The plaintiffs introduced evidence that the officer's conduct violated section 4242 of the Long Beach Police Department's firearms regulations,[3] and argued that the violation created a presumption of negligence.[4] The trial court, sitting without a jury, found for the defendants. The judge concluded that, although the officer failed to comply with the firearms guidelines, section 4242 "does not constitute a minimal standard of care,"[5] and that the officer's conduct was "within the permissible lim-

1. Peterson v. City of Long Beach, 24 Cal. 3d 238, 241, 594 P.2d 477, 478, 155 Cal. Rptr. 360, 361 (1979).

2. Peterson v. City of Long Beach, 72 Cal. App. 3d 852, 140 Cal. Rptr. 401, 403 (1977), *vacated*, 24 Cal. 3d 238, 594 P.2d 477, 155 Cal. Rptr. 360 (1979).

3. Section 4242 of the Long Beach Police Department Manual provides, in part, that a firearm shall not be discharged to effect an arrest unless the officer has reason to believe both that the crime involved violence or the threat of violence and that there is substantial risk that death or serious bodily harm will result if the person is not arrested.

> [I] The policy of the Department governing the display and discharge of firearms is that members shall exhaust every other reasonable means of apprehension before resorting to the use of a firearm.
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> [II A] An officer shall not discharge a firearm in the performance of his police duties except under the following circumstances and only after all other means fail:
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> . . . .
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> [3] To effect an arrest, to prevent an escape, or to recapture an escapee when other means have failed, of an adult felony suspect when the officer has reasonable cause to believe that (a) the crime for which the arrest is sought involved conduct including the use or threatened use of deadly force and (b) there is substantial risk that the person whose arrest is sought will cause death or serious bodily harm if apprehension is delayed.

Reprinted in Long Beach Police Officers Ass'n v. City of Long Beach, 61 Cal. App. 3d 364, 368-69, 132 Cal. Rptr. 348, 350 (1976).

4. 24 Cal. 3d at 248, 594 P.2d at 483, 155 Cal. Rptr. at 366. A presumption of negligence means that the first two elements of actionable negligence are proven—the plaintiff owes a duty of due care and the defendant has breached that duty. *See* HILL, ROSSEN & SOGG, SMITH'S REVIEW OF TORTS 69 (3d ed. 1975).

5. 24 Cal. 3d at 243, 594 P.2d at 479, 155 Cal. Rptr. at 362.

its" of the justifiable homicide provisions of the California State Penal Code.[6] The Supreme Court of California reversed[7] and *held:* A violation of a legislatively authorized internal police department firearms regulation is a violation of a regulation of a public entity and creates, under the California Evidence Code, a rebuttable presumption of failure to exercise due care.[8]

California Evidence Code section 669,[9] essentially a codification of the California common law,[10] creates a rebuttable presumption of a failure to exercise due care when a violation of a statute, ordinance, or

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6. *Id.* Homicide is justifiable if committed by a public officer, "[w]hen necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest." CAL. PENAL CODE § 196 (Deering 1971).

7. The California Supreme Court vacated the appeals court decision, which had reversed the trial court on other grounds. The appeals court held that *Peterson* was correctly decided at the time of the trial, but that a subsequent decision, Kortum v. Alkire, 69 Cal. App. 3d 325, 138 Cal. Rptr. 26 (1977), dictated reversal. The *Kortum* case, according to the appeals court majority, held that a police officer is held to the same standard of care as a private citizen, and thus the force used to apprehend the burglar in *Peterson* "was excessive as a matter of law." 72 Cal. App. 3d 852, 140 Cal. Rptr. at 404 (1977). The Supreme Court did not reach this issue.

8. 24 Cal. 3d at 241, 549 P.2d at 478, 155 Cal. Rptr. at 361.

9. CAL. EVID. CODE § 669 (Deering Supp. 1978). The statute provides in pertinent part:

(a) The failure of a person to exercise due care is presumed if:
(1) He violated a statute, ordinance, or regulation of a public entity;
(2) The violation proximately caused death or injury to person or property;
(3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
(4) The person suffering the death or injury to his person or property was one of the class of persons for whose protection the statute, ordinance or regulation was adopted.
(b) This presumption may be rebutted by proof that:
(1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law . . . .

10. The Law Revision Commission commented:

Section 669 codifies a common law presumption that is frequently applied in the California cases. See Alarid v. Vanier, 50 Cal. 2d 617, 327 P.2d 897 (1958). The presumption may be used to establish a plaintiff's contributory negligence as well as a defendant's negligence. Nevis v. Pacific Gas & Electric Co., 43 Cal. 2d 626, 275 P.2d 761 (1954).

Effect of Presumption. If the conditions listed in subdivision (a) are established, a presumption of negligence arises which may be rebutted by proof of the facts specified in subdivision (b). The presumption is one of simple negligence only, not gross negligence. Taylor v. Cockrell, 116 Cal. App. 596, 3 P.2d 16 (1931).

CAL. EVID. CODE § 669 (Deering Supp. 1978) (comment). *See also* Satterlee v. Orange Glenn School Dist., 29 Cal. 2d 581, 589, 177 P.2d 279, 283 (1947) ("violation of an ordinance or statute is presumptively an act of negligence"); Harris v. Joffe, 28 Cal. 2d 418, 425, 170 P.2d 454, 458 (1946) (failing to light stairway in violation of municipal code held negligence as a matter of law);

regulation is the proximate cause of the type of injury the statute, ordinance, or regulation sought to prevent[11] to a person of the class it intended to protect.[12]

Many jurisdictions limit this presumption of negligence to violations of statutes and ordinances and regard violations of administrative regulations as mere evidence of negligence.[13] In contrast section 669 of the California Evidence Code also covers any violation of a regulation of a

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Siemers v. Eisen, 54 Cal. 418, 420, 421 (1880) (failure to tie horse securely in violation of statute held evidence of negligence or more; should not have left question to jury; proof fully established).

The California common law presumption of negligence did not result in absolute liability; the defendant could introduce evidence of justification or excuse. Satterlee v. Orange Glenn School Dist., 29 Cal. 2d at 589, 177 P.2d at 283.

> An act which is performed in violation of an ordinance or statute is presumptively an act of negligence, but the presumption is not conclusive and may be rebutted by showing that the act was justifiable or excusable under the circumstances . . . . However, the fact which will excuse the violation of a statute has been defined by the court as one resulting "from causes or things beyond the control of the person charged with the violation."

Id.; *see* Mula v. Meyer, 132 Cal. App. 2d 279, 284-85, 282 P.2d 107, 110, 112 (1955).

A statutory violation gives rise in most states to negligence "per se." RESTATEMENT (SECOND) OF TORTS § 288B, Comment a (1965). The statute must meet essentially the same criteria as that outlined in California Evidence Code § 669, *see* RESTATEMENT (SECOND) OF TORTS § 286 (1965), and liability may be avoided through defenses such as contributory negligence and assumption of the risk, *id.* § 288B, Comment b, or excused in emergency or other comparable situations, *id.* § 288A.

11. Mark v. Pacific Gas & Elec. Co., 7 Cal. 3d 170, 183, 496 P.2d 1276, 1284, 101 Cal. Rptr. 908, 916 (1972) (purpose of statute to protect public property and assure adequate lighting, not to prevent injury or death from electrocution; thus § 669(a)(3) requirement is not satisfied); Nunneley v. Edgar Hotel, 36 Cal. 2d 493, 498, 225 P.2d 497, 500 (1950) (statute specifiying minimum height of parapet designed to prevent injuries occurring from walking or stumbling into opening, not from sitting on parapet; height not relevant to danger presented from sitting); Miglierini v. Havemann, 240 Cal. App. 2d 570, 573, 49 Cal. Rptr. 795, 797 (1966) (purpose of statute to prevent loss from damage to unattended vehicle, not to protect owner from personal injury); CAL. EVID. CODE § 669(a)(3) (Deering Supp. 1978).

12. Mark v. Pacific Gas & Elec. Co., 7 Cal. 3d 170, 183, 496 P.2d 1276, 1284, 101 Cal. Rptr. 908, 916 (1972) ("[A]s section 585 [prohibiting the extinguishing of any public light] evidently sought to protect the street-using public, by assuring adequate street lighting, it cannot be said that [plaintiff apartment tenant who unscrewed street-light bulb] was, under section 669 [(a)(4)], one of the class of persons for whose protection the ordinance was adopted."); *see* Richards v. Stanley, 43 Cal. 2d 60, 62, 271 P.2d 23, 25 (1954) (statute requiring removal of ignition keys not designed to protect person injured by thief driving car); Nunneley v. Edgar Hotel, 36 Cal. 2d 493, 497, 225 P.2d 497, 500 (1950) (plaintiff hotel guest is within class of persons meant to be protected by statute requiring minimum height of parapet around hotel roof vent shaft); CAL. EVID. CODE § 669(a)(4) (Deering Supp. 1978).

13. "More frequently than in the cases of statutes or ordinances, the requirements of administrative regulations are not adopted by the court as defining a definite standard of conduct in negligence actions, but are accepted as affording relevant evidence." RESTATEMENT (SECOND) OF TORTS § 288B, Comment d (1965).

public entity.[14] California courts have long held that violations of administrative safety regulations give rise to a presumption of negligence[15] but, before this decision, treated police and fire department internal regulations[16] as mere evidence for the jury because they did not view them as regulations of a public entity.

In finding that a violation of section 4242 of the Long Beach Police Department regulations raises a presumption of negligence, the California Supreme Court decided that the regulation was a regulation of a public entity to which the presumption of section 669 of the California Evidence Code applies.[17] Using a "plain meaning" approach the majority first looked to the Evidence Code definitions of public entity and the relevant Law Revision Commission Comment.[18] Under the code public entity "includes a nation, state, county, city and county, city, district, public authority, public agency, or any other political sub-

14. CAL. EVID. CODE § 669(a)(1) (Deering Supp. 1978).

15. Morris v. Sierra & San Francisco Power Co., 57 Cal. App. 281, 288, 207 P. 262, 265 (1922) (violation of regulations prescribing distances that should exist between electric wire negligent as a matter of law); *see* Morris, *The Role of Administrative Safety Measures in Negligence Actions*, 28 TEX. L. REV. 143, 144-45 (1949).

16. Vallas v. City of Chula Vista, 56 Cal. App. 3d 382, 388, 128 Cal. Rptr. 469, 473 (1976) (action against police officer for gunshot injuries; no presumption of negligence under § 669 of the California Evidence Code because police department regulation is not a regulation of a public entity); *see* Grudt v. City of Los Angeles, 2 Cal. 3d 575, 588, 468 P.2d 825, 831, 86 Cal. Rptr. 465, 471 (1970) (wrongful death action; police manual pertaining to use of firearms admissible as evidence of due care); Dillenbeck v. City of Los Angeles, 69 Cal. 2d 472, 480, 446 P.2d 129, 134, 72 Cal. Rptr. 321, 326 (1968) (wrongful death action against city following collision with police car; directives contained in training bulletin safety rules admitted as evidence of standard of care); Torres v. City of Los Angeles, 58 Cal. 2d 35, 38-39, 372 P.2d 906, 907-08, 22 Cal. Rptr. 866, 867-68 (1962) (fire department rules for emergency vehicles admitted into evidence).

Compare the California courts' treatment of company safety rules. "Plaintiff has not cited nor have we found any case holding that company rules establish a fixed standard of care making their violation negligence per se. . . . It is well settled that such rules are admissible in evidence and their violation is a circumstance to be considered in determining negligence." Davis v. Johnson, 128 Cal. App. 2d 466, 472, 275 P.2d 563, 567 (1954). *See also* Powell v. Pacific Elec. Ry., 35 Cal. 2d 40, 47, 216 P.2d 448, 453 (1950).

17. 24 Cal. 3d at 241, 594 P.2d at 478, 155 Cal. Rptr. at 361.

18. *Id.* at 244, 594 P.2d at 479, 155 Cal. Rptr. at 363. The Law Revision Commission Comments state: "The broad definition of 'public entity' includes every form of public authority, both foreign and domestic." CAL. EVID. CODE § 200 (Deering 1966) (comment). The court used this comment to support the proposition that the term "public entity" was broad enough to encompass the city police department. 24 Cal. 3d at 244, 594 P.2d at 480, 155 Cal. Rptr. at 363. *But see* CAL. GOV'T CODE § 811.2 (Deering 1973) (cross referenced from § 200 of Evidence Code). The definition of public entity, for purposes of claim against that entity "is intended to include every kind of *independent* political or governmental entity in the State." *Id.* Law Revision Commission Comment. (emphasis added).

division or public corporation, whether foreign or domestic."[19] This broad definition, coupled with the express authorization of the Long Beach City Charter,[20] led the majority to conclude that the regulation was that of a public entity.[21] The court acknowledged that the legislature intended that the section codify the common law.[22] Although admitting that most cases applying the common law presumption dealt with the violation of statutes or ordinances, they observed that many others involved administrative regulations.[23] The majority then noted that because the trial court refused to treat the regulation violation as raising a presumption of negligence, it failed to consider whether the defendant could rebut the presumption as provided in section 669,[24] by

19. CAL. EVID. CODE § 200 (Deering 1966).

20. The City Manager and the Chief of Police promulgated § 4242 pursuant to the City Charter. 24 Cal. 3d at 242 n.2, 594 P.2d at 478 n.2, 155 Cal. Rptr. at 361 n.2. Section 161 of the City Charter provided that "[t]he City police department shall be governed at all times by such rules and regulations as the City Manager may prescribe." *Id.* (quoting Long Beach Police Officers Ass'n v. City of Long Beach, 61 Cal. App. 3d 364, 368, 132 Cal. Rptr. 348, 350 (1976)).

21. 24 Cal. 3d at 244, 594 P.2d at 480, 155 Cal. Rptr. at 363. The court disapproved a recent appellate court decision that, using a similar analysis, found police department regulations not to be regulations of a "public entity." *Id.* at 245 n.5, 594 P.2d at 480 n.5, 155 Cal. Rptr. at 363 n.5. In Vallas v. City of Chula Vista, 56 Cal. App. 3d 382, 387-88, 128 Cal. Rptr. 469, 473 (1976), the court said, "None of the definitions of 'public agency' we have been able to find would include a department of a city as such." *Id.* It pointed to California Government Code §§ 1151, 4401, 6500, 20009, 53050 and 1 MCQUILLIN, MUNICIPAL CORPORATIONS § 2.30 (1971) for support. Section 2.30 provides: "[A] department of a city, created by its charter, is not an entity separate from the municipality, even though a distinct city department." *Id.*

22. 24 Cal. 3d at 244, 594 P.2d at 480, 155 Cal. Rptr. at 363.

23. *Id.* at 244-45, 594 P.2d at 480, 155 Cal. Rptr. at 363. The court cited a number of cases in support:

> See, e.g., *Levels v. Growers Ammonia Supply* (1975) 48 Cal.App.3d 443, 447, 121 Cal. Rptr. 779 [Div. of Ind. Safety order; *accord*: *Short v. State Compensation Ins. Fund* (1975) 52 Cal. App.3d 104, 109, fn. 4, 125 Cal.Rptr. 15]; *Atkins v. Bisigier* (1971) 16 Cal. App.3d 414, 420, 94 Cal.Rptr. 49 [Dept. of Health reg.]; *Elton v. County of Orange* (1970) 3 Cal.App.3d 1053, 1059, 84 Cal.Rptr. 27 [social welfare regs.]; *Nevis v. Pacific Gas and Electric Co.* (1954) 43 Cal.2d 626, 629, 275 P.2d 761 [P.U.C. order]; *Peterson v. Permanente Steamship Corp.* (1954) 129 Cal.App. 2d 579, 581, 277 P.2d 495 [Coast Guard reg.]; cf. *San Diego Gas & Electric Co. v. United States* (9th Cir. 1949) 173 F.2d 92, 93 [civil aeronautics reg.]; *Neiswonger v. Good Year Tire & Rubber Co.* (N.D.Ohio 1929) 35 F.2d 761, 763 [Sect. of Commerce rule.]

None of these cases, however, involve departmental regulations governing employee conduct on the job.

24. 24 Cal. 3d at 247, 594 P.2d at 482, 155 Cal. Rptr. at 365. "Since, as we have shown, his violation raised a presumption of negligence, he cannot be freed from liability without a judicial inquiry as to whether he could successfully rebut the presumption." *Id.*

Whether the officer could have rebutted the presumption is questionable. The dissenting opinion of the appeals court summarized the officer's testimony as follows:

> Officer Vershaw further stated that at the time he fired his weapon, he believed that he

showing that the officer "did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law."[25]

The dissent found "arguable" the majority's characterization of the police department as a public entity,[26] but based its disagreement on an interpretation of the class of persons and class of harms the regulation covered. It concluded that the regulation's promulgators did not intend to create a standard of care.[27] The dissent relied in part on another recent case involving section 4242 of the Long Beach Police Department Manual.[28] That court found that the intent of the regulation was to provide training and guidance and to avoid suits involving claims of excessive force.[29]

The majority reached an incorrect result in its effort to impose liability for excessive use of deadly force by the police. Even if the stated purpose of this regulation were to protect suspects resisting arrest from the excessive use of force by the police, the regulation would not consti-

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had no other means to stop [the suspect], and further believed that he was effectuating the arrest of an adult burglary suspect who was attempting to avoid apprehension; that he formed his intention to pull the trigger a split second before Peterson was about to round the corner; that during that split second, the policy of the Long Beach Police Department relating to the use of firearms did not come to mind; . . . that in his police academy training he was taught that he had a right to use deadly force upon a fleeing felon by virtue of the provisions of the state Penal Code; that at the moment he fired, he didn't know whether Peterson had a weapon and didn't know whether there was substantial risk that the person he was going to arrest would cause death or serious bodily harm if the apprehension was delayed.

Peterson v. City of Long Beach, 72 Cal. App. 3d 852, 140 Cal. Rptr. 401, 406 (1977), *vacated*, 24 Cal. 3d 238, 594 P.2d 477, 155 Cal. Rptr. 360 (1979). It is clear from this testimony that the officer could not have argued that he was trying to comply with § 4242. 24 Cal. 3d at 247, 594 P.2d at 481-82, 155 Cal. Rptr. at 364-65.

25. CAL. EVID. CODE § 669(b)(1) (Deering Supp. 1978).

26. 24 Cal. 3d at 248, 594 P.2d at 482, 155 Cal. Rptr. at 365 (Richardson, J., dissenting).

27. "In the trial court's view, to which I fully subscribe, a presumption of negligence properly cannot be based upon violation of internal, departmental policies which were not intended as minimum standards of care." *Id.* at 248, 594 P.2d at 483, 155 Cal. Rptr. at 366 (Richardson, J., dissenting).

28. *Id.*; *see* Long Beach Police Officers Ass'n v. City of Long Beach, 61 Cal. App. 3d 364, 132 Cal. Rptr. 348 (1976). In 1976 the Long Beach Police Officers Association, fearing, among other things, § 4242's probative force in civil suits, sued for injunctive relief to restrain enforcement of the section. *Id.* at 367, 369, 132 Cal. Rptr. at 349, 351.

29. 61 Cal. App. 3d at 376, 132 Cal. Rptr. at 355. Nevertheless, the appeals court, in addressing the effect of § 4242 in a civil suit, recognized that it also was intended as a standard of care. The court added that the courts had not found liability in the past and that in any event "the defendant in such a suit is free to argue that the regulation is more stringent than the minimum standard of care required by law." *Id.*

tute a standard of care for the purpose of a negligence action.[30] The specific provision of section 4242 that the officer violated was designed to protect against an *intentional* invasion of another's rights;[31] in a negligence action "the interest invaded is protected against unintentional invasion."[32] In an action charging the intentional use of excessive force the regulation might be evidence of the reasonableness of the force.[33]

In addition the majority dismissed important policy considerations in a footnote.[34] It did not agree with the concern, which the American Civil Liberties Union and other organizations expressed in amicus briefs,[35] that "finding liability on the basis of a department rule of con-

30. The trial court in *Peterson* found that the officer "intentionally discharged his firearm, killing the decedent." 72 Cal. App. 3d 238, 140 Cal. Rptr. at 410 n.5. The conclusion of law at the trial was that the officer used justifiable deadly force. *Id.* The appeals court ruled that the use of deadly force here was *excessive* as a matter of law; the court did not use the word negligent. *Id.*, 140 Cal. Rptr. at 404.

31. *See* note 3 *supra*; (§§ 4242 [IIA], 3(a), 3(b)); *cf.* Long Beach Police Officers Ass'n v. City of Long Beach, 61 Cal. App. 3d 364, 368-69, 132 Cal. Rptr. 348, 350 (1976) (Section 4242[C] prohibits discharging firearms as a warning or firing at moving vehicles). This section creates a duty of care to avoid placing others at unnecessary risk. An officer violating this provision would create a risk of harm; if he injured someone he would be negligent. Even if he did not intend the consequence, he failed to exercise the standard of care the regulation requires.

32. RESTATEMENT (SECOND) OF TORTS § 281(a) (1965); *see* Mahoney v. Corralejo, 36 Cal. App. 3d 966, 972, 112 Cal. Rptr. 61, 64 (1974).

> California has recognized various degrees of negligence which invoke various legal consequences but as was stated in *Donnelly v. Southern Pacific Co.*, 18 Cal. 2d 863, at page 869 [118 P.2d 465]; "A negligent person has no desire to cause the harm that results from his carelessness, . . . and he must be distinguished from a person guilty of willful misconduct, such as assault and battery, who intends to cause harm. [Citation] Willfulness and negligence are contradictory terms . . . . If conduct is negligent, it is not willful; if it is willful, it is not negligent."

Id. (citations omitted).

33. *See* Grudt v. City of Los Angeles, 2 Cal. 3d 575, 588 n.4, 468 P.2d 825, 831 n.4, 86 Cal. Rptr. 465, 471 n.4 (1970). The plaintiff in *Grudt* brought an action for wrongful death on alternative theories of intentional and negligent tort. The court below dismissed the negligence action and refused to admit a police tactical manual into evidence. *Id.* at 588, 468 P.2d at 811, 86 Cal. Rptr. at 471. The supreme court reversed:

> Even had the negligence issue been properly excluded from the case, it is arguable that the manual was relevant to the remaining issue of intentional tort. The rules on the use of firearms related to the issue of the reasonableness of the force used for self-defense by the officers—an issue which remained in the case on the cause of action predicated upon an intentional tort.

Id. at 588 n.4, 468 P.2d at 831 n.4, 86 Cal. Rptr. at 471 n.4.

34. 24 Cal. 3d at 246 n.7, 594 P.2d at 481 n.7, 155 Cal. Rptr. at 364 n.7.

35. "The American Civil Liberties Union (ACLU) along with several like organizations appearing herein as amici curiae implore us to refrain from holding that violation of a police department manual may invoke a presumption of negligence." *Id.* at 249, 594 P.2d at 483, 155 Cal. Rptr. at 366 (Richardson, J., dissenting).

duct alone will simply deter police departments from making rules of conduct at all, because of their fear of imposing unnecessary civil liability."[36] These organizations believe that internal regulations are vitally important to controlling police misuse of force.[37]

The *Peterson* majority recognized a need to protect the rights of suspects and control the discretion of the police[38] and apparently felt that the threat of civil liabilty for violations of department firearms rules would effectively deter police misconduct.[39] Police departments throughout the nation will be looking at this decision and its implications. We should know soon whether this decision acts as a deterrent or merely discourages internal rule-making.

CONSTITUTIONAL LAW—FIRST AMENDMENT—STATE CONSTITUTION MAY GUARANTEE BROADER RIGHTS OF FREE SPEECH AND EXPRESSION THAN THOSE RIGHTS PROTECTED BY THE FEDERAL CONSTITUTION. *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854, *cert. granted*, 100 S. Ct. 419 (1979) (No. 79-289). Owners of a private shopping center denied appellants, who were soliciting signatures on a petition concerning foreign policy, access to the center.[1] Appellants sought to enjoin enforcement of the

36. *Id.* at 246 n.7, 594 P.2d at 481 n.7, 155 Cal. Rptr. at 364 n.7.

37. *Accord,* K. DAVIS, ADMINISTRATIVE LAW TEXT § 6.06, at 150 (3d ed. 1972); Caplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 L. & CONTEMP. PROB. 500 (1971); Safer, *Deadly Weapons In The Hands of Police Officers, On Duty and Off Duty*, 49 J. URB. L. 565, 572 (1971).

38. 24 Cal. 3d at 244-46 & n.7, 594 P.2d at 480-81 & n.7, 155 Cal. Rptr. at 363-64 & n.7. In its zeal to protect these rights, the supreme court decided this case on an issue that plaintiff had, as the dissent notes, abandoned on appeal. Plaintiff accepted the trial court's ruling that the doctrine of negligence "per se" was not invoked. *Id.* at 249, 594 P.2d at 483, 155 Cal. Rptr. at 366 (Richardson, J., dissenting).

39. In imposing liability the court usurped the function of the legislature.

> The formulation of a policy governing use of deadly force by police officers is a heavy responsibility involving the delicate balancing of different interests: the protection of society from criminals, the protection of police officers' safety, and the preservation of all human life if possible. This delicate judgment is best exercised by the appropriate legislative and executive officers.

Long Beach Police Officers Ass'n v. City of Long Beach, 61 Cal. App. 3d 364, 371, 132 Cal. Rptr. 348, 351-52 (1976).

1. Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 902-03, 592 P. 2d 341, 342, 152 Cal. Rptr. 854, 855, *cert. granted,* 100 S. Ct. 419 (1979) (No. 79-289).