

# ARTICLES

# SEI FUJII:

## *An Alien-American Patriot*

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### BACKGROUND OF THIS ARTICLE

A few years ago, I was approached to represent the Little Tokyo Historical Society and the Japanese American Bar Association to seek the posthumous admission of Sei Fujii to the State Bar of California. At the time, I knew nothing of Fujii and had never heard about the profound impact he had had on the rule of law in California. I was unaware of Fujii's role as the plaintiff in the landmark 1952 case of *Fujii v. California*,<sup>1</sup> in which the California Supreme Court eloquently struck down California's Alien Land Law on constitutional grounds, despite a U.S. Supreme Court precedent that upheld the same law only thirty years earlier.<sup>2</sup> Just seven years after ending the war with Japan, in the heartland of pre-World War II anti-Japanese sentiment,<sup>3</sup> the majority, concurring, and dissenting opinions of

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<sup>1</sup> 38 Cal.2d 718.

<sup>2</sup> *Potterfield v. Webb*, 263 U.S. 225 (1923).

<sup>3</sup> [UNITED STATES] COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS* (1982; reprint 1997); John Leo, *An Apology to Japanese Americans*, TIME, Jan. 24, 2001; Stuart Anderson, *When America*

the California Supreme Court challenged past justifications and cemented the foundation for a new postwar vision of civil rights under the United States Constitution, two years before the Warren Court's *Brown v. Board of Education* decision.<sup>4</sup>

The executive producer (Fumiko Carole Fujita) and director (Jeffrey Gee Chin) of the award-winning movie *Lil Tokyo Reporter* began my education about Fujii based on their own research for the film which dramatically documented part of Fujii's life as the founder of a newspaper in Los Angeles' Little Tokyo. Indeed, years earlier, neither Fujita nor Chin had heard of Fujii and only learned about him when his name emerged in the context of their research about the Japanese Hospital in Boyle Heights that Fujii helped to establish in 1929.

As I listened to Fujita and Chin unfold the story of Fujii, I was joined by an associate, Kimberly Nakamaru, who closely identified with parts of the story and wished she had heard it earlier. Her grand-aunt, Dr. Sakaye Shigekawa, a physician born in South Pasadena, California, in 1913, the year the Alien Land Law was enacted, had just died in 2013 after delivering 20,000 to 30,000 babies over her career, mostly in the Japanese community of Los Angeles. Dr. Shigekawa's father had emigrated from Japan and was a part-owner of a hog farm, but his name was not on the deed because of the Alien Land Law.<sup>5</sup>

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*Imprisoned Japanese Americans*, FORBES, Feb. 18, 2017; Brian Niiya, *Fifth Column*, <http://encyclopedia.densho.org/Fifth%20column> (last visited Aug. 29, 2017) (Fear based on a lack of evidence of espionage or sabotage justified the incarceration of Japanese to then-Attorney General Earl Warren and West Coast Military Commander General John DeWitt); *but cf.*, TOM COFFMAN, *HOW HAWAII CHANGED AMERICA: THE CAMPAIGN FOR EQUAL TREATMENT OF JAPANESE AMERICANS IN THE WAR AGAINST JAPAN* (2014) (The military governor, Gen. Delos Emmons, Army intelligence commander, Col. Kendall J. Fielder, and FBI Hawaii station chief, Robert Shivers, took the opposite view about the absence of evidence of espionage and sabotage and extended trust rather than fear to the Japanese community in Hawaii, risking their careers by their defiance of the president's calls for incarceration of Japanese in Hawaii as on the West Coast.).

<sup>4</sup> 347 U.S. 483 (1954).

<sup>5</sup> After the bombing of Pearl Harbor on December 7, 1941, all of the Japanese staff at the Los Angeles County Hospital, including Dr. Shigekawa who was doing her residency there, were dismissed. She briefly worked at another hospital before being forced by Executive Order 9066 to give up her home and practice to be incarcerated at the Santa Anita Race Track Assembly Center where, at 29 years old, she was one of seven physicians (the youngest and only woman) caring for nearly 19,000 other Japanese suddenly uprooted and deposited in horse stalls for the next seven months before they were

Oral histories from Fujii's descendants and close associates assisted Fujita and Chin in their research. They followed up by scouring the UCLA library for old newspaper articles by Fujii and about Fujii.<sup>6</sup> As the picture of Fujii emerged from these puzzle pieces, questions kept racing through their minds: Why haven't we ever heard of Fujii before? What can Fujii's story teach us today? Are we repeating history?

Fujita and Chin's film *Lil Tokyo Reporter* recounts Fujii's life as the founder of *Kashu Mainichi*, a Japanese- and English-language newspaper that confronted the unlawful acts of organized crime in Little Tokyo and, at the same time, promoted the positive contributions of second-generation Japanese (Nisei) who were born in California and were beginning to succeed on their own in the years before World War II. His newspaper attempted to protect Japanese farmers who would venture into Little Tokyo and visit entertainment clubs where they would be swindled and robbed. His warnings and attacks on organized crime sparked an attempted assassination that he survived only because the Japanese Hospital that he helped to establish in 1929 admitted him, kept him alive, and nursed him

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dispersed to other detention centers in desolate areas for the balance of the war. Like Dr. Shigekawa, two-thirds of those incarcerated were U.S. citizens, born and raised in the U.S., who had committed no crime other than looking like the enemy. Dr. Shigekawa returned to Los Angeles in 1948 and set up her lifelong practice near where she grew up as a child. She was inspired to become a physician because of the influenza epidemic that affected her father and also prompted the establishment of the Japanese Hospital that Fujii helped to set up in 1929. Jocelyn Y. Stewart, *For Doctor, Time Has Much to Heal*, LOS ANGELES TIMES, Dec. 28, 1999; *Pioneering Nisei Doctor Sakaye Shigekawa Dies at 100*, RAFU SHIMPO, Oct. 28, 2013; Alison Bell, *Santa Anita Racetrack Played a Role in WWII Internment*, LOS ANGELES TIMES, Nov. 8, 2009; *Santa Anita (Detention Facility)*, [http://encyclopedia.densho.org/Santa\\_Anita\\_%28detention\\_facility%29](http://encyclopedia.densho.org/Santa_Anita_%28detention_facility%29) (last visited Aug. 28, 2017).

<sup>6</sup> Historical references in this article to Sei Fujii's life are based on the research by Fujita and Chin. In addition to reviewing newspaper articles from Fujii's paper and other publications during this time period, Fujita and Chin interviewed members of Fujii's family, the daughter of J. Marion Wright, and Kenichi Sato who published a biography in Japanese on Fujii's life, *LOS ANGELS GIGYŪ ONDO: HAINICHI TOCHIHŌ O HŌMUTTA FUJII SEI NO KIROKU* (1983). They also searched the "Santa Fe Internment Camp File: Sei Fujii," Los Angeles Evacuation District, National Archives at Riverside, U.S. Department of Justice, 1944 (RG 85, F 15942, sub-file 1720) and gathered pictures and stories from former residents of Little Tokyo. They are in the process of publishing a biography about Sei Fujii that gathers together the research they have collected.

back to health. In addition to a newspaper, Fujii started a radio program to familiarize the larger Los Angeles community with young Japanese Americans who were making their mark and contributing to the growing Los Angeles community. As the winds of war with Japan began to swirl, Fujii wrote a book and published articles telling Japanese in the United States how they could show their loyalty to the United States and tamp down the rising flames of anti-Japanese sentiment that were spreading throughout California. Fujii also worked to build cultural and commercial bridges between the Japanese community and the larger Los Angeles community by starting the annual Nisei Week Festival in Little Tokyo and the Japanese Chamber of Commerce.

## HISTORICAL BACKGROUND

In contradiction to its rule of law, culture, and Fourteenth Amendment emphasis on equal protection, the United States, and California in particular, displayed a history of overt discriminatory hostility toward Asians as a distinct class of “others.” Even before the 1882 Chinese Exclusion Act, there was a perception that Asians were “a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point.”<sup>7</sup> Hostile sentiments toward Chinese led to the formation of the Working Men’s Party of California in 1877 and a constitutional convention (with one-third of its delegates from that party) that specifically changed the California Constitution to discourage Chinese from residing in the state.<sup>8</sup> Violence against Chinese prompted the federal 1882 Chinese Exclusion Act and the decline in Chinese migration to the U.S. from that date forward.<sup>9</sup> This was followed by a rise in Japanese immigration and the transferred resentment of white workers in California “adroitly exploited by the political agitators anxious to secure the labor vote.”<sup>10</sup>

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<sup>7</sup> *People v. Hall*, 4 Cal. 339, 404–405 (1854) (reversing the conviction of a free white citizen’s murder of a Chinese victim based on the trial court’s erroneous admission of testimony from witnesses of Chinese descent, which was interpreted as contrary to the rules of admissible evidence).

<sup>8</sup> Edwin E. Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 CAL. L. REV. 61, 62 (1947).

<sup>9</sup> *Id.* at 63.

<sup>10</sup> *Id.* at 64.

By 1905, the Asiatic Exclusion League was organized in San Francisco for the purpose of reducing or eliminating emigration from Asia and to segregate Japanese children from white children in school.<sup>11</sup> In 1906, the San Francisco Board of Education passed a resolution segregating Japanese pupils from white pupils in the public schools which was immediately protested by the Japanese government. This prompted President Theodore Roosevelt to step in and forge the 1907 “Gentlemen’s Agreement” with the Japanese government to limit passports to the United States in exchange for rescinding of the Board of Education’s resolution. This did not quell the anti-Japanese campaigns in California which increased after the 1911 U.S.–Japan Treaty that protected the right of Japanese nationals to lease land for residential and commercial purposes.<sup>12</sup> Hostility toward the Japanese was driven by fear. Unlike the Chinese,

the Japanese were seen as threats to the American body politic from both within and without. They were seen as threats from within . . . [for their low wage job–stealing potential, like the Chinese]. The Japanese, however, were also perceived as a threat from without. Japan’s growing industrial strength, its imperial military aspirations in the Pacific and the defeat of Russia in 1905, collectively enticed American politicians to inscribe on Japanese immigrants an image of disloyalty and allegiance to a threatening foreign military power. They were portrayed as an imminent fifth column threat within the United States waiting to be activated at the emperor’s command . . .<sup>13</sup>

## FUJII’S EARLY LIFE

In 1882, Sei Fujii was born in Iwakuni, Yamaguchi Prefecture, Japan, seventeen years after the assassination of President Abraham Lincoln and fourteen years after the enactment and ratification of the Fourteenth Amendment to the United States Constitution. He was born into a family of the former

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 65–67.

<sup>13</sup> Keith Aoki, *No Right to Own?: The Early Twentieth-Century “Alien Land Laws” as a Prelude to Internment*, 19 B.C. THIRD WORLD L.J. 37, 44–47 (1998), <http://lawdigital-commons.bc.edu/cgi/viewcontent.cgi?article=1182&context=twlj>.

samurai military nobility. His father died when he was three and he was raised by his grandfather who instilled in him the Bushido Code of samurai principles such as justice, courage, compassion, respect, integrity, honor, loyalty, and self-discipline. Though strong within his own family, the Bushido Code and the public respect for the samurai were waning in the aftermath of the 1868 defeat of the Tokugawa shogunate (the last pre-modern period of feudal military rule by the Tokugawa clan) and the beginning of the Meiji Restoration (the early-modern period of “enlightened rule” by the emperor).

In 1903, Fujii traveled to the United States. He arrived in Seattle on July 3rd, 1903 and saw for himself, on his first full day in America, the celebrated pride of the United States in its rule of law culture that exalted concepts



SEI FUJII ON  
GRADUATING FROM  
USC SCHOOL OF  
LAW IN 1911.

*Photo courtesy of Little  
Tokyo Historical Society.*

similar to the Bushido Code. He was impressed.

He studied for four years at Compton Union High School in Southern California while working as a houseboy for the family that established the Ralph’s supermarket chain and diligently perfected his English language abilities in the process.

In 1908, he attended the University of Southern California School of Law and immersed himself in the rule of law despite a steady drum-beat of anti-Asian, and particularly anti-Japanese, sentiments that made it impossible for him to become a naturalized U.S. citizen or a lawyer when he graduated.<sup>14</sup>

In the course of his studies, he met a fellow student, J. Marion Wright, who shared Fujii’s

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<sup>14</sup> In re Hong Yen Chang, 84 Cal. 163 (1890) (refusing to allow non-white Asians to become lawyers because of their inability to become citizens); Kiyoko Kamio Knapp, *Disdain of Alien Lawyers: History of Exclusion*, 7 SETON HALL CONST. L.J. 103, 126–131 (1996); In re Hong Yen Chang on Admission, 60 Cal.4th 1169 (2015) (admitting Hong Yen Chang posthumously to the State Bar of California and discussing California’s history of denying bar membership to Asians who could not become citizens due to discriminatory immigration laws); ADMINISTRATIVE ORDER 2017-05-17 (S239690), 394 P.3d 488, 2017 CAL. LEXIS 3768, \*\*\*1 (Cal. 2017) (admitting Sei Fujii posthumously to the State Bar of California); Leonard Siegel, *Aliens and the Practice of Law: Rafaelli v. Committee of Bar Examiners*, 6 LOY. L.A. L. REV. 398 (1973) (discussing exclusion of alien lawyers from admission to the bar).

sense of justice, courage, compassion, respect, integrity, honor, loyalty, and self-discipline.

In 1911, Fujii graduated from law school and fell in love with a woman named Same Sato, the beautiful wife of a local bookstore owner. After Sato gave birth to Fujii's first son in America, they ran off together to Japan.

## FUJII WORKS TO OVERTURN CALIFORNIA'S ALIEN LAND LAW OF 1913 AND TO REMEDY OTHER INJUSTICES FACING LOS ANGELES' JAPANESE COMMUNITY

During his two-year absence from California, Fujii received a steady flow of letters from Wright and friends in Los Angeles about the increasing hostility toward the Japanese community and the enactment of the Alien Land Law of 1913 that targeted Japanese farmers who had turned deserts into the most productive farmlands in Southern California.<sup>15</sup> Although neutral in language, the law's focus on denying land ownership to aliens who could not become U.S. citizens was unmistakably directed at Japanese farmers and only Japanese farmers:

By its terms the land law classifies persons on the basis of eligibility to citizenship, but in fact it classifies on the basis of race or nationality. This is a necessary consequence of the use of the express racial qualifications found in the federal code. Although Japanese are not singled out by name for discriminatory treatment in the land law, the reference therein to federal standards for naturalization which exclude Japanese operates automatically to bring about that result.<sup>16</sup>

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<sup>15</sup> *Fujii v. California*, *supra* note 1, at 742 (“The Japanese were pioneers who reclaimed the San Joaquin Valley from the desert. They turned this land from “its unhealthy barren state of wasteland into the richest and most productive district in the state of California.” Through sheer perseverance they gained control of the berry, potato, flower and truck-garden markets,” quoting MILTON R. KONVITZ, *THE ALIEN AND THE ASIATIC IN AMERICAN LAW* 157 (1946)); *see also Oyama v. California*, 332 U.S. 633 (1948) (deciding a San Diego Alien Land Law case on non-constitutional grounds but concurring opinions urged overturn of law on constitutional grounds); Rose Cuison Villazor, *Rediscovering Oyama v. California: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979 (2010) (exploring the historical and political background of the case).

<sup>16</sup> *Fujii v. California*, *supra* note 1, at 729.



To white California farmers, Japanese farmers posed an economic threat that needed to be quashed.<sup>17</sup> As stated in Justice Frank Murphy's dissent in *Oyama v. California* (1948):

The California Alien Land Law was spawned of the great anti-Oriental virus which, at an early date, infected many persons in that state. The history of this anti-Oriental agitation is not one that does credit to a nation that prides itself, at least historically, on being the friendly haven of the tired and the oppressed of other lands. Beginning in 1850, with the arrival of substantial numbers of Chinese immigrants, racial prejudices and discriminations began to mount. Much of the opposition to these Chinese came from trade unionists, who feared economic competition, and from politicians, who sought union support. Various laws and ordinances were enacted for the purpose of discouraging the immigrants and dramatizing the native dissatisfaction. Individual Chinese were subjected to many acts of violence. Eventually, Congress responded to this popular agitation and adopted the Chinese exclusion laws. . . . [T]he arrival of the Japanese fanned anew the flames of anti-Oriental prejudice. . . . Numerous acts of violence were perpetrated against Japanese businessmen and workers, combined with private economic sanctions designed to drive them out of business. . . . Campaigns were organized to secure segregated schools and to preserve "America for the Americans."<sup>18</sup>

In 1913, Fujii returned to California as Wright was graduating from law school and for the next forty years Wright and Fujii worked together to defend and promote the dignity of the Japanese community in Southern California. They represented Japanese farmers falsely accused of distributing harmfully

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<sup>17</sup> Aoki, *supra* note 13, at 54 n.49; Fujii v. California, *supra* note 1, at 735:

"It is generally recognized, however, that the real purpose of the [Alien Land Law] was the elimination of competition by alien Japanese in farming California land. . . . A former attorney general of California declared that the basis of the alien land law legislation was 'race undesirability' and that 'It was the purpose of those who understood the situation to prohibit the enjoyment or possession of, or dominion over, the agricultural lands of the State by aliens ineligible to citizenship, — in a practical way to prevent ruinous competition by the Oriental farmer against the American farmer.'"

<sup>18</sup> *Oyama v. California*, *supra* note 15, at 651–653 (Murphy, J., concurring).

contaminated produce, Japanese who were unpaid for their services, Japanese injured in accidents, Japanese swindled by gangsters, Japanese facing government fines, penalties, and criminal prosecution, and in many other matters besetting the lives of Japanese in Southern California — Wright with a law license and Fujii without. This lifelong partnership continues even today in the monument erected in Little Tokyo to honor Sei Fujii. The plaque on the



AT THE SEI FUJII MEMORIAL LANTERN IN LITTLE TOKYO'S JAPANESE VILLAGE PLAZA, ERECTED BY THE LITTLE TOKYO HISTORICAL SOCIETY (LTHS).

(L.-R.) LTHS DIRECTOR JEFFREY GEE CHIN, CO-PRODUCER, CO-AUTHOR, AND DIRECTOR OF *Lil Tokyo Reporter*; SIDNEY KANAZAWA OF MCGUIREWOODS LLP, WHO WORKED ON THE PETITION FOR FUJII'S POSTHUMOUS ADMISSION TO THE STATE BAR; SAN FRANCISCO ATTORNEY ADAM ENGELSKIRCHEN, GREAT-GRANDSON OF J. MARION WRIGHT, FUJII'S LAW PARTNER; PASADENA ATTORNEY CORALIE KUPFER, DAUGHTER OF ATTORNEY OWEN KUPFER, WHO WORKED WITH WRIGHT AND FUJII ON THE U.S. SUPREME COURT CASE IN 1928 THAT PERMITTED THE CONSTRUCTION OF THE BOYLE HEIGHTS-BASED JAPANESE HOSPITAL OF LOS ANGELES AND THE OVERTURNING OF THE CALIFORNIA ALIEN LAND LAWS; AND LTHS DIRECTOR CAROLE FUJITA, EXECUTIVE PRODUCER OF *Lil Tokyo Reporter*.

*Photo courtesy Little Tokyo Historical Society.*



FILMMAKER JEFFREY GEE CHIN, LEFT, AND SCULPTOR MILES ENDO, HOLDING THE FAR END OF VEIL, REVEAL AN 8-FOOT-TALL STEEL LANTERN IN LITTLE TOKYO'S JAPANESE VILLAGE PLAZA. THE MONUMENT IS DEDICATED TO THE JAPANESE-BORN LATE CIVIL RIGHTS ACTIVIST SEI FUJII. (IRFAN KHAN / LOS ANGELES TIMES)

*Photo and caption courtesy Los Angeles Times.*

monument includes the name of J. Marion Wright as Fujii's colleague and collaborator.<sup>19</sup>

The enactment of California's Alien Land Law on May 19, 1913 relegated people of Japanese ancestry to yet another second-class status. Unlike other persons born outside of the United States, Japanese, by law, had no right to "acquire, possess, enjoy, use, cultivate, occupy, transfer, transmit and inherit real property, or any interest therein" because they were unique among aliens in that U.S. immigration laws denied the right of "non-white" Asians from becoming U.S. citizens.<sup>20</sup>

Ironically, the 1918 worldwide Spanish influenza pandemic (which disproportionately devastated the Japanese community due to its lack of

<sup>19</sup> For press coverage of the monument in the wider Los Angeles community, see Martha Groves, *An Activist Remembered: Monument Honors Little-Known Japanese Advocate Sei Fujii*, LOS ANGELES TIMES, August 2, 2015.

<sup>20</sup> Aoki, *supra* note 13, at 55–62.

access to non-Japanese hospitals in Southern California) presented the first opportunity to chip away at the Alien Land Law.

In the wake of the 1918 influenza pandemic, a group of Japanese doctors, with the support of the Japanese community, banded together to build a Japanese Hospital. To avoid the prohibitions of the Alien Land Law, the doctors formed a corporation to acquire the land for the hospital. California's secretary of state refused to recognize the corporation because its purpose would violate the restrictions of the Alien Land Law.

Wright and Fujii teamed together to help the doctors and successfully took their case up through the California Supreme Court and U.S. Supreme Court, despite community leaders' predicting a coming war with Japan<sup>21</sup> and California political campaigns to save "California — the White Man's Paradise" from the "yellow peril."<sup>22</sup> In the aftermath of the favorable decision by the U.S. Supreme Court,<sup>23</sup> the Japanese community raised \$100,000 to build the hospital in 1929, just before the stock market crash, and built the hospital despite the Great Depression that followed.<sup>24</sup>

By law, Fujii could not practice law in California, but he could and did make a difference in how the rule of law was applied, and he affected the Japanese community by the power of his pen.

Although the 1907 "Gentlemen's Agreement" was supposed to stop the immigration of new workers from Japan, some continued to arrive through Canada and Mexico. There were also profiteers. Corrupt immigration officers and opportunistic Japanese informants extorted and exploited the illegal status of these immigrants. Some Japanese newspapers were complicit and refused to expose this illegal activity.

Even without a law license, Fujii could not stand silent in the face of this injustice. He rallied the Japanese community to oppose this

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<sup>21</sup> WALTER R. PITKIN, *MUST WE FIGHT JAPAN?* (1921).

<sup>22</sup> *Oyama v. California*, *supra* note 15, at 658–659 (1948) (Murphy, J., concurring opinion); Paul Finkelman, *2015 Mid-Atlantic People of Color Conference: Coping with a New "Yellow Peril": Japanese Immigration, the Gentlemen's Agreement, and the Coming of World War II*, 117 W. VA. L. REV. 1409 (2015).

<sup>23</sup> *Jordan v. Tashiro*, 278 U.S. 123 (1928).

<sup>24</sup> Japanese Hospital, located at First & Fickett Streets, also served the Latino, Black, and Jewish communities for many years, and was granted historic designation by the City of Los Angeles on November 1, 2016.

corruption and inhumanity. As documented in the *Los Angeles Times*, over 1,800 Japanese people came to rally with Fujii against the injustice.<sup>25</sup> This gathering sparked a major raid but his followers fought back. Despite a \$150,000 defamation lawsuit by an immigration officer,<sup>26</sup> Fujii refused to be silent and spoke louder for the Japanese community by founding his newspaper, *Kashu Mainichi*, on November 5, 1931 with the support of Japanese farmers and donors from the Yamaguchi Prefectural Association.

*Kashu Mainichi* not only spoke for the immigrants being abused by the immigration system, it spoke for farmers being swindled and cheated by organized crime in Little Tokyo, and for young students making positive contributions to the community around them.

Not all appreciated Fujii's voice. On several occasions, organized crime attempted to burn down his office and to assassinate him as well. On November 25, 1932, assassins were nearly successful, leaving Fujii bloodied on the street. Fortunately, the Japanese Hospital had been built by then and it is where he was taken to recover from his gunshot wounds.

During World War II, on February 22, 1942, Fujii was taken to a high-security detention center because of his leadership position at the *Kashu Mainichi*.

Upon his release, Fujii again joined with Wright to confront the Alien Land Law. Despite the reluctance of second-generation Japanese Americans (Nisei) to "rock the boat" in the immediate aftermath of the Allied forces' victory over Japan, Fujii was insistent on filing a lawsuit to directly challenge the Alien Land Law after the U.S. Supreme Court avoided the question of whether the Alien Land Law was constitutional in the case of *Oyama v. California*.<sup>27</sup>

In 1948, Fujii, still unable to become a U.S. citizen,<sup>28</sup> purchased a property on North Record Avenue in East Los Angeles to specifically challenge

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<sup>25</sup> *Rioters Rout Federal Men: Immigration Officers Flee Japanese Attack*, LOS ANGELES TIMES, November 5, 1931.

<sup>26</sup> *Immigration Man Sues on Accusation*, LOS ANGELES TIMES, October 14, 1931.

<sup>27</sup> 352 U.S. 633 (1948).

<sup>28</sup> *Ozawa v. United States*, 260 U.S. 178, 198 (1922) (holding that the Japan-born appellant "is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side" and is therefore ineligible for citizenship); see also Devon

the law.<sup>29</sup> The state used the Alien Land Law to take the property from him by escheatment. Fujii and Wright used this taking to challenge the constitutionality of the Alien Land Law and successfully obtained that result before the California Supreme Court on April 17, 1952. Two years later, with the change in immigration laws, Fujii became a U.S. citizen and died fifty-one days later.

## THE CALIFORNIA SUPREME COURT UNANIMOUSLY ADMITS FUJII POSTHUMOUSLY

A petition was filed on January 23, 2017 by the Little Tokyo Historical Society and the Japanese American Bar Association for the posthumous admission of Sei Fujii to the State Bar of California, with the support of 72 bar associations and community leaders (listed at the end of this article). On May 24, 2017, the California Supreme Court issued a unanimous administrative order<sup>30</sup> granting honorary posthumous membership in the State Bar of California to Sei Fujii, a Japan-born 1911 USC law graduate who — even without a license to practice law — dedicated his life to using the rule of law to promote justice and dignity for the Japanese community in Southern California, including his service as the plaintiff in *Fujii v. California*.<sup>31</sup> In granting Fujii's admission to the bar, the court noted, in part:

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W. Carbado, *Yellow by Law*, 97 CAL. L. REV. 633 (2009) (for historical and civil rights context of *Ozawa*).

<sup>29</sup> David Sloss, *How International Human Rights Transformed the U.S. Constitution*, 38 HUMAN RIGHTS Q. 426 (2016) (discussing facts of *Fujii v. California* and how it used non-discrimination provisions of the United Nations treaty to transform U.S. constitutional law).

<sup>30</sup> ADMINISTRATIVE ORDER 2017-05-17, *supra* note 14, at \*\*\*1 (Cal. 2017). The petition was filed by McGuireWoods (Kimberly Nakamaru, Arsen Kourinian, Adam Summerfield, Dana Palmer, Leslie Werlin, and Sidney Kanazawa). Much of this generous outpouring of support for the petition was initiated by the enthusiastic volunteer efforts of Fumiko Carole Fujita (Little Tokyo Historical Society), Mark Furuya (assistant general counsel, Clark Construction Group, LLC; president, Japanese American Bar Association), Doris Cheng (partner, Walkup, Melodia, Kelly & Shoenberger), Robert Meneses (administrative deputy, Los Angeles County Office of Alternate Public Defender), and Michael Wu (general counsel, Carters, Inc.) over the holidays just before the filing of the petition.

<sup>31</sup> 38 Cal.2d 718 (1952).

Though Fujii both graduated from law school and made his career in California, throughout his entire professional life he was barred from obtaining a license to practice law in the state. This was an injustice that we repudiate today by granting Fujii honorary posthumous membership in the State Bar of California. . . .

Despite being formally excluded from joining the ranks of the legal profession throughout his life, Fujii spent much of his career using the courts to advance the rule of law in California. . . . Fujii's work in the face of prejudice and oppression embodies the highest traditions of those who work to make our society more just.<sup>32</sup>

The referenced “prejudice and oppression” are amply reflected in the *Fujii v. California* dissent. The dissent begins at a logical place:

There is no question as to what the law is. It was enacted in the year 1920 by the people of California through the initiative [citation omitted]; it is based, as to the classification established, on an act of the Congress of the United States [footnote deleted]; for the past 32 years this law . . . has been consistently upheld by this court and by the Supreme Court of the United States as against the precise attack now made on it. But now, say the majority, upon an elaborate analysis of the trend of recent decisions of the Supreme Court of the United States, they think that that court, if the question were to be again presented to it might or would change its holding. The most careful study of the majority opinion discloses no other legal basis for their holding than this conjecture.<sup>33</sup>

But then the dissent seems oblivious to its own unfounded bias toward an entire class of persons and the odiousness of that generalized classification to our constitutional principles requiring “probable cause” rather than assumptions of guilt:

[I]t can hardly be seriously doubted that use or ownership of land by persons ineligible to citizenship may reasonably be determined by the people of a state to constitute a threat to the safety or welfare of the state because such ineligible persons cannot be bound

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<sup>32</sup> ADMINISTRATIVE ORDER 2017-05-17, *supra* note 14, at \*\*\*2, \*\*\*6–\*\*\*7.

<sup>33</sup> *Fujii v. California*, *supra* note 1, at 753 (Schauer, J., dissenting and concurring).

by an oath of allegiance to the United States, of which each state is an inseparable part, and, as a class their loyalty to and interest in the state are suspect, and further, such ownership of the land by its citizens, or those who can become such, bears a vital relationship to the strength of a free country. . . . The ownership of the soil by persons morally bound by obligations of citizenship is vital to the political existence of the state. It directly affects its welfare and safety. . . . The question is not whether every individual ineligible alien may be said to be disloyal to this nation, but whether the loyalty of such ineligible aliens *as a class* [italics in original] may be doubted. [Footnote 7: As is pointed out by Walter Pitkin in his “Must We Fight Japan?” (1921, The Century Co., p. 440), “The loyalty of the Japanese to his Government stands above all else. That is his religion.”] It is not within the province of this court, especially in the light of history which need go no further back than December 7, 1941, to declare that such doubt is unreasonable and bears no substantial relationship to the public welfare.<sup>34</sup>

Incredibly, the dissent justifies the Alien Land Law’s overt discrimination against Japanese based on stereotypes and fears, rather than any rational basis for different rules of law for aliens from Japan and aliens from non-Japanese countries. The dissent found arguments in pamphlets supporting the anti-competitive purpose of the Alien Land Law to be rational and justified. The pamphlet stated: “[The Alien Land Law’s] primary purpose is to prohibit Orientals who cannot become American citizens from controlling our rich agricultural lands . . . Orientals, and more particularly Japanese, [have] commenced to secure control of agricultural lands in California.” The dissent further justifies the law on the basis of the threat posed by Japanese farmers who work fourteen to eighteen hours a day (as compared with non-Oriental American farmers who take Sundays off and work only ten to twelve hours a day) and have built a growing market dominance because of their efforts — e.g., producing 80% of the tomato crop and 80–100% of the spinach crop in the state and becoming a significant proportion of the growers of various crops:

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<sup>34</sup> *Id.* at 766–767 (Schauer, J., dissenting and concurring).



berries (88%), sugar beets (67%), grapes (52%), vegetables (46%), citrus fruits (39%), and deciduous fruits (36%).<sup>35</sup>

Chief Justice Phil Gibson's majority opinion in *Fujii v. California* first analyzed whether the human rights and equal protection provisions of the United Nations Charter could be the basis for overturning the Alien Land Law. While acknowledging that its "humane and enlightened objectives" are "entitled to respectful consideration by the courts and legislatures of every member nation, since that document expresses the universal desire of thinking men for peace and for equality of rights and opportunities" and that "[t]he charter represents a moral commitment of foremost importance, and we must not permit the spirit of our pledge to be compromised or disparaged in either our domestic or foreign affairs," the majority concluded that the charter was not "self-executing" and cannot "operate to invalidate the Alien Land Law."<sup>36</sup>

The court then considered the Fourteenth Amendment's Due Process and Equal Protection Clauses in the face of U.S. Supreme Court precedents upholding the law and more recent precedents suggesting that the Alien Land Law was unconstitutional:

The clear import of the statements quoted above from the *Korematsu*, *Oyama* and *Perez* cases is that the presumption of validity is greatly narrowed in scope, if not entirely dispelled, whenever it is shown, as here, that legislation actually discriminates against certain persons because of their race or nationality. This view, now established by the latest declarations of the United States Supreme Court, is irreconcilable with the approach previously taken by that court in the *Porterfield* case in determining whether there was a reasonable relation between the purposes sought to be accomplished, and the classification adopted, in the California Alien Land Law.<sup>37</sup>

The majority found that

[t]he only disqualification urged against Sei Fujii is that of race. . . .  
"Nothing in this record indicates, and we cannot assume, that

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<sup>35</sup> *Id.* at 767 n.8, 768 n.10 (Schauer, J., dissenting and concurring).

<sup>36</sup> *Id.* at 720–725.

<sup>37</sup> *Id.* at 730–731.

he came to America for any purpose different from that which prompted millions of others to seek our shores — a chance to make his home and work in a free country, governed by just laws, which promise equal protection to all who abide by them.”<sup>38</sup> [Internal quotes and citations deleted.]

The court noted, “Shortly after the statute was enacted this court recognized that the legislation was directed at the Japanese and that its purpose was to discourage them from coming into this state [citation omitted]. Moreover, the state has enforced the law solely against persons ineligible to citizenship because of race and primarily against Japanese [citing statistics presented in *Oyama v. California*].”<sup>39</sup>

The court then concluded:

In the light of the foregoing discussion, we have concluded that the constitutional theories upon which the *Porterfield* case was based are today without support and must be abandoned. The California Alien Land Law is obviously designed and administered as an instrument for effectuating racial discrimination, and the most searching examination discloses no circumstances justifying classification on that basis. There is nothing to indicate that those alien residents who are racially ineligible for citizenship possess characteristics which are dangerous to the legitimate interests of the state, or that they, as a class, might use the land for purposes injurious to public morals, safety or welfare. Accordingly, we hold that the alien land law [sic] is invalid as in violation of the Fourteenth Amendment.<sup>40</sup>

The concurring opinion by Justice Jesse Carter was even more forceful: “It is clear, therefore, that there is not now and never has been any rational basis for excluding the Japanese from land ownership.”<sup>41</sup> The ineligibility of Japanese for U.S. citizenship has no relation to the interests and welfare of the state. “It would take a high degree of judicial

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<sup>38</sup> *Id.* at 733–734.

<sup>39</sup> *Id.* at 735 (quoting *Ex parte Kawato*, 317 U.S. 69, 71 (1942)); *Oyama v. California*, *supra* note 15, at 661–662 (Murphy, J., concurring).

<sup>40</sup> *Id.* at 737–738.

<sup>41</sup> *Id.* at 742 (Carter, J., concurring).

deference to local judgment to believe that Japanese were the worst offenders in nonproductivity.’<sup>42</sup> Justice Carter quoted, as well, from Carey McWilliams:

“It was George Shima, an immigrant, who taught the Californians how to develop a good potato seed. It was Japanese farmers who developed berry production in the West by increasing the yield four or five times over what it had been . . . . It was the Japanese who took over the semi-abandoned community of Livingston and made it a profitable farming area . . . .”<sup>43</sup>

The concurring opinion also noted the Japanese contribution to the defense of the country during World War II and chided the dissent for wanting to deny rights to the widowed mother of a Congressional Medal of Honor recipient.<sup>44</sup> “The Japanese . . . have probably contributed more to America than any other Asiatics. Their sons formed the famous 442nd Regimental Combat Team, which probably received more decorations and suffered more casualties than any unit of similar size in the entire U.S. Army.”<sup>45</sup> The concurring opinion also noted, “These antiquated statutes [i.e., the Alien Land Law and immigration statutes focused on race] give the Communists in the Far East a powerful anti-American propaganda weapon, and damage our relations with the people of Asia.”<sup>46</sup>

## STORY OF COURAGE

If nothing else, the California Supreme Court’s recognition of Sei Fujii with an honorary posthumous admission to the State Bar of California reminds us of what President John F. Kennedy called “that most admirable of human virtues — courage” in his book *Profiles in Courage*

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<sup>42</sup> *Id.* at 747 (Carter, J., concurring) (quoting Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CAL. L. REV. 7, 39 (1947)).

<sup>43</sup> *Id.* (quoting CAREY McWILLIAMS, PREJUDICE: JAPANESE-AMERICANS: SYMBOL OF RACIAL INTOLERANCE 79 (1944)).

<sup>44</sup> *Id.* at 748 (Carter, J., concurring) (quoting an unnamed article by Blake Clark in THE FREEMAN, July 16, 1951).

<sup>45</sup> *Id.* at 749 (Carter, J., concurring) (quoting Clark).

<sup>46</sup> *Id.* at 748 (Carter, J., concurring) (quoting Clark).

published one year after Fujii's death. It took courage for Fujii to come to the United States, attend USC law school, and study law in the face of laws preventing his U.S. citizenship and admission to the bar. It took courage for Fujii to fight for justice and dignity for the Japanese community against criminal elements within the Japanese community and against the larger non-Japanese community with the training, but not the license, to practice law. It took courage for J. Marion Wright to partner with Fujii to defend the Japanese community in the face of overwhelming anti-Japanese sentiment throughout California before, during, and after World War II. It took courage for the California Supreme Court to strike down the Alien Land Law, seven years after the end of the war with Japan, in the face of a U.S. Supreme Court precedent upholding the same law only thirty years earlier, and to justify this nullification of popular legislation by highlighting the achievements and sacrifices of the Japanese community in proving their loyalty to a country that had treated them like untrustworthy "others" because they looked like a wartime "enemy." And it took courage for the current California Supreme Court to decide to retell this story in this divisive period of polarized politics.

Fujii's story reminds us that now, more than ever, we need the same courage that Fujii and Wright mustered to stand up for "others." To step outside of our political and internet echo-chamber silos. To listen. To empathize. To champion the rights and dignities of those who may not be like us but who deserve the same justice, fairness, and kindness that we expect for ourselves.<sup>47</sup> To



PHOTO OF SEI  
FUJII FROM THE  
USC SCHOOL OF  
LAW CLASS OF 1911  
ALBUM.

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<sup>47</sup> Sabrina Tavernise, *The Two Americans*, NEW YORK TIMES, August 26, 2017; Michael Barbaro, "The Daily": *Two Lives Collide in Western Arkansas*, NEW YORK TIMES, THE DAILY PODCAST (August 30, 2017) (an audio version of Sabrina Tavernise's moving story about vandalism and kindness involving two Americans, Abraham Davis and Hisham Yasin, and a Muslim mosque in Fort Smith, Ark.).



SUPPORTERS OF THE PETITION FOR SEI FUJII'S POSTHUMOUS  
ADMISSION TO THE STATE BAR

(FRONT ROW, L.-R.) YUKIO KAWARATANI, ASSOCIATE PRODUCER OF *LIL TOKYO REPORTER* AND RETIRED SENIOR LOS ANGELES CITY PLANNER; MIKE OKAMURA, PRESIDENT, LITTLE TOKYO HISTORICAL SOCIETY (LTHS); ATTORNEY KIM NAKAMARU, GLOBAL EAGLE ENTERTAINMENT (FORMERLY OF MCGUIREWOODS LLP); LTHS DIRECTOR CAROLE FUJITA, EXECUTIVE PRODUCER OF *LIL TOKYO REPORTER*; PASADENA ATTORNEY CORALIE KUPFER; (MIDDLE ROW, L.-R.) GEORGE SHAW, COMPOSER OF MUSICAL SCORE FOR *LIL TOKYO REPORTER*; LTHS VOLUNTEER TADASHI KOWTA; ATTORNEY ARSEN KOURINIAN, MCGUIREWOODS LLP; LTHS DIRECTOR JEFFREY GEE CHIN, CO-PRODUCER, CO-AUTHOR, AND DIRECTOR OF *LIL TOKYO REPORTER*; LINDSEY SUGIMOTO, JD CANDIDATE, UC BERKELEY SCHOOL OF LAW; (BACK ROW, L.-R.) ATTORNEY SIDNEY KANAZAWA, MCGUIREWOODS LLP; SAN FRANCISCO ATTORNEY ADAM ENGELSKIRCHEN.

*Photo courtesy Little Tokyo Historical Society.*

act as attorneys.<sup>48</sup> And in the end, we may find — just as Fujii, Wright, and the California Supreme Court found — that we are more alike than different and that, in “the land of the free and the home of the brave,” we need the courage to trust and respect each other as fellow citizens, rather than fear each other as enemies in a land of the mean and a home of the scared.

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<sup>48</sup> Sidney K. Kanazawa, *Erase the Lines . . . We're All in This Together*, in ILLP REVIEW 2017: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION 93, 99 (2017) (“Our oath of office is not simply a license to earn money in the business of law. By pledging to uphold the constitution and the rule of law, we joined a profession dedicated to keeping our society together by reminding our fellow citizens of values and principles we hold in common.”).

LIST OF SUPPORTERS — in response to the petition by the Little Tokyo Historical Society and the Japanese American Bar Association for the posthumous admission of Sei Fujii to the State Bar of California, filed by McGuireWoods (Kimberly Nakamaru, Arsen Kourinian, Adam Summerfield, Dana Palmer, Leslie Werlin, and Sidney Kanazawa) on January 23, 2017:

#### INDIVIDUALS

Jeff Adachi, Public Defender of the City and County of San Francisco

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Donald K. Tamaki, Partner, Minami Tamaki LLP

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#### ORGANIZATIONS

American College of Trial Lawyers

Arizona Asian American Bar Association

Asian Americans Advancing Justice — Asian Law Caucus, Asian American Bar Association of Chicago

Asian American Bar Association of Houston

Asian American Bar Association of New York

Asian American Legal Foundation, Asian Americans Advancing Justice — Los Angeles

Asian Law Alliance

Asian Pacific American Bar Association

Asian Pacific American Bar Association of Central Ohio

Asian Pacific American Bar Association of Maryland

Asian Pacific American Bar Association of Pennsylvania

Asian Pacific American Women Lawyers Alliance

Association of Corporate Counsel (ACC); ACC Sacramento Chapter, ACC  
San Francisco Bay Area Chapter, ACC Southern California Chapter  
Chinese for Affirmative Action  
Civil Rights Education and Enforcement Center  
Connecticut Asian Pacific American Bar Association  
Dallas Asian American Bar Association  
Equal Rights Advocates  
Filipino American Lawyers Association of Chicago  
Georgia Asian Pacific American Bar Association  
Go For Broke National Education Center  
Greater Orlando Asian American Bar Association  
Historic Wintersburg, Huntington Beach, California  
Institute for Inclusion in the Legal Profession  
Italian American Bar Association of Northern California  
Japanese American Bar Association  
Japanese American Citizens League  
Japanese American Cultural & Community Center  
Japanese American National Museum  
Korean American Bar Association of Georgia  
Korean American Bar Association of Southern California  
Korean American Lawyers Association of Greater New York  
Little Tokyo Historical Society  
Little Tokyo Service Center  
Los Angeles County Asian American Employees Association  
Los Angeles County Board of Supervisors  
Minnesota Asian Pacific American Bar Association  
Missouri Asian American Bar Association  
National Asian Pacific American Bar Association  
National Asian Pacific Islander Prosecutors Association  
National Bar Association  
National Conference of Vietnamese American Attorneys  
National Filipino American Lawyers Association  
Orange County Asian American Bar Association  
Oregon Asian Pacific American Bar Association  
Philippine American Bar Association  
San Francisco Chapter of the American Board of Trial Advocates

San Francisco Trial Lawyers Association  
South Asian Bar Association of Southern California  
Taiwanese American Lawyers Association  
Thai American Bar Association  
The Bar Association of San Francisco  
The California Chapters of the American Board of Trial Advocates  
Tuna Canyon Detention Station  
USC Gould School of Law

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# CALIFORNIA — LABORATORY OF LEGAL INNOVATION

HARRY N. SCHEIBER\*

## EDITOR'S NOTE

The following article first appeared in the ABA magazine *Experience* in 2001.<sup>1</sup> As chair of the *Experience* Editorial Board at the time, I had invited Harry Scheiber to prepare an article on the theme of California as a leading legal innovator. Later that year, he obtained permission from the ABA to republish the article in the *Yearbook* of the California Supreme Court Historical Society (the predecessor of *California Legal History*), but he did not do so by reason of a pause in publishing during the transition from the *Yearbook* to this journal, both of which he served as founding editor.

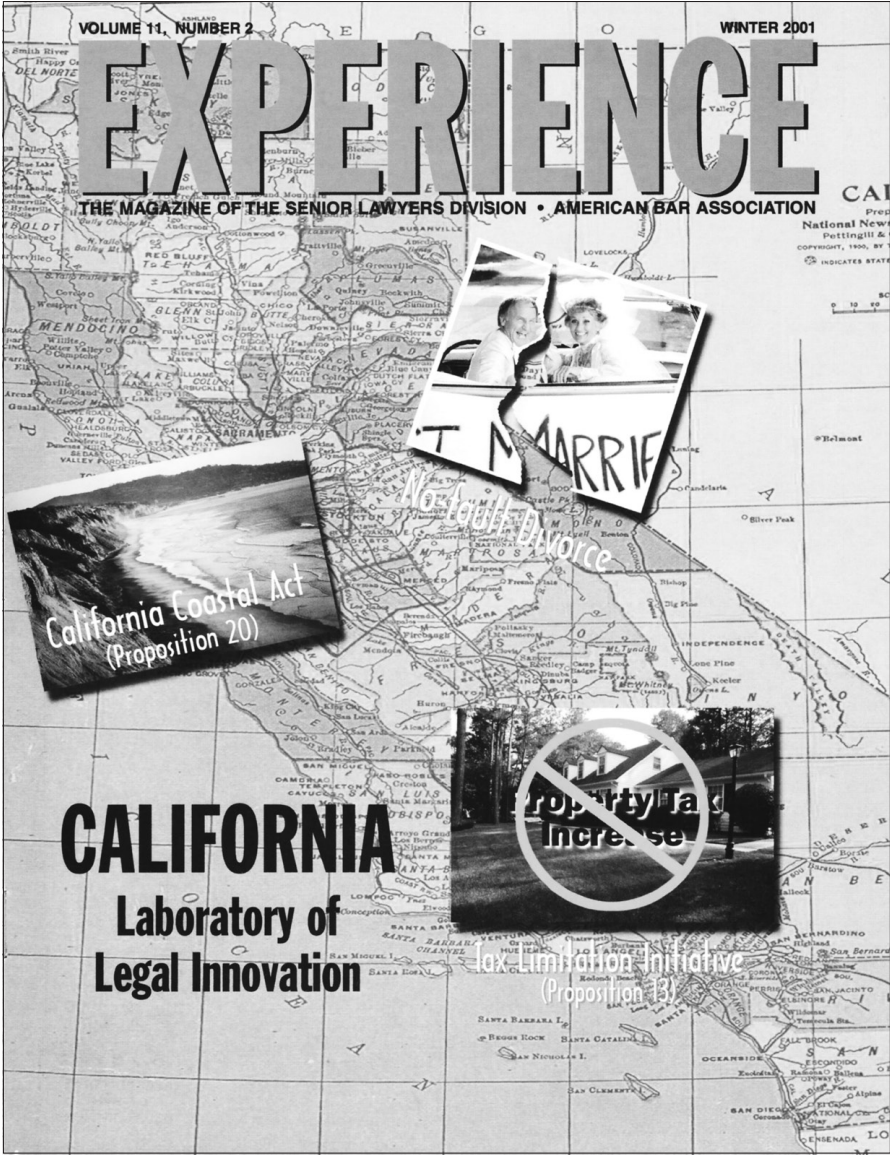
Subsequently, when I proposed the same topic for the Society's annual program at the 2006 State Bar Annual Meeting in Monterey, Professor Scheiber was scheduled to present this research,<sup>2</sup> but emergency oral

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\* Stefan A. Riesenfeld Professor of Law (Emeritus) and Chancellor's Emeritus Professor, University of California, Berkeley, and Director of the Institute for Legal Research.

<sup>1</sup> 11 EXPERIENCE 4 (2001).

<sup>2</sup> The other speakers were Kathryn Mickle Werdegar, Associate Justice, California Supreme Court; Jake Dear, Chief Supervising Attorney, California Supreme Court;



Joseph R. Grodin, former Associate Justice, California Supreme Court and Distinguished Professor Emeritus, UC Hastings College of the Law; Robert F. Williams, Distinguished Professor of Law, and Associate Director, Center for State Constitutional Studies, Rutgers University School of Law, Camden; and Gerald K. Uelmen Professor of Law (and former Dean), Santa Clara University School of Law (who substituted for Professor Scheiber). The moderator was former (and again, 2015–) Court of Appeal Justice Elwood Lui, then partner at Jones Day.

surgery prevented his appearance. Excerpts of the other panelists' remarks were published in the Society's *Newsletter*,<sup>3</sup> but neither Professor Scheiber's spoken nor written words reached their intended California audience. With the present volume of *California Legal History*, his ideas find their home in the Society's publications.

Professor Scheiber's historical overview is confirmed by the passage of time — as is his prescience regarding innovations to come. Although such a work might be updated over time to include later developments, it must ultimately become a historical document that speaks from the perspective of a given moment. In that spirit, it is presented here without revision, as it first appeared, but with the addition of citations and notes.

— SELMA MOIDEL SMITH

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## CALIFORNIA — LABORATORY OF LEGAL INNOVATION

The great social critic and journalist Carey McWilliams famously termed California “the great exception,”<sup>4</sup> asserting that the geographic conditions, cultural mix, economic structure, and social milieu of the Golden State made it unique even in a nation rich in diversity and contrasts. It might be a bit misleading to speak of California law as “exceptional,” because in our federal system every state government can be, if it so wishes, a “laboratory” (as Justice Brandeis said<sup>5</sup>) of policy experiments and legal innovation. In an earlier day, before the national government assumed its modern form with such large boundaries of authority, there was even greater room than now for states to compete for the crowning title of “the great exception.” And California has risen boldly to the challenge, both in modern times and earlier days.

Even in the state's first constitutional convention, held in Monterey in 1849, one delegate denounced the tendency shown by some toward

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<sup>3</sup> Autumn/Winter 2006, Special Supplement, available at <https://www.cschs.org/wp-content/uploads/2014/08/2006-Newsletter-Fall-Monterey-Supplement-updated.pdf>.

<sup>4</sup> CAREY McWILLIAMS, *CALIFORNIA: THE GREAT EXCEPTION* (1949).

<sup>5</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

“servilely” copying the constitutions of other states. This convention was capable of originality, he shouted, and it would be shameful to permit a California constitution to be merely composed of borrowed legal “shreds and patches” (quoted from *Hamlet*).<sup>6</sup> This kind of thinking has had a continuing vitality in the life of the law, as in other respects, in the Golden State’s history.

When California law has been different, moreover, it has often been the bellwether of legal change nationally. Probably every one of the fifty states can point to a few areas of law in which it developed new doctrine accepted by other states. But California has a record, probably unique in the number and subject-matter range, of legal innovations — instituted by the Legislature and the courts alike — that have broken new paths. The degree to which other states have followed California’s lead has been dramatically manifested in some vitally important aspects of private law, such as the field of torts. In modern constitutional law, too, the California Supreme Court has often interpreted fundamental law with positions that the Supreme Court of the United States would eventually adopt.

In the spirit of innovation, the new state’s legislature placed on its agenda various proposals for codification of the laws even before California was admitted formally to the Union. The playbook for codification had been written earlier by the noted legal reformer David Dudley Field in New York State. But Western states were the ones that ran with the ball. The purpose was to demystify and clarify the law for a republican citizen, supplanting both substantive vagaries and the Byzantine procedural complexities of the common law system. The debate went on in California throughout the two decades after statehood was achieved, climaxing after 1863, when Governor Leland Stanford called for “thorough revision and codification.”<sup>7</sup> California lawyers and historians are generally pleased to report that not only did the Legislature finally respond by approving a series of codification commissions in the 1860s, but it also outran New York to the goal line by adopting civil, penal, and political codes in 1872. The process was not

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<sup>6</sup> J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA, ON THE FORMATION OF THE STATE CONSTITUTION, IN SEPTEMBER AND OCTOBER 1949 51 (1850).

<sup>7</sup> ANNUAL MESSAGE OF LELAND STANFORD, GOVERNOR OF THE STATE OF CALIFORNIA, AT THE FOURTEENTH SESSION OF THE LEGISLATURE 8 (January 1863).

complete, and clarification continued throughout the following century through both judicial and legislative action; but California's adoption of Field's code was an example followed by a growing number of states.

## FAMILY LAW

Among the modern landmarks of legal innovation in California, perhaps none is more widely known than the adoption of no-fault divorce under California's Family Law Act of 1970. This was followed by a series of decisions by the California Supreme Court, and also additional statutes on family law, that provided for basic reforms in the rules of child custody, child support, and domestic partnership. In 1976, the attention of a national public was riveted on the adjudication of the famous 1976 case of *Marvin v. Marvin*,<sup>8</sup> when the California Supreme Court ruled that oral agreements of an unwed couple would be enforceable under common law principles of contract. The court followed with a string of decisions in the 1980s extending constitutional protection to the right to choose a life partner (unmarried but living together as a couple), giving unmarried couples protection against discrimination in employment and in the economic marketplace more generally, and banning discrimination against gays and lesbians in adoption law. Colorado, Vermont, and Hawaii have gathered all the headlines in this area of legal innovation in recent days, but their controversial moves in the field of family law and homosexual rights have their beginnings out on the West Coast, in the familiar legal territory that is California's seedbed of new law. One cannot add community property law to the list, however, despite its renown as a California institution, because it was not a California innovation but rather an adoption of Texas law.

## THE ENVIRONMENT

Environmental law and policy is another area in which California has been the bellwether nationally. In coastal zone and offshore environmental protection, California was far out in front, not because of action by the courts or the Legislature but because of a popular initiative in 1972, "Prop. 20," which was unique for the time in providing new doctrines

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<sup>8</sup> 18 Cal.3d 660.

and legal instruments for coastal zone management. In its essential elements, this product of the direct ballot in California would be a model for the provisions of the national Coastal Zone Act adopted by Congress three years later.

In the movement for the more comprehensive regulation of environmental issues, the national government led the way in the 1970s during the Nixon administration. But California's legislature followed suit quickly [with the California Environmental Quality Act of 1970 — "CEQA"], and it was not long before the California judiciary came down with a series of decisions that dealt boldly with some of the hottest issues of unfinished business left to the courts by the legislative process. The California courts made agency compliance subject to judicial scrutiny, fashioned standing doctrines that expedited challenges to both private and governmental action by public interest groups and others, and interpreted broadly the requirements for environmental impact statements. The California court also took a strong position on "public trust" principles in regulatory law and the environment, in this instance referring to the state's heritage of Spanish and Mexican civil law concepts. These judicial rulings were closely watched and taken widely as precedent by other state courts that were sympathetic to the requirements of an effective system of environmental protection. As a broadly noticed scholarly commentary asserted in 1980, the California judiciary had placed itself "on the cutting edge of preservationism" nationally.

## CONSTITUTIONAL LAW

Judicial action on environmental law in California was matched in its influence during the 1970s by the prominence of the state supreme court's constitutional decisions. To cite one especially important case, *Serrano v. Priest*,<sup>9</sup> the state high court ruled in 1976 that education was a fundamental right, and that the state's local property tax structure for support of schools violated the equal protection guarantee. Finding wide disparities in levels of local support produced by the tax, the court required the Legislature to devise a new system that would provide more nearly equal school

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<sup>9</sup> 18 Cal.3d 728.

financing — pointing the way to similar decisions in other states, including most recently, for example, the widely noticed actions in this area of law taken by the Ohio Supreme Court.

The *Serrano* decision was one of a larger body of rulings by the California court that the justices based on the state's own constitution rather than the federal constitution. At that time and earlier, it was common for the state courts to resist "liberal" doctrines that the U.S. Supreme Court had applied to the federal government itself. (The California court itself resisted applying the federal exclusionary rule in state trials, for example, declaring in a 1942 decision that the Fourth Amendment did not apply to the states, and despite similar language on search and seizure in the federal and California constitutions, "California is free to interpret its own constitution" on such matters.<sup>10</sup>) In *Serrano* and other cases in the 1970s, however, the California court introduced its own "liberal" interpretations of state constitutional language, going beyond what the increasingly conservative U.S. Supreme Court was interpreting as the requirements of similar or identical language in the federal document. Thus, the *Serrano* court declared that the equal protection provisions of California's constitution "are possessed of an independent vitality . . . . Accordingly, decisions of the U.S. Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law."<sup>11</sup> Hence the California court chose not to apply a contrary finding on equal school financing that a year earlier had been handed down by the federal Supreme Court in *San Antonio School District v. Rodriguez*.<sup>12</sup>

Application by the high courts in many states of this doctrine of "independent and adequate state grounds" became a prominent feature of the landscape in American law in the 1970s. It was a development largely driven by decisions of the high courts in three or four states in that period, but preeminently so by California's Supreme Court. One of the most respected and influential expositors of the state grounds doctrine, both in scholarly forums and in decisions of the California court, was Associate

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<sup>10</sup> *People v. Gonzales*, 20 Cal.2d 165, 169.

<sup>11</sup> *People v. Longwill*, 14 Cal.3d 943, 951 n.4 (1975).

<sup>12</sup> 411 U.S. 1 (1973).



Justice Stanley Mosk (who has subsequently gone on to establish a record for longevity of service on the court). Discriminatory zoning, separation of church and state, leafleting in shopping centers, search and seizure rules, right to counsel, the right of privacy, the death penalty, and a host of other questions were decided on state grounds by the California high court in the 1970s, as the increasingly conservative national Supreme Court retreated from Warren Court premises and doctrines or else declined to break new legal ground in such areas.

Meanwhile, the California court was also pioneering in tort law, leading in the dramatic “tort revolution” that brought industrial liability to its dominant position nationally. Roger B. Traynor, who served on the court from 1940 to 1970, and was chief justice from 1964 to 1970, was the chief judicial architect of this important court-fashioned legal reform. Traynor also wrote opinions for the California court in a number of constitutional areas where the U.S. Supreme Court would eventually follow suit, for example, in striking down the state’s antimiscegenation statute<sup>13</sup> some two decades before the federal high court adopted Traynor’s reasoning and acted similarly against such laws in *Loving v. Virginia*.<sup>14</sup> In decisions interpreting the federal and state constitutions on the subjects of search and seizure, discovery rights in criminal cases, and discrimination in jury selection, the California court’s rulings were mirrored years later in the U.S. Supreme Court’s decisions.

## CALIFORNIA DEMOCRACY

California also has won a name, admirably or otherwise, as the fountainhead of the “tax revolt” that has had such sweeping consequences for state government and the provision of social services and education in many states. The revolt began with the Golden State’s Proposition 13, adopted in 1978. Within only five years’ time, adaptations of the new tax-limitation law in California had been put on the ballot in sixteen other states. It is the process, and not only the message, in which California has been exceptional. There is no question that recent trends in the political process nationally have constituted a true “Ballot Initiative Revolution,” and again

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<sup>13</sup> *Perez v. Sharp*, 32 Cal.2d 711 (1948).

<sup>14</sup> 388 U.S. 1 (1967).

California was the seedbed. Insofar as the state courts have been involved in this revolution, of the cases challenging procedural and constitutional aspects of direct ballot initiatives, according to one study, nearly 60 percent nationally were before the California Supreme Court.

What makes the initiative process all the more interesting, in California and in some other states with active direct-ballot process, is the very great diversity of subjects brought forward by this process for voter decision. In California, there have been what political scientists call “rights-enhancing” measures, such as a constitutional provision introducing a right of privacy, or, indeed, another that amended the Constitution to assert positively the doctrine of independent and adequate state grounds. Ironically, however, in subsequent years some of the most important California initiatives, both statutory and constitutional, have been “rights-reducing,” designed to reverse decisions of the California Supreme Court that extended to criminal defendants procedural rights that went beyond what decisions of the U.S. Supreme Court required of the state. So California’s unique style of legal innovation first drew upon a tradition of independent state law proclaimed by the courts, and then spawned a populist movement for direct voter action, repudiating some of the most important judicial products of that tradition. It is impossible, in light of this very mixed record in use of the direct ballot, to term the California electorate consistently liberal, conservative, or otherwise; perhaps “ornery” is the term that best describes it.

Nor has the record of participatory democracy been consistent in California’s distant past. When a second constitutional convention was held in 1879, the delegates came down hard on corporations and their immunities; the result contained some extraordinary “liberty-enhancing” provisions such as one protecting women from discrimination in pursuit of “any lawful business, vocation, or profession.” (This ostensibly unambiguous language was interpreted by the state’s high court, however, in ways that whittled away at its strength; and the provision was practically dormant until, in 1971, a unanimous decision of the California high court, *Sail’er Inn v. Kirby*,<sup>15</sup> put a strong new interpretation on that provision and buttressed it by declaring gender discrimination a suspect classification under

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<sup>15</sup> 5 Cal.3d 1.

equal protection analysis.) But the 1879 Constitution also was accepted enthusiastically by the electorate because it included harsh restrictions on employment and civil rights for Chinese residents that amounted to some of the most blatant and vicious types of discrimination that ever disgraced the law books of an American state outside the slavery region of the Old South. All of the most prominent of these discriminatory articles in the 1879 document were subsequently struck down by federal appellate judges, including some of the leading cases of the U.S. Supreme Court in the 1880s.

Constitution writers, legislators, and judges in every state draw upon the law of other states in shaping their own legal rules and procedures. There is credit (and blame) enough to be widely distributed in this regard. But whether one considers questions of constitutional doctrine, procedure, private law, or lawmaking process, California stands out as a fascinating example of the extraordinary opportunity afforded by the structure and rules of the American federal system for a state to be a “laboratory of legal innovation.”

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*Criminal Law Principles in California:*

## BALANCING A “RIGHT TO BE FORGOTTEN” WITH A RIGHT TO REMEMBER

MITCHELL KEITER\*

In the early 1970s, both the California Supreme Court and Germany’s Federal Constitutional Court faced the same legal question. Marvin Briscoe had hijacked a truck in 1956 and sued *Reader’s Digest* for publishing an account of the event a decade later.<sup>1</sup> An unnamed petitioner likewise had participated in a terrorist act that killed several people and sued to enjoin a German television station from identifying him in a documentary about the event, scheduled to air around the time of his prison release.<sup>2</sup> Both the magazine and station asserted a right to disclose the truthful information, but both courts ruled against them, concluding disclosure could impede the offender’s rehabilitation and reintegration into society.

Both California and Europe recently have developed new rules about how to balance the public’s right to truthful information with an

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<sup>1</sup> *Briscoe v. Reader’s Digest Association, Inc.*, 4 Cal.3d 529 (1971).

<sup>2</sup> *Lebach* case, 35 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 202 (1973).

individual's right to suppress embarrassing information about his past. Notwithstanding the prior convergence, the new frameworks are very different, and illuminate the competing philosophical priorities of American and European law. These competing priorities are worth studying, as both the United States and Europe are seeking to apply their model throughout a global internet lacking physical borders,<sup>3</sup> and the post-Brexit United Kingdom has the opportunity to consider both the American and Continental models on free speech, privacy, criminal justice, and many other issues as it charts its own legal course in the coming years.

California's policy follows the common law tradition limiting minors' rights to "secure them from hurting themselves by their own improvident acts."<sup>4</sup> Family Code section 6710 shields minors from the consequences of their "improvidence" and "indiscretions" by permitting them to disaffirm their contracts,<sup>5</sup> and California's new "Eraser Law," developed legislatively, adapts this principle for the Internet Age by letting minors delete content they regretted having posted on the internet.<sup>6</sup>

Europe's "right to be forgotten" is narrower in one respect but broader in others. Whereas California's law allows the poster unilaterally to remove content, Europe's law, developed judicially by the Court of Justice for the European Union (CJEU), requires someone seeking to remove embarrassing data to show they were "inadequate, irrelevant or excessive in relation to the purposes of the processing, that they are not kept up to date, or that they are kept for longer than is necessary," and the final decision lies with a court.<sup>7</sup> But Europe's right has a broader reach. California's law

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<sup>3</sup> Leslie E. Minora, *U.S. Courts Should Not Let Europe's "Right to be Forgotten" Force the World to Forget*, 80 TEMP. L. REV. 609, 616, 619 (2017).

<sup>4</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*464–65, quoted in *J.D.B. v. North Carolina*, 564 U.S. 261, 273 (2011).

<sup>5</sup> CAL. FAM. CODE, § 6710; *Burnand v. Irigoyen*, 30 Cal.2d 861, 866 (1947); *Pearson v. Superior Court*, 202 Cal. App. 4th 1333, 1339 (2012).

<sup>6</sup> CAL. BUS. & PROF. CODE, § 22581, subd. (a). The law took effect in 2015.

<sup>7</sup> Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 2014 E.C.R. 317 (*Google Spain*). Mario Costeja Gonzalez brought suit upon discovering that internet searches of his name disclosed 1998 newspaper articles describing an auction of his property due to unpaid debts. The EUCJ held Gonzalez' fundamental right "to be 'forgotten' after a certain time" would override both the search engine's "economic interest" in presenting and "the interest of the general public in having access to that information." *Id.*

allows individuals to delete only their own posted content, and not any re-posting of that same content by anyone else. By contrast, the European right permits far more: deletion of (1) one’s own content; (2) another party’s re-posting; and (3) anyone else’s comment or description *about* the original subject (e.g., news reports).<sup>8</sup> And most obviously, the California law reaches only minors. The CJEU imposed no such limit, implicitly concluding that the indiscretion of youth should not be wasted on the young.

Whereas Germany’s 1973 decision has shaped European law,<sup>9</sup> the California Supreme Court disapproved its *Briscoe* decision in 2004.<sup>10</sup> The Court naturally cited intervening United States Supreme Court decisions analyzing the First Amendment. But other developments in California criminal law presaged this divergence. In a case arising out of Los Angeles Superior Court, the U.S. Supreme Court in *Farett v. California* (1975)<sup>11</sup> recognized a constitutional right to represent oneself in court, a right not protected by European Union law. The Court would later indicate how the self-representation issue pits the individual’s right to be “master of one’s fate” against the possibility of personal embarrassment, and Part I of this article shows how this contrast reflects the respective priorities of Americans and Europeans on privacy law.

Europe’s “right to be forgotten” derives from the French principle letting a convict, after completing his sentence, suppress disclosure of his crime and incarceration,<sup>12</sup> so differences in American and European criminal law naturally offer insight into the disparate conceptions of the law’s reach. Part II of this article recalls California’s 1977 shift from rehabilitation-based indeterminate sentencing to retribution-based determinate sentencing, and its effect on the right of former criminals to hide information about their past. Part III describes a 1982 voter initiative that revised California law to offer juries more information about defendants’ criminal records for the purpose of evaluating their credibility. Part IV

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<sup>8</sup> Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 68 (2012).

<sup>9</sup> See, e.g., James Whitman, *The Two Western Cultures of Privacy: Dignity versus Liberty*, 113 YALE L.J. 1151, 1195 (2004) (*Two Western Cultures*); JAMES WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 92, 142 (2003) (*HARSH JUSTICE*).

<sup>10</sup> *Gates v. Discovery Commc’ns, Inc.*, 34 Cal.4th 679 (2004).

<sup>11</sup> 422 U.S. 806.

<sup>12</sup> Rosen, *supra* note 8.

shows how the First Amendment provides Americans with far greater speech protections than European law, which restricts speech more to accommodate other values.<sup>13</sup> Part V offers a theory on why the two legal systems have developed such different legal priorities, and Part VI concludes by summarizing the competing principles.

## I. PRIVACY

Continental Europe's inquisitorial system of criminal procedure empowers the state to protect the interests of its people, whereas the adversarial system governing Anglo-American criminal procedure generally trusts citizens to define and defend their own interests.<sup>14</sup> The CJEU judges' empowering courts to determine when to delete internet content, and Californians' empowering users themselves to do so, reflects this general contrast. Along these lines, Continental Europe does not recognize the common law right to self-representation.<sup>15</sup> But *Faretta* recognized a constitutional guarantee flowing from English common law that American criminal defendants may trust themselves to decide on their representation; the state may not impose "an organ of the state" on an unwilling defendant, even if it would probably benefit him.<sup>16</sup> The attorney must be the "assistant" of the defendant, not the "master."<sup>17</sup> The dissenting opinion, however, lamented that the Court had created a constitutional right "to make a fool of himself."<sup>18</sup>

The self-representation right thus procedurally resembles the right to be forgotten. Self-representation occurs in Europe (though many countries confine it to less serious cases), but a court must assent to the arrangement,

<sup>13</sup> FLOYD ABRAMS, *THE SOUL OF THE FIRST AMENDMENT* (2017).

<sup>14</sup> Matthew T. King, *Security, Scale, Form, and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Systems*, 12 INT'L LEGAL PRINCIPLES 185, 191, 194, 201 (2001–2002).

<sup>15</sup> Nina H. B. Jorgensen, *The Right of the Accused to Self-Representation Before International Criminal Tribunals*, 98 AM. J. OF INT'L L. 711, 714–17 (2004), citing, e.g., 23 CODE DE PROCEDURE PENALE [C. PR. PEN.] (Partie Legislative) Arts. 274, 317 [France]; 22 STRAFPROZEBORDNUNG [StPO] §§ 140, 240 [Germany].

<sup>16</sup> *Faretta v. California*, 422 U.S. 806, 820 (1975). "Personal liberties are not rooted in the law of averages." *Id.* at 834.

<sup>17</sup> *Id.* at 820.

<sup>18</sup> *Id.* at 852 (Blackmun, J., dissenting).

whereas the Sixth Amendment permits a defendant to invoke the right unilaterally.<sup>19</sup> As this article will show, it is not the only context where Europe seeks to protect individual welfare and America seeks to respect individual autonomy.

A subsequent exchange on the subject between Justice Stephen Breyer, the justice who has most consistently favored incorporating European norms into American constitutional analysis, and Justice Antonin Scalia, the justice who most forcefully advocated for exclusive reliance on American sources, illuminated the values underlying the self-representation debate.<sup>20</sup> Justice Breyer’s majority opinion opposed self-representation for a defendant whose questionable mental competence suggested “the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling.”<sup>21</sup> The state thus needed to protect the defendant from his own improvidence. But Justice Scalia defined dignity as the opportunity for self-determination, not a shield against humiliation.

[T]he loss of “dignity” the [self-representation] right is designed to prevent is *not* the defendant’s making a fool of himself by presenting an amateurish or even incoherent defense. Rather, the dignity at issue is the supreme human dignity of being master of one’s fate rather than a ward of the State — the dignity of individual choice.<sup>22</sup>

The competition between these values extends well beyond the courtroom. Like Justice Breyer and unlike Justice Scalia, Europeans endorse the value of state intervention to protect individual welfare. When asked which was more important: “for the state to play an active role in society so as to guarantee that nobody is in need” or “for everyone to be free to pursue their life’s goals without interference from the state,” almost two-thirds of the French and German respondents (and more than two-thirds of the Spanish), but barely one-third of Americans, favored state

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<sup>19</sup> Jorgensen, *supra* note 15 at 714–15.

<sup>20</sup> *The relevance of foreign legal materials in U.S. constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. OF CON. L. 519 (2005).

<sup>21</sup> *Indiana v. Edwards*, 554 U.S. 164, 176 (2008).

<sup>22</sup> *Id.* at 186–87 (Scalia, J., dissenting) (boldface added).



intervention over self-determination.<sup>23</sup> Whether the state should actively protect people from harmful outcomes (including humiliation), or respect their self-determination, even when improvidently exercised, is a foundational question that has divided European and American conceptions of “privacy” for well over a century.

Europe and the United States have long maintained different privacy priorities. Professor James Whitman, who has written extensively on the differences between the Continental European and American legal traditions,<sup>24</sup> has observed how Europeans have always valued personal dignity and honor, and their public image, so their law seeks to protect individuals from humiliation.<sup>25</sup> Americans, by contrast, seek to protect “the realm of private sovereignty.”<sup>26</sup> This derives from the individual’s right to exclude the government from one’s home, but extends to other forms of personal sovereignty.<sup>27</sup> California’s constitutional norms, developed during the Gold Rush, especially valued individualism and unrestrained speech.<sup>28</sup>

Professor Whitman cited the aristocratic culture of eighteenth-century France and Germany as the root of European privacy preferences.<sup>29</sup> High-status individuals enjoyed an enforceable right to prevent the loss of honor (“public face”) arising from insult or the disclosure of embarrassing information.<sup>30</sup> A seminal example involved *The Three Musketeers* author Alexander Dumas père, who posed for relatively salacious photographs with a girlfriend half his age.<sup>31</sup> Dumas admitted he had sold the rights to the

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<sup>23</sup> Pew Research Center, *The American–Western European Values Gap* 7 (2011–12) <http://www.pewglobal.org/2011/11/17/the-american-western-european-values-gap>.

<sup>24</sup> See *Two Western Cultures of Privacy*, *supra* note 24; James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 *YALE L.J.* 1279 (2000) (*Enforcing Civility and Respect*); HARSH JUSTICE, *supra* note 9. In many ways, the United Kingdom’s common law tradition accords with the American tradition more than the European one. Unless otherwise indicated, this article will use “European” to refer to the Continental tradition.

<sup>25</sup> *Two Western Cultures*, *supra* note 9, at 1164.

<sup>26</sup> *Id.* at 1162.

<sup>27</sup> *Id.*

<sup>28</sup> *Gerawan Farming, Inc. v. Lyons*, 24 Cal.4th 468, 495 (2000).

<sup>29</sup> *Two Western Cultures*, *supra* note 9, at 1165.

<sup>30</sup> *Id.* at 1162, 1168.

<sup>31</sup> *Id.* at 1175.

photographer, who registered the copyright.<sup>32</sup> To protect Dumas’ honor, however, a court created a new privacy right to compel suppression of the photos.<sup>33</sup> Although Dumas “had forgotten to take care of his dignity,” the court protected it for him, by ordering the photographer to return to Dumas the rights to the photographs.<sup>34</sup>

American privacy law derives from a different foundation. The seminal decision was *Boyd v. United States* (1886),<sup>35</sup> which protected the home, the locus of privacy, from state intrusion.<sup>36</sup> *Boyd* relied on the English case of *Entick v. Carrington* (1765),<sup>37</sup> and described the Founding Fathers as considering *Entick* the “true and ultimate expression of constitutional law.”<sup>38</sup> *Entick* celebrated the “sacred and incommunicable right” to property: “The great end for which men entered into society was to secure their property.”<sup>39</sup> This societal purpose would compel a different outcome for *Dumas*. The property right lay with *the photographer*, whose contract would be deemed inviolable under American constitutional law.<sup>40</sup> Even today, California’s Eraser Law denies the right to remove a post if the minor received compensation or other consideration for it.<sup>41</sup>

The California Supreme Court’s decision in *Shulman v. Group W Productions, Inc.* (1998)<sup>42</sup> reflected this “American” understanding of privacy. A news crew filmed the emergency rescue of automobile accident victims.<sup>43</sup> A victim who was disoriented after the accident later objected to broadcasting the rescue.<sup>44</sup> Asserting her interest in “public face,” valued by Europeans as the right “to have people see you the way you want to

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<sup>32</sup> *Id.* at 1175–76.

<sup>33</sup> *Id.* at 1176.

<sup>34</sup> *Id.* Dumas would not be the last person to pose for risqué photographs and then regret it. See Rosen, *supra* note 8.

<sup>35</sup> 116 U.S. 616.

<sup>36</sup> *Two Western Cultures*, *supra* note 9, at 1210.

<sup>37</sup> 95 Eng. Rep. 807 (K.B. 1765). The *Boyd* Court cited the longer version presented in 19 Howell’s State Trials 1029.

<sup>38</sup> *Boyd*, 116 U.S. at 626.

<sup>39</sup> *Boyd* at 327, citing *Entick*, 19 How. St. Tr. at 1066, emphasis added.

<sup>40</sup> See, e.g., *Fletcher v. Peck*, 10 U.S. 87, 138, [6 Cranch] (1810).

<sup>41</sup> CAL. BUS. & PROF. CODE, §22581, subd. (b)(5).

<sup>42</sup> 18 Cal.4th 200.

<sup>43</sup> *Id.* at 210–12.

<sup>44</sup> *Id.* at 212.

be seen,”<sup>45</sup> she noted, “I certainly did not look my best, and I don’t feel it’s for the public to see.”<sup>46</sup> The Court rejected this “European” interest, finding that the newsworthiness of the event, which highlighted the challenges facing emergency workers, justified publication despite the woman’s embarrassment.<sup>47</sup>

But the Supreme Court vindicated her “American” interest in “resistance to invasions of the realm of private sovereignty.”<sup>48</sup> Endorsing the view that “[h]e who may intrude upon another at will is the master of the other and, in fact, intrusion is a primary weapon of the tyrant,”<sup>49</sup> the Court held there was a triable issue of fact as to whether the journalist improperly intruded into the victim’s “zone of privacy” by riding along in the rescue helicopter, and/or placing a microphone on the rescuer’s person, amplifying and recording what she said and heard.<sup>50</sup>

The *Shulman* court concluded that information’s newsworthiness could justify *publication* despite the subject’s embarrassment, but the story’s value did not abrogate limitations on its *gathering*. “Intrusion into a private place, conversation or source of information” cannot be justified by the intruder’s goal to “get good material for a news story.”<sup>51</sup> The U.S. Court of Appeals, Ninth Circuit had similarly distinguished between publication and gathering in forbidding investigative journalists from using hidden cameras and tape recorders in the Los Angeles home of their target. “The First Amendment is not a license to trespass, to steal, or to *intrude* by electronic means *into the precincts of another’s home or office.*”<sup>52</sup>

*Shulman* reflected an “American” preference for process over outcome in distinguishing between one “who [voluntarily] imparts private information” (and has no right to suppress) and “unauthorized interception” and “secret monitoring” (which might justify suppression).<sup>53</sup> It reflected

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<sup>45</sup> *Two Western Cultures*, *supra* note 9, at 1161.

<sup>46</sup> *Shulman*, 18 Cal.4th at 212.

<sup>47</sup> *Id.* at 228–30.

<sup>48</sup> *Two Western Cultures*, *supra* note 9, at 1162.

<sup>49</sup> *Shulman* at 231, quoting Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 973–74 (1964) (n. omitted).

<sup>50</sup> *Shulman*, at 233.

<sup>51</sup> *Id.* at 242.

<sup>52</sup> *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) (emphasis added).

<sup>53</sup> *Shulman* at 234–35.

the constitutional principle that “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citations.] But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”<sup>54</sup>

American law thus protects the individual from external intrusion but not personal indiscretion. The law does not prevent the revelation of salacious photographs where they are voluntarily (if improvidently) *offered*, but there is a right to suppress if they are involuntarily *taken* from the subject by hidden camera.

This First Amendment principle accords with criminal procedure principles. Americans enjoy not only an exceptional protection from governmental searches compared to Europeans<sup>55</sup> but also an exceptional right to exclude unlawfully taken evidence from trial.<sup>56</sup> But American law is actually more permissive of evidence obtained through trickery,<sup>57</sup> where confessions may be attributed to personal improvidence rather than governmental intrusion.<sup>58</sup>

The Anglo-American cases of *Boyd* and *Entick* likewise recognized “consent” as one of the two exceptions to the general rule protecting private property from intrusion. “No man can set his foot upon my ground *without my licence*.”<sup>59</sup> French law, more paternalistically, constrained the right to consent. A court could find one of the century’s most celebrated novelists had simply “forgotten” to protect his dignity, and vitiate the consent he had freely given.

Europe has long implemented the goal of protecting individuals from improvidence, whether their own or of relatives who could impair the

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<sup>54</sup> *Katz v. United States*, 389 U.S. 347, 351 (1967).

<sup>55</sup> *See, e.g., Two Western Cultures, supra* note 9, at 1159 (France and Germany tap citizens’ phones 10 to 30 times as often, and Italy and the Netherlands 130 to 150 times as often, as the United States).

<sup>56</sup> *See Roper v. Simmons*, 543 U.S. 551, 624–25 (2005) (Scalia, J., dissenting).

<sup>57</sup> Christopher Slogobin, *An Empirically Based Comparison of American and European Regulatory Approaches to Police Investigation*, 22 MICH. J. INT’L L. 423, 441, 443–44, 446 (2001).

<sup>58</sup> *See also Colorado v. Connelly*, 479 U.S. 157 (1986) (confession prompted by defendant’s psychosis rather than governmental coercion was constitutionally voluntary).

<sup>59</sup> *Entick*, 19 How. St. Tr. 1029, 1066, *quoted in Boyd*, 116 U.S. 616, 627 (emphasis added). (The American court changed the spelling to “license.”)

family's standing. Unlike America, which has followed the English rule allowing a testator to distribute his wealth as he chose, permitting the complete disinheritance of any (or all) of his children, France, Germany, and other civil law nations, more concerned with equality (and fraternity), have restricted testamentary autonomy for the sake of a relatively equal division among heirs.<sup>60</sup> For Anglo-Americans, the priority is letting individuals control their fate; Europe subordinates self-determination to protecting individuals (and their heirs) from improvidence.

An even more interesting European restriction on autonomy for the sake of saving offspring from parental improvidence is the practice of restricting parents' choice of a baby's name.<sup>61</sup> Germany, for example, maintains a list from which parents must choose their child's name.<sup>62</sup> The infringement on self-determination is unfathomable to Americans, but "Europeans say that the state simply must intervene to protect children against the stupidities of their parents."<sup>63</sup> But a government that takes the stupidity of adults as its premise will also deny them the authority to make other decisions, or have access to disputed information.

A second ground for limiting the right to property or liberty was criminal misconduct; *Boyd* observed these rights could be "forfeited by his conviction of some public offense."<sup>64</sup> This accorded with waiver by consent, because crime was considered a voluntary act, chosen by a morally responsible agent,<sup>65</sup> so punishment was the "agent's own act."<sup>66</sup> The state designed punishment to induce rational, self-interested actors to follow the law and

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<sup>60</sup> JENS BECKERT, *INHERITED WEALTH*, 35–37, 62, 69–70 (English ed. 2008); Barbara Willenbacher, *Individualism and Traditionalism in Inheritance Law in Germany, France, England and the United States*, 28 J. OF FAM. HIST. 208, 210 (2003). For the French, the objection to testamentary freedom lay in "the sacred principles of natural equality" (BECKERT, at 30, quoting Mirabeau, 2 April 1791); for the Germans, it was the objection to an individualism that denigrated family obligations.

<sup>61</sup> *Two Western Cultures*, *supra* note 9, at 1216.

<sup>62</sup> *Id.* Although Monty Python's "Ministry of Silly Walks," was entirely fictional, there really is a registry of "Silly Names."

<sup>63</sup> *Two Western Cultures*, *supra* note 9, at 1217.

<sup>64</sup> *Boyd*, 116 U.S. 616, 630.

<sup>65</sup> MARTIN J. WIENER, *RECONSTRUCTING THE CRIMINAL: CULTURE, LAW AND POLICY IN ENGLAND, 1830–1914* 11 (1990).

<sup>66</sup> Markus Dirk Dibber, *The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought*, 16 L. & HIST. REV. 113, 118, (1998) quoting J.D. Mabbott, *Freewill*

avoid crime.<sup>67</sup> The contemporary Supreme Court, with Justice Scalia leading the way, has continued to champion the view that punishment shapes criminals’ decision-making, so they choose their punishment.<sup>68</sup>

Nineteenth-century Europe viewed criminals more sympathetically, as the state prerogative to outlaw nonharmful conduct led to the imprisonment of dissidents, duelists and debtors, people who were not “really criminals.”<sup>69</sup> Criminal convictions thus did not stigmatize the individual as much as in America.<sup>70</sup> European privacy law protected high-status individuals from embarrassment, with less regard for whether the status was deserved or not. “[P]rying and insults . . . violate the law when they tend to destroy, through public revelation . . . honor justly or *unjustly acquired*.”<sup>71</sup>

Both Europe and America thus tended to protect from external derogation that which gave individuals status within their social community. In Europe, this was honor and reputation, usually inherited from one’s ancestors. In America, it was property, often earned personally.

America authorized individuals to waive these rights, through consent, or forfeit them, through criminal misconduct. To use Justice Scalia’s later phrase, the American was the “master of one’s fate,”<sup>72</sup> who could alienate his rights, however inadvisably. Europe did more to protect individuals from the consequences of their improvidence (especially where it would harm the entire family).

For much of the nineteenth century, the “classical school” of criminology relied on the Enlightenment premise of human rationality. But America and Europe would discard the classical model and embrace the principles of “scientific” criminology, which shaped criminal law from the

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*and Punishment*, in CONTEMPORARY BRITISH PHILOSOPHY: PERSONAL STATEMENTS 303 (Richard I. Aaron and Hywel David Lewis eds. 1956).

<sup>67</sup> DANIEL J. CURRANT & CLAIRE M. RENZETTI, THEORIES OF CRIME 11 (2001).

<sup>68</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring): “[T]he criminal will never get more punishment than he bargained for when he did the crime”; see also *Blakely v. Washington*, 542 U.S. 296, 309 (2004). As with his position on self-representation, Scalia in *Apprendi* and *Blakely* prioritized individual choice in determining one’s future (sentence) over the state’s providing a more benign one.

<sup>69</sup> HARSH JUSTICE, *supra* note 9, at 108, 120, 178.

<sup>70</sup> *Id.* at 178–79, 196–97.

<sup>71</sup> *Two Western Cultures*, *supra* note 9, at 1179, quoting EMILE BEAUSSIRE, LES PRINCIPES DU DROIT (1888) (emphasis added).

<sup>72</sup> *Indiana v. Edwards*, 554 U.S. 164, 186–87 (2008) (Scalia, J., dissenting).

late nineteenth century until the last quarter of the twentieth century.<sup>73</sup> In allowing Americans to alienate (often improvidently) their right to counsel in *Faretta*, just as they could more freely alienate their dignity through improvident photographs or alienate their property through improvident bequests, the 1975 decision provided an inflection point, from which the two continents would diverge.

California would soon provide other inflection points for this divergence.

## II. PUNISHMENT

The Enlightenment philosophy of Kant and Hegel, deriving from the premise of human rationality, posited that all citizens could combine to devise, follow, and enforce laws as members of an equal community.<sup>74</sup> Retributive punishment was therefore the legitimate consequence of freely chosen behavior.<sup>75</sup> The classical school considered the primary preventive function of punishment to be general deterrence,<sup>76</sup> as “[t]he guiding vision of . . . criminal justice was that of the responsible individual,” who could be influenced by adequate punishment to avoid wrongdoing (and deserve it if he did not).<sup>77</sup>

Owing as much to Darwin as the Enlightenment,<sup>78</sup> the “scientific school” of criminology displaced this model,<sup>79</sup> positing: “The new view

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<sup>73</sup> Mitchell Keiter, *How Evolving Social Values Have Shaped (and Reshaped) California Criminal Law*, 4 CAL. LEGAL HIST. 393, 397–400 (2009); Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 1020 (2016).

<sup>74</sup> Dibber, *supra* note 66, at 117–18.

<sup>75</sup> *Id.* at 118.

<sup>76</sup> General deterrence works by informing the general public of the consequences for an offense; specific deterrence works on the individual, tailored to his circumstances. The rehabilitation model essentially encompasses specific deterrence.

<sup>77</sup> Wiener, *supra* note 65, at 11.

<sup>78</sup> “Humans were beginning to appear to scientists merely as one type of creature, with no special links to divinity . . . [as well as] creatures whose conduct was influenced, if not determined, by biological and cultural antecedents rather than self-determining beings who were free to do what they wanted.” CURRANT & RENZETTI, *supra* note at 15, quoting G.B. VOLD & T.J. BERNARD, *THEORETICAL CRIMINOLOGY* 36 (3d ed. 1986).

<sup>79</sup> Keiter, *supra* note 73, at 398.

of crime and criminals is, that what a man does is a result of his heredity and his environment . . . .”<sup>80</sup> Lacking the classical school’s confidence in individuals’ rational agency, the criminologists of the scientific school de-emphasized deterrence; punishment’s goal was not so much to deter the wicked as to heal the weak.<sup>81</sup> This “diminished estimate” of individuals’ agency invited the state “to assume even greater powers in ‘correcting’ problems now deemed beyond the individual’s power to alter.”<sup>82</sup> If people could not govern themselves, the state would do it for them.

Criminologists spoke of crime in medical terms; it was no more or less than a treatable disease.<sup>83</sup> As the 1931 report of the National Commission on Law Observance and Enforcement (Wickersham Commission) declared, “Physicians, upon discovering disease, cannot name the day upon which the patient will be healed. No more can judges intelligently set the day of release from prison at the time of trial.”<sup>84</sup> As the criminal law moved away from treating criminals as responsible individuals, sentencing became less retributive and more rehabilitative, determining criminal punishment not so much according to the criminal *offense* than the criminal *offender*.<sup>85</sup> Retribution was no longer the primary objective of the criminal law, and many found it an improper consideration altogether.<sup>86</sup> California and other jurisdictions adopted indeterminate sentencing, whereby sentence length was decided not by judges upon conviction but “correctional” officers during the rehabilitative process.<sup>87</sup>

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<sup>80</sup> ERNEST BRYANT HOAG & EDWARD HUNTINGTON WILLIAMS, *CRIME, ABNORMAL MINDS AND THE LAW* xxi (1923).

<sup>81</sup> Keiter, *supra* note 73, at 399.

<sup>82</sup> Wiener, *supra* note 65, at 338; Mimi Ajzenstadt & Brian E. Burtch, *Medicalization and Regulation of Alcohol and Alcoholism: The Professions and Disciplinary Measures*, 13 INT’L J.L. & PSYCHIATRY 127, 135 (1990).

<sup>83</sup> Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. & CRIMINOLOGY 883, 893 n.62 (1990).

<sup>84</sup> *Id.*, quoting the 1931 Wickersham Commission.

<sup>85</sup> *People v. Love*, 53 Cal.2d 843, 856 n.3 (1960).

<sup>86</sup> *Id.*

<sup>87</sup> Rehabilitative-based, indeterminate sentencing was not necessarily more favorable to defendants than retributive punishment; for example, retribution could never justify a sentence of life imprisonment (one year to life) for the offense of indecent exposure, as occurred under California’s indeterminate sentencing model. But in the context of murder, rehabilitation would offer a chance at release, which retribution would not.



The emphasis on rehabilitation generated a right to be forgotten. In the very year of the Wickersham Commission's Report, the California Court of Appeal decided *Melvin v. Reid*.<sup>88</sup> Gabrielle Darley Melvin had been a prostitute and was tried and acquitted for murder. In 1919, after her acquittal, as the California Court of Appeal explained, she "became entirely rehabilitated" and commenced living an "exemplary, virtuous, honorable and righteous life."<sup>89</sup> The defendants produced a film in 1925, *The Red Kimono*, which chronicled the true story of her "past life" with its "unsavory incidents."<sup>90</sup> The film led her new friends to scorn and abandon her, exposed her to ridicule, and caused her mental and physical suffering. The defendants denied that her allegations stated a cause of action.<sup>91</sup>

The Court of Appeal acknowledged that the defendants could describe her life story, as the trial was a matter of public record.<sup>92</sup> But the court found actionable the film's use of her real name.<sup>93</sup> The court recognized that neither the common law nor any California statute barred such use. Like the French court in *Dumas*, the California Court of Appeal discerned a new right, rooted in the opening of the California Constitution, which guaranteed every individual "the right to pursue and obtain happiness."<sup>94</sup> Because Mrs. Melvin had "rehabilitated herself and taken her place as a respected and honored member of society" she was entitled not to have "her reputation and social standing destroyed by the publication."<sup>95</sup> The decision was aspirational, resting on how people (including the media) *ought to* behave, as it chastised the producers for their "unnecessary and indelicate" use of her maiden name, which reflected a "willful and wanton disregard of that charity which should actuate us in our social intercourse."<sup>96</sup>

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<sup>88</sup> 112 Cal. App. 285 (1931).

<sup>89</sup> *Id.* at 286.

<sup>90</sup> *Id.* at 287.

<sup>91</sup> *Id.* By demurring, the defense conceded that Melvin's account was true for the purpose of litigation, though the historical record offers room for doubt.

<sup>92</sup> *Id.* at 290.

<sup>93</sup> *Id.* at 291–92.

<sup>94</sup> *Id.* at 291, citing CAL. CONST. art. I, § 1.

<sup>95</sup> *Id.* at 292.

<sup>96</sup> *Id.* at 291. The Delaware Supreme Court would express its doubt that speech could be restricted whenever it was "indelicate," as "the standard of good taste" was "too elusive to serve as a workable rule of law." *Barbieri v. News-Journal Co.*, 189 A.2d 773, 776 (Del. 1963).

But the primary basis for the result was the prevailing philosophy of criminal law, which the court extended to society as a whole:

One of the major objectives of society as it is now constituted, and of the administration of our penal system, is the rehabilitation of the fallen and the reformation of the criminal. Under these theories of sociology, it is our object to lift up and sustain the unfortunate rather than tear him down.<sup>97</sup>

As a federal court would later recall, *Melvin v. Reid* created “an entire branch of the tort law of privacy.”<sup>98</sup>

The California Supreme Court relied on *Melvin*’s reasoning forty years later when *Reader’s Digest* published an article describing how Marvin Briscoe had hijacked a truck in 1956.<sup>99</sup> The article described several hijacking incidents and the trucking industry’s response.<sup>100</sup> It recalled that Briscoe “fought a gun battle” with police but did not mention when it occurred.<sup>101</sup> Following Mrs. Melvin’s lead, Briscoe conceded that the magazine could describe the event but challenged its use of his name, contending it likewise caused friends and family to scorn and abandon him, and exposed him to humiliation and ridicule.<sup>102</sup>

The California Supreme Court’s analysis vindicated the European privacy interest in saving “face” and preventing humiliation. “Loss of control over which ‘face’ one puts on may result in literal loss of self-identity [citations] and is humiliating beneath the gaze of those whose curiosity treats a human being as an object.”<sup>103</sup>

The Supreme Court offered a three-factor balancing test, and found that Briscoe, like Melvin, had stated a cause of action.<sup>104</sup> The court resolved the first factor, the social value of the published facts, by finding that a reasonable jury could find minimal social value in publishing Briscoe’s

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<sup>97</sup> *Id.* at 292.

<sup>98</sup> *Doe v. Chicago*, 360 F.3d 667, 672 (7th Cir. 2004).

<sup>99</sup> *Briscoe v. Reader’s Digest Ass’n, Inc.*, 4 Cal.3d 529, 532 (1971).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 532–33.

<sup>102</sup> *Id.* at 533.

<sup>103</sup> *Id.* at 534.

<sup>104</sup> *Id.* at 544.

name.<sup>105</sup> Second, “the depth of the article’s intrusion into ostensibly private affairs” supported suppression because most people would find “revealing’s one criminal past” highly offensive to most Americans.<sup>106</sup> And third, the plaintiff in no way voluntarily consented to the publicity: “His every effort was to forget and have others forget that he had once hijacked a truck.”<sup>107</sup>

The opinion lacked a dissent, which could have challenged some of these assumptions. Defining the public criminal act as a “private affair” based on the perpetrator’s *desire to keep it private* would permit any misdeed to qualify as private and justify suppression. And unless criminals had a reasonable expectation of privacy in a public, violent act, its voluntary commission could be seen as “knowingly expos[ing it] to the public,” rendering it fair game for public description. Perhaps the most disturbing part (of either the findings or the test itself) was that speech could be actionable so long as a reasonable trier of fact could find it lacked “social value.” Such value may well lie in the eye of the beholder; few writings, whether articles or complete books, attract the interest of a popular majority. Many of history’s most significant works would never have enriched public discussion if the political majority had been able to suppress them for lacking adequate “social value.” As a contemporary commentary observed, the social value test improperly grants the judiciary “a censorship role, deciding what the public should read, see or hear.”<sup>108</sup> Although other states declined to adopt the social value test,<sup>109</sup> contemporary Europe remains more willing to vest courts with authority over what the public should read, see, or hear.<sup>110</sup>

The Supreme Court, like the Court of Appeal in *Melvin*, ultimately grounded its conclusion in penal policy:

One of the premises of the rehabilitative process is that the rehabilitated offender can rejoin that great bulk of the community from

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<sup>105</sup> *Id.* at 541–42.

<sup>106</sup> *Id.* at 542.

<sup>107</sup> *Id.*

<sup>108</sup> Don R. Pember & Dwight L. Teeter, Jr., *Privacy and the Press Since Time, Inc. v. Hill*, 50 WASH. L. REV. 57, 81 (1974).

<sup>109</sup> *Id.* at 78, 81.

<sup>110</sup> See Part IV.

which he has been ostracized for his anti-social acts. In return for becoming a “new man,” he is allowed to melt into the shadows of obscurity.<sup>111</sup>

The court expressly referenced indeterminate sentencing:

The purpose of the indeterminate sentencing law in California . . . is “to put before the prisoner great incentive to well-doing [citations].” The indeterminate sentence law in theory “affords a person convicted of crime the opportunity to minimize the term of imprisonment by rehabilitating himself in such manner that he may again become a useful member of society.” [Citation.]<sup>112</sup>

Within a decade, the Supreme Court would declare that the “most important” basis for its *Briscoe* decision was the state’s “compelling interest in the rehabilitative process,” as media disclosure of criminals’ identity counteracted that process.<sup>113</sup> This basis appeared so central to the decision that the New Jersey Supreme Court construed the California Supreme Court as limiting *Briscoe*’s publication bar to “cases involving the identity of rehabilitated convicts.”<sup>114</sup>

Germany’s Constitutional Court addressed a comparable issue.<sup>115</sup> The anonymous petitioner had participated in a terrorist act that killed several soldiers. After serving two-thirds of his six-year sentence, he was set to be released. A television station planned a documentary play about the incident, which planned to use the petitioner’s name and likeness. The Constitutional Court granted an injunction because the publication could violate his right to personality.

Germany’s constitution recognized a greater right to suppress information than its American counterpart. “Everyone has the right in principle to determine himself alone whether and to what extent others may represent in public an account of his life or of certain incidents thereof.” The German constitution protected both the press’ right to speak and the subject’s right

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<sup>111</sup> *Briscoe*, 4 Cal.3d. at 539.

<sup>112</sup> *Id.* at 539 n.12.

<sup>113</sup> *Forsher v. Bugliosi*, 26 Cal.3d 792, 810 (1980).

<sup>114</sup> *Romaine v. Kallinger*, 537 A.2d 284, 295 (N.J. 1988).

<sup>115</sup> *Lebach* case, 35 BVerfGE 202. The article quotes from the translated version provided by F H Lawson & B S Markesinis at <https://germanlawarchive.iuscomp.org/?p=62>.

to suppress unwanted descriptions, and neither could claim precedence as being more fundamental. Resolving the conflict required case-by-case judicial balancing, which denied the press any general guidance.

The court acknowledged (as *Briscoe* seemingly had not), that the petitioner's voluntary criminal act had generated the public interest.<sup>116</sup> Disclosure could thus serve as an additional form of punishment (or deterrent). But the court also followed the principle that the "decisive point of reference" was "the interest in reintegrating the criminal into society"; the interest was not just the individual's but that "of the community to restore his social position." Once the event was no longer "current," a television station "undoubtedly" could not disclose the information "if it endangers the social rehabilitation of the culprit." Just as statutes of limitations could restrict *prosecuting* criminal acts, so too could one restrict *speaking* about them. This contrasted with a California appellate decision denying that the "mere passage of time" could bar publication of events involving a person formerly in the public eye.<sup>117</sup>

Despite the similarities between *Briscoe* and *Lebach*, American and European penal policy diverged in the 1970s in a way that would also shape the disclosure issue. The United States generally and California specifically abandoned the formerly ascendant imperative of rehabilitation. The United States Supreme Court justified punishment for the sake of retribution.

[P]unishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventive and nothing else . . . [S]ome crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.<sup>118</sup>

In 1977, California replaced its indeterminate sentencing law with one imposing determinate sentences, graded in accordance with the objective severity of the offense, not the offender's subjective progress during rehabilitation. Its preamble announced, "The Legislature finds and declares that

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<sup>116</sup> The "public interest in information [was] caused by himself by his own deed."

<sup>117</sup> *Werner v. Times-Mirror Co.*, 193 Cal. App. 2d 111, 118 (1961).

<sup>118</sup> *Gregg v. Georgia*, 428 U.S. 153, 184 n.30 (1976).

the purpose of imprisonment is punishment.”<sup>119</sup> And in 1978, California voters answered the California Supreme Court’s 1972 decision abolishing capital punishment<sup>120</sup> with an initiative reinstating it,<sup>121</sup> notwithstanding the penalty’s permanently foreclosing the possibility of rehabilitation.<sup>122</sup>

But Europe retained the rehabilitation imperative, keeping the “scientific” understanding of criminals as “sick” rather than sinful.<sup>123</sup> Germany’s peculiar postwar status generated a special motivation to emphasize rehabilitation and reintegration.<sup>124</sup>

Unlike Americans (or Britons), Germans “feel a burning need to deny that there is such a thing as *immutable* evil, *unforgivable* evil, in order to reconcile themselves to what their culture and people — indeed their *families*, and their parents and grandparents — have done.”<sup>125</sup> In fact, much of the support for Germany’s abolishing capital punishment in 1949 derived from the motivation to save Nazi war criminals from execution.<sup>126</sup>

Germany also was the European pioneer in abolishing the sentence of life imprisonment without possibility of parole, which it did judicially in 1977; Italy followed in 1987 and France in 1994.<sup>127</sup> As Germany’s Constitutional Court later explained, “[a]n offender had to be given the chance, after atoning for his crime, to re-enter society,”<sup>128</sup> even where the crime was sending fifty people to the gas chambers:

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<sup>119</sup> CAL. STATS 1976, ch. 1139 § 273. The law has since been amended to revise the purpose as “public safety,” prescribing prison terms “that are proportionate to the seriousness of the offense.” CAL. PEN. CODE, § 1170, subd. (a)(1).

<sup>120</sup> *People v. Anderson*, 6 Cal.3d 428 (1972).

<sup>121</sup> CAL. PEN. CODE, §§ 190 et seq.

<sup>122</sup> Over the next four decades, many California criminal law doctrines would shift to place more emphasis on “the maintenance of personal security and social order” and less on “an accurate discrimination as to the moral qualities of individual conduct.” Keiter, *supra* note 73, at 395, 441, citing *People v. Blake*, 65 Cal. 275, 277 (1884).

<sup>123</sup> Kleinfeld, *supra* note 73, at 981.

<sup>124</sup> *Id.* at 1035.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 988.

<sup>127</sup> *Id.* at 955.

<sup>128</sup> *Life Imprisonment case (lebenslange Freiheitsstrafe)* 45 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 187 (1977), quoted in *Case of Vinter and Others v. United Kingdom*, Eur. Ct. H.R. 66069/09 28 (2013).

[The] judicial balancing of these [sentencing] factors *should not place too heavy an emphasis on the gravity of the crime* as opposed to the personality, state of mind, and age of the person. In that case, any subsequent review of the petitioner's request for release would be required to weigh more heavily than before the petitioner's personality, age and prison record. This was because the negative effects of sentence became stronger and stronger after an unusually long period of imprisonment.<sup>129</sup>

*Lebach's* reintegration goal of restoring wrongdoers to their former position limits not only the state in *imprisoning* such offenders but private citizens in *speaking* about their past misconduct, as former collaborators with the Vichy regime or Nazis may seek defamation relief for reference to their wartime activities.<sup>130</sup>

The California Supreme Court would reject this notion that, eventually, time heals all wounds:

Insofar as the "just desserts" theory holds that certain murderers do not deserve a fate better than that inflicted on their victims, the passage of time and alteration of circumstances have no bearing on this retributive imperative. [Citation.] For these reasons, Nazi war criminals and church bombers motivated by racial hatred have been prosecuted for murders committed decades earlier.<sup>131</sup>

The contrasting premises expressed in these two quotations help explain why the "right to be forgotten" had gained less traction in the United States.

The scientific school's paternalistic premise, that individuals are not (or are barely) capable of rational self-determination, benefits convicts seeking parole, or people seeking to suppress disclosure of past misconduct. But it

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<sup>129</sup> *War Criminal case*, 72 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 105 (1986) (emphasis added), *quoted in Vinter* at 28. This echoed the *Lebach* reasoning that, as time passes, the "right 'to be left alone' gains increasing importance in principle and limits the desire of the mass media and the wish of the public to make the individual sphere of his life the object of discussion."

<sup>130</sup> *Enforcing Civility and Respect*, *supra* note 24, at 1356–57. The policy gives ironic resonance to the iconic line of the British comedy *Fawlty Towers*, where hotel staff hosting German guests were advised emphatically: "Don't mention the war!"

<sup>131</sup> *People v. Ochoa*, 26 Cal.4th 398, 463 (2001). As a chambers attorney, the author drafted this opinion for the California Supreme Court.

also has consequences for an individual’s right to receive information and be trusted to use it properly.

### III. JURY TRIAL

The United States differs from the European Union in guaranteeing a criminal defendant’s right to trial by jury.<sup>132</sup> American law trusts the public rather than a state professional to determine both the defendant’s guilt and the maximum possible sentence.<sup>133</sup> California courts had long debated just how much to trust jurors with information needed to adjudicate guilt, and then voters themselves expressed their position through a 1982 initiative.

The common law historically deemed felons incompetent to testify at all; testifying was thus one of those rights that could be forfeited through criminal misconduct.<sup>134</sup> The law evolved to permit their testimony but allow impeachment with their past crimes.<sup>135</sup> Attorneys may thus present *witnesses’* convictions to challenge their *credibility*, though prosecutors ordinarily may not present *defendants’* convictions to prove their *guilt*.<sup>136</sup> Nevertheless, convictions offered for impeachment could have that effect.<sup>137</sup>

This creates a legal quandary: informing the jury of a defendant’s past crimes could lead it to improperly find him guilty of the current offense, but denying the jury that information might grant his testimony a “false aura of veracity.”<sup>138</sup> Whether to let the public learn of a neighbor’s past misconduct presents a similar dilemma.

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<sup>132</sup> Like self-representation, jury trial exists (in modified form) on the Continent but is not a guaranteed right. *The jury is out*, THE ECONOMIST (Feb. 12, 2009), <http://www.economist.com/node/13109647>.

<sup>133</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring).

<sup>134</sup> *See Boyd v. United States*, 116 U.S. 616, 630 (1886).

<sup>135</sup> *People v. Castro*, 38 Cal.3d 301, 325–26 (Bird, C.J., dissenting).

<sup>136</sup> *But see* CAL. EVID. CODE § 1108 (permitting evidence of past sex offenses to establish guilt); CAL. EVID. CODE § 1109 (permitting evidence of past domestic violence to establish guilt).

<sup>137</sup> “[P]rior convictions, while relevant to a witness’s honesty or veracity . . . at the same time may be unduly prejudicial.” *Schullman v. State Bar*, 10 Cal.3d 526, 540 (1973).

<sup>138</sup> *People v. Beagle*, 6 Cal.3d 441, 453 (1972).



In the 1970s, the California Supreme Court tightened the admissibility of prior convictions for impeachment purposes.<sup>139</sup> The trend reached its peak (or nadir) in 1975, when the court reversed the murder conviction of Frank Antick in part because the trial court had allowed the jury to learn of Antick's 1955 and 1957 forgery convictions. Consistent with the principles of rehabilitation expressed in *Briscoe* and the *Lebach* case, the court emphasized the convictions' "remoteness" in compelling their suppression: "A conviction which the defendant suffered many years before, '[e]ven one involving fraud or stealing,' is at best very weak evidence that he is perjuring himself at trial."<sup>140</sup>

Voters responded by amending the California Constitution to provide, in pertinent part: "Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding."<sup>141</sup> Though the Supreme Court trimmed the absolute reach of this provision, it nevertheless altered the court's analysis from the preceding decade, and authorized greater impeachment through past convictions than had existed in the 1970s.<sup>142</sup> The voters insisted they be trusted to use and not misuse this information.<sup>143</sup>

The value of information about an individual's past justifies reference to that past in judicial proceedings (at least for impeachment purposes), as well as the state's maintaining databases of those committing child abuse<sup>144</sup> or sexual offenses.<sup>145</sup> But it is not just the government that can benefit from widely available information about personal histories; the entire public craves such information to exercise the right to "informed living," defined

<sup>139</sup> *People v. Castro*, 38 Cal.3d at 307–08 (see cases collected therein).

<sup>140</sup> *People v. Antick*, 15 Cal.3d 79, 98, quoting *People v. Beagle*, 6 Cal.3d 441, 453.

<sup>141</sup> CAL. CONST., art. I, § 28, subd. (f).

<sup>142</sup> *Castro*, 38 Cal.3d at 306–12.

<sup>143</sup> In the 1990s, the California Legislature authorized prosecutors to introduce evidence of past sex crimes (Evidence Code section 1108) or domestic violence (Evidence Code section 1109) to show defendants' substantive guilt. This followed Congress' comparable decision to permit such use of past sexual assaults (Federal Rule of Evidence 413) or child molestation (Federal Rule of Evidence section 414).

<sup>144</sup> CAL. PEN. CODE, §§ 11164, et seq.; see *Los Angeles v. Humphries*, 562 U.S. 29, 31 (2011).

<sup>145</sup> CAL. PEN. CODE, § 290.

as people’s “right to exercise an informed choice about those with whom they live and associate.”<sup>146</sup> The countless online searches conducted every day regarding prospective employees or romantic partners confirm the popularity of this right.

But underlying both *Briscoe* and *Lebach* was the premise that imposing consequences on violent criminals was exclusively a state prerogative; private persons could not later choose to exclude them from their intimate circles. Imprisonment was the prescribed consequence, after which, according to the German court, the decisive point of reference was the community’s interest in restoring the criminal to his former position, even though such restoration required keeping his friends and neighbors ignorant about his past conduct.<sup>147</sup> The *Briscoe* court likewise concluded a convicted criminal was entitled upon release from prison to wear a figurative “mask” to hide from friends and family his violent past,<sup>148</sup> even though that could create a “false aura” of peacefulness.<sup>149</sup> These pre-*Faretta* decisions assumed people would make the “wrong” decision (unduly stigmatizing offenders), so the state would prevent them from doing so by denying them the information, and the opportunity to choose for themselves.

Decisions like *Melvin*, *Briscoe*, and *Lebach* denied that ordinary citizens can be trusted with such information; *Melvin* was “paternalistic in doubting the ability of people to give proper rather than excessive weight to a person’s criminal history.”<sup>150</sup> The resiliency of many people in surmounting embarrassing disclosures casts doubt upon *Melvin*’s conclusion that the public gives so much weight to such information that disclosure will invariably “throw [the subject] back into a life of shame or crime.”<sup>151</sup> One well-known example of an embarrassing disclosure occurred in the 1980s, when *Penthouse* magazine published naked photographs taken years earlier

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<sup>146</sup> Sadiq Reza, *Privacy and the Criminal Arrestee or Suspect: In Search of a Right, in Need of a Rule*, 64 MD. L. REV. 755, 807 (2005).

<sup>147</sup> *Lebach* case, 35 BVerfGE 202.

<sup>148</sup> *Briscoe*, 4 Cal.3d 529, 539.

<sup>149</sup> *People v. Beagle*, 6 Cal.3d 441, 453 (1972). The *Lebach* case expressly permitted disclosure if it was for the purpose of eliciting sympathy rather than creating a “negative slant.”

<sup>150</sup> *Willan v. Columbia County*, 280 F.3d 1160, 1162 (7th Cir. 2002) (emphasis added).

<sup>151</sup> *Melvin*, 112 Cal. App. 285, 292.

of the reigning Miss America, Vanessa Williams. But Williams was a talented singer and actress, and despite the humiliation, went on to a very successful career. Americans are more forgiving than the *Melvin* court assumed, though more for indecencies like naked photographs than for grave crimes like mass murder.

Although *Briscoe* denied that disclosure of past crimes offered any “social value,”<sup>152</sup> nothing better establishes its value than the post-appeal life of Gabrielle Darley Melvin. The Court of Appeal characterized her rehabilitation in glowing terms because it was evaluating the defense’s demurrer, and thus needed to presume the truth of her complaint.<sup>153</sup> But despite her alleging that she “became entirely rehabilitated” after her acquittal and “at all times lived an exemplary, virtuous, honorable, and righteous life,”<sup>154</sup> the truth was more complicated. She returned to prostitution, primarily in a management capacity.<sup>155</sup> Her 1915 victim (whom she admitted shooting) would be joined by others; a total of six men in her life (plus one of her female employees) ultimately were either shot, poisoned, or died under mysterious circumstances.<sup>156</sup> One or more of these individuals might have benefited from greater access to information about her past.

America places more trust than Europe in ordinary citizens to determine guilt in criminal proceedings, recognizing a fundamental right to trial by jury. This participation, essential to democratic self-government, presumes jurors can be trusted to use and not misuse information. The United States also facilitates democratic self-government by trusting its citizens to

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<sup>152</sup> *Briscoe*, 4 Cal.3d 529, 541–42.

<sup>153</sup> *Melvin*, 112 Cal. App. 285, 292; see *Doe v. Chicago*, 360 F.3d 667, 672.

<sup>154</sup> *Melvin*, at 286.

<sup>155</sup> Leo W. Banks, *A Madam, A Murder, A Mystery*, PHOENIX NEW TIMES, Aug. 12, 1999, <http://www.phoenixnewtimes.com/news/a-madam-a-murder-a-mystery-6420333> (Banks).

<sup>156</sup> *Id.* Even her trial defense relied on the absence of truthful information about her past; she claimed to have been orphaned by the San Francisco earthquake of 1906, though she actually had been born in France and emigrated as a teenager. She portrayed the abuse imposed on her by the victim (her pimp/fiancé) so graphically that the foreman explained after the jury’s *eight-minute* deliberation: “She righted a wrong that had been done her.”

use and not misuse speech to determine policy through public debate and elections. Access to information is a precondition for such debate.

#### IV. FREE SPEECH

The California Supreme Court disapproved the 1971 *Briscoe* decision in 2004.<sup>157</sup> Not surprisingly, the court cited not the intervening developments regarding penal philosophy or witness impeachment but United States Supreme Court precedents addressing the reach of the First Amendment. These more recent cases protecting disclosure of assertedly private information show how the United States values and protects free speech more than does Europe.

The first of the intervening cases may have been the most wrenching factually; a television news broadcast disclosed the name of a 17-year-old who had been murdered in the course of a rape.<sup>158</sup> The Supreme Court’s decision rested on the American concept of privacy described by Professor Whitman, and applied by the California Supreme Court in *Shulman*.<sup>159</sup> Publication infringed the European privacy imperative, as it was “embarrassing or otherwise hurtful” to the father.<sup>160</sup> But there was no “physical or other tangible intrusion into a private area,” as the information was gathered lawfully from public judicial records.<sup>161</sup> Ultimately, the court justified publication on the public interest in information about the administration of a government “in which *the citizenry is the final judge* of the proper conduct of public business.”<sup>162</sup>

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<sup>157</sup> *Gates v. Discovery Communications, Inc.*, 34 Cal.4th 679 (2004).

<sup>158</sup> *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 471–74 (1975). In earlier proceedings, the Georgia Supreme Court had cited *Briscoe* in concluding the First Amendment did not necessarily trump the father’s privacy interest. *Cox Broad. Corp. v. Cohn*, 200 S.E.2d 127, 133–34 (Ga. 1973).

<sup>159</sup> *Two Western Cultures*, *supra* note 9, at 1162, 1165; *Shulman v. Group W Prods., Inc.*, 18 Cal.4th 200 (1998).

<sup>160</sup> *Cox*, 420 U.S. at 489.

<sup>161</sup> *Id.* at 489, 491.

<sup>162</sup> *Id.* at 495 (emphasis added). In a later case, the Court likewise protected a newspaper’s disclosing the name of a (surviving) rape victim even where it gathered the information, not from public judicial records, but a police report, which inadvertently included the victim’s name. But the Court again emphasized that the newspaper committed no misconduct in the process of gathering the information. *The Florida Star v. B.J.F.*, 491 U.S. 524, 536, 538 (1989).

Easier cases concerned disclosure of the names of alleged perpetrators.<sup>163</sup> In urging the court to reject a right to publish, the petitioners asserted the rehabilitation interest that the California Supreme Court had found compelling in *Melvin and Briscoe*. “It is asserted that confidentiality will further his rehabilitation because publication of the name may encourage further antisocial conduct and also may cause the juvenile to lose future employment or suffer other consequences for this single offense.”<sup>164</sup> But the rehabilitation imperative was already receding by 1979, and the court refused to justify suppression for that purpose.<sup>165</sup>

The Supreme Court made no mention of the California electorate’s voting to reinstate capital punishment, or to authorize impeachment through prior convictions.<sup>166</sup> But the initiative process indirectly explains why the First Amendment protects speech more fully than its European counterpart(s): No European nation offers ordinary voters the same direct opportunity to influence law and policy. Europeans have less opportunity than Americans generally (and Californians specifically) to reshape law through the initiative process. Even beyond that context, Americans exercise more influence on policy. Americans directly vote for their senators and representatives, so these officials owe their position, and their loyalty, to these voters. By contrast, many European parliaments follow a proportional system, where party leaders assign legislators a place on the party list, and the number of votes received by the party nationwide determines how many candidates on that list take office. Under this kind of system, legislators ultimately owe their position to party leaders rather than voters, minimizing their responsiveness to constituent preferences.<sup>167</sup>

The criminal punishments described in Part II reflect the relative influence of American voters and the political insignificance of their European counterparts. Just as the California Supreme Court’s 1972 decision banning capital punishment<sup>168</sup> produced a popular initiative reinstating

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<sup>163</sup> *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97 (1979); *Oklahoma Publ’g Co. v. Oklahoma County Dist. Court*, 480 U.S. 308 (1977).

<sup>164</sup> *Daily Mail*, 443 U.S. at 104.

<sup>165</sup> *Id.* at 104–05.

<sup>166</sup> The case predated the impeachment initiative by three years.

<sup>167</sup> Sara Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 474–75 (2006).

<sup>168</sup> *People v. Anderson*, 6 Cal.3d 628 (1972).

it,<sup>169</sup> the indication from several United States Supreme Court justices that they might also abolish the punishment<sup>170</sup> produced a nationwide reaction. Support for the death penalty rose substantially, state legislatures (and electorates) reformed their punishment statutes to pass the Supreme Court’s standards, more juries imposed it, and elected officials pledged to implement it.<sup>171</sup> The same popular reaction occurred most recently in Nebraska; the Legislature voted in 2015 to abolish the death penalty and voters the next year reinstated it by initiative, by more than a three-to-two ratio.<sup>172</sup> By contrast, although at least 85 percent of Europeans in every surveyed nation (France, Germany, Italy, Spain, and the United Kingdom) favor the option of a life-without-parole sentence for an especially egregious offender like Osama bin Laden, the European Court of Human Rights’ 2013 *Vinter* decision<sup>173</sup> banning that sentence has not faced any democratic counter-proposal.<sup>174</sup>

The free exchange of information promotes the efficient operation of a government where “the citizenry is the final judge.”<sup>175</sup> As the U.S. Supreme Court explained in *New York Times v. Sullivan*, the First Amendment

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<sup>169</sup> CAL. PEN. CODE, § 190 et seq.

<sup>170</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>171</sup> See, e.g., Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1 (2007); *Legislative Response to Furman v. Georgia — Ohio Restores the Death Penalty*, 8 AKRON L. REV. 149 (1974).

<sup>172</sup> Kim Bellware, *Nebraska Voters Restore the Death Penalty*, HUFFINGTON POST, Nov. 9, 2016, [https://www.huffingtonpost.com/entry/nebraska-death-penalty\\_us\\_58226bfee4b0e80b02cdb66e](https://www.huffingtonpost.com/entry/nebraska-death-penalty_us_58226bfee4b0e80b02cdb66e).

<sup>173</sup> *Case of Vinter and Others v. United Kingdom*, Eur. Ct. H.R. 66069/09 (2013). The European Court backtracked somewhat in 2017, finding the United Kingdom’s whole life punishment protocols complied with *Vinter*, even though the U.K. did not amend those provisions after that case. *Case of Hutchinson v. United Kingdom*, Eur. Ct. H.R. 57592/08 (2017).

<sup>174</sup> Ipsos MORI, *Death Penalty–International Poll*. <https://www.ipsos.com/ipsos-mori/en-uk/death-penalty-international-poll>. Individual European nations had banned the death penalty despite public support, sometimes encompassing more than two-thirds of the population. ANDREW HAMMEL, *ENDING THE DEATH PENALTY: THE EUROPEAN EXPERIENCE IN GLOBAL PERSPECTIVE* 82–85, 108–12, 140–43 (2010); RITA J. SIMON AND DAGNY A. BLASKOVICH, *A COMPARATIVE ANALYSIS OF CAPITAL PUNISHMENT: STATUTES, POLICIES, FREQUENCIES AND PUBLIC ATTITUDES THE WORLD OVER* 35–36 (2002).

<sup>175</sup> *Cox*, 420 U.S. at 495.

was designed “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>176</sup> Speech on political issues is more than self-expression; it is the essence of self-government.<sup>177</sup> Such unfettered interchange is less important (and therefore may not warrant impingement on other interests) where party elites make all the important decisions behind closed doors with only minimal public involvement.

The *Melvin* decision illustrates how suppressing information about individuals can frustrate public debate and the consequent “bringing about of political and social changes desired by the people.” The producer of *The Red Kimono* was Dorothy Davenport Reid, the widow of actor Wallace Reid, who had died from an accidental drug overdose. Rather than squander her inheritance on luxuries, she responded to his death by producing “social conscience” films. Her first, appearing soon after her husband’s death, concerned narcotics addiction.<sup>178</sup>

The *Red Kimono* was a proto-feminist production, created by an all-female team. Adapted from the short story of journalist Adela Rogers St. Johns by Dorothy Arzner, a lesbian who became a pioneer of women’s filmmaking, the film highlighted the social ills created by human trafficking. It portrayed Darley Melvin as more victim than villain, who ultimately redeemed herself rather than let the male protagonist save her. The film ended with her character’s pleading to the audience to give fallen characters a second chance in life — the very principle that *Melvin v. Reid* purported to establish.

Whatever the film’s artistic merit, it expressed a social commentary worthy of protection, which drew additional resonance from the film’s grounding in reality. The 1998 *Shulman* decision would recognize that “truthful detail” is “not only relevant, but essential to the narrative,”<sup>179</sup> and contemporary California might well have found that Darley Melvin’s challenge violated the state’s anti-SLAPP (Strategic Lawsuit Against Public

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<sup>176</sup> *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964), quoting *Roth v. United States*, 354 U.S. 476, 484 (1957).

<sup>177</sup> *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

<sup>178</sup> *OF HUMAN WRECKAGE* (1923).

<sup>179</sup> *Shulman v. Group W Prods., Inc.*, 18 Cal.4th 200, 230 (1998).

Participation) law.<sup>180</sup> Far from unnecessarily holding Darley Melvin up to scorn for no other reason than the pursuit of private profit, as the Court of Appeal characterized it,<sup>181</sup> the film actually worked to protect women from sexual exploitation, and scorned the culture that victimized so many of them. But the Depression-era suit bankrupted Davenport Reid and forced her to sell her mansion. The outcome likely chilled similar socio-political commentary.

Recognizing that speech’s value often lies in the eye of the beholder, the United States Supreme Court has more recently rejected the “social value” test, favored by *Briscoe*, which weighs the benefits of speech with its costs:

The First Amendment itself reflects a judgment by the American people that the benefits of [protecting speech] outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.<sup>182</sup>

But Continental law expressly authorizes courts to balance the value of free speech against other interests.<sup>183</sup> The Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms Article 10 (the European equivalent of the First Amendment) expressly recognizes individual “freedom of expression” but permits its restriction as necessary to protect “the reputation or rights of others,” as well as other competing priorities. Across the board, expression in Europe may be suppressed for a “pressing need” so long as the interference with expression is not “disproportionate to the legitimate aim pursued.”<sup>184</sup>

Protecting honor is one such legitimate aim.<sup>185</sup> The “right to be forgotten’s” anti-embarrassment function manifests in German law criminally proscribing rude exchanges, which may include calling another

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<sup>180</sup> CAL. CODE CIV. PROC., § 425.16.

<sup>181</sup> *Melvin v. Reid*, 112 Cal. App. 285, 291–92.

<sup>182</sup> *United States v. Stevens*, 559 U.S. 460, 470 (2010).

<sup>183</sup> *Enforcing Civility and Respect*, *supra* note 24, at 1381. The *Florida Star* court offered the possibility that “a state interest of the highest order” might justify suppression, but, due to the statute’s underinclusiveness, denied that even the physical safety of rape victims (who might be subject to retaliation) would qualify. *Florida Star*, 491 U.S. at 537–40.

<sup>184</sup> Council of Europe Publishing, *Human Rights Files*, No. 18, 9 (March 2007), [http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-18\(2007\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-18(2007).pdf).

<sup>185</sup> *Enforcing Civility and Respect*, *supra* note 24, at 1381.



person a “jerk,” giving “the finger,” or failing to address the person with the proper honorific.<sup>186</sup> Although American law may suppress speech to prevent a legitimate threat of violence, it will not “provide a balm for wounded feelings”: “There is still, *in this country at least*, such a thing as liberty to express an unflattering opinion of another, however wounding it may be to the other’s feelings . . . .”<sup>187</sup> American law has essentially reified the maxim, “Sticks and stones may break my bones, but names will never harm me.”

Just as Europe limits speech to protect the status of individuals, it also limits speech to protect the reputations of groups.<sup>188</sup> The European Commission against Racism and Intolerance “strongly recommend[ed]” that the United Kingdom create an office for regulating the press and hearing complaints against “prejudicial reporting concerning their community.”<sup>189</sup> The report opposed media “stress” on the “Muslim background of perpetrators of terrorist acts” as harming a “vulnerable group[,]” and urged journalists to downplay or reject that background in favor of alternative explanations for terrorist acts, like mental illness.<sup>190</sup> Europe thus restricts speech that the First Amendment protects.<sup>191</sup> The government in America may suppress a speaker who both intends and is likely to produce imminent unlawful action,<sup>192</sup> but not speech seeking to make fun of immigrants, a ground that the European Court of Human Rights (ECHR) has found will justify criminal conviction.<sup>193</sup>

Far from assuring an *unfettered* interchange of ideas to enable desired changes, Europe restricts “political advertising” to level the “playing field of debate” between viewpoints, even where such advertising does

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<sup>186</sup> *Id.* at 1282–83, 1296–97, 1299.

<sup>187</sup> *Id.* at 1378, quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 59 (5th ed. 1984).

<sup>188</sup> Abrams, *supra* note 13, at 41–42.

<sup>189</sup> European Commission against Racism and Intolerance, *Report on the United Kingdom 22* (fifth monitoring cycle, 2016), [https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/United\\_Kingdom/GBR-CbC-V-2016-038-ENG.pdf](https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/United_Kingdom/GBR-CbC-V-2016-038-ENG.pdf).

<sup>190</sup> *Id.*

<sup>191</sup> Abrams, *supra* note 13, at 46.

<sup>192</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>193</sup> Abrams, *supra* note 13, at 42; *see Case of Vinter and Others v. United Kingdom*, Eur. Ct. H.R. 66069/09 (2013). *Case of Feret v. Belgium*, Eur. Ct. H.R. 15615/07 (2009).

not concern specific candidates.<sup>194</sup> Noting that most European nations ban paid political advertising, the ECHR upheld a British ban against a challenge from an organization seeking better treatment for animals.<sup>195</sup> More recently, France prevented the airing of an advertisement conveying the humanity of children with Down Syndrome, as it might “disturb the conscience” of women who had aborted such children.<sup>196</sup>

But America values the interchange of ideas so much that it protects speech that is disturbing, offensive, or even hurtful, so long as it concerns a matter of public import.<sup>197</sup> This import creates a public benefit to the exchange, which outweighs the hurtful effect on the subject.

But whereas America trusts private individuals to create an environment benefiting the public as a whole (e.g., through unfettered debate enriching democratic self-government), Europe looks to government to protect individuals (e.g., through suppressing speech causing the individual discomfort).<sup>198</sup> European balancing to preserve individual reputations has suppressed from public view many reports about events that could have fostered debate on public policy issues. These included reports about how:

- (1) a. Great Britain allowed entry to a Latvian despite his two prior convictions for raping women at knifepoint; b. he then abducted, sexually assaulted and fatally stabbed a 17-year-old girl; c. three years later, her traumatized younger sister committed suicide;
- (2) a Kosovo-born immigrant struggled against deportation;
- (3) people under 30 suffer from strokes;
- (4) a computer hacker shut down America’s largest port to avenge an insult;
- (5) a solicitor breached insider trading laws;

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<sup>194</sup> *Case of Animal Defenders International v. United Kingdom*, Eur. Ct. H.R. 48876/08 (2013), at 7, quoting *On the Application of Animal Defenders Int’l v. Secretary of State for Culture, Media and Sport* [2008] UKHL 15.

<sup>195</sup> *Animal Defenders International*, Eur. Ct. H.R. 48876/08 at 21–22.

<sup>196</sup> *France’s War on Anti-Abortion Speech: The government bans an ad showing happy children with Down Syndrome*, WALL ST. J., Nov. 30, 2016, <https://www.wsj.com/articles/frances-war-on-anti-abortion-speech-1480552815?mg=prod/accounts-wsj>. Other European nations have aired the advertisement, and the ECHR has not yet ruled on it.

<sup>197</sup> *Snyder v. Phelps*, 562 U.S. 443, 454, 459 (2011).

<sup>198</sup> King, *supra* note 14, at 190–191.

- (6) a woman used Rohypnol to drug (and then rob) wealthy men;
- (7) an Austrian family court denied a British woman even partial custody of her twins despite social workers' concerns about her estranged husband's violent and unpredictable behavior;
- (8) a lawyer who had requested to work for her law firm part-time won a claim for unfair dismissal;
- (9) closed circuit television filmed a police officer assaulting a man;
- (10) three men who refused a police demand to stop were transporting explosives in their car, and more were found in their homes;
- (11) a pensioner's corpse lay undiscovered for nearly six months.<sup>199</sup>

All of these articles could foster a meaningful interchange of ideas leading to desirable political and social changes. Most obviously, (1) could foster debate about (a) immigration policy (as could (2)); (b) public safety; and (c) teenage suicide and the indirect crime on victims' families. Articles (3) through (6) could alert the public about certain dangers and enable self-protection against these diverse harms. Articles (7) and (8) could prompt debate on public issues like domestic violence, divorce and child custody, and balancing parenthood and employment. Articles (9) and (10) could foster debate about police, including their willful misconduct and the dangers produced by fleeing motorists. And (11) could lead to greater protection of the elderly and encourage the public to articulate concerns or suspicions (of all kinds) rather than suppress them as probably meaningless.

The disparate scope of Europe's right to be forgotten is not *sui generis* but part of the broader paternalism underlying European law. Part I described how America trusts its people to defend themselves in court and defend their dignity outside it, whereas Europe more aggressively protects individuals from their own improvidence. Part II showed how the U.S. has moved away from a rehabilitative penology, which spares individuals from the full consequences of their improvident criminal conduct, and toward a retributive model of justice. Part III showed how American law trusts jurors with information about defendants' pasts, unlike Europe, which does

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<sup>199</sup> Rhiannon Williams, *Telegraph stories affected by EU "right to be forgotten,"* THE TELEGRAPH, Sep. 3, 2015, <http://www.telegraph.co.uk/technology/google/11036257/Telegraph-stories-affected-by-EU-right-to-be-forgotten.html>.

not generally empanel juries at all. And Part IV reviewed how the United States protects a far greater range of speech to foster civic self-government, whereas Europe suppresses more speech to shield individuals from offense and discomfort. Accordingly, whereas California offers minors the opportunity to remove unwanted content from the internet, Europe offers this protection to adults as well.

Europe ultimately treats its adult citizens as paternalistically as the United States treats minors — if not more so. The United States Supreme Court has observed that minors have “[a] lack of maturity and an underdeveloped sense of responsibility” which “often result in impetuous and ill-considered actions and decisions.”<sup>200</sup> Minors’ reduced capacity for *personal* self-government shields them from the consequence of capital punishment.<sup>201</sup> But it also excludes them from *civic* self-government, as they do not serve on a jury or vote.<sup>202</sup> European law extends these consequences to adults, as they are exempt from capital/retributive punishment, and there is no right in Continental Europe to serve on (or be judged by) a jury. Although European adults vote, they have less influence over public policy than the American electorate.<sup>203</sup> In fact, adult criminal defendants in Europe are deemed insufficiently responsible to represent themselves or be punished with life imprisonment without possibility of parole, both of which are available to American minors. Part V will explore the roots of this paternalism.

## V. THE ROOTS AND CONSEQUENCES OF EUROPEAN PATERNALISM

When Anthony Faretta asked to represent himself, the court advised him of what he could expect.

*You are going to follow the procedure. You are going to have to ask the questions right. If there is an objection to the form of the question and it is properly taken, it is going to be sustained. We are going to treat you like a gentleman. We are going to respect you. We are*

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<sup>200</sup> *Roper v. Simmons*, 543 U.S. 551, 579 (2005), quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993).

<sup>201</sup> *Roper*, at 578.

<sup>202</sup> *Id.* at 569.

<sup>203</sup> See Beale, *supra* note 167, at 474–75; see also Kleinfeld, *supra* note 73, at 989–90.

going to give *you* every chance, but *you* are going to play with the same ground rules that anybody plays. And *you* don't know those ground rules. *You* wouldn't know those ground rules any more than any other lawyer will know those ground rules until he gets out and tries a lot of cases. And *you* haven't done it.<sup>204</sup>

This admonition would not occur on the European Continent, where criminal defendants have no such right to represent themselves.<sup>205</sup>

But the universal use of the second-person pronoun “you” also manifests Anglo-American exceptionalism; Continental European nations use two different pronouns for the second person.<sup>206</sup> Though it may not cause the competing legal cultures, in which Americans choose to be masters of their fate and Europeans seek protection from their own improvidence, it does much to explain them.

#### A. IT'S ALL ABOUT YOU

The dual use of the second-person pronoun began in the fourth century, when Latin, which had used *tu* (*T*) exclusively, developed the plural *vos* (*V*) for speech directed toward the emperor.<sup>207</sup> It was eventually extended toward other elite figures to reflect asymmetrical power relationships: the nobility used *T* toward commoners and received *V* from them, masters used *T* to servants and received *V*, parents used *T* to their children and received *V*, while social equals used the same pronoun with each other.<sup>208</sup> This *T-V* contrast extended to other languages including French (*tu* and *vous*), Italian (*tu* and *voi*, later *Lei*), German (*du* and *ihr*, then *er*, and then

<sup>204</sup> *Faretta v. California*, 422 U.S. 806, 808 n.2 (1975) (italics added).

<sup>205</sup> Jorgensen, *supra* note 15, at 711, 714–17.

<sup>206</sup> According to the World Atlas of Language Structures, the only European nations whose primary language has only one second-person pronoun are England, Ireland, and Albania. WORLD ATLAS OF LANGUAGE STRUCTURES ONLINE, <http://wals.info/feature/45A#2/23.2/148.5>.

<sup>207</sup> Roger Brown & Albert Gilman, *The Pronouns of Power and Solidarity*, in *STYLE IN LANGUAGE* (T.A. Sebeok ed. 1960) 252, 254.

<sup>208</sup> *Id.* at 255; Catherine A. Maley, *The Evolution of a French Plural of Respect*, 15 *ROMANCE NOTES* 192 (1973); Joseph Williams, “O! When Degree is Shak'd” *Sixteenth-Century Anticipations of Some Modern Attitudes Toward Usage* 69, 90, in *ENGLISH IN ITS SOCIAL CONTEXTS: ESSAYS IN HISTORICAL SOCIOLINGUISTICS* (Machan and Scott eds. 1992).

*Sie*), Spanish (*tú* and *vos*, later *usted*), Portuguese (*tu* and *vos*, later *você*), Russian (*ty* and *vy*).<sup>209</sup>

English did not follow this dual usage. Although the Norman Conquest imported the French practice,<sup>210</sup> England was less rigid about social hierarchy. Medieval and Early Modern English texts show frequent shifts between *T* and *V* usage, often in the same statement, with the pronoun determined more by the *content* of the speech than the *status* of the speaker.<sup>211</sup> The respectful *you* began as the exception in English and became the rule by the sixteenth and seventeenth century,<sup>212</sup> by which time the use of *thou* to a non-intimate of equal rank was considered rude.<sup>213</sup>

The permeability of social class fostered this trend: skilled craftsmen became merchants, and successful merchants became gentlemen, often through educational achievement.<sup>214</sup> Elizabethan England needed a growing bureaucracy to manage the Church and commercial life, so universities recruited intelligent commoners, who, once graduated, became “gentlemen by achievement.” On the other hand, the younger sons of gentlemen, excluded from land ownership through primogeniture, often served as apprentices to artisans. This fluid culture produced numerous interactions where a speaker would not know his listener’s status. The desire to avoid giving offense led to a broader use of *you* with unfamiliar people (regardless of their actual status).<sup>215</sup>

The relative egalitarianism and social mobility shaped political trends; Parliament demanded greater distribution of political authority while

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<sup>209</sup> Brown & Gilman, *supra* note 207, at 254–55, 257; Maley, *supra* note 208, at 188; Williams, *supra* note 208, at 90.

<sup>210</sup> KATIE WALES, PERSONAL PRONOUNS IN PRESENT-DAY ENGLISH 74 (1996).

<sup>211</sup> *Id.* at 75; Brown & Gilman, *supra* note 207, at 278. It was more common in English than European languages for a speaker to use *T* to show contempt, even to a social superior. Brown & Gilman, *supra* note 207, at 278; Wales, *supra* note 210, at 75.

<sup>212</sup> TERRY WALKER, *THOU AND YOU IN EARLY MODERN ENGLISH DIALOGUES* 40 (2007).

<sup>213</sup> *Id.*

<sup>214</sup> Williams, *supra* note 208, at 79.

<sup>215</sup> WALKER, *supra* note 212, at 43; Williams, *supra* note 208, at 86, 91. The upwardly mobile tended to use *you* with each other, adopting the norms of the upper class to which they aspired. WALKER, at 43; WALES, *supra* note 210, at 76.

royal absolutism held sway in France and Spain.<sup>216</sup> English immigrants to the New World were even more predisposed to an egalitarian, democratic culture. The immigrant cohort was “middle-class,” insofar as the aristocratic elite declined to immigrate and forfeit the advantages they enjoyed in England; also staying at home were those at the bottom, who lacked the means (or confidence) to make the voyage.<sup>217</sup>

The general availability of land transformed the social environment. Widespread land ownership created a very different socioeconomic structure than existed in Europe. Instead of a small “V” minority owning the land on which a large “T” majority worked, most American colonists owned their own land and were responsible for its development.<sup>218</sup> Near-universal land ownership produced a much broader governing community than existed in Europe.<sup>219</sup>

It was in America that the institution of trial by jury (of *you*-class peers) permanently expanded protection for truthful speech. Eighteenth-century governments routinely proscribed criticism of government officials, and defendants could not justify their statements by citing truth as a defense. But when John Peter Zenger asserted that his criticisms of New York Governor William Cosby were true and the jury refused to convict, it created *de facto* protection for truthful speech needed for self-government.

By the late nineteenth century, European usage began to distinguish *T* from *V* based more on distance than status.<sup>220</sup> Speakers began using *V* with a stranger and *T* with an intimate, so an employer will now more

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<sup>216</sup> JOHN HARMON MCELROY, *AMERICAN BELIEFS* 180–81 (1999). England’s colonization of the United States developed very differently from France’s colonization of Canada, Portugal’s colonization of Brazil, and the Spanish colonization of Latin America. The U.S. developed a heterogenous population, responsible for its own defense and, increasingly, governance, and reflected less of a binary *T-V* dynamic with the mother country than did the French, Portuguese and Spanish colonies. *Id.* at 32–34.

<sup>217</sup> JOHN HARMON MCELROY, *FINDING FREEDOM* 44 (1989). New England had an even higher rate of literacy than England, further facilitating self-government. DAVID HACKETT FISHER, *ALBION’S SEED* 130–31 (1989).

<sup>218</sup> *AMERICAN BELIEFS*, *supra* note 216, at 46.

<sup>219</sup> Political influence in eighteenth-century America was hardly well-distributed by contemporary American standards, with African Americans and women excluded from the franchise. But it was very well distributed compared to eighteenth-century France, where no one but the king had a meaningful vote.

<sup>220</sup> Brown & Gilman, *supra* note 207, at 258–60.

likely use *V* with an employee, and even high-status brothers will use *T* with each other. The usage reflects an English preference for distance; no other European language has an equivalent word for “privacy,” and the very concept reflects a uniquely Anglo-Saxon value.<sup>221</sup>

Just as “you” creates equality among individuals, it creates distance.<sup>222</sup> In contrasting what he deemed the “European Dream” with its American counterpart, Jeremy Rifkin characterized Americans as finding freedom in independence, created through self-reliance and autonomy, whereas Europeans find freedom in the embeddedness of many interdependent relationships.<sup>223</sup> The language corresponds to Professor Whitman’s description of privacy priorities: Americans seek a private sovereignty with which to interact as equals in arm’s-length transactions, whereas Europeans seek empathic treatment (and protection from shame) from the powers that be.<sup>224</sup>

Europe’s right to be forgotten and California’s Eraser Law manifest the contrasts between European paternalism and American egalitarianism (the former *T-V* distinction) and between European embeddedness/interdependence and American self-reliance/independence (the contemporary *T-V* distinction). The CJEU (the hyper-elite *V*-class) created the right to suppress truthful information, the judiciary determines when and how the right applies in individual cases, and these elites protect everyone; it is not just minors who are deemed to need state protection. On the other hand, the Eraser Law is the product of a democratic process involving a wider range of decisionmakers, who are trusted to manage both their personal and communal

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<sup>221</sup> ANNA WIERZBICKA, *CROSS-CULTURAL PRAGMATICS: THE SEMANTICS OF HUMAN INTERACTION* 47 (2003).

<sup>222</sup> *Id.* This linguistic distance pervades everyday life, as English speakers are more reserved physically, and less likely than other Europeans to kiss, hug, or touch in public interactions. Suvilheto et al., *Topography of social touching depends on emotional bond between humans*, 112 *PROCEEDINGS OF NATIONAL ACADEMY OF SCIENCES* 13811, 13814 (2015), <https://pdfs.semanticscholar.org/53e6/1ce334dcf8f9252e2b9a8f7112fd10d19bd2.pdf>.

<sup>223</sup> Jeremy Rifkin, *The European Dream*, *UTNE READER* (Sept./Oct. 2004), <https://www.utne.com/community/the-european-dream>.

<sup>224</sup> The disparate natures of the American and French Revolutions explain some of the difference. Americans wanted distance (from English authority) and created a limited government model where people could exercise sovereignty in their own private space. The French Revolution, by contrast, opposed exploitation and oppression of the lower class by the upper class. Its political goals involved less the prevention of governmental *intrusion* than *mistreatment* by other private parties.



affairs. The American law furthers self-determination rather than embeddedness, by granting minors a unilateral right to delete information without permission from the governing class. But California allows the user to delete only her own autonomous speech, and not to suppress anyone else's, whereas Europe enforces the subject's right to suppress the speech of others to preserve her face in embedded interdependent relationships.

## B. THE CONSTITUTIONAL CONSEQUENCES OF *NOBLESSE OBLIGE*

Pronoun use symbolizes the status of each population. Insofar as there is a trend to reduce social hierarchy and use a single pronoun in Europe, it is toward the universal use of the informal (*T*),<sup>225</sup> a policy Mussolini had tried to impose on Italians.<sup>226</sup> The United States, by contrast, lacking the feudal ethos that shaped European legal and political norms,<sup>227</sup> has universalized the “adult” form. American (and, to a lesser extent, British) norms reflect a very different set of assumptions about the electorate and its capacity for self-government.

Contemporary European norms, developed by *V*-class elites with minimal involvement from the rest of the population, reflect the continuing influence of *noblesse oblige*. These norms purport to benefit the *T*-class, but also privilege the *V*-class and preserve its ultimate authority.

For example, Europe has outlawed permanent punishment, whether capital or “whole life” imprisonment (without possibility of parole) through the authority of judicial elites. The European Court of Human Rights recalled the conclusion of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which deemed it “inhuman to imprison someone for life with no hope of release.”<sup>228</sup> Europe likewise insists that rehabilitation form the centerpiece of penology and bars punishment where it serves only retributory purposes.<sup>229</sup>

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<sup>225</sup> Janet Morford, *Social Indexicality in French Pronominal Address*, 7 J. OF LINGUISTIC ANTHROPOLOGY 3 (1997); Christina Bratt Paulston, *Pronouns of Address in Swedish: Social Class Semantics and a Changing System*, 5 LANGUAGE AND SOC'Y 359 (1976).

<sup>226</sup> *Enforcing Civility and Respect*, *supra* note 24, at 1329 n.152.

<sup>227</sup> *Id.* at 1285, citing LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 4 (1955).

<sup>228</sup> *Case of Vinter and Others v. United Kingdom*, Eur. Ct. H.R. 66069/09 23 (2013).

<sup>229</sup> *Id.* at 34, 41.

Although presented in terms of solicitude for unfortunates who have suffered conviction for the most aggravated form of murder, repeated surveys have shown that the *T*-class supports permanent punishment far more than the *V*-class.<sup>230</sup> The most obvious explanation is that the *T*-class suffers the most from crime, and thus favors more severe punishment for their own protection.<sup>231</sup>

But protection from punishment is a double-edged sword. The exercise of Continental mercy traditionally served not so much to relieve the convict as to magnify royal authority through a “pure display of sacral sovereignty and hierarchical order.”<sup>232</sup>

European criminal law likewise aggrandizes *V*-class authority: trial decisions are made by counsel, not the defendant, guilt is determined by a judge, not jury, and the public has little voice in sentencing policy. The scientific school’s conceptualization of citizens as children can justify their exclusion from basic tasks of self-government:

To be “cured” against one’s will and cured of states which we may not regard as disease is to be put on a level with those who have not yet reached the age of reason or those who never will; to be classed with infants, imbeciles, and domestic animals. But to be punished, however severely, because we have deserved it, because we “ought to have known better,” is to be treated as a human person made in God’s image.<sup>233</sup>

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<sup>230</sup> *Attitudes toward the EU*, Chatham House - Kantar Public Survey (2017), <https://www.chathamhouse.org/publication/future-europe-comparing-public-and-elite-attitudes>; Ipsos MORI, *Death Penalty Drama* (2009), <https://www.ipsos.com/ipsos-mori/en-uk/survey-channel-4-attitudes-towards-death-penalty>.

<sup>231</sup> See *Glossip v. Gross*, 135 S.Ct. 2726, 2749 (2015) (Scalia, J., concurring):

[W]e federal judges live in a world apart from the vast majority of Americans. After work, we retire to homes in placid suburbia or to high-rise co-ops with guards at the door. We are not confronted with the threat of violence that is ever present in many Americans’ everyday lives. The suggestion that the incremental deterrent effect of capital punishment does not seem “significant” reflects, it seems to me, a let-them-eat-cake obliviousness to the needs of others. Let the People decide how much incremental deterrence is appropriate.

<sup>232</sup> HARSH JUSTICE, *supra* note 9, at 144, 165.

<sup>233</sup> C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224, 228 (1953).

Like parents guiding children, Europe's governing elite denies its general population *responsibility* in both senses of the word. The general population does not face full *accountability* through retributive punishment, but also lacks the *opportunity* to participate meaningfully in policy decisions, which are essentially reserved for the elite. The United States offers a different bargain to its *you*-class. It deems its members capable of *personal* self-government: they can shape their conduct before trial, by choosing the conduct determining their sentence, and during trial, by either representing themselves or determining their defense with counsel. And it deems them capable of *civic* self-government: they can serve on juries and determine sentencing policy. Tocqueville observed how jury service bridges the *T-V* chasm and raises the *T* class to the "*you*" class, which governs itself:

He who punishes the criminal is therefore the real master of society. Now, *the institution of the jury raises the people itself . . . to the bench of judges*. The institution of the jury consequently invests the people . . . with the direction of society.<sup>234</sup>

European speech restrictions reflect a comparable exercise of *V*-class authority. German law proscribing insults developed to guarantee deference to high-status individuals, and it still enforces the right to receive the correct pronoun: the high-status (*V*) address of *Sie*.<sup>235</sup> French insult law also developed to protect from criticism the government generally and police specifically.<sup>236</sup> Calling a German officer a "blockhead" or "idiot with a badge" may result in a fine of over one thousand dollars,<sup>237</sup> but in the U.S., "criticism of the police is not a crime" even to the point of profanity.<sup>238</sup> "The freedom of individuals verbally to oppose or challenge police

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<sup>234</sup> 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 287 (H. Reeve transl., rev. ed. 1900). Although the democratic procedures of self-representation and jury service have distinguished the United States from Europe over time, professionalization of the bar (and bench) has also limited Americans' opportunity for self-government in an absolute if not relative sense. *See, e.g., Faretta v. California*, 422 U.S. 806, 820–32 (1975).

<sup>235</sup> *Enforcing Civility and Respect*, *supra* note 24, at 1297, 1316. German law provides special protections from criticism to groups based on their status, including the judiciary, members of the armed forces, and bank officers. *Id.* at 1311, n.87.

<sup>236</sup> *Id.* at 1350, 1354–55.

<sup>237</sup> As of 2000, the fine was up to 3,000 (pre-Euro) Deutschemarks. *Id.* at 198 n.52.

<sup>238</sup> *Velazquez v. City of Long Beach*, 793 F.3d 1010, 1019–20 (9th Cir. 2015), quoting *Duran v. City of Douglas, Arizona*, 904 F.2d 1372, 1377 (9th Cir. 1990); *see also* Johnson

action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.”<sup>239</sup> It is no coincidence that Germany’s group insult law derives from a 1934 prosecution for criticizing the SS and SA, Hitler’s paramilitary organizations.<sup>240</sup> Though there may be increasingly few who would benefit from suppressing such information, the text of *Google Spain*, empowering courts to censor information deemed to have been “kept for longer than is necessary,” could be cited by an aging collaborator seeking to have his crimes “forgotten.” The conclusion of Germany’s highest court in the *War Criminal* case, that courts should consider the “personality, state of mind, and age of the person,” and not emphasize too heavily the gravity of the crime<sup>241</sup> suggests the new right could apply to such cases.

Defamation law substantially restricts speech in Europe, and the *V* class benefits most from these limits. Notwithstanding her humble origins, Gabrielle Darley Melvin’s successful suppression of social criticism resembled that of aristocrats and governmental officials who have used (or threatened) litigation to suppress challenging speech. Most recently, Vladimir Putin’s threat of a libel suit convinced Cambridge University Press (CUP) to drop a book by Karen Dawisha on Putin’s gangster connections.<sup>242</sup> The publisher attributed the decision to speech-restrictive British libel law, which forces a speaker to prove a statement’s truth, in contrast to the speech-protective American standard, established in *New York Times v. Sullivan*,<sup>243</sup> which forces the plaintiff to prove the statement’s falsity (as well as malice where the subject is a public figure).<sup>244</sup> CUP informed Professor Dawisha that even a successful defense would prove too costly to

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v. Bay Area Rapid Transit Dist., 724 F.3d 1159, 1174 (9th Cir. 2013). The author briefed and argued *Velazquez* before the Ninth Circuit.

<sup>239</sup> *City of Houston, Texas v. Hill*, 482 U.S. 451, 462–63 (1987).

<sup>240</sup> *Enforcing Civility and Respect*, *supra* note 24, at 1328.

<sup>241</sup> *War Criminal* case, 72 [BVerfGE] 105 (1986), *quoted in* Case of Vinter and Others v. United Kingdom, Eur. Ct. H.R. 66069/09 28 (2013).

<sup>242</sup> Abrams, *supra* note 13, at 51; *A book too far: A controversial book goes unpublished*, THE ECONOMIST, Apr. 3, 2014, <https://www.economist.com/blogs/easternapproaches/2014/04/russia>.

<sup>243</sup> 376 U.S. 254, 269 (1964).

<sup>244</sup> *A book too far*.

justify publication.<sup>245</sup> She published her book in the United States without legal challenge.<sup>246</sup>

Defamation can also create criminal liability throughout Europe. Every European Union member (except Cyprus, Estonia, Ireland, Romania, and the United Kingdom) maintains criminal defamation statutes, and 20 of those 23 nations (except Bulgaria, Croatia, and France) authorize imprisonment as a possible penalty.<sup>247</sup> Many of those nations, including France and Germany, impose more severe punishment for speech directed at governmental officials,<sup>248</sup> unlike American law, which provides greater *protection* to criticism of public officials.<sup>249</sup>

Other disparities between European and American speech law described in Part IV likewise reflect formal protections for the *T* class (based on paternalistic estimates of their capacity for self-government) which also benefit the *V* class. Censoring the identity of terrorists (or offering alternative explanations for their crimes, whether true or not)<sup>250</sup> paternalistically presupposes that the public will not use truthful information to engage in an informed debate about immigration policy but will misuse it to engage in retaliatory violence against innocent immigrants or Muslims.<sup>251</sup> The ECHR justified restricting speech critical of immigration due to the risk that “less knowledgeable members of the public” might come to distrust

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<sup>245</sup> *Id.*

<sup>246</sup> ABRAMS, *supra* 13, note at 51.

<sup>247</sup> Organization for Security and Co-operation in Europe, The Representative on Freedom of the Media Dunja Mijatović, *Defamation and Insult Laws in the OSCE Region: A Comparative Study* (March 2017), <http://www.osce.org/fom/303181?download=true>.

<sup>248</sup> The Committee to Protect Journalists, *Balancing Act: Press Freedom at Risk as EU Struggles to Match Action with Values* 16 (2015), [https://cpj.org/reports/cpj\\_eu\\_special\\_report\\_2015.pdf](https://cpj.org/reports/cpj_eu_special_report_2015.pdf). Wealthy private citizens also benefit disproportionately from restrictive speech laws. See John Kampfner, *The Worrying Rise of the rich man's weapon of justice*, THE INDEPENDENT, Mar. 31, 2011, <http://www.independent.co.uk/voices/commentators/john-kampfner-the-worrying-rise-of-the-rich-mans-weapon-of-justice-2258869.html>.

<sup>249</sup> *Gertz v. Welch*, 418 U.S. 323, 342–44 (1974).

<sup>250</sup> The relative insignificance of truth in the debate recalls the European goal of protecting “honor justly or unjustly acquired.” *Two Western Cultures*, *supra* note 9, at 1179, quoting ÉMILE BEAUSSIRE, *LES PRINCIPES DU DROIT* (1888) (emphasis added). Both explain why truth is an inadequate justification for disclosure according to *Google Spain*.

<sup>251</sup> See *Willan v. Columbia County*, 280 F.3d 1160, 1162 (7th Cir. 2002).

immigrants.<sup>252</sup> The censorship promises to protect vulnerable immigrants from violence but also protects governmental elites from critical scrutiny of immigration policy.

The status quo likewise enjoys immunity from challenge due to laws barring advertising on public policy issues. Commercials could present animals in assertedly inhumane conditions but Animal Defenders International could not air comparable commercials calling attention to that issue. Again, a paternalistic assumption about *T*-class rationality justified the ban: the “potential mischief” of political advertising lay in the risk that the public would, in Pavlovian fashion, embrace certain ideas “not because they are shown in public debate to be right but because, by dint of constant repetition, the public has been conditioned to accept them.”<sup>253</sup> Though the United Kingdom justified the law as needed to level the playing field so the wealthy would not dominate public debate, the law effectively eliminates the field of debate altogether — and freezes in place established policies and practices.

That policy contrasts sharply with the American constitutional tradition, which provides more protection to speech about public figures than private, and provides greater protection to speech about public policy than commercial products.<sup>254</sup> The U.S. provides a level playing field by granting the citizen-critic the same legal standing to speak as the government official, because “[i]t is as much his duty to criticize as it is the official’s duty to administer.”<sup>255</sup> And the Court leveled the playing field not by banning political speech but by protecting it:

It would give public servants *an unjustified preference over the public* they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.<sup>256</sup>

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<sup>252</sup> Case of *Féret v. Belgium*, Application, Eur. Ct. H.R. 15615/07 (2009). The irony of a judicial decision forbidding speech to prevent “mistrust” of immigrants, which itself derives from mistrust of the European public, was apparently lost on the ECHR.

<sup>253</sup> On the Application of Animal Defenders Int’l v. Secretary of State for Culture, Media and Sport [2008] UKHL 15, *quoted in* Case of Animal Defenders International v. United Kingdom, Eur. Ct. H.R. 48876/08 7 (2013).

<sup>254</sup> See *Expressions Hair Design v. Schneiderman*, 137 S.Ct. 1144, 1152 (2017) (Breyer, J., concurring.)

<sup>255</sup> *New York Times v. Sullivan*, 376 U.S. 254, 282 (1964).

<sup>256</sup> *Id.* at 282–83 (emphasis added).

If an American advertiser may treat animals inhumanely, another advertiser may object. Accordingly, where the *Google Spain* decision empowered courts to determine whether posted content is adequate, relevant, or excessive, the First Amendment assigns that determination to the public: “[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented.”<sup>257</sup> Rejecting the *noblesse oblige* model, in which the *V* class protects the *T* class, every American equally must decide for himself, “every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.”<sup>258</sup>

Although the U.S. Supreme Court has never faced the *Google Spain* question of whether the state may censor truthful speech to save the subject from embarrassment, its decision in a case about *false* speech leaves no doubt about how it would rule. Xavier Alvarez falsely claimed to have won the Congressional Medal of Honor, and the government prosecuted him criminally for the lie.<sup>259</sup> The Court decided that private shaming, “the dynamics of free speech, of counterspeech, of refutation,” rather than governmental punishment should correct the lie and deter future mendacity.<sup>260</sup> A self-governing people could solve the problem without the coercive hand of government: “Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication.”<sup>261</sup> Far from shielding Alvarez from online ridicule, the Supreme Court celebrated how private citizens had become their own watchmen for truth: “[T]he outrage and contempt expressed for respondent’s lies can serve to reawaken and reinforce the public’s respect for the Medal, its recipients, and its high purpose.”<sup>262</sup>

In endorsing private criticism of Alvarez’s reputation but precluding state-imposed punishment, the U.S. Supreme Court squarely rejected the

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<sup>257</sup> *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

<sup>258</sup> *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring opinion). As the government may not separate “true” from “false,” a fortiori, it may not separate “adequate” from “inadequate,” or “relevant” from “irrelevant.”

<sup>259</sup> *Id.* at 713.

<sup>260</sup> *Id.* at 726–27.

<sup>261</sup> *Id.* at 729.

<sup>262</sup> *Id.*

*Briscoe-Lebach* model, in which state-imposed punishment is the exclusive remedy for misconduct, and informal, private sanctions are forbidden. *Alvarez* concluded that truth does not need handcuffs or a badge, but *Google Spain* appeared to endorse the *Lebach* holding that it does. The divergence on this issue reflects the fundamental contrast: the United States tends to trust the (*you*-class) public but not the government, whereas the European Union trusts the (*V*-class) government more than its (*T*-class) people.<sup>263</sup>

## VI. THE FUTURE OF RETRIBUTIVE SPEECH

The law mostly uses the term “retribution” in the penal context, and it is commonly associated with harsh, mean treatment. But it literally means “pay back,” and it undergirds any culture where one receives treatment according to her conduct rather than birth, race, or any other status-related condition. In the 1970s, both the California Supreme Court and Germany’s Constitutional Court shared a commitment to the rehabilitation imperative, and both ruled against disclosure of past crime to enable the criminal’s restoration to his former standing in the community.<sup>264</sup> Since then, the United States (and California) have returned to the retributive model for punishment — and speech.

To pay back for conduct, good or bad, requires knowledge of it. To judge neighbors on the content of their character rather than the color of their skin requires information with which to evaluate that character. The same retribution that supports punishment of wrongdoing supports reward for doing right.

Continental Europe did not join in the return to retributivism, a model of treating others based on conduct rather than status:

Europeans are not yet ready for a world in which *acts* matter so much more than *persons* — for a world in which the consequences that befall you depend so much on *what you do* rather than *who you are*.<sup>265</sup>

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<sup>263</sup> King, *supra* note 14, at 191.

<sup>264</sup> *Briscoe*, 4 Cal.3d 529 (1971); *Lebach* case, 35 BVerfGE 202 (1973).

<sup>265</sup> Harsh Justice, *supra* note 9, at 94.



Anthony Faretta symbolized the contrary ethos. Though lacking status as a lawyer, the court promised he would be treated with “respect,” “like a gentleman.”<sup>266</sup> But he would receive the same treatment as any credentialed attorney; his success would depend on his own conduct.

Conduct-based treatment works to the detriment of those who have committed serious crimes by allowing severe punishment. It likewise permits speech enabling the public to learn of past misconduct. Retributive speech thus lowers wrongdoers in public standing, and those with the highest standing have the most to lose.

But it enables others to rise according to their favorable conduct. Ever since medieval and early-modern English speakers used *T* (thou) or *V* (you) based on the content of the speech (including the speaker’s contempt for the listener) rather than the listener’s status,<sup>267</sup> the English-speaking world has tended toward a *relative* meritocracy compared to Continental Europe, where the law protected the status of high-ranking individuals, regardless of the *origins* of such rank.<sup>268</sup> Of course, eighteenth-century Anglo-American norms were hardly meritocratic by contemporary standards, but the English at least celebrated the *ideal* of equal justice (however unrealized in practice), as Continental elites did not.<sup>269</sup> Judgment based on conduct offered the possibility that English commoners could become “gentlemen by achievement.”<sup>270</sup> But this conversely entails that others could become “common by vice.”

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<sup>266</sup> *Faretta v. California*, 422 U.S. 806, 808 n.2.

<sup>267</sup> See WALES, *supra* note 210, at 75; Brown & Gilman, *supra* note 207, at 278.

<sup>268</sup> See *Two Western Cultures*, *supra* note 9, at 1179, quoting EMILE BEAUSSIRE, *LES PRINCIPES DU DROIT* (1888) (emphasis added): “[P]rying and insults . . . violate the law when they tend to destroy, through public revelation . . . honor justly or *unjustly acquired*.”

<sup>269</sup> Blackstone boasted, “And it is moreover one of the glories of our English law, that the nature, though not always the quantity or degree, of punishment is *ascertained* for every offence; and that is not left in the breast of any judge, nor even of a jury, to alter that judgment, which the law has before ordained, for every subject alike, without respect of persons.” 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*370–71, *quoted in* HARSH JUSTICE, *supra* note 9, at 41–42. The English hanged murderers regardless of their status, whereas Continental aristocrats convicted of murder received what was considered the higher-status punishment of beheading. HARSH JUSTICE, *supra*, at 103, 153–58.

<sup>270</sup> Williams, *supra* note 208, at 79.

Americans (and, to a lesser extent, Britons) continue to perceive their conduct plays a greater role in their eventual success than do Europeans, who incline more to the determinism underlying the scientific school of criminology, which the United States abandoned in the 1970s. A 2002 Pew survey asking why some people “don’t succeed in life” found Americans were far less likely than German, Italian, or French respondents to attribute non-success to “society’s failure” rather than their own “individual failures” (with the British in the middle).<sup>271</sup> Similarly, six times this century Pew has asked whether “[s]uccess in life is pretty much determined by forces outside our control.”<sup>272</sup> Not once in the twelve combined times they have been asked has a plurality of Americans (or Britons) agreed with this deterministic premise.<sup>273</sup> Pew has asked the French, Germans, Italians, and Spanish about this premise a combined twenty-one times, and not once has a plurality denied it.

These contrasting perceptions may be self-reinforcing. The belief that misconduct is not really the individual’s fault may lead to a broad “right to be forgotten” that suppresses such information. But the absence of such information may further disconnect reward from desert. A homeowner recruiting candidates for a contracting job may seek to learn about their past conduct, and hire the one with the best record. But if no meaningful information is available (because the “right to be forgotten” censors any negative reports, and everyone enjoys a “false aura” of favorability), the homeowner may rely instead on personal connections for recommendations, which will tend to disadvantage people with minimal connections — thereby further diminishing the import of personal merit.

The very “protection” offered by *Google Spain*, shielding from the public an individual’s past difficulty in paying debts, harms the aspiring *T*-class most of all. European law restricts access to individuals’ credit

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<sup>271</sup> Pew Research Center, *What the World Thinks in 2002: How Global Publics View Their Lives, Their Countries, The World, America*, Question 36 (2002), <http://www.pew-global.org/2002/12/04/what-the-world-thinks-in-2002>.

<sup>272</sup> Pew Research Center, *Topline Results, Spring 2014 Survey*, Question 13b, 38, <http://www.pewglobal.org/files/2014/07/2014-07-14-Balance-of-Power-Topline.pdf>.

<sup>273</sup> *Id.* The contrast is a relative one, as usually at least one-third of Americans assert the determinist position, and at least one-third of Europeans assert the non-determinist position.

history far more than American law.<sup>274</sup> Credit is thus much less accessible in Europe,<sup>275</sup> and it is not the *V*-class who suffer from tight credit.

Supporters of the expansive European right may celebrate that it weakens the historical *T-V* dichotomy: in centuries past only the *V* class could protect itself against unfavorable speech (whether true or not), but the aristocratic privilege now extends to everyone.<sup>276</sup> As one commentator celebrates this promise: “whereas there were once masters and slaves, now ‘you shall all be masters.’”<sup>277</sup> But universalizing the censoring power minimizes the capacity of speech to alter the status quo, freezing in place the social hierarchy. If one defines a “master” as having the ability to speak truthfully about others without fear of a defamation suit, and a “slave” as lacking that ability, the European trend could be described as rendering everyone (outside the government) a slave. Limits on speech are limits on social change and mobility.

Americans instead idealize the absence of the *T-V*, master–slave dichotomy altogether, aspiring to (if not fully achieving) its negation as described by Abraham Lincoln: “As I would not be a slave, so too I would not be a master. That is my idea of democracy.”<sup>278</sup> Though there were slaves (and masters) in nineteenth-century America, the nation is moving closer to the ideal of a participatory democracy in which everyone is a self-governing *you*, able to represent herself in court, serve on a jury, and have a meaningful vote on public policy. This adult *you* status also entails being subject to retributive punishment and speech. This status also trusts members of the public with information, because they will use and not abuse it, and accord past misdeeds proper rather than excessive weight.<sup>279</sup> Every American, and not only judges, can be a watchman for truth and decide whether information is relevant or necessary.

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<sup>274</sup> *Two Western Cultures*, *supra* note 9, at 1190–92.

<sup>275</sup> *Id.* at 1192.

<sup>276</sup> *Id.* at 1166.

<sup>277</sup> *Id.*, quoting PHILIPPE D’IRIBARNE, *VOUS SEREZ TOUS DES MAITRES!: LA GRANDE ILLUSION DES TEMPS MODERNES* (1996).

<sup>278</sup> See *Enforcing Civility and Respect*, *supra* note 24, at 1285 (contrasting the European ethos of “*we are all aristocrats now*,” with the American ethos of “*there are no more aristocrats*”).

<sup>279</sup> *Willan v. Columbia County*, 280 F.3d 1160, 1162 (7th Cir. 2002).

The debate over the international reach of *Google Spain*, and the competing claims of the First Amendment, will weigh the value of retributive speech, and the outcome of that debate is uncertain. Americans’ commitment to the unfettered exchange of ideas is diminishing with each generation, and more than three times as many “millennials” as senior citizens favor a governmental ban on speech that is offensive to minority groups,<sup>280</sup> although American millennials remain more speech-protective than the overall populations of all surveyed European nations except the United Kingdom.<sup>281</sup> Millennials may be more comfortable with a paternalistic model, as they form the first generation of adults with more members living with parents than a spouse.<sup>282</sup>

On the other hand, the United Kingdom’s looming exit from the European Union may provide the United States with an influential ally in the international debate over retributive speech. The United Kingdom has been critical of the “censorship” authorized by *Google Spain*.<sup>283</sup> As a House of Lords report concluded, “We do not believe that individuals should have a right to have links to accurate and lawfully available information about them removed, simply because they do not like what is said.”<sup>284</sup> The UK likewise refused a Continental call to create a watchdog organization to censor speech about terrorism.<sup>285</sup> Anglophonic Britain likewise shares

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<sup>280</sup> Pew Research Center, *40% of Millennials OK with limiting speech offensive to minorities*, Nov. 20, 2015, [http://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities/ft\\_15-11-19\\_speech](http://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities/ft_15-11-19_speech).

<sup>281</sup> *Id.* The surveyed Continental European countries were Germany, Italy, Poland, France and Spain.

<sup>282</sup> Pew Research Center, *For First Time in Modern Era, Living With Parents Edges Out Other Living Arrangements for 18- to 34-Year-Olds*, May 24, 2016, <http://www.pewsocialtrends.org/2016/05/24/for-first-time-in-modern-era-living-with-parents-edges-out-other-living-arrangements-for-18-to-34-year-olds>.

<sup>283</sup> THE COMMITTEE TO PROTECT JOURNALISTS, *BALANCING ACT: PRESS FREEDOM AT RISK AS EU STRUGGLES TO MATCH ACTION WITH VALUES* 41 (2015).

<sup>284</sup> *Id.*

<sup>285</sup> “The Government is committed to a free and open press and does not interfere with what the press does and does not publish, as long as the press abides by the law.” Blake Neff, *UK Urged to Ban Press from Revealing Terrorists Are Muslim*, THE DAILY CALLER, Oct. 5, 2016, <http://dailycaller.com/2016/10/05/uk-urged-to-ban-press-from-revealing-terrorists-are-muslim>.

with the U.S. a commitment to both retributive punishment<sup>286</sup> and the self-government procedures of jury service and self-representation.<sup>287</sup> In fact, confidence in their capacity for self-government may have motivated many Brexit voters. Among the factors predicting strongly for a Leave vote was agreement with the statements, “I’d rather put trust in ordinary people than the opinions of experts and intellectuals,” and, “I generally trust the judgements of the British people, even for complicated issues.”<sup>288</sup>

Americans’ similar distrust of legal elites (and trust in themselves) likewise produced a divergence from Europe in criminal justice and speech law in the past four decades. The *you*-class insisted it could be trusted with the responsibility of presenting evidence as a defendant or weighing it as a juror, and would not necessarily defer to the decisions of counsel and judges. Most significantly, a crime wave exposed the apparent ineffectiveness of the rehabilitation model, which experts had promised would contain crime.<sup>289</sup> Americans’ greater capacity for shaping policy enabled them to reject the European model whereby governing elites could forgive violent criminals and send them out to live among unknowing (*T*-class) neighbors. This demand for decision-making responsibility soon affected speech; after Vietnam and Watergate, Americans were less inclined to trust the government to control access to information and restrict its flow.

The CJEU in *Google Spain* acted out of a humanitarian impulse in trying to shield from shame an individual who had failed to pay his debts nearly two decades earlier, assuming that people would give not proper but

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<sup>286</sup> See *R. v. Secretary of State for the Home Department, ex parte Hindley* [2001] 1 AC 410, 416–417, quoted in *Vinter* 14 (¶ 46) finding “no reason in principle, why a crime or crimes, if sufficiently heinous should not be regarded as deserving lifelong incarceration for purposes of pure punishment,” as there are “crimes so wicked that even if the prisoner is detained until he or she dies it will not exhaust the requirements of retribution . . . .”

<sup>287</sup> Nina H. B. Jorgensen, *supra* note 15, at 714–17.

<sup>288</sup> Ipsos MORI Social Research Institute, *Shifting Ground: new political dividing lines?: The interaction between leave/remain and Conservative/Labour voters* (May 2017), <https://www.ipsos.com/sites/default/files/2017-05/shifting-ground-new-political-dividing-lines.pdf>. The confidence in the “British people” may have contrasted with that in the *European* people, or the *British elite*.

<sup>289</sup> Kleinfeld, *supra* note 73, at 1021–24, Keiter, *supra* note 73, at 420–21.

excessive weight to this remote information.<sup>290</sup> It followed the path trod by the California Court of Appeal nearly a century earlier in *Melvin v. Reid*, which sought to reify the “charity which should actuate us in our social intercourse.”<sup>291</sup> But that decision may have had the opposite effect, shielding from public review Darley Melvin’s conduct specifically and prostitution’s harmful effects more generally. In rejecting retributive speech, the *Melvin* decision might have exposed individuals to Melvin’s subsequent mistreatment, and denied the broader public a chance to debate an important public policy issue. California has since renounced that outcome,<sup>292</sup> and the eventual consequences of *Google Spain* may someday lead the CJEU to do the same.

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<sup>290</sup> Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 2014 E.C.R. 317.

<sup>291</sup> 112 Cal. App. 285, 291 (1931).

<sup>292</sup> *Gates v. Discovery Communications, Inc.*, 34 Cal.4th 679 (2004).



# CALIFORNIA'S NO-DUTY LAW AND ITS NEGATIVE IMPLICATIONS

MICHAELA GOLDSTEIN<sup>1</sup>

## I. INTRODUCTION

In 1984, Kathleen Peterson, a student at the City College of San Francisco was attacked on a staircase by a non-student assailant hiding in foliage.<sup>2</sup> The California Supreme Court held that the college had a duty to exercise reasonable care to protect students from reasonably foreseeable assaults on campus.<sup>3</sup> Twenty-five years later, in 2009, Katherine Rosen, a student at the University of California, Los Angeles, suffered severe injuries after being attacked by another UCLA student during a chemistry laboratory.<sup>4</sup> UCLA had ample warning of the assailant-student's propensity for violence and the assailant-student had even made threats directed at Rosen to a UCLA

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<sup>2</sup> Peterson v. San Francisco Community College Dist., 685 P.2d 1193 (1984).

<sup>3</sup> *Id.*

<sup>4</sup> Regents of the Univ. of Cal. v. Superior Court (UC Regents), 193 Cal. Rptr. 3d 447, 450 (Cal. App. 2015).



teaching assistant.<sup>5</sup> However, the California Court of Appeal held that although the attack may have been foreseeable, UCLA was under no duty to protect Rosen from this attack.<sup>6</sup>

Although these cases seem incompatible, they were both decided according to settled, good law. These cases highlight the anomalous exceptions harbored within California's inconsistent no-duty rule. "The general rule in California is that everyone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person . . ." <sup>7</sup> However, rather than the parties' focusing on whether the defendant fell below the standard of care, and therefore breached its duty, the parties spend much of their time establishing whether a duty exists. California has partaken in a flawed, fundamental move away from deciding negligence cases based on whether a defendant breached its duty of care. Instead, California courts wrongfully focus on the first element of negligence: whether a duty exists. In doing so, California has created an intricate, inconsistent common law surrounding whether a duty exists. Often, cases are won and lost on summary judgment on whether a duty exists — a question of law. Deciding negligence cases on summary judgment inevitably leads to cases being removed from the hands of the jury.

This article takes the position that California courts should rely more heavily on the general rule that a duty is presumed and, instead, focus their analytical attention on whether the defendant has breached its duty of care. Part II explains the history of negligence law generally. Additionally, Part II explores the history of negligence law specifically in California and the historical background of the promulgation of the no-duty rule. Part III evaluates the consequences of California's reliance on the no-duty rule — mainly the removal of negligence cases from the hands of the jury and California's creation of a complex common law surrounding duty with confusing exceptions. Additionally, Part III looks to the cases that will be heard by the California Supreme Court in its 2017 term that are based on whether a duty exists — exploring how California's reliance on the no-duty rule has led to narrow exceptions being created in what should be

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<sup>5</sup> *Id.* at 453.

<sup>6</sup> *Id.* at 451.

<sup>7</sup> *Vasilenko v. Grace Family Church*, (*Vasilenko v. Church*), 203 Cal. Rptr. 3d 536, 540 (2016), quoting CAL. CIV. CODE § 1714, subd. (a) (internal quotations omitted).

a general presumption that the defendant owes a duty. Further, Part III contains a discussion of the implications of the no-duty rule, including how the no-duty rule violates one of the main goals of tort law: deterrence. Lastly, Part IV will conclude and recommend that California should move away from the flawed no-duty rule and instead focus on whether a defendant has breached its duty of reasonable care.

## II. HISTORICAL BACKGROUND

### A. HISTORY OF NEGLIGENCE GENERALLY

Negligence did not appear as a general system for resolving tort actions until the nineteenth century, mostly after the American Civil War.<sup>8</sup> Prior to the development of negligence as a cause of action, physical injury or harm to property cases were rooted in trespass law.<sup>9</sup> In these cases, the relationship between the parties to a case was important for two reasons: first, because that relationship between the plaintiff and the defendant might require that the defendant take affirmative actions to prevent harm to the plaintiff;<sup>10</sup> second, the “standard of care or duty owed by the defendant was implicitly set by accepted community practices and expectations as incorporated in the contract or relationship itself.”<sup>11</sup> Given that duties in these cases “tended to find their source in community custom and conduct of the parties, courts naturally did not impose any universal principles of responsibility.”<sup>12</sup> Instead, the courts “imposed liabilities they thought proportioned to the parties’ own contract or expectation.”<sup>13</sup>

Beginning in the nineteenth century, the modern formation of negligence law emerged.<sup>14</sup> Courts began to develop general principles to be applied to personal injury or harm to property cases.<sup>15</sup> Instead of cases being

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<sup>8</sup> DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 121 (2d ed. Practitioner Treatise Series 2011).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See DOBBS ET AL., *supra* note 8, § 122.

judged “by imposing particular duties upon particular callings, courts could simply treat negligence as the basis of liability in all or a large universe of cases.”<sup>16</sup> A tort of trespass was maintained, but negligence became the basis of liability otherwise.<sup>17</sup> Further, negligence did not focus on parties who stood in some special or contractual relationship; negligence was “a general duty of all to all.”<sup>18</sup>

In 1850, *Brown v. Kendall* was decided and became the basis of negligence law. In the case, the Massachusetts Supreme Court abolished the rule “that a direct physical injury entailed strict liability.”<sup>19</sup> The court held that a defendant who attempted to beat a dog but unintentionally struck the plaintiff instead, would not be liable for battery in spite of the direct force applied.<sup>20</sup> Instead, the defendant would only be liable for battery if his *intention* was to strike the plaintiff, or if he was “at fault in striking him.”<sup>21</sup> This meant that other direct applications of force, such as “in railroad accidents or industrial injuries, would not automatically subject the defendant to the threat of liability; instead, the plaintiff would be required to prove fault.”<sup>22</sup> With the decision in *Brown v. Kendall*, negligence law developed. Courts began to view tort law as a separate area of the law, with the core inquiry being whether the defendant was at fault.<sup>23</sup>

In modern law, the term *negligence* merely describes unreasonably risky conduct.<sup>24</sup> “A good deal of tort law is devoted to deciding what counts as an unreasonable risk and to deciding as well whether the judge or the jury is the decision maker in particular cases.”<sup>25</sup> A negligence case has five elements, which must be proved by the plaintiff by proof of facts or persuasion. The elements are:

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*; see G. EDWARD WHITE, *TORT LAW IN AMERICA* 16 (1980); Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127 (1990).

<sup>19</sup> See DOBBS ET AL., *supra* note 8, § 122; *Brown v. Kendall*, 60 Mass. 292 (1850).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> See DOBBS ET AL., *supra* note 8, § 122.

<sup>24</sup> *Id.* at § 124.

<sup>25</sup> *Id.*

(1) The defendant owed the plaintiff a duty to exercise some degree of care for the plaintiff's safety; (2) The defendant breached that duty by his unreasonably risky conduct; (3) The defendant's conduct in fact caused harm to the plaintiff; (4) The defendant's conduct was not only a cause in fact of the plaintiff's harm but also a "proximate cause," meaning that the defendant's conduct is perceived to have a significant relationship to the harm suffered by the plaintiff, in particular that the harm caused was the general kind of harm the defendant negligently risked; and (5) The existence and amount of damages, based on actual harm of a legally recognized kind such as physical injury to person or property.<sup>26</sup>

Whether or not the defendant owed the plaintiff a duty to exercise some degree of care for the plaintiff's safety is a matter of law, which is decided by a judge.<sup>27</sup> To say that the defendant is under a duty is merely to say "that the defendant should be subject to potential liability in the type of case in question."<sup>28</sup> "[D]uty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection."<sup>29</sup> Legal scholars have agreed that "[a] general duty of *reasonable* care is by definition not burdensome."<sup>30</sup> And in most negligence cases, "the elaborate efforts to describe particular duties are both unnecessary and undesirable."<sup>31</sup>

## B. HISTORY OF NEGLIGENCE IN CALIFORNIA

In the 1980s, California "was at the forefront of the movement to sweep aside duty limitations rooted in property and contract law."<sup>32</sup> The general rule in California today is that "[e]veryone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at § 255.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at § 255.

<sup>31</sup> *Id.*

<sup>32</sup> Dilan A. Esper and Gregory C. Keating, *Abusing "Duty,"* 79 S. CAL. L. REV. 265, 289 (2006).

management of his or her property or person . . . .”<sup>33</sup> In other words, “each person has a duty to use ordinary care and is liable for injuries caused by his failure to exercise reasonable care in the circumstances . . . .”<sup>34</sup> However, in 1968, the California Supreme Court decided *Rowland v. Christian*, which set forth factors for a judge to consider in determining whether a duty exists.<sup>35</sup> *Rowland v. Christian* spawned an overthrow of the traditional categories — invitee, licensee, and trespasser, by which the duties owed to entrants on real property were determined in the nineteenth century and the first two-thirds of the twentieth century.<sup>36</sup>

In *Rowland v. Christian*, the defendant told the lessors of her apartment that the knob of the cold-water faucet in the bathroom was cracked and should be replaced.<sup>37</sup> A few weeks later, the plaintiff entered the defendant’s apartment and was injured while using the bathroom faucet.<sup>38</sup> The plaintiff alleged that the defendant was aware of the dangerous condition on her property and that his injuries were proximately caused by the defendant.<sup>39</sup> The defendant moved for summary judgment.<sup>40</sup>

The court looked at the general rule in California, that “[a]ll persons are required to use ordinary care to prevent others being injured as the result of their conduct.”<sup>41</sup> The court then reasoned that

[a]lthough it is true that some exceptions have been made to the general principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances, it is clear that in the absence of statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code, no such exception should be made unless clearly supported by public policy.<sup>42</sup>

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<sup>33</sup> CAL. CIV. CODE § 1714, subd. (a).

<sup>34</sup> *Vasilenko v. Church*, 203 Cal. Rptr. 3d 536, 540 (2016), citing *Cabral v. Ralphs Grocery Co.*, 122 Cal. Rptr. 313, 317 (2011) (internal quotations omitted).

<sup>35</sup> *Rowland v. Christian*, 70 Cal. Rptr. 97 (1968).

<sup>36</sup> See *Esper and Keating*, *supra* note 32, at 276.

<sup>37</sup> *Rowland v. Christian*, 70 Cal. Rptr. at 98.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 97.

<sup>42</sup> *Id.* at 100.

The court then stated factors which should be balanced in determining if the public policy clearly supports an exception to the general rule.<sup>43</sup> The *Rowland v. Christian* factors include: (1) The foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered injury, (3) the closeness of the connection between the defendant's conduct and the injury suffered, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, (6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and (7) the availability, cost, and prevalence of insurance for the risk involved,<sup>44</sup> the most important factor being whether the harm to the plaintiff was foreseeable.<sup>45</sup>

The court enunciated a turn away from the traditional categories of duty applied to invitees, licensees, and trespassers, and instead moved to an analysis more centered on the *Rowland v. Christian* factors. The court then concluded that here the correct inquiry was whether, in the management of his property, the defendant acted as a reasonable person in view of probability of injuries to others.<sup>46</sup> Further, the court concluded that the plaintiff's status as a trespasser, licensee, or invitee was not determinative.<sup>47</sup> The last issue was whether the tenant had been negligent in failing to warn the plaintiff that the faucet handle was defective and dangerous at the time that the plaintiff was about to come in contact with the faucet handle.<sup>48</sup> The court remanded for determination of this specific issue.<sup>49</sup>

Since *Rowland v. Christian*, courts have relied on the *Rowland v. Christian* factors to determine whether an exception to the general duty of care rule exists. Today, courts will only make an exception to California Civil Code section 1714's general duty of ordinary care rule "when foreseeability and policy considerations justify a categorical no-duty rule."<sup>50</sup> Thus, the California Supreme Court intended to create a "crucial distinction between a determination that the defendant owed the plaintiff no duty of

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 105.

<sup>50</sup> *Cabral v. Ralph's Grocery*, 122 Cal. Rptr. at 319.

ordinary care, which is for the court to make, and a determination that the defendant did not breach the duty of ordinary care, which in a jury trial is for the jury to make.”<sup>51</sup>

However, because duty is a live element in every negligence case, as opposed to “[the] general rule in California is that everyone is responsible . . . for [their negligence],” it becomes difficult to know when the issue of duty does or does not arise.<sup>52</sup> This is where the California courts make their most fatal error: the courts have created very specific factual circumstances where there is no duty, which undoubtedly creates complex and narrow exceptions to what is supposed to be a general presumption of duty. From the precedential narrow factual circumstances where the court has held that the defendant is under *no duty of care as a matter of law*, the courts must then determine whether other narrow factual circumstances are similar enough to the previous narrow factual circumstance to warrant a no-duty ruling. However, this determination of fact is essentially an issue for the jury. Whether or not a duty exists is supposed to be determined on a categorical basis; instead, judges are determining an essentially factual issue, which is reserved for the jury.

Today, many negligence cases are decided on summary judgment on the narrow issue of whether a duty exists. Thus, the *Rowland v. Christian* factors, which were supposed to be used in a very narrow set of circumstances to clear up confusion over the previous invitee, licensee, and trespasser categorical rules, have merely created another complicated area of law.

### C. HISTORY OF THE NO-DUTY RULE

Judge William Andrews’ legendary dissent in *Palsgraf v. Long Island Railroad Co.* highlights the long-time debate over the analytical focus on duty rather than breach.<sup>53</sup> In *Palsgraf*, a passenger was boarding a train holding a box.<sup>54</sup> The defendant’s employee, while attempting to help the passenger board the train, knocked the box out of the passenger’s hands, and, unbeknownst to the employee, the box contained some form of bomb, which

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<sup>51</sup> *Id.*

<sup>52</sup> *Vasilenko v. Church*, 203 Cal. Rptr. 3d at 540, quoting CAL. CIV. CODE § 1714, subd. (a) (internal quotations omitted).

<sup>53</sup> *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928).

<sup>54</sup> *Id.*

exploded.<sup>55</sup> The explosion broke some scales on the platform a considerable distance away, causing the scales to fall and strike the plaintiff.<sup>56</sup> The issue, among many, was whether the defendant owed a duty of care to a particular person or persons.<sup>57</sup> Although the appellate court held for the defendant in its majority opinion, which was written by Judge Benjamin Cardozo — disregarding Judge Andrews' fervent dissent — it is Judge Andrews' dissent that represents the majority view today.

Judge Andrews asserted that whenever there is an unreasonable act and some right that may be affected, there is negligence, whether damage does or does not result.<sup>58</sup> Judge Andrews offered this example: if someone drove down Broadway at a reckless speed, the person is negligent whether or not the person strikes an approaching car.<sup>59</sup> It is immaterial whether damage occurs; the act itself is wrongful.<sup>60</sup> Judge Andrews posited that “[t]he measure of the defendant’s duty in determining whether a wrong has been committed is one thing, the measure of liability when a wrong has been committed is another.”<sup>61</sup>

The California negligence duty of reasonable care is supposed to be predicated upon “our common status as human beings” rather than narrow exceptions announced by judges.<sup>62</sup> Duty “is owed by everyone to everyone else and it is ordinarily triggered simply by acting in a way that poses a ‘reasonably foreseeable’ risk of harm to anyone else.”<sup>63</sup> In contrast to duty, breach “is an inquiry into whether a defendant exercised reasonable care in light of all of the foreseeable risks at hand.”<sup>64</sup> Additionally, when the harm that the plaintiff suffers is not expected, this issue is best explored in the element of proximate cause, not duty.<sup>65</sup> Using this accurate explanation of

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 102, quoting Justice Holmes, *Spade v. Lynn & B.R. Co.*, 52 N.E. 747, 748 (1899).

<sup>62</sup> Dilan A. Esper and Gregory C. Keating, *Putting “Duty” In Its Place: A Reply to Professors Goldberg and Zipursky*, 41 LOY. L.A. L. REV. 1225, 1255 (2008).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*



the roles of the negligence elements, California should recognize that there is “a general duty of all to all” and focus any additional inquiry of foreseeability or unexpected harm into the appropriate elements.<sup>66</sup>

*Palsgraf* represents the beginning of a debate over the duty-versus-breach analysis in negligence law. Judge Cardozo’s interpretation of duty has splintered the element of duty into an “indefinite and ill-defined set of duties.”<sup>67</sup> This splintering of duty has blurred the lines between duty, breach, and proximate cause.<sup>68</sup> Although California technically follows Judge Andrews’ dissent, California has fallen into Judge Cardozo’s “indefinite and ill-defined set of duties.”<sup>69</sup> California should revert to following Judge Andrews’ advice, and focus on the breach analysis.

### III. IMPLICATIONS OF THE NO-DUTY RULE

California’s reliance on the no-duty rule has created a multitude of problems. In a series of sharp dissents, Justice Joyce Kennard advanced a concise description of one basic problem with California’s reliance on the no-duty rule: it treats problems of breach as problems of duty.<sup>70</sup> Because the element of duty is a matter of law for the court to determine, California has essentially removed negligence cases from the jury by deciding these cases on whether a duty exists. Second, the old saying *hard cases make bad law* rings true. California courts have carved out narrow and complex exceptions to the duty element in order to protect plaintiffs and defendants. Because the case could not be decided on the more fact-specific, jury-dependent, inquiry of whether the defendant breached their duty, the court defaulted to creating narrow exceptions in whether a defendant owes a duty. The difficulty in burying the duty element in exceptions is very

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<sup>66</sup> See DOBBS ET AL., *supra* note 8, § 122; WHITE, *supra* note 18, at 16; Kaczorowski, *supra* note 18, at 1127.

<sup>67</sup> See Esper and Keating, *supra* note 62, at 1255 (internal quotations omitted).

<sup>68</sup> *Id.*

<sup>69</sup> See DOBBS ET AL., *supra* note 8, § 122; WHITE, *supra* note 18, at 16; Kaczorowski, *supra* note 18, at 1127.

<sup>70</sup> See Esper and Keating, *supra* note 32, at 323, citing *Parsons*, 936 P.2d at 101 (Kennard, J., dissenting); *Ky. Fried Chicken of Cal., Inc. v. Superior Court (KFC)*, 927 P.2d 1260, 1275 (cal. 1997) (Kennard, J., dissenting); *Knight v. Jewett*, 834 P.2d 696, 714 (Cal. 1992) (Kennard, J., dissenting).

apparent in 2017, when the California Supreme Court is set to hear two cases on the very limited issue of whether a duty exists.

Lastly, California courts' reliance on strange and anomalous exceptions to the general rule of presumption of duty has led to courts' analyzing narrow exceptions to determine if a certain factual pattern fits into one of the narrow exceptions previously espoused by the courts. This has led to inconsistent holdings, which go against one of the main goals of tort law: deterrence.

#### A. REMOVING CASES FROM THE HANDS OF THE JURY

"When duty is a live issue in every case, it is impossible to draw a principled line between the provinces of judge and jury."<sup>71</sup> California's reliance on the no-duty rule has led courts away from a determination of whether the defendant fell below the standard of care and breached their duty. Instead, courts now focus on the issue of whether a duty exists, delving into intricate analyses of special relationships,<sup>72</sup> the difference between dangerous landscape versus dangerous fraternity brothers,<sup>73</sup> or any of a multitude of other narrow exceptions rooted in duty. In doing so, California courts have taken many negligence cases out of the hands of the jury.

Negligence law divides determinations into two parts: duty is a matter of law decided by the judge, and breach is a matter of fact decided by the jury. In negligence cases, "[j]uries are in part a well-chosen instrument for determining whether the defendant did in fact act reasonably and in part an intrinsically fair way of resolving reasonable disagreement about what care was due."<sup>74</sup> "They are a well-chosen instrument because juries represent a form of collective judgment particularly appropriate to negligence cases."<sup>75</sup> Judges are better suited than jurors to ruling on questions of law, or to ruling on issues of whether an expert's testimony is admissible or whether the question does in fact call for hearsay. However, when it comes to determining reasonableness, jurors are likely better suited. In determining whether

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<sup>71</sup> See Esper and Keating, *supra* note 62, at 1255.

<sup>72</sup> Crow v. State of Cal., 271 Cal. Rptr. 349, 359 (Cal. App. 1990).

<sup>73</sup> Peterson v. San Francisco Community College Dist., 685 P.2d 1193 (1984); Furek v. Univ. of Delaware, 594 A.2d 506, 522 (Del. 1991).

<sup>74</sup> See Esper and Keating, *supra* note 62, at 1279.

<sup>75</sup> *Id.*

a driver acted unreasonably in changing lanes too slowly on the freeway, a judge is not better suited to make this determination:<sup>76</sup>

The consensus of twelve citizens, many of whom drive on similar freeways and have had the common experience of driving too slow for a fast lane, as well as the experience of driving behind someone who was doing so, is a reliable index of the reasonableness of a driver's actions in those situations.<sup>77</sup>

However, when courts decide negligence cases solely on the issue of duty, while considering the *Rowland v. Christian* factors, they are removing the jury inquiry from the case. “When reasonable people might reasonably disagree over the application of the law articulated by judges to the facts of a particular case, courts do not have the legitimate authority to decide the matter.”<sup>78</sup> Instead, it is the essential role of the jury to decide issues over which reasonable people can differ. According to the California Constitution, “[t]rial by jury is an inviolate right and shall be secured to all.”<sup>79</sup> By wrongly removing negligence cases from the hands of the jury, California courts are violating a party's *inviolable right* to trial by jury.

## B. CALIFORNIA'S SUPREME COURT DOCKET 2017

California's reliance on a no-duty rule has created a difficult to navigate common law surrounding the element of duty. Because of this, the California Supreme Court is constantly hearing cases on whether a duty exists, attempting to smooth out inconsistencies in the current law. For the 2017–18 term, the California Supreme Court will be hearing two cases on the issue of whether a duty exists: *Regents of the University of California v. Superior Court* and *Vasilenko v. Grace Family Church*.<sup>80</sup> Both of these cases could be decided easily by holding that the general rule applies: “that everyone is responsible . . . for an injury occasioned to another by

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> CAL. CONST. art. 1, § 16.

<sup>80</sup> *Regents of Univ. of California v. S.C.*, 364 P.3d 174 (2016); *Vasilenko v. Grace Family Church*, 381 P. 3d 229 (2016).

his or her want of ordinary care or skill in the management of his or her property or person . . . .”<sup>81</sup>

### 1. *UC Regents*

Katherine Rosen, a student at the University of California, Los Angeles (UCLA), suffered severe injuries after being attacked by another student, Damon Thompson, during a chemistry laboratory.<sup>82</sup> Beginning in the fall of 2008, Thompson began submitting complaints that students were making sexual advances toward him, calling him names, and questioning his intelligence.<sup>83</sup> Thompson warned the dean of students that if the university failed to discipline the students, the matter would likely “escalate” and would cause Thompson to act in a manner that would incur undesirable consequences.<sup>84</sup> After Thompson sent emails to multiple professors alleging that students were attempting to distract him by making offensive comments, Thompson was encouraged to seek medical help at UCLA’s Counseling and Psychological Services (CAPS), an on-campus center with trained psychologists who address the mental health needs of students.<sup>85</sup>

In February, Thompson informed his dormitory resident director that he heard clicking sounds he believed came from a gun.<sup>86</sup> Thompson told the resident director that his father had advised him that he could hurt the other residents in response to these incidents.<sup>87</sup> Thompson stated that he had thought about it but decided not to do anything.<sup>88</sup>

The resident director contacted campus police in response to the incident.<sup>89</sup> Finding no gun, the officers recommended that Thompson undergo a medical evaluation.<sup>90</sup> At the psychiatric evaluation, Thompson

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<sup>81</sup> *Vasilenko v. Church*, 203 Cal. Rptr. 3d at 540, quoting CAL. CIV. CODE § 1714, subd. (a) (internal quotations omitted).

<sup>82</sup> *UC Regents*, 193 Cal. Rptr. 3d at 450.

<sup>83</sup> *Id.* at 451.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*; UCLA COUNSELING AND PSYCHOLOGICAL SERVICES, <http://www.counseling.ucla.edu> (last visited Mar. 20, 2016).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 451–52.

<sup>88</sup> *Id.* at 452.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

complained of auditory hallucinations, paranoia, and a history of depression.<sup>91</sup> Thompson agreed to take antipsychotic drugs and attend outpatient treatment at CAPS.<sup>92</sup>

Psychologist Nicole Green believed that Thompson was suffering from schizophrenia but concluded that he did not exhibit suicidal or homicidal ideation and that he had not expressed any intent to harm others.<sup>93</sup> Thompson did, however, inform another psychologist that he had previously experienced general ideations of harming others, clarifying that he had never formulated a plan to do so, nor identified a specific victim.<sup>94</sup>

In June 2009, Thompson was involved in an altercation in his dormitory.<sup>95</sup> According to campus police, Thompson had knocked on the door of a sleeping resident and accused him of making too much noise and then pushed him.<sup>96</sup> When the sleeping resident informed Thompson that he had not been making noise, Thompson pushed him again stating, “this is your last warning.”<sup>97</sup> As a result of the incident, Thompson was expelled from university housing and ordered to return to CAPS when the fall quarter began.<sup>98</sup>

During the summer quarter, Thompson sent letters to two chemistry professors alleging that students and university personnel had made negative comments about him.<sup>99</sup> Although the letters named several individuals, Thompson reported that he intended to ignore the comments and refrain from reacting.<sup>100</sup> When the fall quarter began, Thompson made similar complaints to another chemistry professor.<sup>101</sup>

On October 6th, a chemistry teaching assistant (TA) reported another incident involving Thompson.<sup>102</sup> According to the TA, Thompson alleged

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 453.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

that a student called him stupid.<sup>103</sup> Thompson described the student's physical appearance to the TA and insisted that he be provided with the name of the student.<sup>104</sup> The TA told Thompson that he had been present in the laboratory when this incident allegedly occurred and had not heard anyone say anything derogatory about Thompson.<sup>105</sup> The TA informed the professor that Thompson's behavior had become a weekly routine.<sup>106</sup> The professor informed the assistant dean of students who expressed concern that Thompson had identified a specific student in his class whom he believed was against him.<sup>107</sup>

On the morning of October 7th, a second chemistry TA emailed the same professor to report that a student from another section (later identified as Thompson) had accused students of verbal harassment.<sup>108</sup> The TA had been present during the incident and did not hear or see any harassment.<sup>109</sup>

Two days later, on October 9th, at approximately 12:00 noon, Thompson was working in a chemistry laboratory when he attacked student Katherine Rosen with a kitchen knife.<sup>110</sup> When campus police arrived, Thompson told them "they were out to get me" and complained that the other students had been "picking on him."<sup>111</sup> Thompson also stated that he had been "provoked" by students in the lab who were insulting him, explaining that similar incidents had happened on "several occasions in the past."<sup>112</sup>

Rosen told investigating officers that she had been working in the chemistry laboratory for approximately three hours prior to the attack and did not remember having any interactions or conversations with Thompson.<sup>113</sup> Rosen recalled kneeling down to place equipment in her chemistry

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 453–54.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

locker when she suddenly felt someone's hands around her neck.<sup>114</sup> Rosen looked up and saw Thompson coming at her with a knife.<sup>115</sup> Rosen said she only knew Thompson from the chemistry laboratory and had never insulted him or otherwise provoked him.<sup>116</sup>

A TA informed an investigating officer that Thompson had approached him on several occasions to complain about students "calling him stupid."<sup>117</sup> The TA also stated that on one occasion, Thompson had identified "Rosen as being one of the persons that called him stupid."<sup>118</sup>

The California appellate court held that, although the attack may have been foreseeable, colleges and universities are under no duty to protect students from physical attacks by other students.<sup>119</sup> The California Supreme Court granted the petition for review on January 20, 2016.<sup>120</sup>

*a. Appellate Court's Legal Reasoning*

The *UC Regents* court was not acting erratically in holding that there was no duty in this specific instance. In fact, the *UC Regents* court was following California law. Currently, the California courts impose a duty on a university if an attack on a student occurs due to a dangerous physical condition on the property,<sup>121</sup> but not if a student threatens another student and carries out that threat.<sup>122</sup> For example, if an assailant hides in a foreseeably dangerous staircase, behind foliage, and attacks a student, the college is under a duty to have acted reasonably in preventing the attack.<sup>123</sup> However, if a student informs university personnel of his intent to attack someone in a chemistry lab and then carries out the foreseeable attack, the university is under *no duty* to have acted reasonably in protecting the student.<sup>124</sup> This anomalous distinction is not supported by any reasonable explanation, but is a result of California's reliance on the no-duty rule.

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *UC Regents*, 193 Cal. Rptr. 3d 447, 450 (Cal. App. 2015).

<sup>120</sup> *Regents of Univ. of California v. S.C.*, 197 Cal. Rptr. 3d 129 (2016).

<sup>121</sup> *Peterson v. San Francisco Community College Dist.*, 685 P.2d 1193 (1984).

<sup>122</sup> *UC Regents*, 193 Cal. Rptr. 3d at 450.

<sup>123</sup> *Peterson v. San Francisco Community College Dist.*, 685 P.2d at 1193.

<sup>124</sup> *UC Regents*, 193 Cal. Rptr. 3d at 450.

This reasoning derives from *Crow v. State of California* (“*Crow*”). In *Crow*, the plaintiff had been assaulted by another student while attending a beer party in a student dorm room.<sup>125</sup> The plaintiff brought suit against the university for her injuries.<sup>126</sup> The court held that universities do not owe a duty based on a special relationship between student and school.<sup>127</sup> Instead, the court reasoned that institutions of higher education differ from grammar and high schools because of the non-compulsory attendance and the goal of allowing college students to regulate their own lives.<sup>128</sup> Later cases relied on *Crow*’s reasoning, holding that institutions of higher education are not under a duty to protect their students from student violence.<sup>129</sup>

The *UC Regents* case highlights a few confusing variations of the no-duty rule as it pertains to students. First, grammar and high school students are owed a duty of care by their schools.<sup>130</sup> Second, university students are not owed a duty based on their special relationship between school and student.<sup>131</sup> Third, university students are owed a duty if they are attacked because of a dangerous physical condition on the property.<sup>132</sup> And fourth, university students are not owed a duty if they are attacked by another student, provided it is not a student who is hiding behind a dangerous physical condition on the property.<sup>133</sup>

*b. Other States Have Successfully Moved Away from These Exceptions in College or University Negligence Duties*

According to the appellate court in *UC Regents*, California courts rely on these anomalous distinctions concerning when the university will owe its students a duty because the courts are attempting to prevent the

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<sup>125</sup> *Crow v. State of Cal.*, 271 Cal. Rptr. at 351.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 359.

<sup>128</sup> *Id.*; however, California courts do recognize an exception for grammar and high school students. If this fact pattern were to happen to students at a grammar or high school, the special relationship exception would apply and the school would owe a duty of reasonable care to the victim-student.

<sup>129</sup> *Ochoa v. Cal. State Univ.*, 85 Cal. Rptr. 2d 768 (Cal. App. 1999); *Tanja H. v. Regents of Univ. of Cal.*, 278 Cal. Rptr. 918 (Cal. App. 1991).

<sup>130</sup> *Crow v. State of Cal.*, 271 Cal. Rptr. at 359.

<sup>131</sup> *Id.*

<sup>132</sup> *Peterson v. San Francisco Community College Dist.*, 685 P.2d at 1193.

<sup>133</sup> *Regents of Univ. of California v. S.C.*, 197 Cal. Rptr. 3d 129 (2016).



regulation of college students' lives by universities and colleges.<sup>134</sup> However, other states have successfully imposed a duty on colleges to protect students from negligence, which has not led to close regulation of college students' lives. For example, in *Nero v. Kansas State University*, a student was sexually assaulted in a residence hall by another student.<sup>135</sup> The *Nero* court looked to California precedent but determined that "a university has a duty of reasonable care to protect a student against certain dangers, including criminal actions against a student by another student or a third party if the criminal act is reasonably foreseeable and within the university's control."<sup>136</sup> Therefore, the court imposed a duty of reasonable care on the university.<sup>137</sup>

Similarly, in *Furek v. University of Delaware*, a university student was severely injured in a fraternity hazing event conducted by other students.<sup>138</sup> The court imposed a duty on the university and held that, although the university is not an insurer of the safety of its students nor a policeman of student morality, the university has a duty to regulate and supervise foreseeable dangerous activities occurring on its property, which extends to the intentional activities of students.<sup>139</sup>

California courts previously reasoned that imposing a duty on colleges to protect students from student-on-student attack would lead to the college's too closely regulating the adult lives of college students.<sup>140</sup> However, other states, such as Kansas and Delaware, have imposed a duty on colleges to protect their students from only foreseeable violence from other students.<sup>141</sup> Because these institutions of higher education are only responsible for preventing foreseeable student-on-student violence, this does not require burdensome regulation of adult student lives. "A general duty of *reasonable* care is by definition not burdensome."<sup>142</sup> Instead, colleges and

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<sup>134</sup> *Id.*

<sup>135</sup> *Nero v. Kansas State Univ.*, 861 P.2d at 768.

<sup>136</sup> *Id.* at 780.

<sup>137</sup> *Id.*

<sup>138</sup> *Furek v. Univ. of Delaware*, 594 A.2d at 522.

<sup>139</sup> *Id.*

<sup>140</sup> *UC Regents*, 193 Cal. Rptr. 3d at 460.

<sup>141</sup> *Furek v. Univ. of Delaware*, 594 A.2d at 522; *Nero v. Kansas State Univ.*, 861 P.2d at 780.

<sup>142</sup> See DOBBS ET AL., *supra* note 8, § 255.

universities are merely being required to prevent *foreseeable* harm from befalling their students.

The argument that California colleges and universities should not be under a duty to prevent student-on-student attacks is baseless. Imposing this duty will not require burdensome regulation of adult college students' lives because there is only a duty to protect against foreseeable violence, not all violence. Additionally, a duty to use reasonable care falls far short of regulating student lives.<sup>143</sup> The general rule in California is that “[e]veryone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person . . . .”<sup>144</sup> In other words, “each person has a duty to use ordinary care and is liable for injuries caused by his failure to exercise reasonable care in the circumstances . . . .”<sup>145</sup> These narrow exceptions to determine whether the college or university owes a duty are unnecessary and merely lead to complex exceptions within what is *supposed to be* a general presumption of a duty of reasonable care.

### c. UC Regents at the California Supreme Court

The California Supreme Court will hear *UC Regents* in the 2017–18 term. Currently, there are too many narrow exceptions surrounding whether a college or university will owe a duty to its students. The California Supreme Court has the opportunity to begin to undo the complex common law surrounding narrow exceptions to duty in the context of negligence on college campuses. However, if the California Supreme Court does not abjure reliance on the no-duty rule, and instead push courts to focus on the issue of breach and whether the defendant fell below their standard of care, *UC Regents* will merely provide another narrow exception within the court's negligence duty analysis.

## 2. Vasilenko v. Church

California's reliance on the no-duty rule not only creates confusing situations regarding college and university negligence liability. In *Vasilenko v.*

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<sup>143</sup> *Id.*

<sup>144</sup> CAL. CIV. CODE § 1714, subd. (a).

<sup>145</sup> *Vasilenko v. Church*, 203 Cal. Rptr. 3d at 540, citing *Cabral v. Ralphs Grocery Co.*, 122 Cal. Rptr. at 317 (internal quotations omitted).

*Grace Family Church* (“*Vasilenko v. Church*”), Aleksandr Vasilenko was hit by a car and injured while crossing Marconi Avenue in Sacramento.<sup>146</sup> At the time the plaintiff was injured, he was crossing a busy five-lane road on his way from an overflow parking lot, controlled and staffed by the defendant Grace Family Church, to an event at the church.<sup>147</sup>

The trial court held that there was no duty as a matter of law because the defendant did not control the parking lot.<sup>148</sup> Conversely, the Court of Appeal held that the location of the overflow lot, which required the defendant’s invitees who parked there to cross a busy street in an area that lacked a marked crosswalk or traffic signal in order to reach the church, exposed those invitees to an unreasonable risk



GRACE COMMUNITY CHURCH —  
AERIAL VIEW OF THE CHURCH  
SHOWING THE OVERFLOW PARKING  
LOT IN THE FOREGROUND.

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of injury offsite, thus giving rise to a duty on the part of the defendant.<sup>149</sup> Thus, the appellate court overturned the Superior Court, and held that the defendant owed a duty to the plaintiff to protect him from the dangerous condition of the property.<sup>150</sup> The California Supreme Court granted the petition for review on September 21, 2016.<sup>151</sup>

#### *a. Legal Reasoning of the Appellate Court*

The general rule for landowners is that “[t]hose who own, possess, or control property generally have a duty to exercise ordinary care in managing the property in order to avoid exposing others to an unreasonable risk of

<sup>146</sup> *Vasilenko v. Church*, 203 Cal. Rptr. 3d at 538.

<sup>147</sup> *Id.*

<sup>148</sup> *Vasilenko v. Drury*, 2013 WL 12108463.

<sup>149</sup> *Vasilenko v. Church*, 203 Cal. Rptr. 3d at 538.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

harm.”<sup>152</sup> Usually, “a landowner has no duty to prevent injury on adjacent property.”<sup>153</sup> However, dangerous condition on property cases are much more difficult than they seem. Courts often draw distinctions between holding that a duty exists, or holding that as a matter of law no duty exists, depending on whether the risk on the adjacent property was unreasonable,<sup>154</sup> how much control the defendant exerted over the adjacent property,<sup>155</sup> or whether the defendant created the danger.<sup>156</sup>

The court in *Vasilenko v. Church* first looked to a similar case, *Barnes v. Black*. In *Barnes v. Black*, a child died after the “big wheel” tricycle he was riding veered off a sidewalk inside the apartment complex where he lived, traveled down a steep driveway and into a busy street where he was struck by an automobile.<sup>157</sup> The sidewalk and the driveway were within the apartment complex, and the four-lane busy street was not.<sup>158</sup> The defendant-landowner argued that he owed no duty to the plaintiff because the injury occurred on a public street and not on the land owned or controlled by the defendant.<sup>159</sup> The plaintiff argued that the defendant-landlord “[owed] its tenants a duty of reasonable care to avoid exposing children playing on the premises to an unreasonable risk of injury on a busy street off the premises and [the defendant] failed” to negate the duty of care.<sup>160</sup>

The court held for the plaintiff, imposing a duty on the defendant. The court held that

[a] landowner’s duty of care to avoid exposing others to a risk of injury is not limited to injuries that occur on premises owned or

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<sup>152</sup> *Id.*, citing *Alcaarez v. Vece*, 60 Cal. Rptr. 2d 448 (1997).

<sup>153</sup> *Id.*, citing *Steinmetz v. Stockton City Chamber of Commerce*, 214 Cal. Rptr. 405 (1985).

<sup>154</sup> *Barnes v. Black*, 84 Cal. Rptr. 2d 634, 636 (Cal. App. 1999).

<sup>155</sup> *Steinmetz v. Stockton City Chamber of Commerce*, 214 Cal. Rptr. 405 (1985) (holding that the host of a business party could not be held liable for a criminal assault on a guest that occurred in a nearby parking lot that the host neither owned nor controlled).

<sup>156</sup> *Brooks v. Eugene Burger Management Corp.*, 264 Cal. Rptr. 756 (1989) (holding that the landlord owed no duty to plaintiff to provide fencing or some other means of confining minors to the subject premises).

<sup>157</sup> *Barnes v. Black*, 84 Cal. Rptr. 2d at 636.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

controlled by the landowner. Rather, the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury off-site.<sup>161</sup>

The court determined that even though the child was injured on a *public* street, over which the defendant had no control, this was "not dispositive under the *Rowland* analysis."<sup>162</sup> Further, the court determined that the defendant did not negate the other *Rowland v. Christian* factors, including a failure to introduce evidence that the injury was not foreseeable or that the slope of the driveway or configuration of the sidewalk or play area were not closely connected to the injury.<sup>163</sup>

In *Vasilenko v. Church*, similar to *Barnes v. Black*, the "salient fact is that [the defendant] did not control the public street where [the plaintiff] was injured, but that it *did* control the location and operation of its overflow parking lot, which [the plaintiff] alleges caused or at least contributed to his injury."<sup>164</sup> The court in *Vasilenko v. Church* held that *Barnes v. Black* was very on-point in that the defendant in both cases failed to show that the *Rowland v. Christian* factors had been negated and also failed to show that the defendant did not possess the relevant level of control.<sup>165</sup>

Next, the court in *Vasilenko v. Church* distinguished *Nevarez v. Thriftmart*. In *Nevarez v. Thriftmart* the defendant was a grocery store hosting their grand opening.<sup>166</sup> The plaintiff was struck by a car while crossing the street to attend the grand opening.<sup>167</sup> The court held that as a matter of law, there was no duty because the plaintiff was struck on a public street, where the defendant had no control.<sup>168</sup> The court reasoned that "[t]he power to control public streets and regulate traffic lies with the State

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<sup>161</sup> *Id.*; Additionally, the court held that the fact that the child was injured on a public street over which the defendant had no control was "not dispositive under the *Rowland* analysis," and that the defendant should have offered more evidence of the *Rowland* factors weighing in his favor.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Vasilenko v. Church*, 203 Cal. Rptr. 3d at 542.

<sup>165</sup> *Id.*

<sup>166</sup> *Nevarez v. Thriftmart*, 87 Cal. Rptr. 50, 53 (Cal. App. 1970).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

which may delegate local authority to municipalities . . . and only the State . . . or local authorities, when authorized, may erect traffic signs or signals, all other persons being forbidden to do so . . . with some few exceptions.”<sup>169</sup> Additionally, the court pointed out that the defendant also could not “lawfully use barricades to block off traffic on [the street where the accident occurred] or any other abutting street since, to do so, undoubtedly would constitute a public nuisance.”<sup>170</sup> Therefore, the defendant could not have had control over the public street, and the court held there was no duty as a matter of law.<sup>171</sup>

In *Vasilenko v. Church*, the issue again arises: does a defendant owe a duty when the plaintiff is harmed on an adjacent public street? Here, the trial court held that the defendant did not owe a duty to protect the plaintiff on the public street. The trial court reasoned that the plaintiff “was injured while walking across a public street, not owned or controlled by” the defendant.<sup>172</sup> And therefore held, as in *Nevarez v. Thriftmart*, that “a landowner has no duty to warn of dangers beyond his or her own property when the owner did not create those dangers.”<sup>173</sup>

Conversely, the appellate court reasoned that the defendant did not control the public street where plaintiff-Vasilenko was injured, but it *did* control the location and operation of its overflow parking lot, which gave rise to a duty.<sup>174</sup> The court noted that “while [the Church] may not have had a duty to provide additional parking for its invitees, its maintenance and operation of an overflow parking lot in a location that it knew or should have known would induce and/or require its invitees to cross [the street] created a foreseeable risk of harm to such persons.”<sup>175</sup> Additionally, the court noted that the defendant did not negate any of the relevant *Rowland v. Christian* factors.

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 54.

<sup>172</sup> *Vasilenko v. Drury*, 2013 WL 12108463.

<sup>173</sup> *Id.*, citing *Swann v. Olivier*, 28 Cal. Rptr. 2d 23 (1994); *Brooks v. Eugene Burger Management Corp.*, 264 Cal. Rptr. 756 (1989) (holding that the landlord owed no duty to plaintiff to provide fencing or some other means of confining minors to the subject premises).

<sup>174</sup> *Vasilenko v. Church*, 203 Cal. Rptr. 3d at 544.

<sup>175</sup> *Id.*

*b. Replacing a Confusing System with an Equally Confusing System*

California was the first state to replace the categories of invitee, licensee, and trespasser with a single standard of reasonable care in *Rowland v. Christian*.<sup>176</sup> Prior to *Rowland v. Christian*, California used a categorical approach drawn from property law to determine the duties owed by landowners to those on their property.<sup>177</sup> The three categories were business invitees, licensees, and trespassers.<sup>178</sup> Business invitees were distinct from the other categories because they conferred an economic benefit on the landowner.<sup>179</sup> Because of this, business invitees were owed the ordinary duty of reasonable care.<sup>180</sup> Conversely, a landowner's social guests were classified as licensees, who were *not* owed a duty of reasonable care.<sup>181</sup> Instead, a landowner merely owed licensees a duty to warn of dangers, which were not "open and obvious."<sup>182</sup> Lastly, trespassers, individuals who entered a landowner's property without the permission of the owner, were owed no duty of care at all.<sup>183</sup>

In *Rowland v. Christian*, these categories of land entrants were abolished.<sup>184</sup> There, the California Supreme Court reasoned that by "carving further exceptions out of the traditional rules relating to the liability of licensees or social guests," most jurisdictions ended up with a confusing, unreliable common law.<sup>185</sup> The court held that continuing to evaluate cases based on the rigid categories of land entrants would add to the "confusion, complexities, and fictions . . . [of the] common law distinctions."<sup>186</sup>

The dissent in *Rowland v. Christian* was concerned that this would lead to determinations on a case by case basis — arguably the goal of the majority. The majority was seeking a move away from the rigid rules of invitees,

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<sup>176</sup> *Basso v. Miller*, 352 N.E.2d 868, 872 (N.Y. 1976) (noting that *Rowland v. Christian* was the first California Supreme Court case that abandoned the common law distinctions and adopted the simple rule of reasonable care under the circumstances).

<sup>177</sup> See, e.g., *Oettinger v. Stewart*, 148 P.2d 19, 22 (Cal. 1944).

<sup>178</sup> *Id.*

<sup>179</sup> See *Rowland v. Christian*, 443 P.2d at 565.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> See generally *id.*

<sup>183</sup> See *Fernandez v. Consol. Fisheries, Inc.*, 219 P.2d 73, 77 (Cal. App. 1950).

<sup>184</sup> *Rowland v. Christian*, 443 P.2d at 569.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

licensees, and trespassers, which lead to “confusion, complexities, and fictions.”<sup>187</sup> However, rather than follow through with the majority’s goal of reducing narrow exceptions, later courts merely replaced the invitee, licensee, and trespasser exceptions with other exceptions rooted in duty. As demonstrated by *Vasilenko v. Church*, the California courts now rely on very narrow exceptions relating to whether a duty exists. These narrow exceptions should be removed, and any issue of foreseeability and control should instead be evaluated as to whether the defendant breached their duty — making this a case-by-case *jury* determination, as the majority in *Rowland v. Christian* hoped — rather than whether the defendant owed a duty to the plaintiff.

*c. Vasilenko v. Church at the California Supreme Court*

The California Supreme Court will hear *Vasilenko v. Church* during the 2017–18 term. *Vasilenko v. Church* provides an opportunity for the California Supreme Court to alter the way that the courts approach premises liability negligence claims. The court should hold that the issue present in this case goes to whether the defendant breached its duty, rather than whether the defendant owed the plaintiff a duty. As a general matter, as the appellate court in this case suggests, the defendant should owe the plaintiff a general duty of reasonable care. If the California Supreme Court does not abjure reliance on the no-duty rule, and instead continues to focus the court’s attention on issues of breach rather than whether the defendant fell below their standard of care, *Vasilenko v. Church* will merely provide another narrow exception within the court’s duty analysis.

### C. CALIFORNIA’S ANOMALOUS DUTY CATEGORIES UNDERMINE THE GOALS OF TORT LAW

One of the main goals of tort law is deterrence.<sup>188</sup> In order to deter defendants, wrongful defendants must be consistently held liable, and therefore deterred in order to reach this goal. However, a defendant will not be deterred when the inquiry for negligence is bogged down in the legal

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<sup>187</sup> *Id.*

<sup>188</sup> *Cenco, Inc., v. Seidman & Seidman*, 686 F.2d 449 (Ct. App. 1982); Jane A. Dall, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J.C. & U.L. 485, 508 (2003).



issue of whether a duty exists, instead of inquiring more appropriately into whether the defendant has breached their duty or if the harm suffered by the plaintiff was proximately caused by the defendant.

For example, in *UC Regents*, UCLA failed to prevent foreseeable violence against one of their students by another student during a UCLA chemistry laboratory. If the California Supreme Court holds that UCLA does not owe a duty to the victim-student, then UCLA has no incentive to prevent foreseeable violence against their students, and UCLA's unreasonable conduct will not be deterred. Alternatively, if UCLA were subject to a large jury verdict or settlement following a failure to protect its students from foreseeable violence, then UCLA's unreasonable conduct would be deterred, satisfying the first goal of tort law.<sup>189</sup>

Currently, the California appellate court suggests that universities and colleges may "adopt policies and provide student services that reduce the likelihood" of violent incidents occurring on their campuses; however, the court does not even encourage the adoption of these policies.<sup>190</sup> Here, UCLA is in the best position to implement policies and programs that protect their students, whereas students are unable to bear the burden of protecting themselves from attacks by other students.

Similarly, in premises liability cases, if landowner-defendants presumed that they would owe a duty to the general public, they would be deterred from falling below the standard of care. In *Vasilenko v. Church*, the Superior Court held that as a matter of law the defendant-church had no duty to prevent the harm that befell the plaintiff because the defendant did not control the overflow parking lot.<sup>191</sup> On appeal, the court held oppositely, that as a matter of law a duty does exist.<sup>192</sup> In order to deter the defendant from foreseeably risking harm to people traveling from the overflow parking lot to the church, it is necessary that the defendant owe a duty. Here, the defendant-church is in the best position to provide for crossing guards, a marked crosswalk, or other features to protect the churchgoers from foreseeable harm. Without the imposition of a duty, the church and similar defendants will be under-deterred, which infringes on one of the main goals of tort law.

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<sup>189</sup> *Id.*

<sup>190</sup> *UC Regents*, 193 Cal. Rptr. 3d at 461.

<sup>191</sup> *Vasilenko v. Drury*, 2013 WL 12108463.

<sup>192</sup> *Vasilenko v. Church*, 203 Cal. Rptr. 3d at 538.

#### IV. RECOMMENDATION

This article proposes that California courts should seek to end their reliance on the no-duty rule, and instead focus the courts' attention on whether the defendant has breached its duty of reasonable care to the plaintiff. In doing so, California will move away from the inconsistent and arbitrary no-duty rule which currently exists in California. The "[d]uty doctrine must be used to fix the boundaries among contract, tort, property, and legally unregulated conduct, and to articulate the more particular standards of care owed by certain positions, or incurred by certain undertakings."<sup>193</sup>

California should return to the general rule that "[e]veryone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person . . . ."<sup>194</sup> In other words, "each person has a duty to use ordinary care and is liable for injuries caused by his failure to exercise reasonable care in the circumstances . . . ."<sup>195</sup> In doing so, California will return negligence cases to the jury and refocus the analysis on whether a defendant has breached their duty of care, rather than litigating the intricacies of the no-duty rule in front of a judge. In California, the duty of reasonable care is supposed to be predicated upon "our common status as human beings" rather than narrow exceptions announced by judges.<sup>196</sup> Duty "is owed by everyone to everyone else and it is ordinarily triggered simply by acting in a way that poses a 'reasonably foreseeable' risk of harm to anyone else."<sup>197</sup> In contrast to duty, breach "is an inquiry into whether a defendant exercised reasonable care in light of all of the foreseeable risks at hand."<sup>198</sup> Additionally, when the harm that the plaintiff suffers is not expected, this issue is best explored in the element of proximate cause, not duty.<sup>199</sup> Using this explanation of the roles of the negligence elements, California should recognize

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<sup>193</sup> See Esper and Keating, *supra* note 32, at 273.

<sup>194</sup> CAL. CIV. CODE § 1714, subd. (a).

<sup>195</sup> Vasilenko v. Church, 203 Cal. Rptr. 3d at 540, citing Cabral v. Ralphs Grocery Co., 122 Cal. Rptr. at 317 (internal quotations omitted).

<sup>196</sup> See Esper and Keating, *supra* note 62, at 1255.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

that there is “a general duty of all to all” and focus any additional inquiry of foreseeability or unexpected harm on the appropriate elements.<sup>200</sup>

As legal scholars have expressed, “[t]he elaborate balancing test of *Rowland* is misplaced.”<sup>201</sup> “A general duty of *reasonable* care is by definition not burdensome.”<sup>202</sup> Additionally, the imposition of a general duty of reasonable care does not “leave juries free to bring in irrational verdicts, because the judge remains free to direct a verdict when, on the facts of a particular case, reasonable people could not differ.”<sup>203</sup> The California Supreme Court can begin to remedy the anomalous exceptions in whether a duty exists in the 2017–18 Supreme Court term, by utilizing the two duty cases before the court. The California Supreme Court should hold that a duty generally exists and move the more specific inquiry into whether the defendant breached their duty. By doing so, the California Supreme Court will begin to redirect the analysis to the jury question of whether the defendant breached its duty of reasonable care to the plaintiff.

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## EDITOR’S NOTE

As of the end of 2017, the Supreme Court had scheduled *Regents of the University of California v. Superior Court (Rosen)* for oral argument on January 3, 2018, and had issued a unanimous decision in *Vasilenko v. Grace Family Church* in favor of the appellant church (No. S235412, November 13, 2017) that concludes with the statement:

Vasilenko argues that the Court of Appeal’s decision should be affirmed on the alternative ground that the Church voluntarily assumed a duty to assist him in crossing Marconi Avenue. This argument was not presented to the trial court, and although the parties briefed it before the Court of Appeal, that court found the Church owed Vasilenko a duty under Civil Code section 1714 and

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<sup>200</sup> See DOBBS ET AL., *supra* note 8, § 122; WHITE, *supra* note 18, at 16; Kaczorowski, *supra* note 18, at 1127.

<sup>201</sup> See Esper and Keating, *supra* note 32, at 327.

<sup>202</sup> See DOBBS ET AL., *supra* note 8, § 255.

<sup>203</sup> *Id.*

did not reach the alternative argument. We granted review only on the issue of a landowner's duty to its invitees when it directs those invitees to use its parking lot across the street. We decline to address whether the Church, by its alleged actions, voluntarily assumed a duty. The Court of Appeal on remand may consider this argument if Vasilenko elects to pursue it.

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