STUDENT SYMPOSIUM

Introduction: Student Symposium on

THREE INTERSECTIONS OF FEDERAL AND CALIFORNIA LAW

JOHN B. OAKLEY*

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

* Distinguished Professor of Law Emeritus and Associate in the Department of Philosophy, University of California, Davis

I.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II.

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

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

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

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

III.

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

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

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

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

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

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

* * *

EDITOR'S NOTE:

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

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

— SELMA MOIDEL SMITH

THE DEATH PENALTY DEBATE:

Comparing the United States Supreme Court's Interpretation of the Eighth Amendment to that of the California Supreme Court and a Prediction of the Supreme Court's Ruling in Glossip v. Gross

KELSEY HOLLANDER*

INTRODUCTION

The United States has long grappled with the constitutionality of capital punishment. The flip-flopping history of the country's stance on the death penalty indicates that this issue not only has several underlying components, but also that it has never been and never will be a non-controversial societal problem.

As society progressed and technology advanced, the death penalty did not become obsolete but instead became even more complex. Methods of execution that the early Americans relied on, such as hanging and the firing squad, were displaced by drugs and other technological advancements. And with these new methods came increasing judicial and public scrutiny.

This paper traces the history of the United States Supreme Court's application of the Eighth Amendment to the death penalty and compares

---

This paper was awarded third place in the California Supreme Court Historical Society's 2015 CSCHS Selma Moidel Smith Law Student Writing Competition in California Legal History.

* Member of the California Bar; J.D. 2015, UC Davis School of Law. The author would like to thank Professor John Oakley for his time and feedback!

this to the California Supreme Court's application of the California Constitution to capital punishment. This paper will also discuss how the current shortage of lethal-injection drugs has prompted states to turn to other methods of execution, such as using a controversial drug in their lethal-injection protocol. One such case currently before the United States Supreme Court, *Glossip v. Gross,* addresses this issue. This paper will predict how the United States Supreme Court will apply the federal constitution's "cruel and unusual punishment" prohibition to this pending case.

I. THE UNITED STATES SUPREME COURT'S INTERPRETATION OF THE EIGHTH AMENDMENT

A. A BRIEF HISTORY: DOCUMENTING THE COURT'S VARIOUS OPINIONS REGARDING CAPITAL PUNISHMENT

American society instituted the death penalty as early as 1608, and American views regarding lethal punishment have greatly fluctuated ever since.[1] The mid-twentieth century saw a substantial fluctuation in the public's perception of the death penalty. While the death penalty gained traction and support from 1920 to 1940, this movement was quickly quelled by a counteracting decrease in public support for capital punishment in the 1950s.[2]

The 1960s featured new challenges to the death penalty's seemingly unbridled discretion. Until this time, the Fifth, Eighth, and Fourteenth Amendments had been interpreted as allowing the death penalty.[3] This wave of new analysis began by addressing the absolute discretion given to sentencing juries,[4] a trend that continued until *Furman v. Georgia* in

---

[1] *History of the Death Penalty,* Death Penalty Information Center, *available at* http://www.deathpenaltyinfo.org/part-i-history-death-penalty#const (last accessed Feb. 27, 2015).

[2] *Id.*

[3] *Id.*

[4] *See* United States v. Jackson, 390 U.S. 570 (1968) (holding that the death penalty provision of the Federal Kidnapping Act, which states that the defendant shall be punished by death if the kidnapped person has not been liberated unharmed and if the verdict of the jury should so recommend, is unconstitutional because it tends to discourage of the defendant's assertion of his Fifth Amendment right to plead not

1972. However, amid the increasing scrutiny of the death penalty and the meager number of executions that actually took place in the mid-twentieth century, the federal government expanded the list of death-eligible federal offenses. A series of airplane bombings and hijackings in the late 1950s led Congress to establish such crimes as capital offenses, and killings by explosives became capital crimes in 1970.[5] Therefore, although the list of capital crimes was increasing, the era of the Civil Rights Movement spurred litigation that somewhat restricted jurors' discretion in death penalty cases.

Then in 1972, the United States Supreme Court released an unprecedented yet divided five-person majority judgment in *Furman v. Georgia*[6] that invalidated every existing capital statute and verdict.[7] The fact that each justice wrote a separate opinion, and that no justice signed more than one opinion,[8] highlighted American society's reluctance and ability to reach a resolution, a trend that is unlikely to change any time soon. In *Furman,* the justices agreed that the current death-penalty administration was unconstitutional but that this may not be the case for death sentences imposed under different procedures.[9]

Many states responded by ratifying new capital statutes, beginning just five months after the *Furman* decision was published.[10] When rewriting their statutes, states focused on reining in discretion from the jury and even the judge. The Supreme Court reviewed the constitutionality of

guilty and to deter exercise of the Sixth Amendment right to a jury trial); Witherspoon v. Illinois, 391 U.S. 510 (1968) (a juror cannot be prevented from serving on a jury for a death penalty case simply because he has indicated he had reservations about the death penalty).

5 Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role,* 26 Fordham Urb. L.J. 347, 371 (1999).

6 Furman v. Georgia, 408 U.S. 238 (1972).

7 James S. Liebman, *Slow Dancing With Death: The Supreme Court and Capital Punishment, 1963–2000,* 107 Colum. L. Rev. 1, 7–8 (2007).

8 *Id.*

9 *Id.* at 8 (however, while the justices did agree that the current system was unconstitutional, they could not agree on the basis for which it was unconstitutional. Justice Douglas believed the process was discriminatory while Justice White thought the death decisions were "arbitrarily infrequent.").

10 *Introduction to the Death Penalty,* Death Penalty Information Center (last accessed February 27, 2015), *available at* http://www.deathpenaltyinfo.org/part-i-history-death-penalty#const (Florida rewrote its death penalty statute just five months after *Furman*).

these new statutes in the 1976 decisions known as the *Gregg* decisions. The Court not only upheld the constitutionality of these new laws but also retreated from its finding in *Furman*. As applied under these new statutes, the Court held that the death penalty was constitutional under the Eighth Amendment.[11]

In *Gregg,* the United States Supreme Court held that although the Eighth Amendment does not prohibit the death penalty, criminal sanctions must "accord with the dignity of man, which is the basic concept underlying the Eighth Amendment."[12] Thus the punishment for any particular crime cannot be excessive. Whether a punishment is excessive depends on two factors: first, the punishment cannot involve the unnecessary and wanton infliction of pain, and second, the punishment cannot be grossly out of proportion to the crime's severity.[13]

Chief Justice Burger's *Gregg* Court took the opportunity to review the history of the "cruel and unusual punishment" clause in the Eighth Amendment. The earliest cases involving Eighth Amendment claims did not focus on whether or not the death penalty itself was constitutional, but instead determined whether certain methods of execution violated the Amendment.[14] The Court recognized that the Eighth Amendment has "been interpreted in a flexible and dynamic manner" and that it has not "been regarded as a static concept," principles that the Court still adheres to today.[15] Chief Justice Warren had famously stated that "the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[16]

This idea of interpreting the Eighth Amendment in relation to societal maturation is reflected in the flurry of cases that immediately followed *Gregg.* The fact that the Court wavered and overruled its own precedent several times indicates that societal opinion toward the death penalty also evolves over time. For example, the Court has overturned itself several

---

11 *Id.* (*See also* Gregg v. Georgia, 428 U.S. 153 (1976)).

12 *Gregg, supra* note 11 at 173.

13 *Id.*

14 *Id.* at 170 (citing Wilkerson v. Utah, 99 U.S. 130, 136 (1879); *In re* Kemmier, 136 U.S. 436, 447 (1890); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947)).

15 *Id.* at 171, 173.

16 *Id.* at 173 (citing Trop v. Dulles, 336 U.S. 86, 101 (1958)).

times in regard to whether a mentally ill person can be executed in the United States, ultimately determining that executing a mentally ill prisoner violates the Eighth Amendment.[17] Although the United States Supreme Court has not issued as many death penalty-related opinions in the last few years, the concept of interpreting the Eighth Amendment in the context of ever-changing societal norms would undoubtedly still hold.

These cases following *Gregg* were not only varied in their outcomes but also in their scope. They addressed a wide span of issues regarding the application of the death penalty, including but not limited to the crimes to which the death penalty can be applied, whether the death of the victim was necessary in order to impose the death penalty, the age of the defendant, and the defendant's mental capacity.

1. The Court's Focus on Disproportionality and Whether the Nature of the Defendant's Crime Warrants Capital Punishment

In *Woodson v. North Carolina,* decided the same year as *Gregg,* the Court held that the mandatory imposition of the death penalty in first-degree murder cases violated the Eighth and Fourteenth Amendments.[18] The Court reasoned that such mandatory sentencing was unconstitutional because it prevented the jury from considering the personalized circumstances and characteristics of the defendant.[19] This 5–4 judgment, announced in a plurality opinion written by Justice Stewart, fractured the Court and resulted in numerous concurring and dissenting opinions. Only Justices Powell and Stevens voted with the majority without writing a separate opinion.[20] Justice Brennan concurred in the judgment as did Justice Marshall, who expressed his view that the death penalty should always be considered cruel and unusual punishment under the Eighth Amendment.[21]

---

[17] *See* Ford v. Wainwright, 477 U.S. 399 (1986) at 410 (holding that it is unconstitutional to execute an insane person); Penry v. Lynaugh, 492 U.S. 302 (1989) (holding that the execution of people with mental retardation did not violate the Eighth Amendment); Atkins v. Virginia, 536 U.S. 304 (2002) (finding that executing mentally ill prisoners violates the Eighth Amendment's prohibition of cruel and unusual punishment).

[18] Woodson v. North Carolina, 428 U.S. 280 (1976).

[19] *Id.* at 304.

[20] *Id.* at 282.

[21] *Id.*

Justice White wrote a dissenting opinion, which was joined by Chief Justice Burger and Justice Rehnquist, in which he rejected the argument that the death penalty violated the Eighth Amendment in every circumstance and that the North Carolina statute at issue would not result in the death penalty being arbitrarily imposed so as to render the statute void.[22] Justice Blackmun also penned his own dissenting opinion, as did the more conservative Justice Rehnquist.[23] Justice Rehnquist's opinion contained several reasons for his dissent, including that there was no basis for the plurality's conclusion that a mandatory death sentence for a particular crime was unduly harsh and rigid and that there was no basis in the plurality's conclusion that there must be "particularized consideration of relevant aspects of the character and record of each convicted defendant."[24]

The Court released another death penalty opinion the following year that also limited the scope of capital punishment, this time focusing on the crime of rape. In *Coker v. Georgia,* in a 7–2 judgment without a majority opinion, the Court held that the Eighth Amendment prohibits the imposition of the death penalty in a case where an adult woman is raped but not killed.[25] Justice White wrote the plurality opinion that Justices Stewart, Blackmun, and Stevens joined; this opinion "expressed the view that the Eighth Amendment barred not only punishments that were barbaric but also those that were excessive in relation to the crime committed" and therefore, the death penalty was an excessive punishment for the crime of rape because it did not involve the death of another.[26]

Justice Brennan, one of the more liberal justices on the bench at the time, concurred in this judgment but argued that the death penalty was cruel and unusual punishment in all circumstances.[27] Justice Marshall joined Brennan's concurrence. Justice Powell wrote his own concurring opinion in which he concluded that the Court was correct in holding that the death penalty was excessive in this particular situation because there were no facts of brutality or lasting injury, but that the plurality opinion

---

22 *Id.*

23 *Id.*

24 *Id.*

25 Coker v. Georgia, 433 U.S. 584 (1977).

26 *Id.* at 586.

27 *Id.*

went too far in holding that the death penalty was *always* necessarily a disproportionate penalty for rape.[28] Justice Powell's concurrence demonstrated his well-recognized role on the Court as the pivotal vote, although he did tend to vote conservatively on criminal law issues.[29]

Chief Justice Burger wrote the dissenting opinion, joined by Justice Rehnquist, where he argued that rape is not a minor crime and not too far removed from murder in terms of heinousness.[30] This dissent also pointed out that the plurality opinion questioned the constitutionality of statutes that imposed the death penalty for crimes that might not result in immediate death, such as treason, kidnapping, and airplane hijacking.[31]

After the Court held that the death penalty could not be imposed for a rape conviction, it continued its analysis of death-eligible crimes and concluded that a defendant convicted of ordinary murder is ineligible for capital punishment in *Godfrey v. Georgia*.[32] In yet another judgment without a majority opinion, the Court invalidated a provision of the Georgia Code that allowed a defendant to be sentenced to death after a finding that his offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," finding that this provision violated the cruel and unusual punishment prohibition of the Eighth Amendment because it was too vague.[33] Specifically, the Court held that "there is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' "[34]

Justice Stewart wrote the plurality opinion, just four years after penning the plurality opinion in *Woodson*.[35] Justices Blackmun, Powell, and

---

28 *Id.*

29 *Retired Justice Lewis Powell Dies at 90,* The Washington Post, *available at* http://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/powell082698.htm (last accessed April 15, 2015).

30 *Coker, supra* note 25 at 586.

31 *Id.*

32 Godfrey v. Georgia, 446 U.S. 20 (1980).

33 *Id.* at 422.

34 *Id.* at 428–29.

35 *Id.* at 422 (citing *Woodson, supra* note 18).

Stevens joined Stewart's plurality opinion.[36] Justice Marshall, joined by Justice Brennan, wrote a concurring opinion in which he reiterated his view that the death penalty is always cruel and unusual punishment. Chief Justice Burger wrote a dissenting opinion arguing that because the defendant himself said his crime was "heinous," this is sufficient to warrant the imposition of the death sentence.[37] He also argued that the plurality's opinion has created the onerous task of forcing courts to decide on a "case by case" basis whether a defendant's conduct is egregious enough to deserve capital punishment.[38] Justice White wrote a rather passionate dissenting opinion that Justice Rehnquist joined.[39] It is interesting to note that Justice White strongly dissented here but wrote the plurality opinion in *Coker,* in which the Court held that the death penalty for rape was excessive.[40]

Finally, in 1986, Chief Justice Rehnquist's Court decided to expand the scope of capital punishment by ruling that it does not violate the Eighth Amendment to sentence to death a defendant who was a major participant in the commission of a felony that resulted in a death.[41] The Court held 5-4 in *Tison v. Arizona* that the imposition of the death penalty for a felony murder conviction is not cruel and unusual punishment if the defendant had "major participation in the felony and [showed] reckless indifference to human life."[42]

Expansion of the death penalty's scope under the Rehnquist Court is not surprising, given that Justice Rehnquist had been a consistent advocate for the death penalty throughout his time on the Court. Additionally, Justice Powell was still on the Court and Justice Scalia had since joined. Justices Powell, Rehnquist, Scalia, and White joined Justice O'Connor's majority opinion, which argued that the facts of this case (in which defendants brought "an arsenal of lethal weapons" into Arizona State Prison and

---

36 *Id*.

37 *Id*. at 442.

38 *Id*. at 443.

39 *Id*. at 444.

40 *Coker, supra* note 25 at 586.

41 Tison v. Arizona, 481 U.S. 137 (1986) (thus qualifying the United State Supreme Court's ruling in *Enmund v. Florida,* 458 U.S. 782 (1982), in which the Court held it unconstitutional to impose the death penalty on a defendant who is a minor participant in a felony and did not kill or intend to kill).

42 *Id*. at 138.

gave them to two convicted murderers in furtherance of a prison-break scheme) support the conclusion that the death penalty was not disproportionate to the defendants' crimes because defendants committed acts that were likely to result in the taking of an innocent life and showed reckless indifference to the value of human life.[43] Justice Brennan wrote a dissent, joined by Justices Marshall, Blackmun, and Stevens.

In 2008, the Court circled back to the issue of imposing a death sentence for a rape conviction, this time focusing on child rape. Although there were dissenters in *Coker* who advocated that the death penalty should not necessarily be forbidden for a rape conviction,[44] the Court in *Kennedy v. Louisiana* held that it is unconstitutional under the Eighth Amendment to sentence to death a defendant for a child-rape conviction in which the victim did not die because this sentence is a disproportionate punishment.[45]

In a 5–4 decision, the Court reasoned that there is a distinction between intentional first-degree murder and non-homicidal crimes; although these non-homicidal crimes, including child rape, are devastating and harmful, "in terms of moral depravity and of the injury to the person and to the public, they cannot compare to murder in their severity and irrevocability."[46] The majority stated that this opinion is only limited to crimes against people and that this case is not intended to address crimes against the State such as treason, espionage, and terrorism.[47] Justice Kennedy authored the majority opinion and was joined by Justices Stevens, Souter, Ginsburg, and Breyer.

Justice Alito filed a dissenting opinion, joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas, where he argued that such policy arguments are not pertinent to whether the death penalty constitutes cruel and unusual punishment for this crime and that holding "that the Eighth Amendment does not categorically prohibit the death penalty for the rape of a young child would not 'extend' or 'expand' the death penalty."[48] The dissent in *Kennedy* made it very clear that the conservative justices on the

---

43 *Id.* at 151, 152.

44 *Coker, supra* note 25.

45 Kennedy v. Louisiana, 554 U.S. 407 (2008).

46 *Id.* at 412.

47 *Id.* at 437.

48 *Id.* at 462, 465.

Court would embrace an expansion of the death penalty and did not construe the "cruel and unusual punishment" provision as a necessarily prohibitive check on capital punishment.

2. How Personal Factors Such as Mental Retardation and Defendant's Age Affect the Court's Application of the Eighth Amendment to the Death Penalty

The following cases represent areas of death-penalty law that have proven to be inconsistently applied by the Court and remain controversial today. The first major United States Supreme Court case addressing the execution of mentally ill prisoners was *Ford v. Wainwright* in 1986. In *Ford,* Chief Justice Burger's Court held that executing mentally ill defendants violated the cruel-and-unusual punishment prohibition of the Eighth Amendment.[49] This case, which largely focused on Florida's procedures for determining whether a defendant is insane, splintered the Court. Justice Marshall wrote the Court's opinion and was joined by Justices Brennan, Blackmun, and Stevens.[50] Justice Powell, concurring in part and concurring in the judgment, wrote his own opinion to which Justice O'Connor joined in part.[51] Justice O'Connor also wrote a dissent in part, which Justice White joined, in which she shared Justice Rehnquist's view that "the Eighth Amendment does not create a substantive right not to be executed while insane."[52] Justice O'Connor's concurrence in part and dissent in part reflected her position on the court as a moderate conservative.[53] Justice Rehnquist, joined by Chief Justice Burger, wrote his own dissent.[54]

This issue proved to be so controversial that just three years later, the United States Supreme Court granted certiorari to another case addressing the application of the death penalty to the mentally ill and overturned *Ford*. In *Penry v. Lynaugh,* Justice O'Connor writing for the Court held that the Eighth Amendment does not categorically prohibit capital punishment

---

[49] *Ford,* supra note 17.

[50] *Id*. at 401.

[51] *Id*. at 418.

[52] *Id*. at 427.

[53] *Sandra Day O'Connor,* The Oyez Project at IIT Chicago-Kent College of Law (last accessed April 21, 2015), *available at* http://www.oyez.org/justices/sandra_day_oconnor.

[54] *Ford, supra* note 17 at 431.

for mentally ill criminals but that a mentally ill defendant is entitled to jury instructions that instruct as to the mitigating effects of mental retardation.[55] However, this expansion of the death penalty did not last long.

Atkins v. Virginia, decided in 2002, effectively overturned *Penry* and is the current law.[56] As Justice Scalia wrote in his dissent, this "decision is the pinnacle of [the Court's] Eighth Amendment death-is-different jurisprudence.[57] In *Atkins,* the Court categorically held that the Eighth Amendment prohibits imposing the death penalty on a mentally ill defendant and that the "Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender."[58] The Court reasoned that there is no deterrent effect for such offenders and that these defendants' reduced capacity heightens the risk of a wrongful execution.[59] Justice Stevens wrote the Court's opinion and was joined by Justices Kennedy, Souter, Ginsburg, and Breyer.[60] Justice O'Connor, the author of the Court's opinion in *Penry,* also joined Justice Stevens' opinion.[61]

The Court's conservative justices wrote two separate dissents: Chief Justice Rehnquist wrote a dissent that Justices Scalia and Thomas joined and Justice Scalia also wrote his own impassioned dissent that Chief Justice Rehnquist and Justice Thomas joined.[62] Scalia's dissent reiterated the standards for determining whether a punishment is cruel and unusual under the Eighth Amendment ("modes or acts of punishment that had been cruel and unusual at the time that the Bill of Rights was adopted, and modes of punishment that are inconsistent with modern standards of decency") and argued that executing the mildly mentally retarded did not fall under either of those categories.[63]

---

55 Penry v. Lynaugh, 492 U.S. 302, 328, 339 (1989).

56 *Atkins, supra* note 17.

57 *Id.* at 337.

58 *Id.* at 321.

59 *Id.* at 319–20 (for example, mentally ill offenders are more likely to give false confessions, may be less able to give meaningful assistance to their attorney, are generally poor witnesses, and their demeanor may provide a false impression of their lack of remorse).

60 *Id.* at 306.

61 *Id.*

62 *Id.*

63 *Id.* at 339–40.

As with its analysis of cases pertaining to the defendant's mental capacity, the United States Supreme Court has wavered in its analyses of capital cases in which the defendant is a minor. The first case to address this particular issue is *Thompson v. Oklahoma,* decided in 1988. There, the Court held that the execution of an offender who committed his crime when he was fifteen years old or younger is unconstitutional under the Eighth Amendment.[64] The majority concluded that imposing the death penalty on minors under the age of sixteen has not made, or cannot be expected to make, "any measureable contribution to the goals that capital punishment is intended to achieve. It is, therefore, nothing more than purposeless and needless imposition of pain and suffering."[65]

Justice Stevens, the same justice who wrote the *Atkins* opinion that held it was unconstitutional to sentence a mentally ill defendant to death, wrote the plurality opinion and was joined by Justices Brennan, Marshall, and Blackmun.[66] Justice O'Connor, who had wavered in her stance on categorically prohibiting imposing the death penalty on the mentally ill, wrote an opinion concurring in the judgment in which she appeared not to rule out ever executing a minor but agreed that in this particular case, the death sentence was unconstitutional.[67]

Justice Scalia, joined by Chief Justice Rehnquist and Justice White, wrote a dissent in which he referred to the plurality opinion as a "loose cannon."[68] He also vehemently argued that there is no "plausible basis" for answering the question as to whether "there is a national consensus that no criminal so much as one day under 16, after individuated consideration of his circumstances, including the overcoming of a presumption that he should not be tried as an adult, can possibly be deemed mature and responsible enough to be punished with death for any crime."[69] Justice Kennedy did not participate in this decision.[70]

64 Thompson v. Okla., 487 U.S. 815, 838 (1988).
65 *Id.* (citing *Coker, supra* note 25 at 592).
66 *Id.* at 818.
67 *Id.* at 848–49.
68 *Id.* at 878.
69 *Id.* at 859.
70 *Id.* at 818.

Just one year later, Justice Scalia wrote the plurality opinion in *Stanford v. Kentucky* in which the Court reached a contrary conclusion with respect to juvenile offenders older than 15. In *Stanford,* the Court held that executing an offender who committed a crime at the age of 16 or 17 does not constitute cruel and unusual punishment under the Eighth Amendment.[71] Chief Justice Rehnquist and Justices White, O'Connor, and Kennedy joined Scalia's opinion.[72] Justice O'Connor wrote her own concurring opinion and Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, wrote the dissent.[73]

The Court revisited this issue in the 2005 case *Roper v. Simmons*. There, the Court not only overruled *Stanford* but also broadened the scope of the Eighth Amendment's prohibition on cruel and unusual punishment when it held that it is unconstitutional to sentence to death a defendant under the age of 18.[74] Justice Kennedy wrote the majority opinion, joined by Justices Stevens, Souter, Ginsburg, and Breyer.[75] Kennedy argued that "capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution" but that juvenile offenders cannot be classified among the worst offenders for three reasons: a juvenile's lack of maturity, the greater susceptibility of juveniles to negative influences and outside pressures, and the transitory nature of a juvenile's character when compared with that of an adult.[76] Justice Kennedy concluded that these reasons, along with evolving standards of decency and the fact that all other countries have forbidden the juvenile death penalty, compelled the Court to hold that executing a minor constitutes disproportionate punishment under the Eighth Amendment.[77]

Justice Stevens wrote a concurring opinion that Justice Ginsburg joined.[78] Justice O'Connor wrote a dissenting opinion where she expressed her view that the majority's decision was not justified by the objective

---

71 Stanford v. Kentucky, 492 U.S. 361, 380 (1989).

72 *Id.* at 364.

73 *Id.*

74 Roper v. Simmons, 543 U.S. 551 (2005).

75 *Id.* at 555.

76 *Id.* at 568–70.

77 *Id.* at 575.

78 *Id.* at 555.

evidence of contemporary societal values.[79] Although Justice O'Connor had voted in the majority in *Thompson v. Oklahoma,* where the Court prohibited executing anyone under 16, her dissent in *Roper* is not surprising because she had always appeared hesitant to prohibit categorically the imposition of the death penalty on minors.[80] Justice Scalia adhered to his conservative values and wrote a dissenting opinion, joined by Chief Justice Rehnquist and Justice Thomas.[81]

Roper is still controlling today; pursuant to the Eighth Amendment, minors who commit crimes are immune from execution. It is unlikely that this will change any time soon. The Court's analysis in *Thompson, Stanford,* and *Roper* indicates that it relies very heavily on the national consensus regarding the application of the death penalty when reaching its conclusions. Today, it is highly improbable that a majority of the nation would condone executing a juvenile no matter how atrocious the crime.

B. HOW THE SUPREME COURT HAS INTERPRETED THE EIGHTH AMENDMENT AS IT PERTAINS TO CAPITAL PUNISHMENT METHODS

Despite the seemingly constant publicity and infamous nature of death penalty cases, "the Supreme Court has never invalidated a State's chosen method of execution."[82] The Court ruled on the legality of execution methods as early as 1879, when it held in *Wilkerson v. Utah* that an execution by firing squad does not violate the Eighth Amendment.[83]

As technology progressed, the Court began facing more challenges to the constitutionality of various execution methods. One of the more formative cases in which the United States Supreme Court addressed an execution method in relation to the Eighth Amendment was *Louisiana ex rel. Francis v. Resweber,* where Chief Justice Fred Vinson's Court held that attempting a second electrocution after the first failed does not violate the Eighth Amendment.[84] There, the defendant had been prepared

---

79 *Id.*

80 *See Thompson, supra* note 64 at 848–49.

81 *Roper, supra* note 74 at 555.

82 Workman v. Bredesen, 486 F.3d 896, 899 (6th Cir. 2007) (refusing to invalidate the three-drug protocol used by Tennessee and twenty-nine other jurisdictions).

83 Wilkerson v. Utah, 99 U.S. 130 (1879).

84 Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947).

for execution in the electric chair, but when the executioner flipped the switch, there was a mechanical difficulty and the defendant did not die.[85] Defendant argued that he had already undergone the psychological strain of preparing for electrocution and having to suffer through it again would constitute cruel and unusual punishment.[86] The Court disagreed. It reasoned that the Eighth Amendment protects against "cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution."[87] The Court added that just because the defendant had already been subjected to a current of electricity does not make his successful execution more "cruel."[88] This broad, permissive holding in *Resweber* helps explain why no execution method has ever been deemed impermissible by the Court.

Then, in 1985, the Court refused to grant certiorari for a petitioner who claimed that execution by electrocution was unconstitutional.[89] This was true to form for Chief Justice Burger's Court, which was regarded as being dramatically conservative in the area of criminal law.[90] Justices Brennan and Marshall dissented, stating that the "Eighth Amendment forbids inhuman and barbarous methods of execution that go at all beyond the mere extinguishment of life and cause torture or a lingering death."[91] The two justices argue that empirical evidence and eyewitness testimony demonstrate that death by electrocution is extremely violent and "inflicts pain and indignities far beyond the mere extinguishment of life."[92]

Electrocution became a rather obsolete method soon after the *Glass* decision and states began turning to lethal drugs as their primary execution

---

85 *Id.* at 460.

86 *Id.* at 464.

87 *Id.*

88 *Id.*

89 Glass v. Louisiana, 471 U.S. 1080 (1985).

90 *Biographies of the Robes: Warren Earl Burger,* Public Broadcasting Service, *available at* http://www.pbs.org/wnet/supremecourt/rights/robes_burger.html (last accessed April 22, 2015).

91 *Glass, supra* note 89 at 1084 (citing *In re* Kemmler, 136 U.S. 436, 447 (1890)).

92 *Id.* at 1086.

method.[93] The increase in popularity of this method resulted in an increase of prisoners' challenges to the method's constitutionality. The Court in *Baze v. Rees,* in a plurality opinion written by Chief Justice Roberts and joined by Justices Kennedy and Alito, denied petitioner's argument that Kentucky's lethal-injection protocol is unconstitutional under the Eighth Amendment because there is a risk that these protocols may not be properly followed and would thus result in significant pain.[94]

The Court explained that just "because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of objectively intolerable risk of harm that qualifies as cruel and unusual;" therefore, an "isolated mishap" does not violate the Eighth Amendment because it does not suggest cruelty or that the procedure produces a substantial risk of serious harm.[95] The plurality opinion also denied petitioner's proffered alternative lethal-injection procedure because a petitioner cannot challenge a state's already-approved execution method just by presenting a slightly safer alternative.[96] *Baze* made it even more difficult for prisoners on death row to succeed in bringing an Eighth Amendment claim.

III. HOW THE CALIFORNIA SUPREME COURT HAS APPLIED THE CALIFORNIA CONSTITUTION TO CAPITAL PUNISHMENT

The California Supreme Court established early in its existence high standards for proving that the death penalty is unconstitutional. In *People v. Oppenheimer* in 1909, the Court held that using execution methods "ordinarily adopted by civilized people, such as hanging, shooting, or electricity, is neither a cruel nor unusual punishment, unless perhaps it be so disproportionate to the offense for which it is inflicted as to meet the disapproval and condemnation of the conscience and reason of men generally,

---

93 *Methods of Execution,* Death Penalty Information Center (last accessed April 21, 2015), *available* at http://www.deathpenaltyinfo.org/methods-execution; *see also* Baze v. Rees, 553 U.S. 35, 42 (2008).

94 *Baze, supra* note 93 at 41.

95 *Id*. at 50.

96 *Id*. at 51 (reasoning that this would lead to a slippery slope in which courts would have to determine the best execution practices).

as to shock the moral sense of the people."[97] When considering the culture and historical time period in which the Court decided *Oppenheimer,* the court's holding and the public support for the death penalty becomes clearer: California was a new state battling outlaws and overrun with new settlers and gold miners. Hanging outlaws was not abnormal for California citizens. In the years following, the California Supreme Court adhered to its conclusion in *Oppenheimer* and routinely denied petitioners' claims that the death penalty was unconstitutional under the California and United States Constitutions.[98]

One of the most distinctive California Supreme Court decisions that analyzes "cruel and unusual punishment" in relation to the death penalty was *People v. Anderson* in 1972, decided earlier in the same year that the United States Supreme Court released its *Furman* decision.[99] Until then, the California Supreme Court had focused on justifications for sustaining the death penalty and had relied heavily on the fact that much of the California population had witnessed executions and encouraged them as a form of "vigilante justice."[100] *Anderson* constituted an unprecedented liberal shift of the Court.

In *Anderson,* the California Supreme Court held that the death penalty constitutes cruel or unusual punishment under article I, section 6 of the California Constitution; therefore, the Court did not need to address the legality of the death penalty under the United States Constitution.[101] While it is likely that the California Supreme Court would have come to the same conclusion when analyzing capital punishment under the U.S. Constitution's Eighth Amendment, the Court's reliance on the California Constitution insulated its judgment from federal review.

It is instructive to note that article I, section 6, of the California Constitution, unlike the Eighth Amendment to the United States

97 People v. Oppenheimer, 156 Cal. 773, 737 (1909).

98 *See, e.g.,* People v. Quicke, 71 Cal.2d 502 (1969); People v. Thomas, 65 Cal.2d 698 (1967); People v. Bashor, 48 Cal.2d 763 (1957); *In re* Wells, 35 Cal.2d 889 (1950); People v. Lazarus, 207 Cal. 507 (1929).

99 *Furman, supra* note 6; People v. Anderson, 6 Cal. 3d 628 (1972).

100 *Id.* at 642.

101 *Id.* at 633–34.

Constitution, prohibits the infliction of cruel *or* unusual punishments.[102] However, the California Supreme Court stated that the "cruel *or* unusual punishment" provision in the California Constitution serves the same purpose as the Eighth Amendment in the United States Constitution.[103] The *Anderson* Court recognized that it had historically been interpreting constitutional claims to the death penalty on the basis of whether a punishment was cruel *and* unusual and determined that it must analyze the issue under the "cruel or unusual punishment" standard.[104]

The Court emphasized that in deciding that capital punishment is cruel in the constitutional sense, it did not concentrate only on the "mere extinguishment of life" or on a particular method of execution because the United States Supreme Court had already determined that these are not unconstitutional.[105] Instead, it focused on "the total impact of capital punishment, from the pronouncement of the judgment of death through the execution itself, both on the individual and on the society which sanctions its use."[106] The Court considered the "degrading and brutalizing" psychological effects of impending execution on a prisoner, the lengthy imprisonment before execution, the evolving standards of decency on which enforcement of the Constitution relies, and the steady decrease in executions in California over the last few decades.[107]

Justice McComb was the sole dissenter in *Anderson*.[108] He argued that the death penalty deters people from committing violent crimes that result in the deaths of innocent people.[109] It appears that the California population agreed with Justice McComb's views. Nine months after the California Supreme Court decided *Anderson,* California voters passed Proposition 17 in November 1972, which amended the California Constitution to declare that the death penalty is neither cruel nor unusual

---

[102] *Id.* at 634 (opposed to cruel *and* unusual punishment under the Eighth Amendment of the U.S. Constitution).

[103] *Id.* at 640.

[104] *Id.* at 645.

[105] *Id.* at 645–46.

[106] *Id.* at 646.

[107] *Id.* at 648–50.

[108] *Id.* at 657.

[109] *Id.* at 658.

punishment.[110] Capital punishment was constitutional again in California — but only on terms passing muster under the federal constitution.

This changed just four years later in December of 1976, an important year for death-penalty litigation and a year in which the California Supreme Court's and United States Supreme Court's rulings intersected. As discussed earlier, the United States Supreme Court released its series of *Gregg* decisions in July 1976, where it held that while capital punishment does not violate the Eighth Amendment of the U.S. Constitution in all circumstances, some states' death-penalty laws were unconstitutional.[111] In December of 1976, the California Supreme Court piggybacked off *Gregg* and unanimously held in *Rockwell v. Superior Court* that California's capital punishment law violated the United States Constitution.[112]

In *Rockwell,* the Court quoted *Gregg* when it recognized that death-penalty laws are unconstitutional under the Eighth Amendment of the federal constitution if they make the death penalty mandatory and do not give the judge or jury absolute discretion in choosing life or death.[113] The laws must also provide standards for the sentencing authority so it can consider the particularized circumstances of the crime and defendant.[114] The California Supreme Court, after engaging in analysis of several United States Supreme Court decisions, ultimately found that California's death-penalty laws violated the Eighth Amendment because they required that death be a mandatory punishment for first-degree murder and did not allow for evidence of mitigating circumstances, therefore resulting in the arbitrary imposition of the death penalty.[115]

Yet again, this prohibition on capital punishment in California did not last long. The California Legislature rewrote the California death penalty law in 1977, specifically allowing mitigating evidence and adding the possible sentence of life in prison without parole, therefore effectively

---

[110] *California,* Death Penalty Information Center, *available at* http://www.deathpenaltyinfo.org/california-1 (last accessed April 26, 2015).

[111] *Gregg, supra* note 11 (holding that North Carolina and Louisiana's death penalty laws were unconstitutional).

[112] Rockwell v. Superior Court, 18 Cal.3d 420 (1976).

[113] *Id.* at 428.

[114] *Id.*

[115] *Id.* at 445.

re-enacting the death penalty statute.[116] Proposition 7 superseded the 1977 death penalty statute in November of 1978, and is California's current death-penalty statute.[117]

California Penal Code section 3604(a) constitutes the death-penalty statute for California:

> The punishment of death shall be inflicted by the administration of a lethal gas or by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections.[118]

The prisoner has the choice between lethal gas and lethal injection. However, although they have the right to choose their execution method, in making this choice the inmates effectively waive their right to claim that the method is unconstitutional.[119]

Although the California Supreme Court has not yet ruled on cases alleging the unconstitutionality of California's execution methods, U.S. District Courts in California have addressed such claims. In 2006, U.S. District Court Judge Jeremy Fogel held in *Morales v. Tilton* that California's procedures for execution by lethal injection violated the Eighth Amendment of the United States Constitution.[120] Judge Fogel found that California's protocol was unreliable, lacked transparency, and contained serious deficiencies.[121] These deficiencies included inconsistent and unreliable screening of execution team members, a lack of meaningful training, supervision, and oversight of the execution team, inconsistent and unreliable recordkeeping, improper mixing preparation and administration of sodium thiopental by the execution team, and inadequate lighting,

---

116 *History of Capital Punishment in California,* California Department of Corrections and Rehabilitation, *available at* http://www.cdcr.ca.gov/Capital_Punishment/history_of_capital_punishment.html (last accessed April 22, 2015).

117 *Id.*

118 Cal. Pen. Code §3604(a).

119 Stewart v. Lagrand, 526 U.S. 115 (1999).

120 Morales v. Tilton, 465 F. Supp. 2d 972, 981 (N.D. Cal. 2006).

121 *Id.* at 979–80, 81.

overcrowded conditions, and poorly designed facilities where the execution team works.[122]

Judge Fogel's *Morales* opinion resulted in a de facto moratorium on capital punishment in California because no licensed medical professional would perform the procedure.[123] This injunction was lifted in August 2010 when the California Department of Corrections and Rehabilitation adopted newly approved regulations, but California has still not executed a prisoner since 2006.[124]

However, in 2014, another District Court judge imposed a second moratorium on the death penalty in California. In *Jones v. Chappell,* Judge Cormac J. Carney held that California's death penalty administration violated the cruel and unusual punishment provision of the Eighth Amendment because it "is so plagued by inordinate and unpredictable delay that the death sentence is actually carried out against only a trivial few of those sentenced to death."[125] Therefore, the system is arbitrary in that many are sentenced to death but only a few are actually executed and such a system constitutes arbitrarily inflicting the ultimate punishment of death.[126]

The fact that California has been subject to two separate moratoriums on capital punishment just ten years apart for two completely different reasons demonstrates that the death penalty in California is on tenuous grounds. One federal court in California has even ruled an execution method to be unconstitutional.[127] While the United States Supreme Court has yet to do so, this may change in the upcoming year or so.

---

122 *Id*. at 979–80.

123 *A Timeline of the Death Penalty in California,* Stanford Progressive, *available at* http://web.stanford.edu/group/progressive/cgi-bin/?p=1773 (last accessed April 23, 2015).

124 *California's Lethal Injection Protocol Deemed Invalid by State Court,* Prison Legal News, *available at* https://www.prisonlegalnews.org/news/2014/jun/5/californias-lethal-injection-protocol-deemed-invalid-state-court (last accessed April 22, 2015).

125 Jones v. Chappell, 31 F. Supp. 3d 1050, 1062 (C.D. Cal. 2014).

126 *Id*. at 1063 (noting that "arbitrariness in execution is still arbitrary, regardless of when in the process the arbitrariness arises").

127 It should be noted that this ruling was "as applied" and not "facial." It held lethal injections in California to be unconstitutional because of the way in which they were administered.

IV. THE NATIONAL DEBATE REIGNITED: HOW THE UNITED STATES SUPREME COURT WILL APPLY THE EIGHTH AMENDMENT IN *GLOSSIP V. GROSS* TO STATES' NEWLY PROPOSED EXECUTION METHODS AMID A LETHAL DRUG SHORTAGE

For at least a year, states have been unable to procure pentobarbital for their executions. Pentobarbital is one drug in the typical three-drug cocktail used in lethal injections.[128] This shortage has forced states to turn to other similar drugs as a substitute. In April of 2014, Oklahoma used midazolam, which is a sedative, and two other drugs to execute Clayton Lockett.[129] This three-drug combination had never been used in Oklahoma before and the execution went horribly wrong; Lockett regained consciousness during the procedure, tried to sit up, and then died of a massive heart attack.[130]

This is not the first botched execution since states have substituted other drugs for pentobarbital. In Ohio, a prisoner took twenty-five minutes to die and was gasping for breath after he was given an untested cocktail containing midazolam.[131]

The Supreme Court of the United States has finally decided to consider the issue of states' substituting drugs for the originally approved three-drug cocktail upheld in *Baze*.[132] On January 23, 2015, the Supreme Court granted certiorari to hear the appeal of three death-row inmates in Oklahoma who are challenging the state's new three-drug protocol.[133]

---

128 *States Scramble to Deal With Shortages of Execution Drugs,* National Public Radio, *available at* http://www.npr.org/2015/03/11/392375383/states-scramble-to-deal-with-shortages-of-execution-drugs (last accessed April 26, 2015).

129 *Oklahoma Execution: What Went Wrong and What Happens Now*?, NBC News, *available at* http://www.nbcnews.com/storyline/lethal-injection/oklahoma-execution-what-went-wrong-what-happens-now-n93556 [hereinafter *Oklahoma Execution*] (last accessed April 26, 2015).

130 *Id.*

131 *Id.*

132 *Baze, supra* note 93 (holding that a popular three-drug lethal injection method is constitutional).

133 *Court To Rule on Lethal-Injection Protocol,* Supreme Court of the United States Blog, *available at* http://www.scotusblog.com/2015/01/court-to-rule-on-lethal-injection-protocols/ [hereinafter *Court To Rule*] (last accessed April 25, 2015).

Earlier that week, the Court had voted 5–4 to grant delays in four inmates' executions and denied a stay to one inmate, who was executed later that same night. The three remaining inmates bring the case currently before the Court.[134]

On April 29, 2015, the Supreme Court heard oral arguments in *Glossip v. Gross*. This case presents the following question: whether it is constitutional for a state to carry out an execution using a three-drug protocol where there is a well-established scientific consensus that the first drug has no pain-relieving properties and cannot reliably produce deep, coma-like unconsciousness and it is undisputable that there is a substantial risk of pain and suffering from the administration of the next two drugs when a prisoner is conscious.[135]

A. A STEP-BY-STEP ANALYSIS OF THE *BAZE* PLURALITY OPINION, CONCURRENCES, AND DISSENTS

The *Baze* Court upheld lethal injection in a 7–2 plurality opinion written by Chief Justice Roberts and joined by Justices Kennedy and Alito.[136] The plurality opinion emphasized that the Court has never invalidated a state's chosen procedure for carrying out an execution and that "simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual."[137] The plurality also denied several of the petitioner's claims that Kentucky's use of sodium thiopental is cruelly inhumane.[138]

Justice Alito wrote his own concurring opinion in which he states that *Baze* demonstrates the high standard for modifying lethal injection

---

134 *Id.*

135 Glossip v. Gross, Supreme Court of the United States Blog, *available at* http://www.scotusblog.com/case-files/cases/glossip-v-gross/ [hereinafter Glossip] (last accessed April 24, 2015).

136 *Baze, supra* note 93 at 41.

137 *Id.* at 48, 50.

138 *Id.* at 53–56 (dismissing claim that there is a substantial risk of suffocation when there is an insufficient dose of sodium thiopental; petitioners did not establish a substantial risk of harm related to the IV lines; there is no excessive wait time to establish the IV).

protocol.[139] He wrote: "In order to show that a modification of a lethal injection protocol is required by the Eighth Amendment, a prisoner must demonstrate that the modification would '*significantly* reduce a *substantial* risk of *severe* pain.' Showing merely that a modification would result in some reduction in risk is insufficient."[140]

Justice Stevens wrote his own concurrence as well.[141] He predicted that instead of settling the death penalty debate once and for all as the Court intended to do with this opinion, *Baze* would actually incite more debate about the constitutionality of the three-drug protocol.[142] Although he voted with the plurality, his concurrence seemed hesitant. Justice Stevens is no longer on the Court, however, so his opinion in *Baze* is inconsequential for the purposes of predicting the Court's decision in *Glossip*.

Justice Scalia wrote a concurrence that Justice Thomas joined.[143] This concurrence was, essentially, a response to Justice Stevens' relatively liberal concurrence; Justice Scalia argued that Justice Stevens' conclusions are not supported by the available data and strongly advocated that the death penalty serves a retributive purpose.[144]

Justice Thomas also wrote a concurrence that Justice Scalia joined.[145] His concurrence specifically addressed the constitutionality of a method of execution and wrote that "in my view, a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain . . . ."[146] Therefore, in Justice Thomas' view, there is an extremely narrow standard for determining that an execution method is unconstitutional.

Justice Thomas conceded that not all methods of execution are constitutional, but the unconstitutional methods he listed so clearly constitute "cruel and unusual punishment" that his concession is not necessarily meaningful.[147] For example, he noted that burning at the stake is an

---

139 *Id.* at 67.

140 *Id.*

141 *Id.* at 72.

142 *Id.*

143 *Id.* at 87.

144 *Id.* at 89, 90.

145 *Id.* at 94.

146 *Id.*

147 *Id.* at 95–96 (noting that former methods of burning at the stake, gibbeting, public dissection, emboweling alive, beheading, and quartering are clearly unconstitutionally cruel).

unconstitutional method of execution because, unlike hanging, it was "always painful and burned the body . . . . [I]t was considered 'a form of super-capital punishment, worse than death itself.'"[148] Gibbeting, where the prisoner was hung in an iron cage and his body would decay in public, was another unduly painful method.[149] Justice Thomas wrote that these methods violated the Eighth Amendment because they were purposely designed to inflict more pain and suffering than was necessary to cause death.[150] His concurrence ended with a recapitulation of his conservative argument: "In short, I reject as both unprecedented and unworkable any standard that would require the courts to weigh the relative advantages and disadvantages of different methods of execution or of different procedures for implementing a given method of execution."[151]

Justice Breyer wrote the last concurring opinion, in which he agreed with Justice Ginsburg that the relevant factors in assessing an execution method consist of "the degree of risk," "the magnitude of pain," and "availability of alternatives," and are all interrelated.[152] Justice Breyer appeared highly skeptical of petitioner's reports alleging that the lethal injection method may produce unnecessary suffering. He referred to the study as possibly being "seriously flawed" and noted that the research "casts a shadow of uncertainty upon the ready availability of some of the alternatives to lethal injection methods."[153] Thus, Justice Breyer's concurrence focused heavily on the studies and research supporting petitioner's claims.

Justice Ginsburg wrote the sole dissent, which Justice Souter joined.[154] A staunch liberal, she was unconvinced that inmates were adequately anesthetized by the first drug in the three-drug protocol.[155] She proposed that although the Court has addressed and preserved various methods of execution in the past, there is still "no clear standard for determining the constitutionality of a method of execution."[156]

---

148 *Id.* at 95.
149 *Id.*
150 *Id.* at 96.
151 *Id.* at 106.
152 *Id.* at 107–08.
153 *Id.* at 109, 111.
154 *Id.* at 113.
155 *Id.* at 114.
156 *Id.* at 115.

B. A PREDICTION OF THE UNITED STATES SUPREME COURT'S *GLOSSIP V. GROSS* OPINION

The Court's composition has changed since *Baze,* but only slightly. Chief Justice Roberts, author of the *Baze* plurality, is still on the Court and will hear the *Glossip* case. The current Court has been called the "most conservative" Supreme Court in generations.[157] Republican Justices Scalia and Thomas, who both wrote strongly-worded conservative concurrences in *Baze,* remain on the Court. Justice Alito, a conservative who joined the *Baze* plurality and wrote his own concurrence, still holds his seat on the Court. Justice Breyer is also still on the Court and, although he wrote a concurring opinion in *Baze,* he is generally considered more liberal.

The only two justices who heard *Baze* and are no longer on the Court are Justices Souter and Stevens. Justice Souter joined Justice Ginsburg's dissent in *Baze* and was difficult to classify as either conservative or liberal.[158] Justice Stevens, too, avoided political labels but seemed to become a voice of moderation when the Court became more conservative with the appointments of Justice Alito and Chief Justice Roberts.[159]

Justices Kagan and Sotomayor have since replaced Justices Stevens and Souter. Justice Sotomayor replaced Justice Souter and many believe that her views mostly align with her predecessor's although she identifies as an independent.[160] Justice Kagan succeeded Justice Stevens. This also is not a marked ideological change because, although Justice Kagan is a steadfast liberal, Justice Stevens was often considered a leader of the liberals during his time on the Court.[161]

---

157 *John Roberts,* Forbes, *available at* http://www.forbes.com/profile/john-roberts/) (last accessed April 26, 2015).

158 *David H. Souter,* The Oyez Project at IIT Chicago-Kent College of Law, *available at* http://www.oyez.org/justices/david_h_souter (last accessed April 24, 2015).

159 *John Paul Stevens,* The Oyez Project at IIT Chicago-Kent College of Law, *available at* http://www.oyez.org/justices/john_paul_stevens (last accessed April 26, 2015).

160 *Sotomayor Confirmed By Senate, 68–31,* The New York Times, *available at* http://www.nytimes.com/2009/08/07/us/politics/07confirm.html (last accessed April 26, 2015).

161 *Elena Kagan Confirmed as Supreme Court Justice,* CBS News, *available a*t http://www.cbsnews.com/news/elena-kagan-confirmed-as-supreme-court-justice (last accessed April 26, 2015).

Therefore, the current Court that will hear *Glossip* is predominately conservative, and seven out of the nine current members participated in the *Baze* opinion. Out of these seven members, six voted with the plurality with only Justice Ginsburg dissenting.[162]

As mentioned earlier, the predominant question to be presented in *Glossip* is whether it is constitutional for a state to carry out an execution using a three-drug protocol where there is a well-established scientific consensus that the first drug has no pain-relieving properties and cannot reliably produce deep, coma-like unconsciousness and it is undisputable that there is a substantial risk of pain and suffering from the administration of the next two drugs when a prisoner is conscious.[163] Although this is a slightly different question than that presented in *Baze,* both cases address the legality of a lethal-injection method. *Glossip,* however, is being decided in a different context because there is currently a shortage of the already-approved pentobarbital; this could mean that the Court may have to engage in an analysis of available alternative methods.

It may be a foreshadowing of the Court's decision that they denied one of the petitioner's requests to grant a delay of his execution.[164] It can be argued that, after the Court read the parties' briefs and still decided to allow the execution, this may be a sign that it does not think the lethal-injection method is unconstitutional. But others can also argue that simply because the Court did not grant a stay does not bear any indication of their ruling on the merits of the case.

The fact that the Court is laden with conservatives will likely be the determining factor in deciding *Glossip* and will probably result in an outcome similar to that of *Baze's*. Chief Justice Roberts will most likely vote that Oklahoma's use of midazolam in their drug cocktail is not unconstitutional even if it does cause the inmate pain; he wrote in *Baze* that simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual.[165] Therefore, he might argue in *Glossip* that this risk of pain from the midazolam

---

162 *Baze, supra* note 93 at 113.

163 *Glossip, supra* note 134.

164 *Court To Rule, supra* note 132.

165 *Baze, supra* note 93 at 48, 50.

does not necessarily establish the "objectively intolerable risk of harm" that petitioners must prove.

There is hardly any doubt that Justices Scalia and Thomas will vote that the use of midazolam does not violate the Eighth Amendment. The use of this drug, likely to be held comparable to that of pentobarbital, definitely does not meet Justice Thomas' high standards of "cruel and unusual punishment" and in no way compares to the methods that he would deem unconstitutional (i.e. burning alive and decomposing in public). Justice Thomas will likely argue that the use of this new drug is not substituted solely for the purpose of "inflict[ing] more pain and suffering than was necessary to cause death" and therefore is constitutional.[166] Justice Scalia, whose *Baze* concurrence was mostly a rebuttal to Justice Stevens' concurrence, will certainly vote that the method is constitutional. There has not been one United States Supreme Court case that he has heard where he voted that the death penalty was unconstitutional.[167]

Justice Alito will also likely vote that Oklahoma's new method is constitutional. His concurrence in *Baze* highlighted the extremely high standard he applies for proving a violation of the Eighth Amendment.[168]

Justice Kennedy did not write a concurrence in *Baze* but voted with the plurality. He has been an inconsistent vote in the Supreme Court's death penalty cases: he voted with the majority in *Stanford v. Kentucky* to uphold the death penalty for juveniles but then voted with the majority in *Roper v. Simmons,* which overturned *Stanford*.[169] He also wrote the opinion of the Court in *Kennedy v. Louisiana,* where the Court struck down the execution of a child rapist. Therefore, his vote in *Glossip* is not as clearcut.

Justice Ginsburg will just as likely vote to remand the case, continuing the stay of execution. Her dissent in *Baze* indicated that she was highly

---

166 *Id*. at 96.

167 *See, e.g.,* Thompson, *supra* note 64 (where he dissented in the Court's ruling that juveniles 15 years or younger could not be executed); *Stanford, supra* note 71 (where he wrote the opinion holding that 16-year-olds could be given the death penalty); Roper, *supra* note 74 (dissenting where the Court overturned *Stanford* and held that minors cannot be executed); *Atkins, supra* note 17 (dissenting when the Court ruled that mentally ill offenders cannot be executed).

168 *It's All Right With Sam,* The New York Times, *available at* http://www.nytimes.com/2015/01/08/opinion/its-all-right-with-samuel-alito.html (last accessed April 27, 2015).

169 *Stanford, supra* note 71; *Roper, supra* note 74.

skeptical of the humaneness of the pentobarbital, so this wariness will probably transfer to *Glossip*. This is especially true because the new drug, midazolam, has only been used a few times, and one of the executions in which it was used went horribly wrong.[170]

Justices Kagan and Sotomayor's votes are more dubious. Although Justice Kagan is liberal, she has expressed before that she has no reservations about ruling that the death penalty is constitutional.[171] Justice Sotomayor, a self-identified Independent, led the dissent in the Supreme Court opinion that denied the *Glossip* petitoner's request for his execution to be delayed.[172] She was joined by Justices Ginsburg, Breyer, and Kagan.[173] In this dissent, all four justices appeared skeptical about the effects of the untested drug midazolam.[174]

Justice Breyer wrote a concurring opinion in *Baze* where he focused mostly on the reliability and credibility of the studies in that case.[175] He seemed distrustful of the reports that alleged the lethal-injection drugs were inhumane. Because *Glossip* relies heavily on reports that allege the use of the new drug midazolam leads to an inhumane death, Breyer's analysis in *Glossip* will likely mirror that of his in *Baze*.

The fact that Justices Sotomayor, Ginsburg, Breyer, and Kagan were proponents of halting one petitioner's execution does not necessarily mean that they will find Oklahoma's new drug protocol unconstitutional. But it does suggest that the *Glossip* opinion may be slightly different than *Baze* in that more justices will find that the Oklahoma drug protocol is unconstitutional.

To conclude, because the California Supreme Court no longer has an independent state constitutional basis on which to suspend the death penalty, a ruling in *Glossip* upholding the use of midazolam in lethal

---

170 *Oklahoma Execution, supra* note 128.

171 *Statements of Elena Kagan on the Death Penalty,* Texas Moratorium Network, *available at* http://www.texasmoratorium.org/archives/1287 (last accessed April 26, 2015).

172 *Sotomayor Leads Dissent in Oklahoma Death Case,* The National Law Journal, *available at* http://www.nationallawjournal.com/id=1202716150323/Oklahoma-Asks-Supreme-Court-to-Delay-Scheduled-Executions (last accessed April 26, 2015).

173 *Id.*

174 *Id.*

175 *Baze, supra* note 93 at 109.

injections will likely lead to the resumption of executions in California absent an adoption of an initiative amendment to the California Constitution abolishing the death penalty. Although California voters have previously rejected such initiatives, the recent approval of Proposition 47[176] has indicated that a liberal movement is sweeping the state. An initiative completely abolishing the death penalty may be in California's near future.

* * *

[176] *California Proposition 47,* Ballotpedia.org, *available at* http://ballotpedia.org/California_Proposition_47,_Reduced_Penalties_for_Some_Crimes_Initiative_(2014) (last accessed June 27, 2015).

GENDER EQUITY IN THE WORKPLACE:

A Comparative Look at Pregnancy Disability Leave Laws in California and the United States Supreme Court

BY MEGHA BHATT*

TABLE OF CONTENTS

CONTINUED ON NEXT PAGE

* Megha Bhatt, J.D. 2015, UC Davis School of Law. Thank you to Professor John Oakley for his mentorship and effective guidance as I developed this paper.

INTRODUCTION TO PREGNANCY DISCRIMINATION IN THE UNITED STATES

Pregnant women have historically faced barriers in being recognized as a special class of people in the workplace in need of greater protections. Until the last half-century, legislatures in the United States "protected" women by 1) systematically encouraging their total exclusion in the workplace except as teachers, secretaries, nurses and nannies and 2) regulating the

number of hours that pregnant women could work.[1] But this "protection" was often a pretext for preserving better jobs for men and keeping women out of certain roles.[2] The challenge we face today is how to protect women's access to the modern labor market without ignoring the difficulties and disabilities that affect women only. Many legislatures and employers do not recognize pregnancy as a valid "disability" condition that sometimes requires reasonable accommodations, temporary leave from work or other workplace protections. State and circuit courts are split regarding the idea of whether facially neutral laws violate the Pregnancy Discrimination Act (PDA) when they fail to recognize a disparate impact on pregnant women. I will discuss laws such as the PDA of Title VII of the Civil Rights Act of 1964 that was enacted to protect pregnant women, as well as California and federal case law that give women increasing protections in the workplace.

This paper will comparatively present the evolution of cases from the federal courts as well as California courts on the subject of job-protected pregnancy leave and reasonable-accommodation laws. I will also discuss how the history of cases affects women and families in their daily lives and what this means for the future of sex jurisprudence. The way that the United States Supreme Court has interpreted how the status of pregnancy fits into sex discrimination has evolved over the past forty to fifty years. Due to the Americans with Disabilities Act — which provides for reasonable accommodations in the disability rights context — groups have advocated for similar protections for women. However, the Supreme Court has been reluctant to accept this comparative approach. There are many explanations of how the law should protect pregnant women in the workplace. In this paper, I argue that when courts fail to recognize a lack of pregnancy

---

[1] Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 Duke J. Gender L. & Pol'y 67, 71–72 (2013); 208 U.S. 412, 422 (1908).

[2] *See, e.g.,* Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1219, 1237–38, 1239 (1986) (observing that "[f]etal vulnerability policies excluding all fertile women have been adopted only in male-dominated industries," while "women are generally allowed to work in women's jobs without restrictions based on fetal safety"); David L. Kirp, *Fetal Hazards, Gender Justice, and the Justices: The Limits of Equality,* 34 Wm. & Mary L. Rev. 101, 115 (1992) ("Expressions of corporate concern for the plight of fetuses . . . have been highly selective. Businesses that depend heavily on women workers have been much less scrupulous about the dangers they impose on the unborn . . .").

leave or reasonable accommodations in the workplace as having a disparate impact on women, it furthers sex discrimination. It may seem obvious that lack of reasonable accommodation leads to a disparate impact for women, but surprisingly, California courts and the United States Supreme Court have been slow to make this recognition explicit. In order to establish statutorily reasonable accommodations, the courts must first recognize the disparate impact.

Lack of proper leave laws and reasonable accommodations put women at risk of losing their livelihood, medical benefits, career trajectory and sense of security. It is important that when deciding cases that interpret the PDA, our federal judiciary should act in a way that will allow pregnant women to get reasonable accommodations that are necessary in the workplace. In California, there are more protective laws than those in the federal system. However, the California judiciary also has great potential for improvement in pregnancy discrimination jurisprudence.

II. HOW TO RECONCILE TITLE VII WITH MORE ADVANCED STATE LAWS: PDA AND PREGNANCY DISCRIMINATION LAWS

A. FEDERAL STATUTORY AND CASE LAW

Pregnancy-discrimination jurisprudence in the United States made some significant strides over the past fifty years. Early cases about pregnancy decided that pregnancy discrimination was not considered sex discrimination and pregnancy was not considered a disability.[3] A brief overview of the progress that our legislature and judiciary have made will be presented.

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employment discrimination on the basis of sex and several other protected classifications. While it seems obvious now that treating an employee differently because she is pregnant would fall within the protections of Title VII, this was not always the case. In *Geduldig v. Aiello,* in 1974, the U.S. Supreme Court held that there was no equal protection violation for denying

[3] Martinez v. NBC Inc., 49 F. Supp. 2d 305, 308 (S.D.N.Y. 1999) ("Every court to consider the question to date has ruled that pregnancy and related medical conditions do not, absent unusual conditions, constitute a [disability] under the ADA.").

normal pregnancy disability benefits from the California state disability insurance program.[4] The four plaintiffs in *Geduldig* argued that being denied disability insurance for pregnancy although they were otherwise qualified for the program was a violation of the Equal Protection Clause because the policy adversely affected women. Regarding the Equal Protection Clause arguments, the Court reasoned that "the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all."[5] The Court was quick to dismiss the gender discrimination issue in a footnote — reasoning that the potential recipients of disability funds are either pregnant women or non-pregnant persons.[6] While the first group is all-female, the second group consists of males and females and therefore members of one sex only were not discriminated against.[7] At this time, the Supreme Court was not ready to accept pregnancy discrimination as sex discrimination but did not say so explicitly.

Two years later, In *General Electric v. Gilbert,* the Supreme Court addressed the issue of whether a disability policy that excluded pregnant women was a violation of Title VII.[8] In *Gilbert,* the Court stated that the *Geduldig* equal protection rationale was directly on point to the Title VII discrimination claims in the present case. The Court held that discrimination based on pregnancy was not sex discrimination, as prohibited by Title VII.[9] *Gilbert* was the first instance in which the Court held explicitly that Title VII of the Civil Rights Act did not protect women from pregnancy-based discrimination.[10]

In *Nashville Gas Co. v. Satty,* decided only one year after *Gilbert,* the Supreme Court invalidated an employer policy forcing pregnant women to take leave from work and then denying them their previously accumulated seniority when bidding for new positions thereafter.[11] As the Court reconciled this position with *Gilbert,* employers were not required to provide

4 Geduldig v. Aiello, 417 U.S. 484, 494 (1974).

5 *Id.* at 485.

6 *Id.* at 496 n.20.

7 *Id.*

8 General Electric Co. v. Gilbert, 429 U.S. 135–36 (1976).

9 *Id.*

10 *Id.*

11 Nashville Gas Co. v. Satty, 434 U.S. 136, 142 (1977).

benefits to "one sex or the other 'because of their differing roles in the scheme of human existence,"' but neither could they "burden female employees in such a way as to deprive them of employment opportunities."[12] The next year in 1978, Congress passed the Pregnancy Discrimination Act which marked a reversal of the foregoing trend in case law.

1. Pregnancy Discrimination Act

In 1978, Congress swiftly enacted the Pregnancy Discrimination Act, an amendment to Title VII, for the express purpose of repudiating *Gilbert*.[13] The purpose of the PDA was to "enable women to maintain labor-force attachments throughout pregnancy and childbirth."[14] It amended Title VII to require that women affected by pregnancy "be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work."[15] The Pregnancy Discrimination Act also prohibits discrimination based on pregnancy with respect to pay, job assignments, promotions, layoffs, training, fringe benefits, firing, and any other term or condition of employment.[16] The PDA applies only to workplaces with fifteen or more employees, as well as all employment agencies, apprenticeship or training programs, and labor organizations.[17]

Under the federal Pregnancy Discrimination Act (PDA), an employer that allows temporarily disabled employees to take disability leave or unpaid leave, must allow an employee who is temporarily disabled due to pregnancy to do the same. After the Court's decision in *Gilbert,* Congress endeavored to expand protections to pregnant workers statutorily.[18] The

---

12 Brake & Grossman, *supra* note 1 at 73–74.

13 AT&T Corp. v. Hulteen, 556 U.S. 701, 727 (2009).

14 Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality,* 46 Harv. C.R.–C.L. L. Rev. 484 (2011).

15 42 U.S.C. § 2000e(k).

16 U.S. Equal Employment Opportunity Commission, Pregnancy Discrimination, *available at* http://www.eeoc.gov/eeoc/publications/fs-preg.cfm.

17 Legal Aid Society — Employment Law Center, Pregnancy Discrimination, Pregnancy Accommodations, and Pregnancy Disability Leave, *available at* http://las-elc.org/fact-sheets/pregnancy-discrimination-pregnancy-accommodations-and-pregnancy-disability-leave#sthash.oLjdUtZG.dpuf.

18 *See* Nicholas Pedriana, *Discrimination by Definition: The Historical and Legal Paths to the PregnancyDiscrimination Act of 1978,* 21 Yale J.L. & Feminism 1 (2009)

PDA was a fundamental turning point because it nullified the decision in *Gilbert* by providing that discrimination based on pregnancy is sex discrimination, within the meaning of Title VII.

The Pregnancy Discrimination Act contains two key provisions. First, it provides that unlawful sex discrimination under Title VII includes discrimination "on the basis of pregnancy, childbirth, or related medical conditions."[19] Second, it provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."[20] Most of the litigation relating to the PDA centers on the second provision. Lower courts have tied the reach of the second clause to the scope of the first instead of seeing clause two as sufficient to establish a violation of the PDA standing alone.[21] Nevertheless, as Brake and Grossman argue, the text and legislative history of the PDA point to the second clause as establishing a defense to pregnancy discrimination if pregnant women are treated the same as others in their ability to work. Or it could be treated as an independent violation of the Act if pregnant workers are treated worse than those similar in their ability to work.[22] The scope of the comparative right of accommodation is not fully known but should be made more clear with the decision in *Young v. UPS*.[23]

Five years after enactment of the PDA, in *Newport News Shipbuilding v. EEOC,* the EEOC brought a discrimination claim. The EEOC made two claims: 1) the failure of the employer's health insurance plan to provide its female employees with hospitalization benefits for pregnancy-related conditions to the same extent as other medical conditions and 2) providing less favorable pregnancy benefits for spouses of male employees were both discriminatory under the PDA.[24] The Court held, "The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes,

(chronicling the passage of the PDA).

19 42 U.S.C. § 2000e(k) (2012).

20 *Id*.

21 See Brake & Grossman, *supra* note 1.

22 *Id*.

23 Young v. United Parcel Serv., Inc., 707 F.3d 437 (4th Cir. Apr. 10, 2015).

24 Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C., 462 U.S. 669, 670–71 (1983).

discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex."[25] In a span of ten years from the 1974 *Geduldig* ruling to *Newport News* in 1983, the United States Supreme Court began to recognize that discrimination on the basis of pregnancy is sex discrimination.[26] However, there is still a grey area with respect to the extent of reasonable accommodations that are necessary under the PDA. For example, in *Newport News,* the Court failed to link a lack of reasonable accommodations to a disparate impact on pregnant women. And they failed to link the disparate impact to a furtherance of sex discrimination against women.

In 1990, the Americans with Disability Act (ADA) was enacted to provide protections against employment discrimination for qualified individuals with disabilities.[27] The ADA requires reasonable accommodations for employees with disabilities that will allow the employee to perform the essential functions of his or her job. Courts have generally concluded that a normal pregnancy does not constitute a "disability" under the ADA.[28]

Unlike the ADA, however, the Pregnancy Discrimination Act does not contain a reasonable-accommodations provision."[29] Without accommodations, some women cannot perform the essential functions of their jobs. The lack of a reasonable-accommodations provisions gives some employers the ability to deny accommodations to pregnant workers and therefore to force them out of their jobs. For example, Peggy Young is a UPS worker who was initially denied accommodations to lift less-heavy packages due to her pregnancy. The *Young* case will be discussed in greater depth later in this paper.

In 2009, the Supreme Court heard *AT&T v. Hulteen*.[30] The issue was whether AT&T violated the PDA by paying retired female employees lower pensions because they took unpaid pregnancy-related leaves between 1968 and 1974, before passage of the PDA. The majority sided with AT&T, ruling that the service credit system was not the product of intent to discriminate,

---

25 *Id*. at 669, 684.

26 *Young,* 707 F.3d 437.

27 42 U.S.C. §§ 12111–12117.

28 *Id*.

29 John Ashby, *EEOC Enforcement Guidance Expands Protections Against Pregnancy Discrimination,* 58 Advocate 31, 31–32 (2015).

30 *AT&T Corp. v. Hulteen,* 556 U.S. 701 (2009).

since the system was not unlawful at the time and therefore was a "bona fide seniority system," a defense to Title VII claims.[31] As Justice Ginsburg points out in her dissent, however, this ruling extends the effects of *Gilbert* into another millennium, despite the clear intent of Congress to repudiate it.[32] In *Gilbert,* the Court reasoned that policies that are "facially nondiscriminatory" and do not have "any gender-based discriminatory effect" are permissible.[33] In the same vein, in *AT&T,* the Court reasoned that the retired female employees in receipt of lower pensions were analogous to the disadvantageous treatment described in *Gilbert*: "facially nondiscriminatory," and without "any gender-based discriminatory effect."[34] However, the *AT&T* ruling does not serve to cease disadvantageous treatment for "all employment-related purposes on the basis of pregnancy, childbirth, or related medical conditions," as required by the PDA.[35] Instead the ruling serves to further discriminate against women for their pregnant status by paying them lower pensions, when compared to other similar employees, for the rest of their lives.

The language of the PDA indicating that pregnant women should be treated the same for all employment-related purposes implicitly suggests that any workplace policy that creates an invidious adverse impact for pregnant women should be re-examined. In the *AT&T* case, the adverse impact was a lower pension benefit for female employees who took unpaid pregnancy-related leaves during a certain timeframe. Ideally, the text of the PDA should read, "shall be treated the same for all employment-related purposes and shall not suffer a disparate impact due to employment policies. . . . " Since the PDA is not explicit in its language to indicate that adverse or "disparate" impacts on pregnant women are a violation of the statute, this can be realized only by the Supreme Court through its rulings or by Congress in amending Title VII to include the disparate impact language.

Over the years, gender-discrimination jurisprudence in the Supreme Court has evolved to include pregnancy discrimination. However, pregnant women continue to experience adverse implications both during

---

31 *Id.* at 707–15.

32 *Id.* at 719.

33 *General Elec. Co.,* 429 U.S. at 136–38.

34 *AT&T Corp.,* 556 U.S. at 701, 721.

35 42 U.S.C. § 2000e(k).

pregnancy and even afterward. The Supreme Court must explicitly address the idea of disparate impact on child-bearing women, to show women that they will not be punished for choosing to have a baby and raise a family while maintaining a career.

2. What is the best way to secure reasonable accommodations for pregnant workers?

a. Equal Employment Opportunity Commission (EEOC) Guidance Document calls for reasonable accommodations

The Equal Employment Opportunity Commission (EEOC) has created a guidance document for how the Pregnancy Discrimination Act should be interpreted. The EEOC Guidance document is meant to summarize the law, as opposed to advocating for a change in the law.[36] Nevertheless, the most controversial part of the EEOC guidance document advocates for a change in the law — providing reasonable accommodations for pregnant women. The document states that even if they do not have a disability under the ADA, pregnant employees may be entitled to "workplace adjustments similar to accommodations provided to individuals with disabilities."[37] In accordance with the PDA, the EEOC guidance lists actions of the employer that may occur — current pregnancy, past pregnancy, potential pregnancy and related medical conditions — as examples of conduct that would be deemed discriminatory. However, the courts have rejected the notion that reasonable accommodations are required under the PDA.[38]

Although the PDA makes great strides by outlining employer actions that are discriminatory, there is still no legislation or case law that declares lack of adequate leave laws or reasonable accommodations to have a disparate impact on pregnant women. The jurisprudence in the field of pregnancy discrimination needs work. In order to secure statutorily reasonable accommodations for pregnant workers, the courts would first need to acknowledge the disparate impact.

Members of Congress have introduced the Pregnant Workers Fairness Act, which would expand the Pregnancy Discrimination Act to require that

---

[36] Ashby, supra note 29 at 32.

[37] *Id.*

[38] *Id.*

pregnant employees be granted reasonable accommodations.[39] In addition, many states such as California have more protective laws than the PDA.[40] No federal court of appeal has adopted the position that failure to provide light duty or reasonable accommodations to pregnant women is a violation of the PDA. Doing so would be an important step in the federal scheme for women to gain the necessary accommodations in the workplace.

b. A limitation to the PDA is "no similarly situated" employees

Even if women are granted reasonable accommodations in line with the PDA, it is unclear how pregnant women will be accommodated in relation to others similar in their ability to work and how the various conditions related to reproduction will be handled. The PDA has been extremely useful in reshaping pregnancy-discrimination jurisprudence in the Supreme Court. However, the language of the statute does include some limitations. For example, the PDA states that pregnant women, "shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . ."[41] This language is not helpful because it is not clear what constitutes employees who are similar in their ability to work. The experience of pregnancy is unique to each woman. All pregnancies to some degree involve an enlarged abdomen, hormonal changes, weight gain, fetal movement and increased blood volume.[42] A woman dealing with complications due to pregnancy may experience depression, gestational diabetes, and severe, persistent nausea and vomiting.[43] In some cases women experience persistent nausea and vomiting throughout the entire pregnancy due to a condition called hyperemesis gravidarum (HG).[44] Hospitalization may be required in order to "be fed fluids and nutrients through a tube in their veins."[45] Additionally, some women may experience complications pre-pregnancy with fertility treatments and post-pregnancy with breastfeeding and postpartum depression.

---

39 *See* Ashby, *supra* note 29; Pregnant Worker's Fairness Act, S. 942, 113th Cong. (2014).

40 Cal. Gov. Code § 12945; Cal. Gov. Code 12945.2 (a).

41 42 U.S.C. § 2000e(k).

42 Stages of Pregnancy, Women's Health, *available at* http://womenshealth.gov/pregnancy/you-are-pregnant/stages-of-pregnancy.cfm (last visited May 19, 2015).

43 *Id.*

44 *Id. See* Pregnancy Complications.

45 *Id.*

Every woman's body copes with pregnancy in a different way and comparing the symptoms of pregnancy with those of others "similar in their ability to work" is not always practical or fair for women.

For example, in 1994 in *Troupe v. May Department Stores Company,* a pregnant worker was terminated because of excessive tardiness due to abnormal morning sickness.[46] The plaintiff brought suit under the PDA but was unsuccessful in her claim. The U.S. District Court for the Northern District of Illinois granted summary judgment for the employer.[47] On appeal, the Seventh Circuit held that because the worker could not provide evidence of a non-pregnant employee with similar tardiness that was treated better, she could not bring a claim for pregnancy discrimination.[48] Instead, the Court noted that her tardiness demonstrated that she could not meet the employer's requirements for her job and therefore her termination was not due to a pretext.[49] In *Troupe,* the plaintiff's recovery depended upon proving more favorable treatment of a non-pregnant but similarly situated employee. If such a person does not exist, then pregnant workers are limited in their recovery, and discrimination can occur without remedy. This case might have been decided differently if there had been a specific accommodations provision for pregnant workers rather than an approach demanding comparison with other similarly situated employees.

Due to the wide range of experiences with pregnancy, pregnant women cannot adequately be compared to other employees who do not share the highly-individualized experience of pregnancy.[50] The only effective way to accommodate women for whatever symptoms are manifested during pregnancy is to realize the unique experiences that pregnancy presents to each individual and provide reasonable accommodations accordingly. The PDA could be strengthened if it added language in line with this understanding.

As Maryn Oyoung suggests, a reasonable-accommodations provision in the PDA could be modeled after California law. Such provisions could

---

46 Troupe v. May Department Stores Company, 20 F.3d 734, 735 (7th Cir. 1994).

47 *Id. a*t 734.

48 *Id.* at 734, 736–37.

49 *Id.*

50 Maryn Oyoung, *Until Men Bear Children, Women Must Not Bear the Costs of Reproductive Capacity: Accommodating Pregnancy in the Workplace to Achieve Equal Employment Opportunities,* 44 McGeorge L. Rev. 515, 535 (2013).

include "job restructuring, modified work schedules, reassignment, modifications to examinations, policies, and other similar adaptations for individuals experiencing pregnancy or conditions related to the unique female reproductive capacity."[51] The exceptions to such accommodations would depend on whether such accommodations would cause an undue hardship on the employer, and the employer would be responsible for proving that the proposed accommodations would impose "significant difficulty or expense."[52] Instead, the reasonableness of the accommodations would be determined by the court based on the totality of circumstances. This test would include factors such as size, financial resources, nature, or structure of the employer's business.[53] When female employees file complaints with the EEOC claiming a violation of the PDA they often are not able to recover for discrimination or lack of reasonable accommodations claims. Adding specific provisions relating to reasonable accommodations and the totality of circumstances test would give teeth to the PDA and allow it to fulfill its mission to eliminate sex discrimination in the workplace due to pregnancy related conditions.

B. CALIFORNIA STATUTORY AND CASE LAW

In California, the Fair Employment and Housing Act and, more recently, the Pregnancy Disability Leave Law protect pregnant workers from discrimination in the workplace. These laws have generally been successful for securing greater protections for pregnant workers in California than provided by federal law. Nevertheless, the jurisprudence in California does not explicitly recognize a disparate impact due to lack of proper leave and reasonable accommodations.

1. Fair Employment and Housing Act (FEHA) and Pregnancy Disability Leave Law (PDLL)

Under the California Fair Employment and Housing Act, there is a prohibition against employment discrimination on the basis of sex.[54] The definition of the term "sex," includes, but is not limited to, pregnancy, childbirth,

---

[51] *Id.* at 515, 540.

[52] Cal. Gov. Code § 12926(u).

[53] *See, e.g.,* 29 U.S.C. § 207(r)(3) and Cal. Gov. Code § 12926(u)(2).

[54] Cal. Gov. Code 12940(a).

or medical conditions related to pregnancy or childbirth.[55] The California Fair Employment and Housing Act applies only to workplaces with five or more employees, as well as all employment agencies, labor organizations, state licensing boards, and state and local governments.[56]

The Pregnancy Disability Leave Law (PDLL) is a part of California's FEHA. It explicitly prohibits employers from harassing, demoting, terminating, or otherwise discriminating against any employee for becoming pregnant, or for requesting or taking pregnancy leave.[57] It also requires employers with five or more employees to provide reasonable accommodations and job-protected disability leave of up to four months for pregnancy, childbirth, and related conditions.[58] The PDLL is meant to provide a reasonable period of leave to workers disabled by their pregnancy, not to exceed four months.[59] An employee who is disabled by her pregnancy and entitled to PDLL leave may take the leave all at once, or in increments. An employer is not required to pay wages to an employee taking PDLL leave, unless it has a policy of paying wages for other types of temporary disability leaves. Furthermore, the employer must know the employee is pregnant in order for the employee to make a prima facie case of discrimination based on pregnancy.[60]

In California, there are considerably more protective laws for pregnant women such as the Paid Family Leave Act (PFL) and California Family Rights Act (CFRA). Certain employees have additional leave-and-return rights for health reasons or child bonding under the Family Medical Leave Act and the California Family Rights Act. CFRA allows new mothers and fathers to take up to twelve weeks to bond with a new baby or adopted child or to care for a family member or for their own medical condition. This means that a pregnant worker could take four months of PDLL leave and an additional leave for up to twelve weeks.[61] However these laws often do not meet the needs of all pregnant women because the female employee must be employed for twelve months with the employer and complete at least 1,250 hours of work

55 Cal. Gov. Code § 12926, (p).

56 Legal Aid Society, *supra* note 17.

57 CCR § 7291.3 and CCR § 7291.6.

58 CCR § 7291.2(h).

59 Cal. Gov. Code § 12945(b)(2); 2 Cal. Regs 7291.7(a).

60 Trop v. Sony Pictures Entertainment Inc., 129 Cal. App. 4th 1133 (2005).

61 Cal. Gov. Code § 12945.2(a).

within the preceding twelve months to be eligible for leave under FMLA.[62] The FMLA also leaves employees of smaller businesses unprotected because the protections only apply to employers with fifty or more employees.[63]

2. The delicate dance between Title VII and more protective state laws: PDA should be considered a floor beneath which protections cannot drop

In *California Federal Savings & Loan Association v. Guerra,* the U.S. Supreme Court was faced with the issue of whether a pregnant worker had a qualified right to reinstatement after a pregnancy leave of no more than four months.[64] This type of preferential treatment was not provided for employees who experienced other workplace disabilities.[65] The Court upheld the preferential treatment under the more protective California pregnancy leave laws and ruled that Title VII was intended as a floor beneath which pregnancy protection could not drop.[66] The Court in *California Federal Savings* held that Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, does not pre-empt a California statute (PDLL) that requires employers to provide leave and reinstatement to pregnant workers who are disabled. Congress was aware of state laws similar to the PDLL in California and did not consider them to be in conflict with the federal laws. Therefore, the Court in *California Federal Savings* held that the California statute was an acceptable expansion of pregnant workers' rights. Despite the favorable ruling for pregnant workers, the reasoning regarding disparate impact that the Supreme Court adopted in reaching its conclusion is problematic, as will be discussed later.

Courts are split over the idea of whether facially neutral laws violate the PDA when they have a disparate impact on pregnant employees. As Melissa Feinberg points out, the D.C. Circuit Court of Appeals and the Fourth Circuit Court of Appeals have held that a lack of adequate leave and disability benefits

---

62 26 U.S. Code § 2611(2)(A)(i).

63 26 U.S. Code § 2611(2)(B)(ii).

64 California Federal Savings & Loan Association v. Guerra, 479 U.S. 272 (1987).

65 *Id.*

66 *Id.* at 562, 565.

for pregnancy violates the PDA due to a disparate impact on women.[67] For example, in *Abraham v. Graphic Arts International Union,* the plaintiff brought an action because as a full-time temporary worker, she was only given ten days sick leave; the normal pregnancy leave is six weeks.[68] The D.C. Circuit held that insufficient leave time could not lawfully lead to termination of an employee under the PDA.[69] In *Abraham,* the Court recognized that insufficient leave has a disparate impact on pregnant women because it almost inevitably leads to their dismissal from work.[70] Similarly, the Fourth Circuit in *Brown v. Porcher*[71] held that denying unemployment compensation to women because they left their previous employment due to pregnancy violates federal law regardless of how non-pregnant disabled employees are treated.[72] As will be discussed below, the *California Federal Savings* case gives more insight into how the Court would rule on the issue of whether preferential treatment due to a disparate impact may be required under the PDA.

III. DISPARATE IMPACT STANDARD

A. RECOGNIZING THAT THE DISPARATE IMPACT STANDARD IS ESSENTIAL TO ENSURE GENDER EQUALITY FOR PREGNANT WORKERS

1. What is "disparate impact?"

Courts and lawmakers prioritize gender equality in the workplace as an important theme in the modern labor market. Facially neutral laws that treat men and women the same would appear to give both sexes equal opportunity. However, women are unique in their ability to bear children and often deal with complications and disability due to this unique characteristic. Therefore, laws such as the PDA and California's PDLL aim to create equality

---

[67] Abraham v. Graphic Arts International Union, 660 F.2d 811 (D.C. Cir. 1981); *see also* Melissa Feinberg, *After California Federal Savings and Loan Association v. Guerra: The Parameters of the Pregnancy Discrimination Act,* 31 Ariz. L. Rev. 141, 150–51 (1989).

[68] *Abraham,* 660 F.2d 811.

[69] *Id.* at 819.

[70] *Id.* at 819 n.64.

[71] Brown v. Porcher, 660 F.2d 1003–04. (1981).

[72] *See* Feinberg, *supra* note 67.

by giving women the opportunity to have children while maintaining their livelihood and career trajectory. Disparate impact in the arena of pregnancy discrimination is the concept that a lack of proper leave or reasonable accommodations disadvantages women by forcing women to choose between maintaining a career and having a family. Courts differ in how they reach conclusions regarding reasonable accommodations, disability benefits, and pregnancy leave for pregnant women. Courts that explicitly recognize a lack of certain minimum benefits as a "disparate impact" serve to close the gender gap while those courts that fail to make such recognition are furthering implicit gender discrimination in the workplace.

2. California and federal courts are slow to recognize disparate impact on pregnant women

The jurisprudence in California is more favorable toward pregnant employees due to more progressive state laws. However, both California and federal courts could do a better job of explicitly recognizing the disparate impact that pregnant women face in the workplace. In *Newport News Shipbuilding & Dry Dock Co. v. EEOC,* in 1983, the Court stated that the 1978 PDA makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions.[73] However, *Newport News* failed to link pregnancy discrimination to the disparate impact standard and furthermore to the need to have reasonable accommodations.

In *California Federal Savings & Loan Association v. Guerra,* in 1987, the Court ruled that Title VII does not preempt state statutes that accord preferential treatment to pregnancy.[74] The Court rejected the argument that the PDA prohibits all differentiation on the basis of pregnancy, and upheld a California statute that required employers to provide pregnancy leave for employees.[75] Even though the rulings in *Newport News* and *California Federal Savings* are favorable for pregnant employees, they failed to articulate specific limits on the scope of preferential treatment. As the Harvard Law Review Association notes, "Because the Court did not base its interpretation of the PDA on a finding that a lack of pregnancy leave has a disparate impact on women, *California Federal Savings* may create

[73] Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C., 462 U.S. 669, 684 (1983).
[74] California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 683, 693 (1987).
[75] *Id.*

the impression that pregnancy leave is merely a gratuitous dispensation to women, thereby reinforcing paternalistic stereotypes that traditionally have disadvantaged women in the workforce."[76] In order for pregnancy leave and reasonable accommodations to be deemed necessary, the Courts must get serious about recognizing the disparate impact of pregnancy discrimination and they must be serious about reversing the current trend. In addition, Congress and state legislatures must also take seriously the need to provide more statutory protections for pregnant employees that explicitly address the disparate impact that pregnancy employees currently face.

In *California Federal Savings,* the Court held that states might provide more protections than federal law under the PDA. However, it has not yet ruled on whether preferential treatment for pregnant employees is *required* under the PDA. Both the majority opinion in *California Federal Savings* and legislative history point to the proposition that the PDA does not require a disparate impact analysis to determine whether leave and benefit policies for pregnant employees are required.[77] However, Justice Stevens in the concurring opinion in *California Federal Savings* links the PDA with the broader agenda of Title VII. As Feinberg aptly notes, "Title VII case law recognizes discrimination claims grounded in disparate impact."[78] In a landmark Title VII case, *Griggs v. Duke Power,* the Court held that Title VII does not allow either overt or implicit discrimination.[79] As the EEOC Guidance document points out, when interpreting the PDA in line with other Title VII case law, courts should recognize disparate impact claims as a valid cause of action for pregnancy discrimination.[80] As noted above, pregnant women are a unique class of individuals and should be treated as such. Complications and disabilities that arise from pregnancy cannot adequately be compared to a group of non-pregnant, similarly situated employees without leading to disparate impacts for women. If there is no appropriate comparator, then women like the plaintiff in *Troupe* will have to deal with the harsh consequences of implicit discrimination in the workplace.

---

76 Title VII-Pregnancy Discrimination, 101 Harv. L. Rev. 320, 320–21 (1987).

77 California Federal Savings, 479 U.S. at 286–88.

78 Griggs v. Duke Power, 401 U.S. 424.

79 *Id.* at 431.

80 29 C.F.R. § 1404.10(c) (1988).

What will it take for the Supreme Court and California courts to recognize that pregnancy discrimination has a disparate impact on women? No matter what the answer is to this question, lawyers and legal advocates should champion the voice of pregnant employees who have experienced disparate impacts in the workplace. Through telling stories and raising awareness, we may be able to see gradual change in the legal system.

IV. THE FUTURE OF SEX JURISPRUDENCE

A. OUTCOME OF *YOUNG* CASE COULD SHAPE PREGNANCY AND SEX JURISPRUDENCE GOING FORWARD

The Fourth Circuit on remand from the Supreme Court made a ruling that widely affects sex jurisprudence in the United States. As discussed above, Peggy Young brought an action as a pregnant UPS worker who was expected to lift packages as heavy as seventy pounds on her job. She asked for an accommodation to be put on light duty and be required to lift no more than twenty pounds. However, UPS would not grant the accommodation. UPS's policy limits light duty work to (1) employees who have been injured on the job and (2) employees who have a disability as defined by the ADA. Ms. Young did not fit into either of these categories. Her only alternative was to take unpaid leave with no medical benefits. Although the leave would be far beyond what is given through the Family and Medical Leave Act (FMLA), Ms. Young argued that she should be able to receive light-duty assignments just like a worker injured on the job or a worker who had a qualifying disability under the ADA. UPS made accommodations for "on-the-job injuries, for disabilities entitled to accommodation under the Americans with Disabilities Act (ADA), and for conditions, medical or otherwise, leading to the loss of driving certification."[81] Nevertheless, at the federal appeals level, the Fourth Circuit Court of Appeals ruled for UPS, holding that Young did not experience pregnancy discrimination and that allowing her to go on "light duty" would give pregnant employees an advantage over other employees. Surprisingly, courts have found ways

[81] Young v. United Parcel Service, Inc., 707 F.3d 437 (4th Cir. 2013), petition for cert. filed, No. 12-1226, 2013 WL 1462041 (U.S. Apr. 8, 2013).

to discount analogies to workers who are "similarly situated" to pregnant women as a way to deny reasonable accommodations.[82]

Many women's advocacy groups, law professors and other organizations submitted briefs in support of Young stating that ruling against her would have devastating impacts for women most harmed by pregnancy discrimination — those in low-wage jobs who are most likely to experience conflict between maintaining a healthy pregnancy and meeting their job requirements. The EEOC guidance document however, reaches the opposite conclusion to that of the Fourth Circuit — it states that under the PDA, employers are required to provide light duty assignments to pregnant workers if the employer has a policy limiting to light duty workers injured on the job and/or employees with qualifying disabilities under the ADA.[83]

The Supreme Court ruled that Young should have the opportunity to make her case at the very least and remanded the case to the Fourth Circuit. Although this was not a groundbreaking decision for pregnancy discrimination, the Court, in a 6–3 decision, said Young could further her case using the framework of a disparate-impact claim, "showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under [the relevant civil rights law]."[84] As a result, the burden then shifted to UPS to show nondiscriminatory reasons why pregnant women were not included among the classes of workers accommodated.[85] The majority held that pregnant women do not have to be accommodated in a manner similar to non-pregnant employees with similar conditions as long as there is a legitimate reason.[86] Such an accommodation would be too broad and would turn an anti-discrimination statute into "a requirement to provide accommodation to pregnant employees, perhaps even at the expense of other, non-pregnant employees."[87] The employee could, however, show

82 Brake & Grossman, *supra* note 1 at 109.

83 *See* Ashby, *supra* note 29.

84 Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1354 (2015).

85 *Id.* at 1338, 1341.

86 Young v. United Parcel Serv., Inc., 707 F.3d 437, 446-47 (4th Cir. 2013) *cert. granted,* 134 S. Ct. 2898, 189 L. Ed. 2d 853 (2014) and *vacated and remanded,* 135 S. Ct. 1338 (2015) and *opinion amended and superseded,* No. 11-2078, 2015 WL 1600406 (4th Cir. Apr. 10, 2015).

87 *Id.* at 448.

that she faced "disparate treatment" from her employer — if the employer's actions were more likely than not based on discriminatory motivation, and the employer's reasons for doing so were a pretext.[88] An approach that analyzes "disparate treatment" focuses on the employer's actions and motivations to discriminate. By contrast, the "disparate impact" analysis asks how the policy adversely affected the woman.

Justice Kennedy in his dissent aptly points out that the majority in *Young* conflated "disparate treatment" and "disparate impact" and only addressed disparate treatment.[89] As Kennedy notes, "[t]he PDA forbids not only disparate treatment but also disparate impact, the latter of which prohibits 'practices that are not intended to discriminate but in fact have a disproportionate adverse effect.'"[90] Confusing these two concepts in the *Young* case likely contributed to the unfavorable ruling for Ms. Young. Although the Supreme Court dances around the idea, they have not yet definitively ruled on whether employees are required to receive reasonable accommodations under the PDA. Nonetheless, it is promising that the Court was at least willing to hear Young's discrimination case."[91]

UPS recently announced since Young's lawsuit that it would change its policy going forward and allow pregnant workers to stay on the job performing light-duty work.[92] This gives hope to many women that perhaps the greatest tool for pregnancy-related accommodations is increasing awareness among the public that companies are discriminating against pregnant employees. Public shaming of such companies can be a useful mechanism to change policy and enforce a larger agenda of equitable workplace conditions for women. It will also be telling whether other employers change their policies as UPS did to follow the EEOC guidelines or whether they follow the strict interpretation of the PDA.

---

88 *Id.* at 442.

89 Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1368 (2015).

90 *Id.* at 1367.

91 Nicole Flatow, U.S. Supreme Court sides with Pregnant Worker in Major Discrimination Case *available at* http://www.usnews.com/news/articles/2015/03/25/supreme-court-rules-against-ups-in-pregnancy-discrimination-case (last visited May 4, 2015).

92 *Id.*

V. PREGNANCY DISCRIMINATION IN THE FEMINIST CONTEXT

A. HOW TO ADDRESS THE PARTICULAR CONCERN OF WOMEN IN LOW-WAGE JOBS WHO EXPERIENCE PREGNANCY DISCRIMINATION

1. Pregnant women working in low-wage jobs, in lower socio-economic statuses, are more likely to suffer from pregnancy discrimination in the workplace

The women in low-wage jobs are at the highest risk when it comes to pregnancy discrimination. When women are paid less and are working in male-dominated jobs it becomes difficult to gain traction when they experience discrimination in any context. The PDA does not provide for additional protections for low-wage workers whose only comparators are employees who are treated just as badly as pregnant employees. If a minimum-wage employee needs leave or accommodations due to pregnancy but her "stingy" employer does not provide accommodations for any workers, the pregnant employee will receive the same poor treatment under the PDA.[93] This example again belies the assertion made earlier that pregnant women should be treated as a separate and unique class of employees who need varying accommodations in the workplace. Women in low-wage jobs with unforgiving bosses should not be punished for their socio-economic status.

As Brake and Grossman note,

> The women who lose the most under the courts' cramped readings of the PDA are the least privileged and most economically vulnerable women. The PDA is failing the women who need it most — those who work inflexible hours or in rigidly structured work settings or who perform physically demanding tasks. Cases like the one brought by a pregnant fitting room attendant at Wal-Mart who claimed that she was fired for carrying a water bottle at work (per doctor's orders) illustrate the problem. Professional women

[93] National Women's Law Center, It Shouldn't be a Heavy Lift: Fair Treatment for Pregnant Workers (2013) at 6–7, *available at* http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf (noting the inflexibility of employers in low-wage jobs).

> in more flexible work settings may still lose their cases, but they have a better chance of finding at least some protection under the Act, if they can prove that their opportunities were limited based on stereotyped and untrue assumptions about how pregnancy affects their work capacity or commitment. And they have a greater chance of reconciling the effects of pregnancy with work obligations without needing to resort to litigation. In short, while the PDA still offers some protection from animus-based discrimination, it has become increasingly unhelpful to those women whose pregnancies are most likely to harm their economic security.[94]

Furthermore, women in low-wage jobs with pregnancy complications may request reasonable accommodations such as temporary alternative duties, light duty or reassignment. These are all accommodations that may in some cases be required by the ADA.[95] For example, in *Arizanovska v. Wal-Mart Stores, Inc.*,[96] Ms. Arizanovska asked Wal-Mart for an accommodation when her doctor told her she could lift no more than ten pounds.[97] Wal-Mart denied the accommodation and placed her on an involuntary leave of absence.[98] The Court held that this Wal-Mart policy, which treats pregnancy different from disabilities accommodated by the ADA, was permissible.[99] Such disparate treatment of workers who are not treated the same as other non-pregnant employees similar in their ability to work is a violation of the PDA.

2. Recognizing the realities of childbirth rather than penalizing women for choosing to have a family

While the PDA may not leave room to provide benefits or incentives for women to have children, it does provide a floor for minimum protections. As Feinberg notes, "[i]nevitably, childbirth involves a period of disability.

---

94 Brake & Grossman, *supra* note 1 at 69–70.

95 *See, e.g.,* Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999) (holding that the ADA requires reasonable accommodation of an employee with a disability to a vacant position to which he seeks to transfer).

96 Arizanovska v. Wal-Mart Stores, Inc., 682 F.3d 698 (7th Cir. 2012).

97 *Id.* at 5.

98 *Id.* at 5–6.

99 *Id.* at 702.

Failure to consider this fact in fashioning a leave policy constitutes discrimination on the basis of pregnancy. Under the PDA, this constitutes gender-based discrimination and is therefore prohibited."[100] Despite the progress in statutory law, pregnant women need extra protections so they do not have to face the disparate impacts that men would never have to encounter in the workplace.[101] The disparate impact analysis takes into account the realities of childbirth and the need for women to have adequate leave, disability benefits, and reinstatement in the same or similar role as before her pregnancy leave. Employers who fail to take into account the needs of pregnant women implicitly further gender discrimination and continue to force women to make the difficult and unnecessary choice between career and family.

VI. CONCLUSION

Throughout modern history, pregnant women have faced considerable obstacles in entering the workforce, maintaining a successful career trajectory, and making a decent living while often dealing with disabilities and complications arising from pregnancy. In this scheme, women at lower socio-economic levels are the most at-risk population; the PDA does little to protect poorer women from harsh workplace policies. At this time, the law can be exercised as a powerful tool to secure rights for pregnant women. The California and federal judiciary can expressly tackle the ideas of disparate impact, reasonable accommodations, and proper leave laws. In addition, state and federal legislatures can address the same ideas through legislation that will allow women to maintain dignity in their jobs, raise a family, and maintain a career without unnecessary complications.

* * *

100 Feinberg, *supra* note 67 at 151; 42 U.S.C. § 2000e(k).

101 *Abraham, supra* note 67 at 819.

PROTECTING OUR CHILDREN:

The California Public School Vaccination Mandate Debate

ELAINE WON*

TABLE OF CONTENTS

CONTINUED ON NEXT PAGE

* J.D. Candidate, Class of 2016, UC Davis School of Law. I would like to thank Professor John Oakley for his guidance and encouragement on this paper.

INTRODUCTION

In late December of 2014, a measles outbreak sickened 147 people in the United States.[1] Of those cases, 131 were in California.[2] Six of these measles cases were among infants who were too young to be vaccinated.[3] Health officials suspected that this outbreak originated from an overseas visitor who spread the disease at Disneyland in Anaheim, California.[4] While measles outbreaks are rare in the United States, outbreaks have occurred in U.S. communities with low vaccination rates.[5] The Disneyland measles outbreak highlighted a small, but growing population of parents who refuse to vaccinate their children for religious or other personal reasons.[6]

While the United States does not have federal vaccination laws, each of the fifty states have laws mandating vaccination of children against diphtheria, tetanus, pertussis, polio, measles, and rubella as a condition of enrolling in public schools.[7] However, there are exemptions to this rule.[8] All states allow a medical exemption where vaccinations would complicate the health of the child; most states have a religious exemption; and nineteen states have a personal-belief exemption.[9] California is one of nineteen states that allow all three of these exemptions [prior to enactment of SB 277 in June 2015].[10]

As children, and particularly those who are unvaccinated, are at higher risk of contracting and spreading diseases, public schools have become

---

[1] Alicia Chang, *Disney Mealses Outbreak That Sparked Vaccination Debate Ends,* Associated Press (Apr. 17, 2015, 4:44 PM), http://hosted2.ap.org/APDEFAULT/bbd825583c8542898e6fa7d440b9febc/Article_2015-04-17-US--Measles%20Outbreak-Things%20to%20Know/id-23d959cc52384abbb72c1b7c9d320a1b.

[2] *Id.*

[3] Christopher Ingraham, *California's Epidemic of Vaccine Denial, Mapped,* The Wash. Post (Jan. 27, 2015), http://www.washingtonpost.com/blogs/wonkblog/wp/2015/01/27/californias-epidemic-of-vaccine-denial-mapped/.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *State Vaccination Exemptions for Children Entering Public Schools,* ProCon.org, http://vaccines.procon.org/view.resource.php?resourceID=003597 (last visited Mar. 8, 2015).

[8] *Id.*

[9] *Id.*

[10] *Id.*

the hotbed for the vaccination debate. Pro-vaccinators argue that children must be vaccinated in the absence of a medical issue in order to maintain herd immunity.[11] Herd immunity occurs when approximately 90 percent of a community is vaccinated and protected from disease.[12] The higher this percentage of immunization is, the less potential there is for an outbreak.[13] This could be a matter of life or death in cases of children who cannot be vaccinated due to weak immune systems caused by chemotherapy or other health issues.[14] On the other hand, anti-vaccinators who claim a personal-belief exemption cite the purported link between vaccinations and autism.[15]

Recently, the California Senate introduced SB 277, a bill that would eliminate California's religious and personal-belief exemptions from the mandate requiring vaccinations for students seeking to attend public school.[16] The bill was recently passed by the California Senate and referred to the California Assembly Committee on Health for additional amendments.[17] Anti-vaccinators, however, continue to oppose the bill, arguing that the bill forces their children to be homeschooled.[18] They further contend that homeschooling is infeasible for single-parent and low-income families and would strip their children of their right to obtain a

---

[11] *Community Immunity ("Herd Immunity"),* VACCINES.GOV, http://www.vaccines.gov/basics/protection/ (last visited Apr. 18, 2015).

[12] Emily Willingham & Laura Helft, *What is Herd Immunity,* KVIE, http://www.pbs.org/wgbh/nova/body/herd-immunity.html (last visited Mar. 8, 2015).

[13] *Id.*

[14] Lisa Aliferis, *To Protect His Son, A Father Asks School to Bar Unvaccinated Children,* NPR (Jan. 27, 2015, 5:05 PM), http://www.npr.org/blogs/health/2015/01/27/381888697/to-protect-his-son-a-father-asks-school-to-bar-unvaccinated-children.

[15] Steven Salzberg, *Anti-Vaccine Movement Causes the Worst Whooping Cough Epidemic in 70 Years,* FORBES (July 23, 2012, 6:00 AM), http://www.forbes.com/sites/stevensalzberg/2012/07/23/anti-vaccine-movement-causes-the-worst-whooping-cough-epidemic-in-70-years/.

[16] A Senate Bill Removing Religious and Personal Belief Exemptions from Vaccination Mandates, S.B. 277, 2015 Sess. (C.A. 2015), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB277 [hereinafter SB 277 Bill Text].

[17] *Id.*

[18] Tracy Seipel, *Vaccine Exemption: California SB 277 Opponents Vow to Pull Kids from School if Bill Passes,* SAN JOSE MERCURY NEWS (Apr. 13, 2015, 6:24 PM), http://www.mercurynews.com/health/ci_27907241/vaccine-exemption-california-sb-277-opponents-vow-pull.

public school education.[19] The fundamental issue underlying this debate is whether one student's right to an education trumps another student's right to stay healthy.[20]

This paper argues that SB 277 is constitutional. Part I provides background to the debate on balancing health and education in California public schools. Part II discusses foundational case law and statutes on vaccination. Part III analyzes the constitutional complexities that SB 277 brings to the debate. Part IV addresses concerns of inability to access vaccinations and adjustments to the terms of SB 277 with future biomedical advances. Part V is a summary and conclusion.

I. BACKGROUND: THE ANTI-VACCINATION DEBATE

This section provides a general background to the vaccination debate. It first discusses the idea of "herd immunity" and why low vaccination rates in public schools are of concern. It then tracks the increasing level of unvaccinated children in California and what contributed to the recent trend of unvaccinated children. Finally, this section discusses the demographics of anti-vaccinators in California.

A. HERD IMMUNITY

Pro-vaccinators emphasize the importance of immunization because of the idea of community immunity, or "herd immunity."[21] Herd immunity is critical to a community's health because it prevents the potential for outbreak and infection of individuals who are particularly vulnerable to disease.[22] These persons include infants, pregnant women, or immunocompromised individuals.[23] While the threshold vaccination percentage for herd immunity is dependent on the disease, most diseases meet

---

19 Dave Marquis, *Bill Requiring Student Vaccinations Headed to Committee, Again,* News 10 ABC (Apr. 22, 2015, 10:48 AM), http://www.news10.net/story/news/local/california/2015/04/22/vaccine-bill-immunize-home-school-amendments-vaccinate/26167515/.

20 *Id.*

21 *Community Immunity, supra* note 11.

22 *Id.*

23 *Id.*

the minimum threshold at around 85 percent, but can range up to 94 percent.[24]

B. THE INCREASE OF ANTI-VACCINATORS IN CALIFORNIA

The anti-vaccination movement has existed for over one hundred years in the United States.[25] The theories that existed a century ago regarding the perils of vaccination tend to parallel the arguments for anti-vaccination today. In 1898, a pamphlet claimed that vaccination "increases disease and *mortality,* and is believed to be the most likely cause of the increase of *consumption* and *cancer,* and probably many other forms of disease."[26] A *Washington Post* article notes that anti-vaccination ideas included fear of cancer caused by impurities in the blood from vaccines and the belief that alternative medicine is a more effective option than vaccines.[27] Many of these anti-vaccination pamphlets appealed to mothers worried about what chemicals their children were exposed to.[28]

Despite the long history of anti-vaccination in the United States, vaccination exemptions of children in public and private schools have doubled in just the last eight years.[29] In 2000, 0.77 percent of California kindergarteners had personal-belief exemptions.[30] This number quadrupled to 3.15 percent by 2013.[31] This pattern is attributed to a 1998 study by Dr. Andrew Wakefield. A well-respected British medical journal, *The Lancet,* published Dr. Wakefield's research, which linked measles, mumps, and

---

24 Willingham & Helft, *supra* note 12.

25 Abby Ohlheiser, *Meet the Crunchy, Chemical-Hating Anti-Vaccine Conspiracy Theorists. From 100 Years Ago,* The Wash. Post (Feb. 5, 2015), http://www.washingtonpost.com/blogs/wonkblog/wp/2015/02/05/meet-the-crunchy-chemical-hating-anti-vaccine-conspiracy-theorists-from-100-years-ago/.

26 *Id.*

27 *Id.*

28 *Id.*

29 Michael Hiltzik, *Rich, Educated and Stupid Parents are Driving the Vaccination Crisis,* L.A. Times (Sept. 3, 2014, 1:18 PM), http://www.latimes.com/business/hiltzik/la-fi-mh-vaccination-crisis-20140903-column.html.

30 Ingraham, *supra* note 3.

31 *Id.*

rubella vaccines to autism in children.[32] The study was widely reported, especially to parents with autistic children.[33] While Dr. Wakefield's study was retracted because no doctors could replicate the study and no other research has linked vaccines to autism, the anti-vaccination movement has continued.[34]

There are various factors that have contributed to the continuing vaccination scare. In the early 2000s, politicians in England and the United States sparked the modern vaccination debate.[35] However, the recent spread of the anti-vaccination scare was due to the media.[36] Prominent print and online magazines as well as veteran journalists printed various anti-vaccination articles which spread across the nation.[37] In 2011, the anti-vaccination debate found a staunch advocate in actress Jenny McCarthy.[38] Since then, various media personalities and shows have weighed in on the vaccination debate.[39] Although the Institute of Medicine and the Centers for Disease Control and Prevention released reports that disputed the link between vaccines and various developmental disorders, the U.S. media largely ignored this information.[40]

C. DEMOGRAPHICS OF ANTI-VACCINATORS IN CALIFORNIA

The *Los Angeles Times* reports that higher rates of personal-belief exemptions are correlated with high median incomes.[41] One study finds that in Los Angeles County, there are more than 150 schools "with exemption rates of 8 percent or higher for at least one vaccine [which] were located in census tracts where the incomes averaged $94,500 — nearly 60 percent

---

[32] Brian Krans, *Anti-Vaccination Movement Causes a Deadly Year in the U.S.*, Healthline (Dec. 3, 2013), http://www.healthline.com/health-news/children-anti-vaccination-movement-leads-to-disease-outbreaks-120312.

[33] *Id.*

[34] *Id.*

[35] Curtis Brainard, *Sticking with the Truth,* Columbia Journalism Review (May/June 2013), http://www.cjr.org/feature/sticking_with_the_truth.php.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] Hiltzik, *supra* note 29.

higher than the county median." Another study reports that rich charter schools have the highest exemption rates.[42]

Although, as stated earlier in Part IA, most diseases meet the threshold vaccination percentage for herd immunity at around 85 percent, an 8 percent exemption seriously threatens this immunity and causes the community to be prone to an outbreak.[43] Another article demonstrates how, in the last thirteen years, vaccination exemptions have tended to increase in wealthy coastal California cities.[44] In certain school districts in California, these rates are even higher.[45] Ocean Grove Charter School in Boulder Creek reports a 51 percent personal-belief exemption.[46] Certain private schools report a 75 percent or higher personal-belief exemption rate.[47] In the Montecito Union School District in Santa Barbara, which reports a 27.5 percent exemption rate, the median income is nearly $103,000.[48]

One question is why higher-income families tend to avoid vaccination. One article reports that parents who avoid vaccination tend to have less trust in governmental authorities.[49] Anti-vaccinators also tended to have a wider social network, comprising books, blogs, websites, and magazines, which they utilized for information on vaccination, and to rely on trends.[50] Nina Shapiro, a professor at the UCLA School of Medicine, writes that this trend falls into the "whole natural, BPA-free, hybrid car community that says 'we're not going to put chemicals in our children.'"[51] Seth Mnookin, a journalist and author writing on the anti-vaccination

---

42 Philip N. Cohen, *Charter, Private, and Wealthy Schools Lead California Vaccine Exemptions,* Family Inequality (Feb. 4, 2015, 7:00 AM), https://familyinequality.wordpress.com/2015/02/04/more-on-california-vaccine-exemptions/.

43 Hiltzik, *supra* note 29.

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 Hiltzik, *supra* note 29.

49 Whet Moser, *Why Do Affluent, Well-Educated People Refuse Vaccines?,* Chicago Mag. (Mar. 26, 2014), http://www.chicagomag.com/city-life/March-2014/Why-Is-Vaccine-Refusal-More-Prevalent-Among-the-Affluent/.

50 *Id.*

51 Alex Seitz-Wald, *What's With Rich People Hating Vaccines?,* Salon (Aug, 14, 2013, 4:45 AM), http://www.salon.com/2013/08/14/whats_with_rich_people_hating_vaccines/.

movement, reaffirmed this sentiment, noting that families with a higher income could afford the expensive consequence of avoiding vaccination, and "tended to be self-satisfied, found it difficult to conceive of a world in which their voices were not heard, and took pride in being intellectually curious, thoughtful, and rational."[52]

II. THE UNITED STATES AND CALIFORNIA VACCINATION MANDATES

This section discusses foundational vaccination cases that paved the way for the current debate over vaccinations for children in California public schools. *Jacobson v. Massachusetts*[53] introduces the law behind mandating vaccination, while *Abeel v. Clark*[54] and *Zucht v. King*[55] discuss the constitutionality of mandating vaccines for students entering public school in California. *Prince v. Massachusetts*[56] discusses why parental rights do not trump the preservation of community health and safety. *Wong Wai v. Williamson*[57] clarifies exactly when a vaccination mandate may be applied in an unconstitutional, discriminatory manner; this will provide a standard in determining whether SB 277 unfairly targets a certain class of individuals in California. *Williams v. State* is a settled California case that discusses public schools' duty to maintain the health of its students.[58] Finally, the next few sections introduce specific California statutes mandating vaccination — and amendments to the statutes in order to address a growing number of unvaccinated children — and explore instances in which excluding unvaccinated children may be warranted.

---

[52] Moser, *supra* note 49.

[53] 197 U.S. 11 (1905).

[54] 84 Cal. 226 (1890).

[55] 260 U.S. 174 (1922).

[56] 321 U.S. 158 (1944).

[57] 103 F. 1 (N.D. Cal. 1900).

[58] *Notice of Class Action Settlement in the Williams v. State of California Education Lawsuit,* Cal. Dept. of Educ., http://www.cde.ca.gov/eo/ce/wc/noticeenglish.asp (last visited Apr. 3, 2015) [hereinafter Williams v. State of California *Settlement Notice*].

A. *JACOBSON V. MASSACHUSETTS:* THE BROAD VACCINATION MANDATE

Jacobson v. Massachusetts[59] was a 1905 United States Supreme Court case that upheld the right of the states to enforce compulsory-vaccination laws. In *Jacobson,* the court addressed a 1902 regulation that mandated vaccination against smallpox, which was a prevalent disease and growing threat in the city of Cambridge during the early 1900s.[60] While a medical exemption for children existed, Massachusetts maintained that individuals over the age of 21 were required to receive vaccinations or pay a fine of five dollars.[61] Henning Jacobson refused to be vaccinated, claiming that a vaccine had made him seriously ill as a child.[62] He was charged with criminally failing to be vaccinated despite being over the age of 21 and having access to free vaccinations.[63]

Jacobson broadly argued that the Massachusetts law requiring vaccination violated the "spirit" of the United States Constitution and cited the state's duty to uphold the Constitution through the Fourteenth Amendment.[64] He further argued that the law invaded his liberty when the state subjected him to a fine or imprisonment as a result of his choice to refuse vaccination.[65] He noted that it was "hostile to the inherent right of every freeman to care for his own body and health in such a way as to him seems best" and argued that such penalties would be "an assault upon his person."[66] The Supreme Court disregarded the Fourteenth Amendment argument, noting that it was not the source of any substantive power of the U.S. government.[67] Holding that the state had the authority to enact this statute under its police power, the Court discussed the validity of a compulsory-vaccination mandate.[68]

---

59 197 U.S. 11 (1905).
60 Jacobson v. Massachusetts, 197 U.S. 11, 12–13 (1905).
61 *Id.* at 12.
62 *Id.* at 37.
63 *Id.* at 13.
64 *Id.*
65 *Id.* at 26.
66 *Id.*
67 *Id.* at 13, 26.
68 *Id.* at 26.

The Court concluded that individual constitutional rights may be reasonably constrained for the common good.[69] Specifically, the Court reasoned that real liberty in an organized society can only exist when weighed against the injury that may be inflicted on others as a consequence of individual action.[70] The Court acknowledged that the common good is facilitated by the legislature, which exercises the police power of the states.[71] Importantly, the Court noted that the opinion of a minority of individuals who believe in the harmful effects of vaccinations was trumped by the "common belief" of the majority of people and medical professionals who accept vaccinations as an effective method of preventing disease.[72] The Court further reasoned that a "common belief, like common knowledge, does not require evidence to establish its existence," and that the legislature and judiciary may act on this common belief without proof.[73] Thus, weight is given to common belief despite the possibility that it may be invalidated in the future.[74]

In this case, the Court noted that the state took reasonable and appropriate measures when mandating adult vaccination.[75] The state required vaccination during an emergency called by the board of health, which was composed of persons who would be fit to determine this need.[76] The Court determined that while blanket, compulsory vaccination is unconstitutional, a mandate with medical exemptions that results in a fine or imprisonment for refusing to vaccinate is valid.[77]

B. *ABEEL V. CLARK:* THE PUBLIC SCHOOL VACCINATION MANDATE IN CALIFORNIA

Abeel v. Clark[78] was an 1890 California Supreme Court case that affirmed that children could be denied admission to public schools for failing to

---

69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.* at 34–35.
73 *Id.* at 35.
74 *Id.*
75 *Id.* at 27.
76 *Id.*
77 *Id.*
78 84 Cal. 226 (1890).

obtain necessary vaccinations. At the time of this case, a 'Vaccination Act' mandated the vaccination of all children seeking admission into school, unless the child obtained a medical exemption from a licensed physician.[79] James Abeel, the student seeking admission, argued that this act was unconstitutional because: (1) the subject of the act was not expressed in the title, and (2) the act was special, not general, in its scope.[80]

The first argument refers to what is now California Constitution article IV, section 9.[81] The purpose of this provision is to prevent legislators and the public from being misled by the title of legislation.[82] The Court quickly dismissed this argument, noting that 'Vaccination Act' is a reasonable title for a mandate that requires vaccination.[83] The second argument was that the act is discriminatory because it impacts a certain class of individuals.[84] The Court reasoned that the class of students who attend public schools in the state is general in its scope.[85] The act does not need to include all classes of individuals in the state to be considered nondiscriminatory.[86] *Abeel* confirms that a broad vaccination mandate for public school children is valid, but discriminatory application of such a mandate would be unconstitutional.[87]

In the 1922 case of *Zucht v. King,*[88] the U.S. Supreme Court ratified the holding in *Abeel,* holding that children who failed to obtain vaccinations and did not have a valid exemption could constitutionally be excluded from public and private schools.[89] Furthermore, the Court noted that this exclusion was valid even when there was "no [particular] occasion for requiring vaccination," because the board of health had full, constitutional discretion to determine when vaccinations were mandatory for school children.[90]

---

79 Abeel v. Clark, 84 Cal. 226, 227–28 (1890).
80 *Id.* at 228.
81 *Id.* at 228; Ca. Const. art. 4, § 9.
82 *Clark,* 84 Cal. at 228.
83 *Id.* at 229.
84 *Id.*
85 *Id.* at 229–30.
86 *Id.* at 230.
87 *Id.*
88 260 U.S. 174 (1922).
89 Zucht v. King, 260 U.S. 174, 177 (1922).
90 *Id.* at 175.

C. *PRINCE V. MASSACHUSETTS:* PARENTAL RIGHTS

This 1944 U.S. Supreme Court case addressed the issue of when parental rights in caring for their children conflicts with another government interest.[91] In *Prince v. Massachusetts,* Sarah Prince was convicted for violating Massachusetts' child-labor laws, which mandated that no boy under twelve and no girl under eighteen be allowed to sell or offer for sale merchandise in any street or public place.[92] Prince allowed her two sons to engage in preaching activities, which consisted of selling copies of Jehovah's Witness religious material.[93]

In upholding Prince's conviction, the Court looked at the balance between Prince's rights and the legitimate exercise of the state's police power over individual behavior.[94] Prince's interests included "freedom of conscience and religious practice," which is connected with her authority over her household and the "rearing of her children."[95] On the other hand, these rights conflict with the state's interest in protecting the welfare of children.[96] Here, Prince's right to exercise her religion and to raise her children in her preferred manner conflicted with the state's interest in protecting children from being exploited for labor.[97] The Court concluded that family and parental rights are subject to regulation in order to maintain this public interest of protecting children from exploitation.[98]

The Court provided further instances where this principle may come into effect.[99] The Court noted that the state may restrict a parent's control by requiring children to attend school, by regulating child labor, and by mandating vaccination over religious objections.[100] In regard to vaccination, the Court argued that the "right to practice religion freely does not include liberty to expose the community or the child to communicable

---

91 Prince v. Massachusetts, 321 U.S. 158, 159 (1944).
92 *Id.* at 159–60.
93 *Id.* at 161–62.
94 *Id.* at 165.
95 *Id.*
96 *Id.* at 165–66.
97 *Id.*
98 *Id.*
99 *Id.* at 166.
100 *Id.*

disease or the latter to ill health or death."[101] The Court placed higher restrictions on children's activities because the United States relies on a "healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."[102] While adults may choose specific actions that may harm themselves or make them "martyrs," they do not have the authority to subject their children to potentially harmful behavior "before they have reached the age of full and legal discretion when they can make that choice for themselves."[103]

D. *WONG WAI V. WILLIAMSON:* UNNECESSARY VACCINATION RESTRICTIONS

However, it is possible for a vaccination mandate to be invalid even when the government claims it is meant to protect the health and safety of the community. In *Wong Wai v. Williamson,*[104] a federal circuit-court injunction in San Francisco was overturned. This injunction required all Chinese residents in San Francisco to receive a dangerous vaccination for the bubonic plague as a requirement to leaving the city.[105] In overturning the injunction, the Supreme Court noted that this vaccination was not implemented to protect the community against the bubonic plague, but instead was "boldly directed against the Asiatic or Mongolian race as a class, without regard to the previous condition, habits, exposure to disease, or residence of the individual."[106] The Court further reasoned that the suggestion that a particular race was more susceptible to the plague than another was not sufficient justification for implementing such a mandate.[107]

E. *WILLIAMS V. STATE:* SCHOOLS HAVE THE DUTY TO MAINTAIN HEALTH STANDARDS

Williams v. State was a 2004 class-action lawsuit brought against the State of California, the California Department of Education, California

---

101 *Id.* at 166–67.
102 *Id.* at 168.
103 *Id.* at 170.
104 103 F. 1 (N.D. Cal. 1900).
105 Wong Wai v. Williamson, 103 F. 1, 3 (N.D. Cal. 1900).
106 *Id.* at 7.
107 *Id.*

Board of Education, and California Superintendent of Public Instruction, alleging that students were attending substandard schools.[108] One of the deprivations that the lawsuit defined was an "inadequate, unsafe, and unhealthful" school facility where the students were subject to unsafe temperatures and unsanitary conditions that would subject them to disease.[109] While this lawsuit was ultimately settled, the state's reluctance to contest the merits of the lawsuit suggests that California schools may have the duty to preserve a healthy environment for their students.[110]

F. CAL. HEALTH AND SAFETY CODE SECTION 120325 ET SEQ.

California also mandates immunization for children entering public and private schools in its Health and Safety Code.[111] Section 120335 requires both public and private school districts (including those that govern childcare centers, day nurseries, nursery schools, family-care homes, or development centers) not to admit students who have not been fully immunized.[112] The section specifically mandates immunizations against the following diseases: diphtheria, haemophilus influenza type B, measles, mumps, pertussis (whooping cough), poliomyelitis, rubella, tetanus, hepatitis B, and chickenpox.[113] It further states that students need not be fully immunized against hepatitis B to advance to the seventh grade, but must be immunized against whooping cough to do so.[114] The Health and Safety Code also provides exemptions from this mandate.[115] Section 120365 provides a religious and personal-belief exemption. Section 120370 provides a medical exemption.[116]

---

108 Williams v. State of California *Settlement Notice, supra* note 58.

109 *Id.*

110 *Id.*

111 Cal. Health & Safety Code § 120325 et seq. (West 2015).

112 Health & Safety § 120335.

113 *Id.*

114 Health & Safety §§ 120365, 120370.

115 Health & Safety § 120365.

116 Health & Safety § 120370.

G. AB 2109: AMENDING CAL. HEALTH AND SAFETY CODE SECTION 120365

In response to the growing anti-vaccination movement, the California legislature passed AB 2109 in late 2012.[117] This bill required parents to see a pediatrician or health-care practitioner before obtaining a religious or personal-belief exemption for their children.[118] However, upon signing the bill, Governor Brown added a directive that allowed for a separate religious exemption on the form.[119] The bill went into effect in January 2014.[120] In the first year of the bill's implementation, 20 percent fewer parents used the personal-belief exemption.[121]

H. EXCLUDING UNVACCINATED STUDENTS FROM PUBLIC SCHOOLS

Currently, California schools may exclude unvaccinated children during instances of an outbreak. The California Department of Public Health is vested with this ability to exclude students during outbreaks, which is outlined in the affidavit for personal-belief exemptions.[122] The specific regulation authorizing the Public Health Department to exclude unvaccinated students is 17 California Code of Regulations section 6060.[123] In cases of an outbreak, such as that of measles early in 2015, a local health officer

---

117 An Assembly Bill Mandating Physician Consultation for Religious and Personal Belief Exemptions, A.B. 2109, 2012 Sess. (C.A. 2012), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB277 [hereinafter AB 2109 Bill Text].

118 *Id.*

119 *Jerry Brown Signs Bill Requiring Signatures for Those Opting Out of Vaccinations,* Capitol Alert, The Sac. Bee (Sept. 30, 2012), http://blogs.sacbee.com/capitolalertlatest/2012/09/jerry-brown-signs-bill-requiring-signatures-for-those-opting-out-of-vaccinations.html [hereinafter Capitol Alert].

120 *Id.*

121 David Greenwald, *Legislation Introduced That Would End California's Vaccine Exemption Loophole,* The People's Vanguard of Davis (Feb. 6, 2015), http://www.davisvanguard.org/2015/02/legislation-introduced-that-would-end-californias-vaccine-exemption-loophole/.

122 Giana Magnoli, *Hope School District Cleared to Exclude Unvaccinated Students in Case of Measles Outbreak,* Noozhawk (May 5, 2015, 11:21 AM), http://www.noozhawk.com/article/hope_school_district_could_exclude_unvaccinated_students_during_outbreak; Personal Beliefs Exemption to Required Immunizations, http://eziz.org/assets/docs/CDPH-8262.pdf (last visited Apr. 20, 2015).

123 Cal. Code Regs. tit. 17, § 6060 (2015).

will decide whether a specific school district may exclude unvaccinated children.[124]

While there are parents who are against exclusion of unvaccinated students from public schools, there are also parents who are pushing this further and are calling for the exclusion of unvaccinated children from public schools whether or not an outbreak has occurred.[125] An illustrative case for this need is found in Rhett Krawitt.[126] Rhett is a six-year-old student in Marin County, California, who fought leukemia for the last five years.[127] As a result of his chemotherapy, he is unable to be vaccinated because his immune system is still rebuilding.[128] While the measles may not be as serious for any other student, it would be extremely debilitating to Rhett.[129] This is one of the situations that SB 277 is attempting to address.

III. THE CONSTITUTIONALITY OF SB 277

SB 277 was introduced on February 19, 2015 by Senator Richard Pan (D-Sacramento), a pediatrician, and Senator Ben Allen (D-Santa Monica), a professor and attorney.[130] SB 277 seeks to combat the danger arising out of a growing population of unvaccinated children by eliminating the religious and personal-belief exemptions from the California Health and Safety Code. The approval of this bill would make California one of three states that offer only a medical exemption to state vaccination laws (the other two being Mississippi and West Virginia).[131] This section addresses how SB 277 alters California's vaccination laws, the criticisms of SB 277, and the constitutionality of the bill [signed into law by the governor, June 30, 2015].

---

124 Magnoli, *supra* note 122.

125 Aliferis, *supra* note 14.

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

130 SB 277 Bill Text, *supra* note 16.

131 *State Vaccination Exemptions,* Nat'l Vaccine Info. Center, http://www.nvic.org/CMSTemplates/NVIC/pdf/state-vaccine-exemptions_blue.pdf (last visited Mar. 29, 2015).

A. THE TERMS OF SB 277

On April 22, 2015, an amended version of Senate Bill 277 was passed by the California Senate Education Committee.[132] This bill would remove both the religious and personal-belief exemptions from California's vaccination mandate for students, requiring unvaccinated students to receive a "home-based private school" or "independent study" education.[133] The amended bill specifically addresses concerns that unvaccinated children would have difficulty accessing an education by broadening an exemption for home-schooled children.[134] Under this broadened amendment, multiple families would be able jointly to homeschool their unvaccinated children.[135] Furthermore, unvaccinated children would be allowed to enroll in independent-study programs run by school systems.[136] If SB 277 passes, this would also negate AB 2109, which requires consultation with a pediatrician or health care practitioner before applying for a religious or personal-belief exemption.[137]

On April 28, 2015, the Senate Judiciary Committee passed the bill, as amended to clarify that the bill would only mandate vaccinations for ten diseases: diphtheria, hepatitis B, haemophilus influenza type b, measles, mumps, pertussis (whooping cough), poliomyelitis, rubella, tetanus, and varicella (chickenpox).[138] Any additional vaccinations would need to be deemed appropriate by several health groups and departments.[139] Furthermore, on June 10, 2015, the Assembly Health Committee passed the bill with an amendment that specifies that a licensed physician may consider

---

132 *Senators Richard Pan and Ben Allen's SB 277 Passes Senate Education Committee on Bipartisan Vote,* California Senator Richard Pan (Apr. 22, 2015), http://sd06.senate.ca.gov/news/2015-04-22-senators-richard-pan-and-ben-allen% E2%80%99s-sb-277-passes-senate-education-committee.

133 SB 277 Bill Text, *supra* note 16.

134 *Id.*

135 Capitol Alert, *supra* note 119.

136 *Id.*

137 SB 277 Bill Text, *supra* note 16.

138 Senate Judiciary Committee, *Media Archive,* California State Senate (Apr. 28, 2015), http://senate.ca.gov/media-archive [hereinafter Senate Judiciary Committee Video].

139 SB 277 Bill Text, *supra* note 16.

family medical history when evaluating the necessity of a medical exemption for a child.[140]

Those opposed to SB 277 have raised several primary points of concern. The first is the idea that the bill violates the religious and parental rights of parents and children who oppose vaccinations for religious reasons.[141] The second is that the bill discriminates against a "class" of unvaccinated and partially vaccinated children.[142] Third, anti-vaccinators argue that the bill would interfere with a child's right to a public education.[143] Lastly, opponents of the bill claim that there is no compelling interest in this case because there is no pressing or medically verified need to pull unvaccinated children from public schools.[144]

B. GOVERNMENT INTEREST IN MANDATING VACCINATIONS IN PUBLIC SCHOOLS TO PRESERVE PUBLIC SAFETY TRUMPS RELIGIOUS AND PARENTAL RIGHTS

While the exclusion of unvaccinated students during an outbreak is standard procedure across the nation, there have been cases challenging the constitutionality of these directives. *Phillips v. City of New York,*[145] a recent New York federal district court case, addressed whether the exclusion policy violated the rights of children exempted on religious grounds.[146] The court ruled that there is no constitutional right to a religious vaccine-exemption.[147] The court noted that the Supreme Court has "strongly suggested that religious objectors are not constitutionally exempt from vaccinations" under *Jacobson v. Massachusetts,* and that sister courts in its Eastern District have rejected a constitutional exemption from vaccinations.[148]

---

140 *Id.*

141 Senate Education Committee, *Media Archive,* California State Senate (Apr. 15, 2015), http://senate.ca.gov/media-archive [hereinafter Senate Education Committee Video 1].

142 *Id.*

143 *Id.*

144 Senate Judiciary Committee Video, *supra* note 138.

145 27 F. Supp. 3d 310 (E.D.N.Y. 2014).

146 Phillips v. City of New York, 27 F. Supp. 3d 310, 311 (E.D.N.Y. 2014).

147 *Id.* at 312.

148 *Id.*

This case suggests that laws which interfere with individual liberties in the name of public health, such as SB 277, may be valid.[149] Furthermore, this case affirms that California does not have to provide a religious exemption from mandated vaccinations in public schools in the name of protecting public health and safety.[150] *Prince v. Massachusetts* further confirms that freedom of religious practice and a parent's authority to raise his or her children does not trump the state's interest in protecting the welfare of children.[151] This Court was also specific about how this principle applied to the vaccination of children, strongly noting that individual preference to raise one's children does not warrant exposing the community and its children to preventable diseases that could ultimately lead to illness or death.[152]

C. THE BILL DOES NOT UNCONSTITUTIONALLY DISCRIMINATE AGAINST A "CLASS" OF UNVACCINATED OR PARTIALLY VACCINATED CHILDREN

Opponents of the bill have compared the effect of this bill to the "separate but equal" state of the public-education system before *Brown v. Board of Education*.[153] While the anti-vaccinators' legal argument for this assertion is vague, it appears there are two primary points of contention. The first is that it is discriminating against a class of children whose parents refuse vaccinations as a result of religious or personal beliefs, in effect discriminating against people of that particular faith or personal belief.[154] But while the state has a duty to uphold religious exemptions when they are legislated in place, as noted above, there is no underlying constitutional requirement for the states to enact a religious or personal-belief exemption. As held in *Phillips,* such convictions do not trump the state's interest in preserving community health.[155] Therefore, this argument does not hold.

The second argument appears to be a type of disabilities-discrimination claim. Various parents testified at the Senate Committee hearings on SB 277 that they were unable to obtain a medical exemption for their

149 *Id.*

150 *Id.* at 312–13.

151 Prince v. Massachusetts, 321 U.S. 158, 173–74 (1944).

152 *Id.* at 166–67.

153 Senate Education Committee Video 1, *supra* note 141.

154 *Id.*

155 Phillips v. City of New York, 27 F. Supp. 3d 310, 312 (E.D.N.Y. 2014).

"vaccine injured" children.[156] Anti-vaccinators argue that the bill discriminates against these children who are vaccine-injured, have the potential to become vaccine-injured, or have a condition that may not fall into a clear medical exemption but may cause the child to face higher risks with respect to certain vaccinations.[157] As Senator Pan noted in the Senate Judiciary Committee hearing held on April 28, 2015, "vaccine injured" is not a medical term, but a term of art used by opponents to the bill to explain a wide range of reactions to vaccines.[158] These "vaccine injured" children may range from death, to the inability to speak for 24 hours, to various minor reactions.[159] Children may be termed "vaccine injured" even if the vaccine was not linked to the injury (for instance, when the injury was coincidental to receiving the vaccine).[160] The United States has a no-fault compensatory infrastructure for those who suffer a reaction to a vaccine under the National Childhood Vaccine Injury Act of 1986.[161] In order to receive compensation under this system, the United States Court of Federal Claims must find by a preponderance of the evidence that the child sustained or suffered significant aggravation of an illness, disability, injury, or condition as a result of a vaccine.[162]

It is not clear whether the opponents of the bill will attempt to bring a disabilities-discrimination claim under the individual right to equal protection. The Equal Protection Clause of the Fourteenth Amendment states that no state will "deny to any person within its jurisdiction the equal protection of the laws."[163] In order to succeed on an equal-protection claim, the plaintiff must demonstrate that he or she was treated differently than others who occupied a position similar to the plaintiff's and that the

156 Senate Judiciary Committee Video, *supra* note 138; Senate Education Committee Video 1, *supra* note 140; Senate Education Committee, *Media Archive,* California State Senate (Apr. 22, 2015), http://senate.ca.gov/media-archive [hereinafter Senate Education Committee Video 2].

157 Senate Judiciary Committee Video, *supra* note 138

158 *Id.*

159 *Id.*

160 *Id.*

161 42 U.S.C. § 300aa-11.

162 *Id.* at (c)(1); Snyder ex rel. Snyder v. Secretary of Health and Human Services, 88 Fed. Cl. 706, 740 (2009).

163 U.S. Const. amend. XIV.

unequal treatment was both intentional and unjustified.[164] The court in *Workman v. Mingo County Board of Education*[165] noted that there is no facial discrimination on the basis of religion because the state is not required to provide a religious exemption and did not target a particular religious belief.[166] In this case, the plaintiff claimed that the defendant, the Mingo County Board of Education, violated her constitutional rights when the Board refused to admit her unvaccinated daughter, M.W., to public school.[167] The plaintiff chose not to vaccinate M.W. because her other child, S.W., had begun to suffer health problems that appeared around the same time that S.W. received vaccinations.[168] The plaintiff received a medical exemption for M.W., but this was later denied when a school nurse challenged the exemption.[169] One of the plaintiff's primary arguments was that the vaccination statute was facially discriminatory because it did not provide a religious exemption.[170] The court rejected her claim because she did not explain how the statute was facially discriminatory.[171] The court further reasoned that the plaintiff's complaint was not that the statute targeted a particular religion, but that it did not provide an exemption for her personal religious beliefs.[172] This reasoning indicates that anti-vaccinators must clearly demonstrate discriminatory impact or intentional targeting of a specific protected class for the court to consider a facial discrimination claim. Here, the plaintiff demonstrated only that the mandate goes against her personal beliefs, but not necessarily individuals who practice a particular religion.

Furthermore, a claim that the bill is facially discriminatory against "vaccine injured" children would not be valid. This argument should not hold in court because "vaccine injured" children are a vague and unrecognized "class" who are also not categorized as disabled.[173] Additionally, the

---

164 Morrison v. Garraghty, 239 F.3d 648, 654 (4th Cir. 2001).

165 Workman v. Mingo County Bd. of Educ., 419 Fed. Appx. 348 (4th Cir. 2011).

166 *Id.* at 354–56.

167 *Id.* at 350–51.

168 *Id.* at 351.

169 *Id.*

170 *Id.*

171 *Id.* at 355.

172 *Id.*

173 Senate Judiciary Committee Video, *supra* note 138.

bill still provides a medical exemption for children who may suffer from vaccinations.[174] In this case, the duty should be on the doctor to provide an appropriate ground for medical exemption. In fact, the amended version of the bill specifically notes that a licensed physician may deem that a child should not be vaccinated due to family medical history, which would include a family member's previous adverse reactions to a vaccination. In comparison, this bill would not have the discriminatory effect that *Wong Wai v. Williamson* had. In that case, the potentially deadly bubonic-plague vaccination was specifically directed toward the Asian race "without regard to the previous condition, habits, exposure to disease, or residence of the individual."[175] In other words, that class-based vaccination was not a calculated and reasonable mandate meant to preserve the public health of the community. SB 277 does not unnecessarily target a group of children regardless of legitimate health concerns.

D. THE DEBATE SURROUNDING THE RIGHT TO A PUBLIC SCHOOL EDUCATION

While the amendment broadens the educational options for unvaccinated or partially vaccinated children, critics continue to view this as an unconstitutional infringement on their children's right to a free public education.[176] Since 1879, article IX, section 5, of the California Constitution has guaranteed a free public-school education, specifically noting that the "Legislature shall provide for a system of common schools by which a free school shall be kept up and supported."[177] In *Serrano v. Priest,* the California Supreme Court held that education was a "fundamental" interest guaranteed by the California Constitution.[178] The right to a free public school education is distinctly a matter of California, as opposed to federal, law.

In 1940, the State Board of Education implemented a regulation to uphold the "free school guarantee."[179] Title 5, California Code of Regulations, section 350, specifies that a student "shall not be required to pay any

174 SB 277 Bill Text, *supra* note 16.

175 Wong Wai v. Williamson, 103 F. 1, 7 (N.D. Cal. 1900).

176 Senate Judiciary Committee Video, *supra* note 138.

177 Cal. Const. art. IX, § 5.

178 Serrano v. Priest, 5 Cal. 3d 584, 589 (1971).

179 Cal. Code Reg. tit. 5, § 350.

fee, deposit, or other charge not specifically authorized by law."[180] These prohibited fees were clarified by the California attorney general and included fees like security deposits, membership fees for organizations, and necessary school supplies.[181] The Court reaffirmed and clarified how the educational guarantee functions in *Butt v. State of California,* noting that the California Constitution "prohibits maintenance and operation of the public school system in a way which denies basic educational equality to the students of particular districts."[182]

The California Supreme Court has since ruled on various fees that were allegedly in violation of the California Constitution's "free school guarantee." While fees for educational extracurricular activities, driving classes offered through the school district, and to compensate for lost state funding due to unexcused absences were unconstitutional, fees that were legitimately educational in nature were valid.[183] The following fees were also found not to be contrary to the "free school guarantee": optional attendance as an observer at a school event, food, replacement costs for materials that a student failed to return or deliberately defaced, field trips, transportation to school (so as long as indigent students could receive a waiver for the fee), medical insurance for field trips, physical-education attire, parking, direct cost of materials for projects kept by the student, duplication of public records, summer-employment transportation fees, out-of-state tuition fees, fingerprinting programs, deposits for musical instruments and other regalia that are taken overseas, and eye-safety devices.[184]

1. SB 277 Does Not Violate the "Free School Guarantee"

Those who oppose SB 277 argue that this mandate eliminates the "free school guarantee" for unvaccinated students. While private homeschooling and independent study are options, these can be time-intensive and at times, costly.[185] The opposition has also brought up the concern that single parents

---

[180] *Id.*

[181] Ops. Ca. Atty. Gen. No. NS-4114.

[182] Butt v. State of California, 4 Cal. 4th 668, 685 (1992).

[183] *Guidelines for District Staff and Parents Regarding Student Fees, Donations and Fundraising,* San Diego United School Dist., http://www.sandi.net/Page/2570 (last visited Apr. 13, 2015).

[184] *Id.*

[185] Senate Education Committee Video 1, *supra* note 141.

or two-parent households with insufficient income would be unable to put their children in any homeschooling or independent study options.[186]

This argument does not have a strong foothold in California, as there are free-homeschooling options available for students.[187] These options include programs offered by public school districts, charter schools, and online education.[188] Though parents may argue that the quality of the free-homeschooling option available to them is not agreeable, this does not invalidate the fact that there are free-homeschooling and independent-study options for California students that would suffice to satisfy the "free school guarantee." Furthermore, under the second set of amendments by the Senate Education Committee, families now have more options to homeschool their children jointly with other families, alleviating the pressure on families who may not have as much time to care for their children.[189]

2. Subjecting the Mandate to Strict Scrutiny

While the American Civil Liberties Union (ACLU) agrees with the mandatory vaccination of children, the civil rights group argues that SB 277 lacks a "compelling interest" in requiring all students in schools to be vaccinated.[190] United States courts apply "strict scrutiny" in two situations: when a fundamental constitutional right is infringed,[191] or when a government action applies to a "suspect classification."[192] In this situation, the right to education in California is considered a fundamental constitutional right that has been

---

186 *Id.*

187 *Free Public Homeschool Options in California,* HubPages (Sept. 2, 2014), http://learnthingsweb.hubpages.com/hub/Free-Homeschool-Options-in-Southern-California (last visited Apr. 13, 2015).

188 *Id.*

189 Senate Education Committee Video 2, *supra* note 156.

190 Kevin Baker, *ACLU Statement: SB 277, California Vaccination Bill,* American Civil Liberties Union of Northern Cal. (Apr., 28, 2015), https://www.aclunc.org/news/aclu-statement-sb-277-california-vaccination-bill [hereinafter ACLU Statement].

191 Graham v. Kirkwood Meadows Pub. Util. Dist., 21 Cal.App.4th 1631, 1642 (1994) ("California has followed the two-tier approach employed by the United States Supreme Court in reviewing legislative classifications under the equal protection clause."); Kevorkian v. Arnett, 939 F. Supp. 725, 732 (1996) ("Under this test, strict scrutiny is applied in cases involving suspect classifications or fundamental rights; rational basis analysis is applied to all other cases.").

192 Roe v. Wade, 410 U.S. 113, 155 (1973).

reaffirmed by the California Supreme Court.[193] Therefore, strict scrutiny would apply as a matter of California, rather than federal, constitutional law.

In order to survive strict scrutiny, the law or policy must satisfy three tests: it must be justified by a compelling government interest,[194] it must be narrowly tailored,[195] and it must be the least restrictive means for achieving that interest.[196] California's Legislative Analysts note that the ACLU opposes SB 277 because it conditions access to California's "free school guarantee" without a showing of a "compelling interest."[197] When evaluating the constitutionality of vaccination mandates, courts weigh individual liberties and the necessity of governmental interference into these liberties to preserve public health and safety.[198] According to Professor Lawrence Gostin, four overlapping standards are taken into consideration in weighing these interests: necessity, reasonable means, proportionality, and harm avoidance.[199] These standards should be taken into consideration when addressing the strict-scrutiny test.

3. The Compelling Interest of Public Health and Safety of California's Public School Students

The authors of SB 277 have articulated the government's compelling interest. In its non-partisan bill analysis, the Senate Judiciary Committee notes

193 Serrano v. Priest, 5 Cal. 3d 584, 589 (1971).

194 Somers v. Superior Court, 172 Cal. App. 4th 1407, 1412 (2009) ("But if the statutory scheme imposes a suspect classification, such as one based on race [citation], or a classification which infringes on a fundamental interest . . . the classification must be closely scrutinized and may be upheld only if it is necessary for the furtherance of a compelling state interest.") (quoting *Weber v. City Council,* 9 Cal. 3d 950, 959 (1973)).

195 Griffiths v. Superior Court, 96 Cal. App. 4th 757, 775 (2002) ("If a challenged law operates to the peculiar disadvantage of a suspect class or impinges on a fundamental right, this court subjects it to the severe standard of 'strict scrutiny.' Under strict scrutiny, a discriminatory law will not be given effect unless its classification bears a close relation to promoting a compelling state interest, the classification is necessary to achieve the government's goal, and the classification is narrowly drawn to achieve the goal by the least restrictive means.").

196 *Id.*

197 SB 277 Bill Analysis, Cal. Committee on Health (Apr. 8, 2015), http://leginfo.ca.gov/pub/15-16/bill/sen/sb_0251-0300/sb_277_cfa_20150407_101248_sen_comm.html.

198 Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944).

199 Lawrence Gostin, *Jacobson v. Massachusetts at 100 Years: Police Power and Civil Liberties in Tension,* 95(4) Am. J Pub. Health 1, 576–81 (2005).

that the government's compelling interest is to preserve the health and safety of the students in California's public school system by increasing herd immunity and protecting vaccine-deprived children from disease.[200] This interest has been continuously affirmed in both California and United States Supreme Court cases, including *Zucht v. King*[201] and *Prince v. Massachusetts*.[202] Furthermore, as noted above, *Williams v. State* suggests that the school has an affirmative duty to ensure the safety of its students.[203]

4. The Bill is Narrowly Tailored and Achieves its Goals

In order for the bill to meet strict scrutiny, it must also be narrowly tailored.[204] The law is narrowly tailored when it targets only that interest.[205] It is not narrowly tailored when it is overbroad or fails to address the essential aspects of that compelling government interest.[206]

The opposition argues that this bill is not narrowly tailored because vaccinations do not necessarily protect the public from communicable diseases.[207] Anti-vaccinators argue that non-vaccinated children do not necessarily lack immunity, while vaccinated children may not necessarily be protected.[208] An exchange between Senator Heff and Senator Pan during the Senate Education Committee hearing illustrates this dilemma.[209] During the April 15 hearing, Senator Robert Heff (R-Diamond Bar) noted that chickenpox may be transmitted six weeks after receiving the vaccination, and yet these recently immunized children are not sheltered from immunocompromised children.[210] Senator Pan noted that no vaccination

---

200 SB 277 Bill Analysis, Senate Judiciary Committee (Apr. 22, 2015), http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0251-0300/sb_277_cfa_20150427_153640_sen_comm.html [hereinafter SB277 Judiciary Bill Analysis].

201 260 U.S. 174 (1922).

202 321 U.S. 158 (1944).

203 Williams v. State of California *Settlement Notice, supra* note 58.

204 *Wade,* 410 U.S. at 155.

205 *Id.*

206 *Id.*

207 Senate Education Committee Video 1, *supra* note 141.

208 Alan Phillips, *Vaccine Exemptions: Do They Really Put Others At Risk?,* Natural News (Feb. 18, 2012), http://www.naturalnews.com/035024_vaccine_exemptions_children_infectious_disease.html.

209 Senate Education Committee Video 1, *supra* note 141.

210 *Id.*

provides full protection from disease, but can provide near-perfect coverage.[211] In the case of chickenpox, the infectious agents created by recent vaccinations would be less potent than "wild" chickenpox.[212] Furthermore, the Federal Drug Administration sets the highest bar for potential risk that is unavoidable but very minimal.[213] He also acknowledges that every vaccination is different for every child, and certain vaccinations, such as that for whooping cough, are not as effective as others, like those for measles.[214]

Here, it is evident that this dilemma is caused by conflicting medical opinions. Supporters of the bill see the risks posed by vaccination as extremely minimal and necessary to preserving community health, while those who oppose it see vaccination as a potentially deadly choice that may ultimately make no difference in protecting herd immunity.[215] However, as noted in Part I, studies show that this is not true. The rate of personal-belief exemptions has in fact risen over the past decade, and there are school districts where the herd immunity levels fall far below the 90 percent rate.[216] This is because parents against vaccination tend to cluster in high-income communities, leading that particular community to be particularly susceptible to disease.[217] Senator Pan and various accounts of the recent Disneyland measles outbreak have reported that the measles tended to travel in those communities with higher personal-belief exemptions.[218] This is the case even with AB 2109 in place. Ultimately, the Legislature will need to weigh the credibility of these conflicting medical opinions. By removing unvaccinated and partially vaccinated children from public schools, the bill would ensure the safety of vaccine-deprived children while rapidly increasing the herd immunity of public schools. As noted earlier in Part IIID, the children removed from public schools would also still have reasonable access to their right to a free public education through alternative schooling, such as homeschooling and independent study.

---

211 *Id.*
212 *Id.*
213 *Id.*
214 *Id.*
215 *Id.*
216 *Supra,* notes 45–46.
217 *Supra,* notes 41–42.
218 Senate Education Committee Video 1, *supra* note 141.

5. The Bill is the Least Restrictive Means for Achieving Public Safety and Health in Public Schools

Lastly, the bill must be the least restrictive means of achieving the government's compelling interest.[219] If there is an alternative method that achieves the same interests but causes less interference with the rights of the affected children, this bill would be considered unconstitutional.[220] The bill's opposition may find the most merit in this argument.

The bill seeks to remove unvaccinated and partially vaccinated children from California's public school in an effort to protect the community from outbreaks (ideally keeping all schools and districts over 90 percent in all vaccinations) and to protect children who are medically exempt from vaccinations from being subject to vaccine-preventable diseases.[221] Opponents will argue that AB 2109 better serves the bill's purpose, citing the 20 percent drop in personal-belief exemptions since the beginning of 2014.[222] The American Civil Liberties Union also contends that AB 2109 has had a short history in which to see results, but that the 20 percent drop in the use of personal-belief exemptions is a positive step toward achieving the same interests as SB 277.[223]

While AB 2109 has been relatively effective, it does not guarantee that school districts that have herd immunity rates below 90 percent would increase their rates to a safe level. This also places immunocompromised children such as Rhett Krawitt at high risk of contracting disease. This would then place the responsibility on Krawitt's parents, instead of the parents utilizing the personal-belief exemptions, to remove their child from public school to avoid exposure to others who can more readily transmit diseases to him. Therefore, AB 2109 does not meet the compelling government interest that SB 277 seeks to achieve.

---

219 Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 656 (2004).

220 *Id.*

221 SB277 Judiciary Bill Analysis, *supra* note 200.

222 Robin Abcarian, *Fight Against Vaccination Bill Finds Ally in ACLU,* L.A. Times (Apr. 24, 2015, 4:30 AM), http://www.latimes.com/local/abcarian/la-me-abcarian-vaccination-bill-20150424-column.html.

223 *Id.*

E. A COMPARATIVE LOOK AT MASSACHUSETTS AND WEST VIRGINIA

California's vaccination debate is unique because it is one of only a few states that have a constitutional right to a public education and yet is removing both its religious and personal-belief exemptions. This would place California in the small minority of states that have only a medical exemption; the other two are Massachusetts and West Virginia.[224] This section analyzes how the lack of religious and personal-belief exemptions have impacted case law in these states.

The Supreme Court of Appeals of West Virginia case, *D.J. v. Mercer County Board of Education,* similarly addressed the issue of the conflict between the right to be healthy and the right to access a public education.[225] In this case, a child, T.J., was previously and fully vaccinated according to West Virginia's immunization code.[226] However, new vaccinations were required by West Virginia's interpretive rule.[227] The plaintiffs, the parents of T.J., argued that West Virginia's Department of Health and Human Resources (DHHR) exceeded its authority by enacting this rule; that its enforcement of the rule was discriminatory; and that the rule denied children the fundamental right to an education.[228]

In finding against the plaintiffs and for the Board of Education, the court analyzed whether the government met the strict-scrutiny test.[229] West Virginia also recognizes that education is a fundamental right in the state.[230] The court subjected the law to strict scrutiny, which required a compelling government interest, narrow tailoring, and least restrictive means in order to pass the test.[231] The court concluded that the compelling interest was satisfied because "the protection of the health and safety of the public is one of the most important roles of the State."[232] Furthermore,

---

224 *State Vaccination Exemptions for Children Entering Public Schools, supra* note 7.

225 D.J. v. Mercer County Bd. of Educ., No. 13-0237, 2013 WL 6152363, at *1 (S.E. 2d Nov. 22, 2013).

226 *Id.* at *1.

227 *Id.*

228 *Id.* at *2.

229 *Id.* at *4.

230 *Id.*

231 *Id.*

232 *Id.*

it noted that the schools are responsible for maintaining the health of children.[233] The court did not extensively consider whether mandatory vaccinations are overbroad or the least restrictive means of meeting this compelling interest, as it relied on West Virginia's existing mandatory-vaccination laws.[234] While this case may not be exactly parallel to California's case, as California is in the position of repealing its religious and personal belief exemptions as opposed to maintaining medical-only exemptions, this case further affirms that the elimination of religious and personal-belief exemptions to school vaccinations is constitutional.

IV. ADDITIONAL CONSIDERATIONS

Although the bill may be constitutional, there are additional concerns the Legislature should consider as it moves forward with the mandate. The first is low-income-household access to vaccinations. Second is making a concerted effort to update its vaccination laws to balance concerns about vaccinations and future biomedical advances.

A. ACCESS TO VACCINATIONS

The ACLU issued a statement on April 28, 2015, clarifying its stance on SB 277.[235] Though the ACLU was previously seen as an ally to the bill's opposition, it states that it remains neutral on the bill because of its potential impact on low-income families. Specifically, it points out that in some cases, children are not vaccinated because "parents lack knowledge, have poor access to health care, face transportation problems, or other barriers." The California Legislature and school systems should have responsibility to mitigate these issues and ensure that children are not being penalized for being unable to obtain vaccines as a result of their families' financial status. The authors of the bill have expressed their willingness to work with school districts to maintain access to California's public school system.[236] Accordingly, the California Legislature should work with school districts to create on-site vaccination programs, to hold educational programs and

233 *Id.*

234 *Id.*

235 ACLU Statement, *supra* note 190.

236 Senate Judiciary Committee Video, *supra* note 138.

create materials for parents to learn about vaccinations, and to create a process for families who may be unable to afford the vaccinations.

B. MEDICAL ADVANCES

The anti-vaccination debate is, of course, an offshoot of a division in opinion as to whether vaccinations are medically necessary. California, West Virginia, and Massachusetts would have the same vaccination requirements if SB 277 passes: diphtheria, hepatitis B, haemophilus influenza type b, measles, mumps, pertussis (whooping cough), poliomyelitis, rubella, tetanus, varicella (chickenpox), and meningitis (primarily for postsecondary education).[237] These states have provisions that would allow for various health authorities to alter the specific list of mandatory vaccinations.[238]

As the country continues to make medical advances, it is possible that certain vaccinations may become obsolete, or alternative medications may become available that are equally effective as current vaccinations. One Note suggests distinguishing vaccines by two types of "necessity" for the public health or safety of the community.[239] The first would be a "medical necessity" and the second a "practical necessity."[240] "Medically necessary" vaccines are those that are the only known viable defenses against a disease in the community.[241] "Practically necessary" vaccines are those where there are efficacious alternatives, but these alternatives are not used by a significant number of people.[242] This Note suggests that vaccines not be permanently relegated to either of these categories.[243] Instead, whether a vaccine is "medically or practically necessary" would be dependent on future biomedical advances.

The Note emphasizes the need for this distinction in order to preserve civil liberties. According to Professor George Annas, compromising civil liberties would undermine the public's trust, "an essential ingredient in

---

237 SB 277 Bill Text, *supra* note 16; Mass. Gen. Laws ch. 76, § 15 (2015), W. Va. Code § 64-95-4 (2015).

238 *Id.*

239 Harvard Law Review, *Toward a Twenty-First-Century* Jacobson v. Massachusetts, 121 Harv. L. Rev. 1820, 1820 (2008).

240 *Id.*

241 *Id.*

242 *Id.*

243 *Id.* at 1840.

any well-operating public health endeavor."[244] By having tailored vaccination mandates specific to the type of vaccine and effective alternatives, it allows individual choice, but "minimizes the number of opt-outs."[245] This would demonstrate to the community that the legislature is keeping its laws up-to-date with legitimate biomedical advances and balancing the concern of parents who are against vaccination with the current availability of equally efficacious alternatives to vaccination.

V. CONCLUSION

The focus of the vaccination debate should be the health and wellbeing of children — one of the most vulnerable classes of people in our society. As the courts across the nation have concluded, the interest in preserving the wellbeing of our children and the community is so critical that it takes precedence even when in conflict with individual liberties. This is because the ability to exercise individual freedoms should not unreasonably impinge on the welfare of the whole. As such, the legislature may create public health legislation that interferes with individual rights so long as it is narrowly tailored, reasonable, and the least restrictive means of doing so. SB 277 meets all of these requirements without interfering unduly with the child's right to a public education. Accordingly, the courts should find this bill to be constitutional under both California and federal law.

* * *

244 *Id.* at 1835.

245 *Id.* at 1841.