Insurance

# Letters to the Editor

## Prosecutor Deserved More Severe Sanction

Reading Laura Ernde's story "Accused Murderer Cleared Seven Months After Dying in Prison" (Jan. 18), I found myself utterly flummoxed. How is it possible that the most severe sanction visited on the prosecutor responsible for this obscene injustice appears to be some annoying press inquiries that he declined to return. Surely some punishment greater than life in Tulare County is appropriate for this dereliction of duty "strik(ing)," as a unanimous panel of the 5th District Court of Appeal correctly observed, "at the very heart of our system."

As Millard Fillmore observed on Polk's election to the presidency, "May God save the country, for it is evident that the people will not."

**David W. Fermino**
San Francisco

## New Rule Challenges Meaning of Precedent

Ninth Circuit practice under the new Rule 32.1 of the Federal Rules of Appellate Procedure, allowing citation of unpublished opinions, is likely to differ in one major respect from what Laura M. Wilson describes ("Uncovering Unpublished Opinions," Jan. 18).

The key question is what effect the courts will give to the now-permitted citations. Wilson writes that "judges will have discretion to determine what weight, if any," to give those cases. That's only partly true. The 9th Circuit's Rule 36-3(a) declares that unpublished dispositions are "not precedent." Judges thus will not have discretion to decide that unpublished cases should be given precedential weight. They can give only what ordinarily will be lesser weight, such as "persuasive" or "permissive" authority. This will raise interesting questions about the meaning of precedent — about efforts by lawyers or judges, for example, to rely on prior decisions without calling them precedents. But if 9th Circuit judges want to avoid this bifurcation and expand judges' discretion so as to encompass precedential weight, they can always amend their rule.

**Stephen R. Barnett**
Berkeley