Introduction: Student Symposium on

THREE INTERSECTIONS OF FEDERAL AND CALIFORNIA LAW

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In January of 2015, as I commenced my class in Constitutional Law II at King Hall, the law school of the University of California, Davis, I was asked to invite students to write papers on aspects of California's legal history for possible inclusion in a student symposium to be published in the journal, *California Legal History*. The subject of my course was individual rights and liberties under the Bill of Rights and the Fourteenth Amendment of the federal constitution. This offered the prospect for students to undertake original research comparing rights and liberties protected by federal law with those protected independently by California law. A number of students responded to my invitation. Their only reward was the substitution of their papers for a final examination. They received no extra credit for the very substantial additional work that is manifest in the three papers reprinted below. These papers were deemed by anonymous reviewers to be of exceptional merit, worthy of publication in the symposium that follows. I take great pride in presenting them to you.

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I.

Absent voluntary compliance by the judgment-loser, every judgment of a court of law becomes effective only through the coercive enforcement of that judgment. At common law, this entailed the issuance by the court of a "writ of execution," authorizing the sheriff or some other law-enforcement officer to exercise such force as was necessary to achieve compliance with the writ, and hence to "execute" the judgment. The most draconian judgment to be executed by a legal system is the imposition of capital punishment: the execution of a judgment that the defendant shall be put to death. And so the whole process of capital punishment has become uniquely identified with the legal term of art for enforcing that as well as any other legal judgment: condemned prisoners are said to be "executed," and legally unsanctioned murders that are accomplished by particularly purposeful and conclusive methods are accordingly called "execution-style" killings.

This most awesome and irrevocable use of the coercive power of government as licensed by law is rarely used in modern democracies dedicated to the socially inclusive values of liberty, equality, and autonomy. Even in warfare, the killing of disarmed prisoners is not tolerated. The total eradication of life — as opposed to the systematic curtailment of autonomy through life-long incarceration, always subject to prospective correction should judicial error be belatedly discovered — is a stark reminder of the totalitarian régimes which stained the middle decades of the twentieth century. Nonetheless, capital punishment remains politically popular in the United States, although by a declining majority as evidence of the actual execution of innocent defendants mounts. Given the prominence of judicial protection of individual rights against majoritarian action within our constitutional scheme of governance, it is not surprising that capital punishment has been a recurrent topic of litigation under both state and federal constitutions.

Kelsey Hollander's paper on *The Death Penalty Debate* gives an excellent overview of federal and state constitutional law as applied to this subject in California. The applicable federal constitutional norm is the Eighth Amendment's prohibition of "cruel and unusual punishments." This nominally limits only the power of the federal government, but it has been incorporated into the meaning of the "due process of law" that limits the power of state governments under the Fourteenth Amendment. As Ms. Hollander makes clear, the Eighth Amendment has never been interpreted

by a majority of the Court as imposing a *substantive* ban on capital punishment. In keeping with the exclusively adjectival wording of the ban not on punishment, but only such punishments as are "cruel and unusual," the Eighth Amendment has been given only *procedural* effect in limiting *how*, not *whether*, capital punishment may be imposed. Less obviously, but no less importantly, this emphasis on procedural review of the execution of judgments of death has never resulted in the invalidation of a particular method of execution prescribed by state or federal law.

Execution methods have, of course, drastically changed since the founding of the United States. While the beheadings of Tudor England and revolutionary France never gained a foothold in American law, hanging and firing squads were common into the twentieth century. The move to electrocution and gas chambers was driven by a strange coincidence of technological pizazz and putative humanitarianism at play in legislatures unmediated by courts. Execution technique has most recently converged on lethal injection, with the apparent supposition that life can thus be extinguished in both an antiseptic and anesthetic way: pulling the plug without pain, if not without the painful anxiety of a conscious person aware that death is just a needle away.

Lethal injection is rare among American execution methods in that it kills the prisoner endogenously rather an exogenously — by poison rather than by some lethal application of external force. The only similar method is the gas chamber, where the poison is inhaled rather than injected. The fact that lethal gas — from the trenches of World War I to Auschwitz to San Quentin Prison — operates mainly by suffocating its victims, was a major factor in its displacement by the seemingly more humane method of lethal injection, which is supposed to sedate the victim into unconsciousness before stopping the victim's heart and/or respiration.

Recently both the medical profession and the pharmaceutical industry have refused to facilitate executions of the condemned, or to supply products for use in execution by lethal injection. This has led to jury-rigged drug protocols that have apparently suffocated prisoners without prior sedation. Ms. Hollander considers, and accurately predicts, whether the Supreme Court of the United States will allow this procedural uncertainly about the manner in which death occurs to inhibit the substantive power of government to impose capital punishment. In its final opinion of the 2014 Term

— decided on June 30, 2015, the very day her paper was submitted — the Court held 5–4, in the alignment Ms. Hollander wrote was most likely, that petitioners facing execution by lethal injection using an untested protocol of drugs had failed to carry their burden of proving that the protocol entailed a constitutionally-unacceptable risk of pain. "Our decisions in this area have been animated in part by the recognition that because it is settled that capital punishment is constitutional, '[i]t necessarily follows that there must be a [constitutional] means of carrying it out.'. . . Holding that the Eighth Amendment demands the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether." *Glossip v. Gross*, 576 U.S. ___, 135 S.Ct. 2726, 2732-33 (2015).

Ms. Hollander also provides an overview of the California Supreme Court's formerly independent review of the constitutionality of the death penalty. In 1972, that court struck down California's death-penalty statutes because its arbitrary and inconsistent application violated California's disjunctive prohibition of *either* "cruel" *or* "unusual" punishments. The high court found that the substitution of the ban on "cruel or unusual punishments" instead of "cruel and unusual punishments" in the 1849 California Constitution, carried over to the still-effective 1879 Constitution, had not been inadvertent. This disjunctive rather than conjunctive phrasing was parallel to the majority of state constitutions in effect at the time of California's founding. In *People v. Anderson*, 6 Cal.3d 628 (1972), the California Supreme Court ruled that the actual carrying-out of executions in California had become so capriciously rare as to be "unusual" within a strictly domestic context, and no less unusual when compared to the worldwide practices of civilized legal systems. The court also held that the infliction of capital punishment had become "cruel" as a matter of state constitutional law, whether or not it was deemed unconstitutionally "cruel" by the United States Supreme Court in that Court's interpretation of the Eighth Amendment.

This independent construction of the state constitution was announced in an opinion written by the Chief Justice of California, Donald R. Wright, and joined by all but one of the court's seven justices. This decision surprised Governor Ronald Reagan. Chief Justice Wright was a municipal bond lawyer in Pasadena before becoming a state trial judge. He was a judge's judge, who had served as presiding judge of one of the nation's largest courts, the Los Angeles County Superior Court. When Governor Rea-

gan appointed him chief justice, he was thought to be both colorless and conservative. Governor Reagan, who remained in office until 1975, swiftly repudiated both his appointee and the *Anderson* opinion that Chief Justice Wright had authored.

The California Constitution is rather easily amended: an initiative amending the constitution requires only the signatures of registered voters equal to one-eighth of the votes cast for governor at the last gubernatorial election in order for an initiative to be placed on the ballot, and then only a simple majority of votes cast for the enactment of that initiative. *People v. Anderson* was decided on February 18, 1972. With the full support of the popular governor, Proposition 17 was adopted by a 2–1 margin at the general election of November 7, 1972. This initiative amended the California Constitution to declare that the death-penalty statutes in effect on February 17, 1972, were restored to full force and effect free of any state constitutional impediments. Thus the constitutionality of the death penalty in California remains subject only to the lenient federal standards of *Glossip v. Gross*.

It is difficult to resist the conclusion that Eighth-Amendment death-penalty standards — to which California law is tied — have taken an ironic turn. As Justice Thomas has made clear, in an opinion highlighted by Ms. Hollander, the framers of the Eighth Amendment surely meant at least to bar such exquisitely cruel means of ending life as the stake and the gibbet. Both involve the infliction of extreme pain not just as the means of death, but as its precursor. One might conclude from these exemplars that the most immediate and conclusive means of death would be the most constitutionally acceptable. And this would seem to recommend the means of execution favored in the People's Republic of China: the instantaneous and hence painless bullet to the back of the head.

This method of execution is not only painless, but self-evidently quick and simple, even painless. Why is it beyond the constitutional pale? I suspect the reason lies in its exogenous brutality. We want the condemned to die, not to be killed. Better to be burned from within than to be bruised or bloodied from without. The Chinese method would transform a metaphor into a fact: execution-style killing employed for executions. The Eighth Amendment, it seems, now protects the process, not the product. It has encapsulated death, indifferent to its potential agony. And Californians, having foregone their constitutional independence, have nothing more to say.

II.

Justice Louis Brandeis, dissenting in 1932 from a decision of the United States Supreme Court that condemned as unconstitutional an Oklahoma state scheme requiring a license for the manufacture, sale, or distribution of ice, famously praised the potential of states to serve as "laboratories of democracy" within our federal system. Allowing states leeway to experiment with innovative grants of rights or policy initiatives, when not in fundamental conflict with federal law, allows legislators nationwide to determine the value of such innovations based on actual practice. When California enacted Proposition 17 in 1972, it closed down its laboratory on administration of the death penalty by specifying that state law was to be identical to federal law, however that should develop. But Megha Bhatt's paper, *Gender Equity in the Workplace*, demonstrates that California continues to be a well of legal inspiration when it comes to the integration of pregnancy into the law of reasonable accommodation of disabled workers.

The United States Supreme Court's nine justices now include three women. That is hardly over-representation. As Justice Ruth Ginsberg has whimsically noted, there will be "enough" women on the Court when all nine of the justices are women. Statistically, the representative figure should be between four and five. Until the appointment of a transgender justice, utopia will have to wait. But we do have a good sense of the consequences of dystopia. Until President Reagan's appointment of Sandra Day O'Connor in 1981, no woman sat on the Supreme Court. Only this circumstance can explain what Ms. Bhatt describes: a pair of decisions, in 1974 and 1976, in which the Court ruled that the denial of disability-benefits to pregnant women was not gender-based discrimination under either the Equal Protection Clause of the Fourteenth Amendment, or Title VII of the 1964 Civil Rights Act. The relevant classification, the all-male Court held, was between pregnant and non-pregnant people, and since women were included along with men in the non-pregnant class, the classification was not gender-based. Although women did not then hold the highest judicial office, they had since 1919 possessed the constitutional right to vote. Congress swiftly passed the Pregnancy Discrimination Act (PDA), which in 1978 amended Title VII to forbid discrimination in employment based on pregnancy.

The persistent problem addressed in Ms. Bhatt's paper arose after the passage in 1990 of the Americans with Disability Act (ADA). The ADA requires

employers to provide reasonable accommodation of the disabilities of employees. The PDA does not include a reasonable-accommodation provision, and federal courts have read the two Acts as providing parallel but not congruent remedies. Thus women temporarily disabled by pregnancy — a disability which varies markedly from woman to woman, and pregnancy to pregnancy — have no federal protection against loss of employment when disabled by pregnancy from performing their normal workplace duties. In California, pregnant workers have been given statutory protection beyond that provided by the federal ADA and PDA. Ms. Bhatt traces the reverberations this California experiment has had on the body of federal law which it supplements.

III.

The final paper in this symposium, Elaine Won's *Protecting Our Children*, deals with the constitutional constraint on federalism's "laboratories of democracy." State-law innovations, however valuable as experiments in effective governance, cannot transgress federal constitutional limitations on state power. Requirements that school children be vaccinated for such common diseases as measles have been left entirely to state law. There are three common exemptions: the medical exemption of students who have some sort of immuno-deficiency; the exemption of students whose parents have a religious objection to vaccination; and the more-amorphous exemption of students whose parents object to vaccination on "personal-belief" grounds.

Recent outbreaks of vaccination-controllable diseases, most prominently a measles outbreak among visitors to Disneyland, have focused attention on "herd immunity." In any given population, vaccination of approximately 90 percent is sufficient to prevent epidemic disease by vaccination-preventable pathogens. This "herd immunity" allows immuno-deficient individuals to benefit from that shared immunity without the potentially fatal consequences of personal vaccination. But when additional individuals decline vaccination on religious or ideological grounds, depressing the overall vaccination rate below the 90-percent herd-immunity threshold, a serious threat to public health may be created.

Ms. Won's paper discusses the constitutionality of proposed legislation in California that would abrogate the religious and person-belief exemptions to California's mandatory school-vaccination law. The bill she discussed,

Senate Bill 277, was in fact signed into law by Governor Jerry Brown on the same day that Ms. Won's paper was submitted for review: June 30, 2015.

The requirement of vaccination as a condition of enrollment in public schools has a long history of judicial review. Ms. Won begins her account of the relevant state and federal cases in the nineteenth century. It seems that parents blindly opposed to vaccination inhabit the same forget-the-facts anti-intellectual space as climate-change deniers. Recently, a retracted report of a wholly unproven correlation between the principal childhood vaccines and autism has led to a four-fold spike in parental claims for a "religious" or "personal-belief" exemption of their children from vaccination. This threatens the herd immunity of school children, which is the only defense against epidemic disease for children who, because they have degraded immune systems (often incident to organ transplants or cancer treatment) would likely be killed by otherwise routine vaccinations.

The enactment of SB 277 has already spawned lawsuits and proposed ballot measures. Ms. Won's careful and sustained analysis in support of SB 277's constitutionality suggests that, in court at least, the opponents of comprehensive vaccination of public school students are unlikely to shut down this particular experiment in the laboratories of democratic federalism.

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EDITOR'S NOTE:

Among the goals of the California Supreme Court Historical Society and its journal are to encourage the study of California legal history and to give exposure to new research in the field. Publication of the following "Student Symposium" furthers both of these goals.

Professor John Oakley, who offers a course each year in Constitutional Law at the University of California, Davis School of Law, graciously agreed to propose to his Spring 2015 students that they consider writing on California aspects of the topic, with the possibility that the most promising papers might be accepted by the journal. From those provided by Professor Oakley, three appear on the following pages as a student symposium on intersections of federal and California law.

— SELMA MOIDEL SMITH