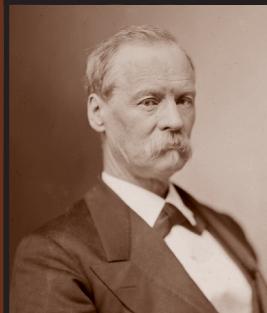
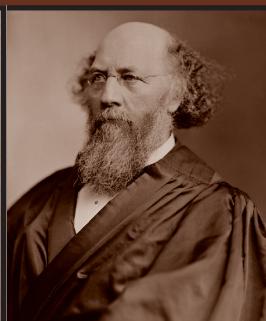


VOLUME 9: 2014

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# CALIFORNIA LEGAL HISTORY



JOURNAL OF THE  
CALIFORNIA SUPREME COURT  
HISTORICAL SOCIETY

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VOLUME 9  
2014

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ORAL HISTORY  
DONALD R. WRIGHT

CHIEF JUSTICE OF CALIFORNIA  
(1970-1977)



*Introduction to the Oral History of*  
**DONALD R. WRIGHT**

JULIAN H. LEVI\*

Donald R. Wright served as chief justice of California from 1970 to 1977. As successor to Chief Justices Roger Traynor and Phil Gibson, he was the third chief justice leading and maintaining the California Supreme Court as the preeminent state supreme court in the nation for more than a half century. Such a heritage should not be cherished, but it should be analyzed to determine how such leadership came about.

At the outset, we must acknowledge that in Donald Wright we did not have a jurist with the unparalleled judicial craftsmanship or literary skills of Benjamin Cardozo, Learned Hand, or our own Roger Traynor. Among

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\* Remarks presented at the The Chief Justice Donald R. Wright Memorial Symposium on the California Judiciary at the University of Southern California, November 21, 1985, sponsored by the Judicial Committee of the California State Senate, et al. Published in Proceedings and Papers, Timothy A Hodson, ed. (Sacramento: Senate Office of Research), 15–25 (abridged); Appendix (complete). The late Julian Levi was introduced by the moderator, UCLA Professor of Law Daniel Lowenstein, as follows: “Professor Levi has had so many very distinguished careers that it would be quite tedious to recount them in any detail, but he was a successful lawyer for many years in Chicago, was a professor of urban studies at the University of Chicago for a couple of decades or so, and since 1978, has been a professor of law at the Hastings College of the Law in San Francisco.”

Judge Wright's opinions we do not find a *Meinhard v. Salmon*.<sup>1</sup> What we do find is a chief justice who in fact was chief by force of character, intellect and personality, and who at the same time would be referred to repeatedly by his colleagues as a "warm, compassionate, and caring human being."

Donald Wright came to the office of chief justice with superb credentials.

Following an undergraduate education at Stanford University culminating in a *cum laude* degree, he earned his law degree at Harvard and then at the University of Southern California, both with distinction.

For a decade he engaged in the general practice of law as a private practitioner in Pasadena, and then, in World War II, entering the armed services, he rose to the rank of lieutenant colonel, squadron commander, and chief of intelligence of the 11th Air Force Service Command. After World War II, he returned to the practice of law in Pasadena.

Then in 1953, he accepted appointment to the Pasadena Municipal Court and served until 1960 when he was elected to the Superior Court of Los Angeles; and in 1967 he became the presiding judge of that court.

Governor Reagan appointed him to the state court of appeal in 1968, and then in 1970 appointed him chief justice of California.

Hence, Chief Justice Wright came to the chief justiceship after twenty years of experience as a private practitioner of the law, after fourteen years of experience as a trial judge in a busy metropolitan court of general jurisdiction, and two years of full experience as an appellate judge. His opinions demonstrate that he understood the difficulties and the frustrations of private practice; that he knew at first hand the responsibilities and problems of the trial judge made evident by his own practice of laboriously reading trial court records time after time; that he understood both the limitations and opportunities of appellate and Supreme Court service.

More significantly, bench and bar as well as the general public understood that here was a chief justice who had earned that title. As one of his colleagues remarked from the very beginning of his term, "the Chief fit in well."

Chief Justice Wright, in accordance with the Constitution and statutes of California, had major responsibilities in the administration of the judicial system of the state. His skill as an administrator was a bright point of his tenure. The Chief has been described as a politically moderate justice

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<sup>1</sup> 164 N.E. 545 (N.Y. 1928),

with high intellectual abilities, but even greater administrative skills. He was a judge's judge. Professional, quiet and undramatic in demeanor, he seemed to exude dignity, open-mindedness, fairness and compassion.

The Chief understood that he administered best by persuasion, rather than by force of will or the powers of his office. He was an experienced and tactful administrator who maintained the traditions established by Chief Justices Phil Gibson and Roger Traynor. Retired Associate Supreme Court Justice Raymond Sullivan has described Wright's administration of the judicial branch as "masterful." According to Justice Sullivan, the Chief's leadership was uniquely effective because of his warmth in dealing with his colleagues and with those outside the judiciary. Of course, the fact of years of prior skill and experience and service was all important. In most cases, the Chief was working with judges whom he knew in prior years, and who themselves knew that the "Chief had been there himself and understood their problems."

During Judge Wright's tenure, the courts of appeal were in trouble as their workload had increased repeatedly. The traditional means of dealing with a growing backlog is to add judges. With the appointment of more appellate judges, however, it is difficult to maintain the quality of appointments and uniformity among decisions. To avoid appointing numerous appellate judges, Judge Wright instituted several important administrative reforms. For example, he created a central staff which could relieve the justices of some routine work. Judge Wright introduced the use of memorandum dispositions for routine cases. The criteria for publication of opinions of courts of appeal were also changed so that less opinions would qualify for publication. The success of these reforms is demonstrated by the increased productivity of the justices and the consequent elimination of the need to add authorized positions to the courts of appeal for ten years. While the number of dispositions per judge in the courts of appeal increased by approximately three percent during Judge Wright's tenure, the percentage of published opinions dropped steadily: 39 percent were published for the 1969-70 term, and only 16 percent were published for each of the last two terms during Judge Wright's tenure. Judge Wright instituted this structural reform by quiet persuasion and coaxing his fellow judges into acceptance.

During the tenures of Chief Justices Gibson, Traynor, and Wright, the power to select judges for the appellate department of the superior court, for all practical purposes, had been transferred from the chief justice to the presiding judge of the superior court in the larger counties. Justice Wright reformed the existing process of assignment to the appellate department by meeting periodically with the presiding judges and suggesting to them that assignments to the appellate department be rotated with a new judge added each year who would serve for a total of three years and then return to other assignments.

Removing Associate Justice Marshall McComb was one of Justice Wright's most sensitive administrative accomplishments. In light of the fact that Justice McComb was conservative and the Court at the time was liberal, Justice Wright did not want his removal to appear to be politically inspired. Therefore, he helped engineer a constitutional amendment through the Legislature that provided an avenue whereby Justice McComb's removal would not appear political. The amendment provided that, if a justice of the Supreme Court was involved, the recommendations of the Commission on Judicial Performance would be referred to seven randomly selected court of appeal judges. As a result of the creation of this special tribunal, Justice McComb's removal did not appear to be politically inspired.

Justice Wright is remembered for being accessible and thoughtful. He returned phone calls from other judges and from the press. He put out a press release on every case in order to establish a public information office. He made special efforts to ensure that research attorneys were treated fairly. He made their pay comparable to civil service lawyers of equal seniority. As it has become evident, his administrative reforms were acceptable because he instituted them after consultation and in a way that was acceptable to the majority of judges and his colleagues.

With the petition for hearing system, the California Supreme Court under Chief Justice Wright retained control over its docket. From 1970 to 1977, the total number of filings increased by less than two percent. The percentage of petitions for hearing granted of cases previously decided by the courts of appeal steadily decreased during that time: 9.3 percent of the petitions for hearing filed were granted during the 1970–71 term, while only 7.9 percent of the petitions for hearing filed were granted during the 1976–77 term.

The quality and depth of opinions written by justices of the California Supreme Court are especially remarkable in the number of cases per justice on the merits. For example, during the terms of 1974–75 and 1975–76, each justice of the California Supreme Court wrote 27 opinions for cases decided on the merits. This ratio becomes more meaningful when contrasted to the fact that, during those terms, each United States Supreme Court justice wrote only 17 opinions for cases decided on the merits.

During his eight years of service, Chief Justice Wright wrote the opinion for the majority of the Court in 196 cases. These opinions throughout are remarkably consistent. There is always the meticulous and even methodical exposition of fact so carefully done that while policies or statements of law might be questioned in dissent, the accuracy of fact summaries were largely unchallenged. There is always the careful exposition of law and prior case authority plainly and clearly stated. Throughout there is the insistence on judicial duty and function expressed by the chief justice himself in his landmark opinion in *People v. Anderson*,<sup>2</sup> dealing with the constitutionality of the death penalty under the California Constitution:

(5) Our duty to confront and resolve constitutional questions, regardless of their difficulty or magnitude, is at the very core of our judicial responsibility. It is a mandate of the most imperative nature. Called upon to decide whether the death penalty constitutes cruel or unusual punishment under the Constitution of this state, we face not merely a crucial and vexing issue but an awesome problem involving the lives of 104 persons under sentence of death in California, some for as long as 8 years. There can be no final disposition of the judicial proceedings in these cases unless and until this court has decided the state constitutional question, a question which cannot be avoided by deferring to any other court or to any other branch of government.<sup>3</sup>

I suspect the subsequent comment by then Governor Ronald Reagan, who had appointed the chief justice, that this was his “worst appointment” came as no surprise to the Chief. Whether a particular decision would be a

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<sup>2</sup> 6 Cal. 3d 628 (1972).

<sup>3</sup> *Id.* at 640.

popular decision or not was irrelevant when measured against the core of judicial responsibility.

Analysis of those decisions of Chief Justice Wright most widely cited reinforce these observations.

In *Vesely v. Sager*,<sup>4</sup> Chief Justice Wright, speaking for a unanimous Court, permitted third persons to sue vendors of alcoholic beverages for serving alcohol to an obviously intoxicated customer who, as a result of intoxication, injured the third person. That ruling overturned prior California judicial precedents based upon concepts of proximate cause. The defendant in *Vesely* argued that in light of these precedents, changes in judicial doctrine should be left to the Legislature. The Chief responded that the precedents were judicially created and were patently unsound and totally inconsistent with the principles of proximate cause established in other areas of negligence law. *Vesely* was controversial and was eventually overturned by the California Legislature after a wave of public protest.

Similar is the opinion in *People v. Beagle*<sup>5</sup> where Chief Justice Wright, again speaking for a unanimous Court, imposed severe restrictions on the ability of prosecutors to discredit a defendant by referring to prior felony convictions. Before *Beagle*, the majority view in California was that a trial judge had no discretion under the California Evidence Code to exclude evidence of a prior felony conviction offered for purposes of impeachment where the lawfulness of the conviction was established or uncontested. In a methodically written opinion, the Chief rejected the majority view and held that by reading several sections of the California Evidence Code together, the trial judge had discretion to exclude evidence of prior felony convictions where the probative value of the evidence is outweighed by risk of undue influence. This year *Beagle* was overturned by the California Supreme Court in a decision holding the 1982 Victim's Bill of Rights had introduced an easier rule for the admission of such evidence.

In 1973, in *Legislature v. Reinecke*,<sup>6</sup> the chief justice led a unanimous Court in laying down a blueprint for reapportionment after then Governor Ronald Reagan and the Legislature could not agree on a single plan. The Court appointed several special masters to devise and recommend

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<sup>4</sup> 5 Cal. 3d 153 (1971).

<sup>5</sup> 6 Cal. 3d 441 (1972).

<sup>6</sup> 19 Cal. 3d 396.

a reapportionment plan, which recommendations were adopted by the Court. These recommendations avoided preserving the status quo and gave non-incumbent candidates a fair chance at election.

Finally, the chief justice in *Birkenfeld v. City of Berkeley*<sup>7</sup> wrote the opinion again for a unanimous Court upholding the legality of residential rent controls.

During his eight years of service, the chief justice wrote the opinion for the majority of the Court in 196 cases. Of these 196 opinions, dissents were filed in only 54 cases. In these 54 cases, 16 of the dissents were filed by lone dissenters. Thus, in only 38 cases out of 196 was there significant disagreement among the justices.

On this data alone, it is thus clear that here was a chief justice who led his Court.

Closer examination reinforces this conclusion. Of Wright's 196 opinions, 126 were criminal cases and 70 were in other areas of the law. The latter figure may be subject to some adjustment in that some matters such as juvenile criminal issues or habeas corpus proceedings are classified as non-criminal. Of the 54 dissents, 46 were in criminal cases and only 8 were in civil cases.

During Wright's tenure as chief justice, eight justices served with him. The dissenting activity among these justices can be broken down into categories.

Justices Clark, McComb and Peters dissented along lines of ideology and broad policy.

Justices Mosk, Richardson, Sullivan and Burke, when they disagreed, did so on specific factual determinations or on narrow technical grounds.

Most remarkably, Justice Tobriner, who served throughout Wright's tenure, never wrote a dissent to an opinion authored by his chief justice. This record from a justice of Tobriner's competence and deeply felt convictions is a strong indication of how the chief justice time after time found a basis upon which he could unify the Court.

During these years Justice Clark was unique in the vehemence of the language of his dissents. Clark evidently believed that the California Supreme Court was too liberal and too favorable to defendants. He believed

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<sup>7</sup> 17 Cal. 3d 129 (1976).

that the California Supreme Court not only was not following the United States Supreme Court precedents as to defendants' rights, but on occasion intentionally attempted to avoid review by shifting the ground of its decision to provisions of the California state constitution rather than the federal Bill of Rights.

Justice Clark, during his years on the Wright Court (1975 to 1977), wrote 16 dissents to the 75 opinions of Chief Justice Wright on behalf of the majority of the Court. In these dissents, Justice Clark charged his colleagues with incompetence, being "altogether unreasonable," their rulings "completely unrealistic," their conclusions "inexplicable" and "[un]supported by reason or authority." On one occasion, he charged that the judiciary is "developing a messianic image of itself."

In contrast to Justice Clark, Justice Peters was more liberal than the Wright Court. He wrote six dissenting opinions; one of these dissents opposed extension of the felony-murder rule; two dissents concerned procedural rules of the Court regarding acceptance of guilty pleas; the other three dissents turned on search and seizure issues.

Justice Richardson wrote dissents in four cases. Two of the cases reflect disagreements on narrow, technical points of law. In the other two cases, he felt the majority was limiting unnecessarily the discretion of the trial court. In all four dissents, Justice Richardson was joined by Justices Clark and McComb. Additionally, Richardson concurred without opinion in the dissents in four other cases.

Justice Sullivan wrote only four dissenting opinions, all involving criminal law issues. Two of the cases concerned his disagreement with the majority's application of the exception to the hearsay rule in cases of co-conspirators charged with premeditated murders of spouses; in the third case, Justice Sullivan was outraged by police conduct which he saw as an attempt to circumvent rules of criminal procedure requiring the presence of defendant's attorney at a lineup; in the fourth case, Justice Sullivan felt the majority had unnecessarily addressed a constitutional issue. Additionally, Justice Sullivan concurred without opinion in dissents in six other cases.

With the exception of the opinions of Justice Clark, the dissents throughout were characterized by civility and respect among the justices. These justices were strong men with deeply held convictions, but their

Chief held them together in mutual respect for one another and the institution of the law which they served.

In the final analysis, the chief justice's colleague, Justice Stanley Mosk best summarized:

Perhaps his most noteworthy characteristic was a fierce independence. Don Wright bowed before no master: not the bench, the bar, the Governor, the press, or public opinion. He marched to the beat of no drummer, only to an ethical and compassionate conscience.<sup>8</sup>

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<sup>8</sup> Stanley Mosk, "Chief Justice Donald R. Wright," 65 CAL. L. REV. 224, 225 (1977).



*Oral History of*

# CHIEF JUSTICE DONALD R. WRIGHT

## EDITOR'S NOTE

The oral history of former Chief Justice Donald R. Wright was recorded by Professor Harvey P. Grody of California State University, Fullerton in two interviews held at Justice Wright's home in Pasadena, California on May 12 and June 1, 1982. It is presented here in slightly condensed form, intended to focus on matters directly related to Justice Wright's life and judicial career. It has received minor copyediting for publication. Insertions in square brackets are from the original transcript.

The oral history is reprinted by courtesy of the Center for Oral History and Public History, California State University, Fullerton. The interviews were conducted for the Fullerton branch of the California Government History Documentation Project and as part of the Oral History Program sponsored by CSU Fullerton. The original transcript indicates that copies are available for research use at the CSU Fullerton Library, The Bancroft Library at UC Berkeley, the UCLA Department of Special Collections, and the State Archives in Sacramento.

— SELMA MOIDEL SMITH



DONALD R. WRIGHT  
CHIEF JUSTICE OF CALIFORNIA, 1970–1977  
*Courtesy California Judicial Center Library*

## FIRST INTERVIEW: MAY 12, 1982

GRODY: Chief Justice Wright, we'd like to start with some general biographical data. You are a third generation Californian?

WRIGHT: That is correct. Yes.

GRODY: And you were born in Orange County?

WRIGHT: That is also correct.

GRODY: Would you like to take us from there?

WRIGHT: Well, I was born in what is now the city of Placentia, but it was county territory at the time of my birth back in 1907, over seventy-five years ago. My folks were orange growers in that area. One of my older uncles was the first man in the area to plant Valencia oranges and, eventually, he and his wife succeeded in getting all the relatives into the business, which was fortunate for everyone involved, frankly. In 1912, my family moved to Pasadena because of the school situation. My two oldest brothers rode horseback into the little school in Placentia, but there were four more younger children coming along and it didn't seem practical to remain out in the country. For that reason, my father, who was brought up in Pasadena back in the eighties and nineties of the last century, decided to return to Pasadena to live. So as I indicated, we moved back up here in 1912 and I have lived here ever since, excepting times when I was away at college and law school and times when I served in the Army Air Corps and times when I was on the Supreme Court sitting in San Francisco.

GRODY: That's concise. Did you go to the public schools in Pasadena?

WRIGHT: Yes. I went to the local grammar schools which were in our area and then to Pasadena High School graduating in 1925. Then I enrolled at Stanford University, entering that fall of 1925, and graduated cum laude, I might mention [chuckle], in 1929. This was at the time when the country was at its most buoyant, and it was almost promised that all you had to do was to graduate from Harvard Law School and you would be assured of a job. So in the fall of 1929, I went to Cambridge to attend the Harvard Law School. Things were not quite as they had been predicted because when I finished the law school in 1932, the situation was such that I was lucky to get a job working for almost nothing. I continued in the practice of the law here in Pasadena and, eventually, I was modestly successful.

GRODY: What kind of influence did you have toward selecting a legal career? Did you decide that before you went to Stanford?

WRIGHT: Not at all. I was not at all directed that way. In fact, in college I had been a major in the political science field and had a professor I thought a great deal of, Professor Tom Barkley, who is now in his ninety-second or ninety-third year. He had a great influence upon me and many other individuals who were at Stanford, not only then but later. At least three or four United States senators entered the political field largely because of Tom Barkley's effect on them. I had determined that I was going to go to Columbia University, which was his alma mater, secure a Ph.D. degree, and then become a professor of political science. A good friend of mine came down on July 28, 1929, and asked me why did I want to go to Columbia, and why did I want to study political science? He said, "Why don't you go to Harvard Law School? Everybody's going to law school back at Harvard," which was slightly an exaggeration [chuckle], but a goodly number were. So I said, "Well, just a minute, I never thought of it." I did give it a few moments thought, and I said, "I'll go ask my father." My father simply hated lawyers. He had several nasty experiences with some, I understand, and so when I told him what I wanted to do, he paused for a while, and he said, "Well, so far, you haven't really done too bad a job. If that's really what you want to do, why, it's all right but, personally, I would prefer that you do something more honest." [laughter] So I sent a telegram to the Harvard Law School saying, "This is my application; transcript will follow." Had I applied three days later, that is on August first or after, I would have been too late to have secured admission.

GRODY: That really was literally a last minute choice on your part.

WRIGHT: It was absolutely a last minute choice. But I might admit that once I got there and got into it, and from then on to this very day, I have never regretted my choice of profession.

GRODY: How about your father? Did he ever say anything more about it?

WRIGHT: Well, unfortunately, he died while I was at law school, after I had finished two years, and so he never had a chance to reflect on it, at least not with me. He might have reflected, but not with me. [laughter]

GRODY: What kind of practice did you have?

WRIGHT: I practiced here in Pasadena. The firm I was with was a small firm at that time, and we were primarily involved in probate work, trust work, preparation of wills, and domestic relations. There was no corporate law in Pasadena, to speak of. There was no tax law because taxes weren't even a problem in those days, or they were a minor problem, I should say. So that's what went on here, that type of practice. It's greatly changed, now, of course.

GRODY: You practiced for close to eighteen or twenty years then, before you were first put on the municipal bench.

WRIGHT: No. I practiced from 1932 to 1942, ten years, and then I joined the Army Air Corps. I was in the Army Air Corps exactly four years.

GRODY: Did you practice law in the service?

WRIGHT: No. I sat on a goodly number of courts-martial, but I was not assigned to the legal section. I was in the intelligence section, largely, and then the last year or so I was a squadron commander, non-tactical. I'm not a flyer, but it was a non-tactical support group. Then after my completion of the time in the service, I returned to Pasadena and picked up with the same group of people I had practiced with before and continued with them until 1953. In the fall of that year Governor Earl Warren, an individual I had never seen in my life — I didn't know that he even knew of my existence — called and talked to my wife. I was in court that day, and when I got home she told me that I was supposed to call Governor Warren. I said, "Well, that's nonsense. He doesn't even know who I am." She gave me the number to call, and I called the governor's office, and he told me what he wanted. He wanted to put me on the municipal court here in Pasadena. There was a vacancy at that time. I said, "Well, Governor, thank you very much, but I really am not one bit interested in the job," and frankly I wasn't. He said, "Well, I don't think you should turn it down quite that quickly. I think you should give it a little bit of thought." I said, "I surely will, sir. May I have about two weeks to think it over?" He said, "Well, no, I can't give you that much time because things are happening here very quickly." It was at the time when [U.S.] Attorney General [Herbert] Brownell from the Eisenhower administration was in Sacramento and had offered him the chief justiceship of the United States, although no public announcement at that time had been made. He said, "Can you let me know by tomorrow night?"

I said, "I surely will, sir." Whereupon that evening I went up to my senior partner's home with my wife, and we talked it over. They and I — and I mean a bunch of us — changed my mind back and forth about ten times. Finally, my senior partner said, "Well, Don, I think you ought to take it. The governor does not call up and offer these jobs without good cause of some type. So why don't you go and try it for six months. If you don't like it, well, then come right on back and we'll just go on as it was before." So I called up the governor the next day and told him that I would take it. I did not tell him, however, that it was only on a trial basis. But I stayed twenty-four years, so obviously I liked it.

GRODY: Did you ever get any inkling as to what had brought your name to his attention?

WRIGHT: Yes, I did. I didn't know at the time, and I didn't know, as a matter of fact, until I was appointed chief justice of California. Then one of the senior attorneys in town, Herbert Hahn, of the law firm of Hahn and Hahn, sent me a copy of a letter which he had sent to the governor at that time. He was a close friend of Earl Warren. They had served in the service together in World War I, and I guess the governor relied upon him a lot for advice for appointees in this particular area. The copy of the letter which I had, said, "Dear Earl, the vacancy, as you know, in Pasadena, has to be filled soon. If I was in your position, here are the ones I would pick." For some reason, and I never knew why, he put my name at the head of the list. So I take it the governor just started down the list, and the first person he called was willing to serve. That's how I was selected.

GRODY: In 1953, of course, the municipal court was relatively new with the reform legislation.

WRIGHT: Yes. It seems to me the reform went in about 1949, if my memory's correct, and I liked it right from the beginning. I had no experience whatsoever in the criminal law field, and in the municipal court that is a good deal of the type of law you have to deal with. It was a good deal like teaching school; you just stay one jump ahead of the class. So that's the way I handled it, and the years on the municipal court were among my very happiest.

GRODY: Was there any kind of political, partisan or nonpartisan, activity in the community in which you'd been involved?

WRIGHT: No, no. I have never been active in political matters at all. I've never been involved in partisan politics. I think the only time in my life [that could be considered at all] was when Alf Landon ran against [Franklin D.] Roosevelt. It would have been the 1936 battle. Republican friends of mine asked me if I would go and pick up some voters and take them to the polls. Pasadena was such a very — I hate to use the word — "stuffy" community at that time that around the University Club luncheon table everyone was certain that Alf Landon was going to just trim Roosevelt in a glorious fashion. That was not what came about. So that one activity of running some nice little old ladies from Pasadena up to the polls, that does it as far as political activity on my part.

GRODY: Did Supreme Court Justice Stan Mosk pick that up from you, or did he use the "little old ladies in tennis shoes from Pasadena" before he met you?

WRIGHT: He used it before he met me and, as a matter of fact, later on we became good friends when I was on the California Supreme Court. He used to love to introduce me in places by saying, "He was born in Orange County and lived in Pasadena. As far as Republicans are concerned, he can do no wrong." [laughter]

GRODY: I noticed in looking at some biographical statements, that you went to the superior court in 1960.

WRIGHT: That's correct.

GRODY: Now, the record says that you ran for election. Were you not appointed to a vacancy? Did you ever run for reelection on the municipal court?

WRIGHT: I ran for election in this fashion: while I was on the municipal court, I frequently sat on assignment to the superior court. Some of the time, I would say probably one-fifth of the time, I would be on assignment there appointed by Chief Justice Phil Gibson at that time. Kenny Newell, or Kenneth Newell, who was a superior court judge — is now ninety-one years of age and, strangely, lives right across the street from me — called Louis Burke, who served on the California Supreme Court later with me. Burke was the presiding judge of the superior court in Los Angeles. Kenny said to Louis, "I am not going to run for reelection this year. Do you have

any municipal court judges who have done a particularly good job for the superior court on assignment?" To which Louis replied, and I owe him a debt for that, too, "Well, I think Don Wright, who's over there in Pasadena, has done the best work for us of any of them." So based upon that, Kenny Newell called me. He was upstairs, and I was downstairs, and he said, "I would like to talk to you for a moment." He told me that he did not intend to run for reelection. However, he was going to sign up to run for election, and he wanted me to go in at the last minute or so and also sign up. Then when the time came to pay your money, your fees, he was going to default, in effect. I said, "Well, that doesn't seem honest to me." He said, "Well, there are a great number of judges on the court who are here by just that same fashion." Since I had not been active politically, [Governor Goodwin] "Goody" Knight was not about to elevate me, nor was Pat Brown. So, I talked to several older attorneys in town and said, "Is that really honest to do it that way?" They said, "Well, surely. That's the way the law permits it," and they named a whole group of judges who had got on the superior court in that fashion.

GRODY: Naming your own "heir apparent" in the process.

WRIGHT: Yes, that's right. So I proceeded that way and signed up at two minutes before five on the last day of registration. So, of course, I appeared on the ballot as unopposed. So I was elected, but I was unopposed.

GRODY: You never stood, then, for election as a municipal judge?

WRIGHT: Oh, yes, surely.

GRODY: Just initially?

WRIGHT: Well, you see, you inherit the terms of your predecessor. Now, I'm not certain how the election to the municipal court operates, but I stood for election in the municipal court and had no opposition. I had no opposition at all on the superior court, initially, nor when I was up for election six years later. I didn't have any. The same was true all the way up. I was fortunate. In 1960 I was elected to the [Superior] Court of Los Angeles County, and in 1961 I was sworn in and was assigned to the Burbank Department of the [Los Angeles] Superior Court, the Burbank-Glendale Court.

GRODY: That leads us, then, to your next two appointments which, of course, were gubernatorial appointments to the appellate bench, the California Court of Appeal and the California Supreme Court.

WRIGHT: I was very lucky on the superior court. I was the head of a branch department first, and then I was only in that job for about one year, I guess, when I was brought downtown. Judge McIntyre Faries, who had become the presiding judge upon Louis Burke's appointment to the California Court of Appeal put me in charge of the criminal departments, Department 100, which at that time was the largest criminal court in the country. I served in that capacity for a year and also served a year or so in the trial criminal courts. Then I was made the head of the probate department. During that time I was lucky enough to be given the authority to completely revamp them [the courts]. They were greatly in need of it. Very frankly, the court to this day operates completely in the way I revamped it way back in the early sixties. Based upon that, I was made the assistant presiding judge, and before I knew it, I was presiding judge. It all happened in a very short span of time. I went on the [superior] court in 1961 and then seven years later went on the court of appeal in 1968.

GRODY: That would have been how many terms?

WRIGHT: Well, I was at that time the presiding judge of the Superior Court of Los Angeles. Strangely, I had been elected and reelected a total of three times, as it turned out, because I inherited the balance of the term of my predecessor, Lloyd Nix, who retired because of age. I was elected to his unfinished term, and then I was elected to a whole year of my own. Then I was reelected for another year, 1969, but by that time Governor Reagan had appointed me [to the court of appeal]. So even though I only served a year and three months, I was elected and reelected three times!

GRODY: In that period, in reading some of your background material, I found that while on the Superior Court of Los Angeles you had been active in advisory committees for other appointments to the bench.

WRIGHT: That is correct. In other words, the way the governor operated was that he had committees set up all through the state, perhaps not in each county because some of them were too small and they only had one or two superior court judges and no municipal court judges. He picked the presiding judge of the Los Angeles court to be chairman of one of these committees of six. My predecessor, Lloyd Nix, had served in that capacity, and then upon his leaving the court, I was asked to remain and be chairman of the new group. The group was composed of two judges, two

lawyers, two lay individuals, and names were submitted to us for evaluation. There was also another group, and I don't know how many were in it, but I assume it was a comparable number of individuals who selected people whose names went to the governor, and the governor would submit them to us for evaluation. It worked very well. I will have to say that it was a little more idealistic than it turned out to be practical, for this reason: either Harold Schweitzer, who was the other judge with me and who is now a retired justice, or I could call up any attorney or any judge, say, in Long Beach, and say, "Tell me, how is John Doe? What kind of an attorney is he? Is he ethical?" Or there were many other questions I could ask. As a judge, I could get the answer. But if a lawyer tried to call and ask those same questions, he would get few responses, and lay individuals would get even fewer responses. So in the end, it turned out that Harold and I did practically all of the work. That isn't because of lack of desire to do the work by the other four members, but it was just that the makeup of the committee dictated the way it had to happen.

GRODY: Your first appointment then, by Warren, is not too different from your appointment by Reagan to the appellate bench. You had not met him or had contact with him?

WRIGHT: That is correct. When I went on the court of appeal I had only seen him. At that time, I believe, I'd seen him twice in my entire lifetime. Lloyd Nix, my predecessor as presiding judge on the superior court, had invited him to come down to Los Angeles to swear in the first group of appointees he appointed to the court. As I had been elected the presiding judge [in the meantime], I quite naturally stood in for my predecessor, and that was more or less just a handshake. There were about seven or eight judges being sworn in. That was the second time I had seen him. The first time I saw him was when I was sent up with the committee of three to find out what the governor's attitude was about additional judges on the Los Angeles Superior Court. Again, it was my predecessor, Lloyd Nix, who sent me up to Sacramento to ask Governor Reagan. There were three of us and we waited all day, to almost five o'clock, to get in to see him. When we did get to see him, he was so tired that we all felt embarrassed to take any time at all. We had nicely prepared a resume of what the bill was we were going to present or have presented on our behalf and he had had his staff

review it. He's very good, as you know, at gleaning material very quickly off short cards. So he responded that he saw nothing wrong with it, and he would not veto the measure. We were going to take the position that if he was going to veto it, we were not going to introduce it. That was probably a meeting that lasted three minutes. Those were the only two occasions when I had ever seen the man.

**WRIGHT:** When the governor called and told me that he was going to appoint me to the court of appeal, five vacancies had been created. I answered a few questions and thanked him for the appointment and told him that I'd be happy to accept. The evening before the appointments were to be made public, I got a telephone call from his secretary, and she told me the governor was going to make the appointments the following day; however, she did not know to which political party I belonged. She wanted to know whether I was a Republican or a Democrat because she knew and the governor knew those questions would be put to him at the time he made the announcement. I told her I was a registered Republican, although not active in Republican affairs. She thanked me, and that was all there was to the conversation; but it's an indication how, at that time, there was little or no concern about political background.

**GRODY:** However, when you were appointed to the California Supreme Court there was an exchange which took place between you and the governor in those few minutes when you saw him. Perhaps you could recall the little card that was shown to you. These were going to be his remarks, and you were asked for agreement.

**WRIGHT:** Yes, the card was shown to me by Ed Meese and Herb Ellingwood. Ed Meese was then in some capacity.

**GRODY:** He was the executive secretary.

**WRIGHT:** He was the executive secretary, and Herb Ellingwood was the legal affairs secretary. It's all so long ago — twelve years ago or more. As I recall, when we, I mean my wife and I, arrived in Sacramento and went to the governor's office, we were told that he had appointments and that the press conference was not to be called until eleven o'clock. We were told to walk out into the Capitol gardens there and enjoy ourselves and to come back around twenty minutes before the hour. So we did. When

we got back, either Ed or Herb handed me a little card on which there was a short biographical sketch and some other items about judicial attitudes and so forth, and I was asked a question: Did I agree with everything that was on there? To which I replied, "Most of it is correct, but I don't agree with all of it." The answer I got was, "Well, it's too late now to make any changes," and it was because the press conference took place within the next ten minutes or so. The governor read off the remarks that were on the little card, or I should say, even better, he spoke them from memory as it appeared to me, and then turned the questioning over to the newspaper reporters and the television people and left me standing in the [laughter] dock!

GRODY: I guess the main point of his remarks, as you indicate, weren't really partisan politics.

WRIGHT: No.

GRODY: Were they philosophical in that he placed some emphasis on judicial restraint as a judicial philosophy?

WRIGHT: I really can't remember. I don't like to use the word frightened, but for one of the few times in my life, I think I was frightened by all of the glare of the television lamps, lights showing on you, and so I really can't remember, at this time, what the gist of his remarks were.

GRODY: Essentially, when he appointed you, the remarks were that there was a need for judicial restraint, and you were quoted in the *Los Angeles Times* article as saying, "I'm an advocate of judicial restraint, and one who does not believe the court is to legislate." That was about the extent of the quote.

WRIGHT: I could have said that.

GRODY: So that would fit, certainly, into what at that time would have been an expected view of a conservative governor and the kind of a judiciary with which he'd be interested. That would especially track with Nixon's presidential campaign in 1968 and the great deal of comment about the need for judicial restraint.

WRIGHT: Restraint, right.

GRODY: As a matter of fact, that even goes back to Nixon's gubernatorial try some years before in California.

WRIGHT: You mean against Pat Brown?

GRODY: Yes. When Brown ran for reelection in 1962, Nixon campaigned a great deal as the first in a long line of "law and order" campaigners in California.

WRIGHT: You have a better memory than I, number one, and number two, that's your profession, political science [laughter].

GRODY: Is it fair to say your appointment to the California Supreme Court may have come about in some measure from the previous association with Ned Hutchinson? Or is it unknown to you, or not really clear?

WRIGHT: To this day it is completely unknown, because I made no application to be put on the Court. I'd only been on the court of appeal for a year plus three months or so. I had no expectation in the world of ever being considered for such an appointment, and I would permit no one to write a letter on my behalf. Several individuals who were interested in becoming the chief justice not only wrote many letters themselves, on their own behalf, but had files on the governor's desk which were anywhere from four inches to eight inches thick. When I appeared there, Ned Hutchinson showed them to me. I won't mention any names, but he said, "Now, this is the application from So-and-So, and here's the application from So-aud-So and So-and-So." I said, "Where's mine?" He opened it, and there was one piece of yellow paper in there, and it simply had my name and the dates I'd been appointed to the court. That was the only paper in there. That I remember very clearly. Looking back on it, I think maybe I was appointed because, very frankly, I had had as much experience in the judicial system as any judge in the state of California. Having served on the municipal court, and as presiding judge of the municipal court, and having served on the superior court and as the presiding judge of the criminal court, of the probate court, the domestic relations court, civil court, and the whole court, I think that was largely the reason I was selected.

GRODY: Well, it's interesting that there had been some speculation at that time that Louis Burke would be elevated to chief justice.

WRIGHT: I assumed that he would be. I think most of us on the court in Los Angeles Superior Court and the [Second Circuit] Court of Appeal rather expected that and, frankly, I know that Louis himself did [chuckle].

GRODY: Did you ever talk about that with him, or was there any discussion?

WRIGHT: No, no. We never had any discussion, but I know my other colleagues told me that they expected him to be promoted to that position and were frankly, surprised when I was named. I didn't know any one of them except Justice Burke. The others I didn't even have a knowledge of. If I saw them in person, I wouldn't have known them.

GRODY: You succeeded Roger Traynor?

WRIGHT: That's correct.

GRODY: After your appointment to the Supreme Court, the governor continued to make other appointments to the appellate bench which you now perceived from a different role as chairman of the Commission on Judicial Appointments. Did you perceive a change in the quality of appointments, because you made at least one press-noteworthy vote when you voted against the appellate appointment of Herbert Ashby, who was also from, I guess, the Alameda County area?

WRIGHT: No, Ashby was from Ventura.

GRODY: Ventura, right. Yes, as a matter of fact, Bruce Thompson, who is the former D.A. in Ventura County had strongly come out against Ashby's appointment. But that was, I guess, your first occasion to vote against a confirmation.

WRIGHT: Well, I figured, and very correctly I think, that if you were going to be the chairman of that appointments commission, it was incumbent upon you to do your duty and not just automatically put a rubber stamp upon every individual the governor named. The appointments commission, in my opinion, is very, very poorly designed. First of all, in my opinion, the attorney general should not be a member of it, because in more than half the cases that appear before the appellate courts and the Supreme Court, the attorney general is one of the parties before the court. It's almost ludicrous to think that an individual such as that should have one-third of the veto power.

GRODY: You anticipate me. That was certainly a question that I was going to get to.

WRIGHT: I think it's very, very poorly planned. I took my job very seriously. When Herb Ashby's name came up, I called and said, "You have no staff on the appointments commission, no staff at all," so I personally took my time as chief justice and called probably twenty to twenty-five lawyers in the Ventura area and asked them their frank opinion of what his qualifications were. Not a one, as I recall, rated him as having any qualifications for the job at all. He was simply named because he was a very close friend of Herb Ellingwood, and that was not sufficient in my mind to constitute voting "yes" on his appointment. I do want to put this in right now that he's turned out to be a very good court of appeal justice, and I'm very happy that he has. But that's how I felt at the time, and that's how I voted which, of course, shook everybody because beforehand nobody did anything but rubber stamp them.

GRODY: Do you think that Attorney General Deukmejian's role on that commission in recent years has heightened any interest in changing that role?

WRIGHT: I really couldn't answer that. These are subjects that I don't discuss with members of the bar or other friends of mine. Friends who are not lawyers would not know what I was talking about, and most lawyers pay little heed to it, to be very honest.

GRODY: Well, you had voted "no" on an appellate appointment, and we will get to your even more celebrated "no" vote on William Clark's nomination to the California Supreme Court. Deukmejian has voted "no," probably in record numbers, I would think.

WRIGHT: He's voted "no" on everyone, I believe, except Otto Kaus.

GRODY: Right.

WRIGHT: There may have been one other appellate justice in some northern part of the state, I don't know. There will be three more up for confirmation next Friday [May 21, 1982], and we'll see then what he does, but I'm sure that he'll carry out the same pattern.

GRODY: Well, some would say that footsteps in voting "no," Deukmejian is just following in your [chuckle] —

WRIGHT: But I voted "no" for very different reasons! I dug into the scholastic records. I don't like to pin things in these kinds of interviews on

individuals, but Herb Ashby had a dismal academic record and a very, very mediocre success as a lawyer and as a public servant of any kind. There was really, at that time, no reason why he should have been elevated. Bill Clark had a miserable academic record. He had flunked out of Stanford. He went for six quarters and only barely got four quarters of credit out of the six quarters he was there. Then he joined the service, and when he came back to Loyola Law School nights, he flunked out of the place. Finally, he studied for the bar while working for a lawyer. So there were many other things in Bill's case that caused me to vote "no." I did do it in what I thought was a dignified way, saying that I thought there was nothing in his education or his training "at this time" which would say he was qualified to sit on the California Supreme Court, and I don't have any doubt in the world that I was correct. I was just inundated with compliments from all over the state, law schools, and everything else because it was, frankly, true at that time.

GRODY: As in the case with Ashby, Clark was confirmed and became your colleague, and it may or may not be a proper question, but I'll ask, and then you can constrain —

WRIGHT: As a judge I am used to ruling on improper questions! [chuckle]

GRODY: You had offered the comment that you felt that Ashby had turned out to be a good appellate jurist, and when you had voted "no" on the Clark appointment, you said that you hoped that you would prove to be wrong. Do you feel you were proved to be wrong?

WRIGHT: That's a rather hard question to answer, because during the years that Bill and I served on the Court together, he was not a leading member of the Court, shall we say. In fact, I don't recall ever hearing him express an opinion on much of anything. In fact, it was difficult to get a vote out of him. When we would have discussions after our hearings on cases and we were making the final vote, Bill's response would usually be, "Well, I'll have to make more study of that. I don't know." So I couldn't put a "yes" or a "no" as to how he was going to vote. In all fairness to Bill, I can indicate or say that I'm sure it wasn't the happiest time of his life. I had voted against him, and when he came on board I welcomed him. I said, "I know it's going to be kind of hard, Bill, but let's make things work." But nevertheless, I could always feel that the hurt was probably there, and so that brought out in him a very, very quiet manner. Maybe that's his manner anyway. He

would never, for example, go with the rest of us to lunch. Occasionally he would get talked into it following a Wednesday conference, but the rest of us used to all go out to lunch together.

GRODY: I remember reading a profile on him saying that if he did go to lunch sometimes it would be with Justice Marshall McComb.

WRIGHT: That is correct.

GRODY: Then there were bets on whether or not anyone would say anything at all during the course of the lunch! [laughter]

WRIGHT: Well, that's a very accurate observation. Also on the Court with us at that time was Ray Sullivan who went off the Court just about the same time I did. He had the most completely analytical mind of any human being I have ever run across in my life. I would never want to be cross-examined by him. He was a perfectly fabulous attorney and a wonderful person, but if Bill Clark thought in the early days that his statements would go unchallenged, he was in error because [chuckle] Ray would listen to what he said and then give simple devastating answers or arguments contrary to him. It was a very belittling experience to go through that. Bill got so that he just never opened his mouth at all at a conference except maybe to say "yes" or "no" on a vote. So you asked me the question, "How did he finally work out?" During the time that I was there, he didn't. But I've been told by others that later, after Ray and I left — perhaps a little bit of fresh air came in [chuckle] — that his opinions thereafter were better and he contributed more on the Court. I can understand why he behaved in that fashion.

GRODY: The record for your period of time as chief justice indicates a fairly high rate of unanimous or, let's say, 6-1 votes on the Court.

WRIGHT: Far more than they've had in recent years! [laughter]

GRODY: Yes, not only in the period after you, but even in the period before you. I found in looking at the record that Clark was not the lone dissenter or did not join the dissent that often. McComb seemed to be more the lone dissenter when there was a lone dissent.

WRIGHT: Yes. McComb, of course — you probably know the history as well as I do — was totally incompetent the whole seven years I was there and had been for many years before. He had no idea what was going on.

There was no way of removing him; he was the “darling” of a great group of individuals in California, and upon his name coming up for election to being given another term, he got a tremendously high percentage of the votes. I attempted to get him to leave the Court, unsuccessfully. I attempted to get his family to use pressure on him, and I was not successful in that. I even explained to them what a really ridiculous figure he had become. He would go to sleep all the time on the Court and lean back in his chair with his mouth open, and I could see people in the audience pointing to him. But there was no way you could get him off the Court unless his family could succeed in talking him into leaving, or unless you could, yourself, succeed in that. Fortunately, scandals arose in the Florida Supreme Court in which three members of the court had to be removed, and that got a group of people in California together, including Seth Hufstedler, Bob Thompson, myself, and others, to find out how they would get rid of us if a scandal broke out on the California Supreme Court. The weakness in the system, you see, was who could explain Marshall’s behavior on the Court except the other six of us who served with him? And each one of us would be disqualified then from voting. There was no way that any group other than the Supreme Court, except the voters or the Legislature by impeachment, could remove him. There was no effective way of doing it. So then we devised this system — I was not the author of it; however, I wish I had been smart enough to have been the author — where if a Supreme Court justice was involved, then a “rump” Supreme Court would be created, seven of them drawn by lot from the court of appeal, to sit and that was the way we finally had Justice McComb removed off the bench.

GRODY: Was that a change in the rules of court?

WRIGHT: Oh, no, it was a constitutional amendment. It could not be accomplished by a rule of court, and I have a feeling that had we not done so, he would have been sitting there until the day he died.

GRODY: Yes. Well, that’s sad.

WRIGHT: It finally got in the last three years or so that I didn’t assign him any cases.

GRODY: If I may go back to Clark for just a moment?

WRIGHT: Sure.

GRODY: I'll ask the same question as I did with Ashby. When you did cast a negative vote, though again Clark was confirmed, did you get any reaction out of the governor's office?

WRIGHT: No.

GRODY: As you say, Ellingwood had close ties to Ashby, and in this case, of course, the governor directly had close ties to Clark. Clark had been his executive secretary prior to his brief stay on the superior court and appellate court. You didn't have any reaction from anyone?

WRIGHT: No. As a matter of fact, there was no response at all. In fact, I didn't expect one, and I don't think it would have been proper for anybody in the governor's office to say anything. I'm sure they weren't very happy with my vote.

GRODY: I think we have pretty well covered the history of the appointments and the kind of appointment process, or style rather, that the governor had. Most records that I have seen on Reagan's terms as governor have given him relatively high marks for the quality of judges he appointed to the bench.

WRIGHT: I would say that would be a proper assessment. I think those appointed in the later years were philosophically different from the ones appointed in the earlier years. In other words, I think those appointed in the earlier years didn't have any philosophical direction, I mean sole direction. Some of those appointed in later years were definitely hard-boiled "law and order" type individuals, and I know they were not selected by the governor but by the people who were in the appointments system who felt that way themselves. I'm sure Ed Meese feels that way and Herb Ellingwood feels that way.

GRODY: As you reflect on that, too, I suppose, you were aware of that as you reviewed these people for their appointments. Yet, it was something, apparently, which you didn't consider as significant in your judging them one way or the other.

WRIGHT: No, not at all. I knew that Justice [George] Paras and Justice [Robert] Puglia and several others were rabid "law and order" people, but I felt that every individual is entitled to his own philosophy, and that didn't deter me from voting for them at all. Their records were outstanding. They were well-educated individuals and had performed, I won't say totally

brilliantly, but at least adequately as members of the bar and as members of the lower courts. So their philosophy wouldn't affect me at all; unlike George Deukmejian, for example, who won't vote for anybody unless they philosophically agree with him. That I did not think was our business. It's for the governor to make those choices, and I did not vote against either Herb [Ashby] or Bill [Clark] for philosophical reasons. In fact, I didn't even know what they were!

GRODY: Well, when your successor as chief justice was confirmed, Rose Bird, Attorney General Evelle Younger cast the critical vote in her favor. He has since said that he has had more than some second thoughts about it. He regretted it, but he apparently saw things differently than Deukmejian, too. That is, he felt that the philosophic view really wasn't what he was there to review. He was there to review other kinds of qualifications and make the judgment based upon that.

WRIGHT: Also, you must not forget that "Ev" Younger was and probably still is a very ambitious individual who expected to be governor and had good reason to think that he might be governor. He did not care, I believe, to have commission members set a precedent of "knocking off" [laughter] the governor's nominees. Now, he never mentioned that, but if you'll look at his record, he never voted against anybody, not a single one, until this court of appeal justice who was confirmed and then later retired from the court.

GRODY: Halvonik.

WRIGHT: Paul Halvonik, after his involvement, or his wife's involvement, with growing marijuana. That was the only individual he ever voted against. I will tell this since it's for history. It's true. During the proceedings in the Rose Bird nomination, I got a telephone call from Ev, and he said, "Well, Don, aren't you going to appear up here and speak on this matter?" I said, "Well, no. Why should I?" I said, "When I was named, nobody appeared at all to speak either for or against me." As a matter of fact, when my name was brought up, I wasn't even there. The only thing before the commission was one letter which said, "I don't know a thing about this Judge Wright, but if Governor Reagan appointed him, he can't be any good." [laughter] That was the sum total of letters in the file, just one letter! So if they used that as a basis, they would have voted "no." But I said, "No, I'm not going to appear. First of all, I haven't heard any of the testimony. I

haven't heard anything. All I know is from the brief accounts I read in the paper." He said, "Well, aren't you going to write a letter and express your views?" I said, "No, I have no intention of doing so, Ev," He and I had gone round and round on several other matters, and I said, "For once, Evelle, use some guts and vote how you think this matter should come out." He was very troubled, I knew. He said, "I don't think she's qualified." And I said, "If you don't, then that's the way you should vote." But then, to my amazement, he voted the other way.

GRODY: And his was a critical vote.

WRIGHT: It surely was.

GRODY: His was apparently the central vote. I think that Parker Wood voted against her.

WRIGHT: He did.

GRODY: By the way, there was some interesting speculation in the press on that. When you named the acting chief, he then cast the vote on Bird in that position because you had left. The acting chief was Mathew Tobriner, and the speculation was that if you had named someone else, perhaps Stanley Mosk, Rose Bird would not have been confirmed.

WRIGHT: I really don't know. I didn't intend to name Matt Tobriner and, of course, under the law, I had no authority to name anyone, anyway, which I was not completely aware of at the time. But what happened was, on the last day in January, at the Court [sitting] down in Los Angeles, I made a brief announcement at the conclusion of the session to thank everybody and say this would be the last session of the Court that Justice Sullivan and I would be sitting on as we were both leaving the Court within the next week or so. With that, Matt Tobriner, who was a dear friend of mine, took over. He was the senior member of the Court because Marshall McComb wasn't sitting then. Charges had been made against him, and he was not permitted to sit under the law. Tobriner took over and eulogized — I use that word not properly — both Ray and myself, and he said, "Now, as the senior member of this Court." So I felt there was nothing [that could be done] the way he took over. He said, "I'll be the acting chief justice." Well, the law was such that really the remaining six themselves, or five is all there were because Marshall was no longer sitting, should have chosen who would

be the acting chief justice. But not one of them took the trouble to look up what the law was.

GRODY: Actually, your responsibility for appointing an acting chief was only in the event of your absence or when you were temporarily away from the Court.

WRIGHT: Yes. That's right. Only as long as I was still in the position. Under the law I had no authority. So the result might have been different. I'm sure it would have been different if I'd appointed Bill Clark [laughter] as the acting chief justice, and he'd been able to act!

GRODY: Did you become to Reagan what Holmes became to Teddy Roosevelt or Earl Warren became to Dwight Eisenhower?

WRIGHT: I suppose it appeared that way to many. [chuckle] I don't know whether it's a compliment or an insult, but I'll take it as a compliment. You are correct. By reason of the fact that the headquarters of the California Supreme Court are in San Francisco, while the legislative and executive groups are in Sacramento, there is little contact between the two, between the Supreme Court and the executive, or the Supreme Court and the Legislature. As I indicated to you, we went to Sacramento twice a year for one day, two days at the most, but very rarely three days. During that entire seven years, I don't suppose that I saw the governor but once that I can recall. That was when I dropped into his office for something to do with some appointment that was coming up, and I spent a very short time with him. I only recall that because I saw on the couch a great number of needlepoint pillows with "jellybean" written on them and jellybeans in compote dishes and such. [chuckle] There was no contact, at all, between the Court and the governor's office.

GRODY: I raised the question of an analogous relationship to T. Roosevelt and Holmes or Eisenhower and Warren, in that, at least in terms of press accounts, there were on a couple of notable occasions of public statements by the governor himself regarding the substance of some of the decisions that came out of your Court. I guess you were in the position, as every justice on the California Supreme Court suddenly discovers if he didn't know it before he got there, that you get nothing but the hard stuff!

WRIGHT: That's probably our own fault [chuckle] because we are the ones who vote to take over the cases, and we have no mandatory cases that we

have to take over with the exception of death penalty cases. On the rest of them, we can all say, "no." In fact, if we followed Justice McComb's record, we would have had no work to do at all because [chuckle] he voted "no" on almost all of them.

GRODY: Well, I think the first public record that I was able to find of the governor's commenting critically on a Court opinion was the death penalty case in *People v. Anderson*.<sup>1</sup> But you had a series of cases that from a philosophic point of view, if we can presume to understand what Governor Reagan's philosophic view was, would have run counter to the governor. There was the death penalty case, and there was *Serrano v. Priest*,<sup>2</sup> the school tax equity case.

WRIGHT: Justice Sullivan wrote that opinion.

GRODY: Yes.

WRIGHT: I think that was a 6–1 vote, or it may have been a unanimous decision. I'm not sure.

GRODY: Then you had the reapportionment opinion.

WRIGHT: I'm very proud of that one. I wrote it.

GRODY: Yes! So I guess there were enough of those kinds of opinions where you could see some reaction. Two things I notice is that there was not only a reaction from around the governor, but there was reaction and the governor was highly critical of the death penalty case.

WRIGHT: I guess so. As a matter of fact, the San Francisco papers, to my recollection, printed no comment that the governor ever made, and it was only sometime later that I found out that he was madder than a wet hen about that decision. He never expressed the same to me. He never expressed any opinion about any opinion that I ever wrote or that I was coauthor of or that I had joined in the decision. So I was completely in the dark on that. He made no attempt whatsoever to indicate his disapproval of any opinion to me or to any other member of the Court.

GRODY: The death penalty opinion was, in fact, a 6–1 opinion, with McComb voting "no." And if I remember correctly, I think Burke had written a prior

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<sup>1</sup> 6 Cal. 3d 628 (1972).

<sup>2</sup> 3 Cal. 3d 580 (1971).

opinion a few years before upholding the death penalty. He had written the earlier majority opinion, and was in your majority.

WRIGHT: That's right. He had written the opinion upholding it, and Mosk joined it. If you want a brief history of that case, what had happened was we had waited for two years for the United States Supreme Court to come down with a definitive opinion on the death penalty. In the meantime, the people on death row were just being stacked up. There were 108 or 110, around that neighborhood, and I finally said to my colleagues, "Well, thank God, this fall the Supreme Court will be deciding this issue." The very first case on the calendar to be argued at the October term was the death penalty case. However, Justices Black and Harlan both became ill and left the Court before the October term began. Then the difficulty arose over the appointment of their successor with the [G. Harold] Carswell and [Clement] Haynsworth appointments first, to be followed by Rehnquist and Justice Powell. So the death penalty case was put off indefinitely. I said to my colleagues, "This is becoming intolerable. We have people stacked up there awaiting the death penalty." I also brought to the attention of my colleagues, [something] which possibly they already knew: I said, "Even when they come down with a decision, what effect is that going to have upon the California situation? Our state constitution reads that it [punishment] cannot be either 'cruel or unusual,' the disjunctive. The federal constitution reads 'cruel and unusual,' so it has to be both, conjunctive." I said, "We're still going to have to face up to it, because an argument can be made that this [death penalty] is 'unusual.'" And a good argument can surely be made on that, even if you don't find it "cruel" so that it wouldn't apply at the federal level. So we decided to go forward with it. Then when it came time to decide who would be the author, I wasn't particularly looking for the work, but Louis Burke said, "I think this should come from you. You're the Chief." I said, "All right, I won't shirk it. I'll take it, but I want you people to help me." So I would have matters drafted; I would draft it myself, and then I'd submit it to all my colleagues, and they would object to some portions of it. It really was a work of all six of us. Each one of us contributed something to that opinion, and I am not one bit ashamed of it to this day. The odd part of it is that, to this day, they always say the California Supreme Court tossed out the death penalty, which we did in the *Anderson* case. However, shortly

after that, the United States Supreme Court did act in *Furman v. Georgia*,<sup>3</sup> and, as you probably know, they declared every death penalty in every state in the United States to be unlawful, unconstitutional. Every single one of them was, so everybody had to start back on the drawing board, including the State of California. So the *Anderson* case really only had a temporary effect but no permanent effect.

GRODY: There were two things about *People v. Anderson* that really may be of particular interest here. One is the reaction of Reagan to it. The other aspect has to do with the general judicial direction of the Court which various news articles have connected with you, and that is a view of using the California Constitution as a basis of decision regardless of the federal constitution's standards, if you felt that the California standards were greater. Perhaps Justice Mosk initially held that view most strongly.

WRIGHT: I think you are correct in that Justice Mosk was the one who felt the most ardent about that and was the first one to acknowledge it and make a public speech on that particular subject. I think he delivered a lecture or a talk to the Chicago Law School alumni on the independent state authority to overrule matters that the federal constitution would not permit being overruled. You are correct and we did apply that, but not on any great number of cases. Perhaps in the last five years they've extended it. I don't follow the Court as closely as I did then, because I know I'm never going to be in a position where I'll be doing any ruling on it. So when the opinions come down in the advance sheet, I simply glance at them. Some I remember, and some I don't even try to remember.

GRODY: As to that second point, if you were to be viewed as a judicial restrainer or as a conservative when you first went on the Court, whatever those magic terms mean, then the substance of your opinions, for instance, the death penalty case in which you opposed the death penalty on the basis of the California Constitution, was in direct opposition to the governor's strongly held views about the death penalty. "Judicial activism" is more likely to be the term attached to saying, "Well, we're going to read our constitution to see if it requires harder, greater standards than the national constitution." So I think that's the context in which I remember picking up on this particular theme.

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<sup>3</sup> 408 U.S. 238 (1972).

WRIGHT: I suppose we did. I don't know how many cases we used that criterion in. It had been used in several cases before I went on the Court. I remember one particular case, and I did not concur in the reasoning of it at all, although, as I said, it happened before I came on the Court. It involved an individual who was riding in the car of a person who was stopped with contraband, and there was every reason, you'd think, to believe that the man sitting in the front seat might also have some and, yet, you couldn't touch him. That seemed to me to be a totally false way of looking at it. That was the first case I remember being based upon the California Constitution, a search and seizure case. Then there were several that came in. One I remember was *Disbrow*,<sup>4</sup> which had to do with *Miranda*. It seemed to me to be almost a perversion to permit the police officers — and they were doing it in increasingly great numbers — to refuse, or fail to give the *Miranda* case warning, and then wait until the defendant, lulled into a sense of false security, took the stand and then made some slip or told a little bit different story from what they remember him telling. Then it [evidence obtained in abeyance of the *Miranda* warning] was permitted by way of impeachment. So the officers were violating the rights of the individual by just laying low. Of course, they didn't really affect any of the sophisticated criminals because they wouldn't open their mouth anyway, but the poor and the ignorant would.

GRODY: Did you dissent in *Disbrow*?

WRIGHT: No. I wrote a concurring opinion. Mosk wrote majority.

GRODY: Did that permit impeachment of testimony?

WRIGHT: No. We ruled it out. That was when we relied upon independent California grounds.

GRODY: Oh, even though the federal ruling allowed the impeachment, you ruled it out by reading the California Constitution. Do you think it was a violation of rights?

WRIGHT: Yes, that's right, and I still think that our reasoning was correct, because it could become a way of completely doing away with the rights that *Miranda* granted. One of the other cases that I remember was *People v. Robinson*.<sup>5</sup> I don't recall the name of the other one [the companion case].

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<sup>4</sup> 16 Cal. 3d 101 (1976).

<sup>5</sup> 62 Cal. 2d 889 (1965).

There were two of them which came up at the same time before the United States Supreme Court. One involved a student in Florida. The young man crossed over a double line on his way to school, if I remember the facts correctly, and he was stopped by a police officer. They wanted to see his driver's license. He said that he was sorry, he didn't have it, he had left it at home. He just lived a short distance down the road, and he would go back and get it, or they could go with him. They said, "Not at all," and they gave him a complete body search and found a marijuana roach, or something of that nature. To me I just couldn't conceive of this kind of a law whereby you get stopped for a little traffic [infraction] and the police officer is permitted to give you a complete body search. I said [in *Robinson*], "That far, I just can't go." I still think it's a better decision than the United States Supreme Court came down with. You don't have to express yourself! [chuckle]

GRODY: Well, I think that the point of the original question is that at best the appointer is guessing at the direction to come from his appointments no more or less than any other jurist who is appointed to the bench. But the reaction of Reagan to the death penalty case, again, was pretty direct.

WRIGHT: To this day I don't even know what he was supposed to have said. I believe he said something [to the effect] that I had told him I was in favor of the death penalty.

GRODY: Yes, one matter that I'd like to clear up is the business of Governor Reagan's response to the death penalty case. The newspapers quoted him as saying, "The court is setting itself up above the people and their legislators." There was a lot of legislative reaction, state assemblymen and state senators. It was mostly Republicans who were critical in the press. They were pro death penalty. Anderson's attorney was Amsterdam from Stanford Law School.

WRIGHT: Tony Amsterdam, the professor there.

GRODY: He criticized Reagan's comments as being the "rhetoric of a demagogue." So we had this kind of exchange! This was in February 1972. In September of that year, you published in the *California Law Review* an article entitled "Role of the Judiciary: *Marbury* to *Anderson*," in which you made some comments that the critics of the death penalty case disturbed you as critics because their criticisms went beyond the merits of the case.

Some newspaper accounts of your article interpreted those comments to be, without naming the governor, a response to his criticism. Do you recall any intent in that regard?

WRIGHT: No. As a matter of fact, I do not know what the governor said. I may appear a little naive; I don't recall even reading in the San Francisco papers any comment that he might have made. I can't say that I recall definitely what you read, but I have no doubt that's what I said. But it most assuredly was not directed at all at anything Governor Reagan might have said. I'm [feeling] a little like the scene from "The Barrets of Wimpole Street," starring Katherine Cornell, in which Robert Browning first calls on her [Elizabeth Barrett]. She hands him a copy of *Pippa Passes* and says, "There are some lines in there I don't understand, Mr. Browning. Would you please read them through?" He reads them, and they don't seem to make any sense at all. So he says, "Well, Miss Barrett, when I wrote that, God and Mr. Browning knew what they meant, but now only God knows." [laughter] So maybe these things will have to be considered in that fashion.

GRODY: Well, about a week after the *Law Review* article came out in September, you addressed the California State Bar, as did Governor Reagan. In his address the governor indicated there was a crisis in the courts. You followed the governor's address with your own, which obviously was prepared before the governor said anything, so you couldn't have written a speech on the spot to respond to him! Nevertheless, it was reported in the press that in your speech you suggested that criticisms of the Court were, perhaps, politically motivated. You were quoted as saying, "Certainly some reform is needed; it will come in time, perhaps, in a nonelection year." Everybody picked up on the phrase "perhaps in a nonelection year," interpreting you to suggest that the criticism of the Courts now are more politically motivated than anything else.

WRIGHT: Was that in an election year?

GRODY: Yes, 1972.

WRIGHT: But, of course, he wasn't running again for reelection.

GRODY: No, it was a presidential election year. But it was an election year in terms of the state legislature.

WRIGHT: Yes, when I wrote that, it was all done, as you mentioned ahead of time. To be very honest, I do remember some of the comments that Reagan made at that time. Some of them I did not think were justified at all, but I did not mean in my speech to refute them. I didn't believe this to be a place for open debate, and I wouldn't be very good at that, anyway. So there was nothing intentional about that, and why I put in "even in an election year" is pretty sound, because I find that in election years you do find the most absurd statements being made by candidates from both parties.

GRODY: This is ten years since you made those comments. Would you find that your observations were still applicable?

WRIGHT: They would be absolutely the same. I don't remember on the death penalty case any comment made by Mr. Reagan, except it was reported to me that he did mention that he had asked me if I believed in the death penalty. I have no recollection of that question being put to me at all by him. I don't wish to contradict him; he has memory one way, and I have it another. I do know the subject was brought up at the press interview when one of the press persons, an individual, simply asked me about the death penalty. My reply, as I can best recall, was to the effect that it is a law of this state and that I would be obligated to follow it. However, I further added that I don't believe it has ever proved to be much of a deterrent, if any. That's my best recollection.

GRODY: In your other interviews, which you've kindly given in the past, you didn't recall being asked directly by Reagan, and your response to the press was: "It's the law, and I enforce the law." That, of course, didn't raise the constitutional question at all at that time. I don't mean to belabor the death penalty case; it is just that it was one of those occasions then that appeared to be unusual, that is the governor of the state making a direct comment on the Supreme Court's finding. Today, it is not at all unusual to find governors or candidates for governor, or any other elected or election-seeking officer using the courts as a "whipping boy." Perhaps, that is also one of the things we can talk about in that last part of our interview, your view of an apparent increase in the politicization of the courts in the last decade. Let me move to one last aspect about appointments before moving to the second major phase of the interview. It really isn't a matter of your appointment as much as your "non-resignation," which was the other

major cause célèbre that got into the newspapers. The *Los Angeles Daily Journal* had a story that Ned Hutchinson wrote to you and indicated his great dismay at, among other things, your deciding not to resign. Reagan later, in interviews which I picked up in the *Los Angeles Times*, said that you had indicated that you would retire prior to his leaving office so he could appoint a successor. You had intended to retire when you were sixty-eight? You were sixty-five when you went on the California Supreme Court?

WRIGHT: Sixty-three!

GRODY: Your response was printed in the paper. But Hutchinson was supposed to have said two things. One, in the *Los Angeles Daily Journal* article he indicated that you had made a promise to resign. Second, he was quite dismayed that you had “demeaned all of Reagan’s appellate appointees and made hateful remarks toward the governor.” That was the quote that came out of the *Daily Journal*.

WRIGHT: I well remember that, and I haven’t the foggiest idea how, or where, or from whom, he ever got such an impression. I don’t remember in public, and in private either, ever making derogatory comments about the governor, and so I have no idea. I think Ned was simply mad over something and blew his top.

GRODY: Perhaps your failure to retire.

WRIGHT: I had intended to retire because I had had open heart surgery, and it took me a time to recover from it. Although, oddly enough, I never missed a Court session or even a work day. I missed that Wednesday that I was operated on, but the State Bar was meeting in September, so the Court did not hold a conference that day. I did all my work in the hospital but I never, in effect, missed a single day. The source of Ned’s comments — to this day — I don’t understand. I do remember them now, although I’d long forgotten them.

GRODY: Do you recall if you got a letter from him which had those comments in them?

WRIGHT: No. Not that I have any recollection.

GRODY: I think the *Los Angeles Daily Journal* indicated that he had written these remarks to you.

WRIGHT: He could well have done it. That was so long ago that I have no recollection of it at the present time. I do remember reading the comments you mentioned, now that you refresh my recollection, but if you had asked me out of the clear, "Did he ever say anything?" I would have had to say, 'no,' because it has just completely left my memory. And he could well have written a letter. If he said he wrote a letter, I'll go with that, but I don't have any recollection of it.

GRODY: The other question for our record here, although you have responded to it in other interviews, was where did the governor get the impression you would retire while he was still governor?

WRIGHT: I think the basis of that came when I was put on the court of appeal. I was not particularly happy there. It was not a very congenial group mainly because of one justice whose name shall remain anonymous, but that individual was able to make everything uncomfortable in our division of the appellate court. I had been on an active court. I had been very active on the trial court level serving as presiding judge of all the courts I've mentioned, so I was always in the action. To all of a sudden be put in a monastic setting was not in keeping with the kind of life that I liked. In fact, I used to say if I didn't have a wife, I could die here some Friday and nobody would even find me until the janitor came around in another four or five days. That's the way it was, and I had envisioned that the Supreme Court would be very much the same. Indeed it was not, but I had envisioned that. So I had let it be known that when my twenty years were put in — I think I would have had to have been sixty-six or something like that — I intended to resign. I did intend to resign, but when I got on the Supreme Court, I found it was such a stimulating life that I had no desire to leave. In fact, I wish I was there now!

GRODY: Well, you are retired, but from what you said to me earlier, you're really not retired because you're keeping fairly active with assignments.

WRIGHT: I do a great deal of arbitration work, and I am on a great number of boards. There's scarcely a day when I have a day off completely, and that's the way I like it. Otherwise, I'm afraid I'd rust more quickly than I am. That's where the impression came from. The day the governor had me come up to Sacramento — this is one little thing I guess I should tell you — to indicate he was going to offer me the job, I went into his office

together with Herb Ellingwood and Ed Meese, I never was able to see the governor alone at any time. He always had a couple of his people with him, which is quite common of people in that position. So we had a very brief discussion, and he offered me the job, and I said, "Well, since I'm in the judging business, I don't know why I shouldn't take it." Then on the way out, I jokingly said to him, "Governor, I forgot to ask you one question. What does the job pay?" He laughed, and he said, "Well, if you'd asked me that question first of all, I wouldn't have offered the job to you." He is, as you know, a very quick wit. Also, I indicated to him, in response to a question put by either Herb or Ed, that it was my present intention, at that time, to leave after I had got my twenty years in. I just said it was my intention. There was no flat promise. They didn't extract a promise or say, "You can't have this job if you don't [promise to retire at a certain time]," Nothing like that ever happened. I simply assumed that I would be happy to get out of the job.

GRODY: Did the governor in his legislative program solicit from you or the judicial council recommendations for legislative action on judicial reform? Or did the governor respond favorably or unfavorably to the judicial council in that regard?

WRIGHT: To be honest, I don't recall any reaction one way or the other because we never went through the governor's office in our approach on those problems. We went through the Legislature. Traditionally, and for years before I came on board, the Judicial Council and the State Bar both made recommendations, but they were always to the appropriate committees within the Legislature for future matters to be enacted into law. They never went to the governor's office. We just carried on the same way. I will say that as far as budgetary matters were concerned, we were treated very fairly. In fact, I was the first chief justice who had the real privilege of streamlining the Court in the staff structure and of giving the individuals the jobs they were reasonably entitled to. Before then, everything went through the state director of finance. A justice of the Court couldn't raise his chief research attorney one step up the ladder without getting the personal approval of the director of finance, who knew nothing about how the judicial system worked. That authority was all turned over to me when I came into office, and it still remains with the chief justice. So we never

had any budgetary problems. We tried to be reasonable and adhere to standards which were comparable to those enforced in the other branches of government. So I have no complaint at all. We were fairly treated.

GRODY: There was one reference you had made earlier about a proposed change in the Constitution.

WRIGHT: Well, that, of course, was by this [lunch] committee, and I mentioned the members of it [Wright, Seth Hufstedler, Bob Thompson, and Ralph Kleps]. They made the recommendation to the committee chairmen within the Legislature where those things originate. They don't originate with the governor. I suppose the governor can, if he wishes, ask somebody within either house to introduce a constitutional amendment, but I don't believe that is usually the way that is handled.

GRODY: And you never had any reaction or reason? You never heard why the governor's office indicated why they were opposed?

WRIGHT: Never. Never a word.

GRODY: One legislative reaction that comes to mind is the death penalty case immediately after which the governor's office suggested that they would, in fact, legislate a constitutional amendment to change the court's view.

WRIGHT: Well, there's no question, that is the political thing to do. Strangely enough, at the time of *Anderson* or prior thereto, the majority of people in this state were against the death penalty. Now I don't think there's any doubt. It's probably 75 percent in favor of it.

GRODY: Yes, we've had an amazing cycle. Some years ago there was a study of popular opinion on the death penalty, and the farther you got from the last execution, the more pro-death penalty public opinion was, and it swung the other way the closer you got to or immediately following the next execution. It's sort of the Court's conscience being carried over to the public conscience.

WRIGHT: Well, when I talk with friends of mine, I find that it comes as a great surprise for them to realize that in all of the Americas, excepting the United States, in all of Europe west of Russia, there is no death penalty with the exception of Greece. Greece has one that is seldom if ever carried out. In all of Western Europe and all of South and Central America, none

of them has the death penalty. We're the only country in the world, practically, except those behind the "Iron Curtain."

GRODY: And the Middle Eastern countries.

WRIGHT: Yes, Middle Eastern and African countries. But they simply can't believe it.

GRODY: Let me ask a question that I think would be appropriate now. Certainly, in contrast to earlier years, the bringing of the courts and particularly some judges into the political scene has certainly increased a great deal. It is not uncommon at all, now, to see attacks on courts and judges from the Legislature or from those running for governor. Of course, Governor Brown has not been critical of the courts. Most of the criticism has been from his opponents and from people now seeking his office who attack these judges as "Brown appointees."

WRIGHT: Surely. It's done to get at the governor by pointing at Rose Bird and saying, "Well, that's the kind of person he appoints to the Court. The rest of them are that way, too." There's no question that it's a rather effective way of campaigning, and it's carried on by all of them, I guess. In fact, sometimes I read what [Lieutenant Governor] Mike Curb has said, and I almost could come to the conclusion that he's running for chief justice, that Rose Bird is his chief opponent.

GRODY: Republican State Senator H. L. Richardson is prominent in the attacks. The Republican party, especially Curb and Deukemjian have made the courts a particular target of attack. Do you perceive that the courts themselves have changed or that the issues have changed? Certainly nothing could have been more dramatic than the death penalty opinion when you wrote it. We saw a response, but it was nothing like the response we see now. Do you have any thoughts on that?

WRIGHT: No, I can't understand it. The next time [after the death penalty case], I came up for confirmation by the voters, I still got over 88 percent of the vote. So the voters didn't feel so strongly as some of the individuals who spoke on it did.

GRODY: Rose Bird was confirmed by a 52 percent or smaller "yes" vote. It was a relatively narrow margin, and there was a campaign waged against her.

WRIGHT: That's correct.

GRODY: Is it just the ambitions or the ideologies of certain political actors which have found a ripe target, or have the courts themselves been doing things that might be encouraging this kind of attack?

WRIGHT: I really can't answer that intelligently. I can't see that the courts are behaving in any different fashion, or in a very much different fashion from what they have always. I think that Chief Justice Bird has made several dramatic mistakes, and I'm sure she would [think so], too, upon reflection. I think, for example, that investigation which she made was poorly planned. If she had talked to her colleagues, I'm sure they would have all said, "Let's not go that way." It held the California Supreme Court up to ridicule. It held the Court up to the public as being a group that fought among themselves the whole time, which simply wasn't true when I was there. We didn't fight. Perhaps, they do now; I don't know. It took a lot of the luster and the glamour off the Court, and I think that hearing [by the Commission on Judicial Performance, at Bird's request, on allegations that the Court had withheld opinions until after the judicial retention election in November 1980] was largely responsible for that.

GRODY: I faithfully watched those hearings until two or three o'clock in the mornings.

WRIGHT: We were in Europe then, and I'm glad I was.

GRODY: One of the interesting things from those hearings was that William Clark emerged as a very different character from the way you depicted him in your relationship when you were chief justice. Obviously, he was the prime antagonist to Bird.

WRIGHT: I told you that he was clearly operating under wraps when Ray Sullivan and I were on the Court, and I can easily understand this, as I explained earlier. I do know that he was much more open and much more talkative and commented on many more things in conference than was true in the earlier days. I have no doubt of that. I read Preble Stoltz's book *Judging the Judges*, and so I have a pretty good picture now of what went on.

GRODY: Of course, Stoltz's views themselves have drawn criticism in terms of how he depicts what went on.

WRIGHT: Yes, that's right.

GRODY: The Reagan appointee, Clark, who may have stayed under wraps while you were on the bench, seemed to shed some of that shyness when he had a clear ideological opponent to face on the bench.

WRIGHT: I don't know that he alone felt that way. I think it's reflected in Stan Mosk's actions, too; and, yet, Stan Mosk and Bill could not be in any way accused of having the same philosophical point of view. I don't think that's what tied them together. I think that they were both unhappy about the way the Court was being run.

GRODY: There was also comment in some reviews of the Court that Frank Richardson felt a greater sense of freedom and dissent and criticism with Clark on the bench and that Bird's appointment was far enough away from Richardson's ideological or philosophical orientation to encourage jointly with Clark a greater split on the Court than had been apparent under your tenure.

WRIGHT: Yes. As you mentioned earlier, we had dozens and dozens and dozens of opinions that were unanimous or 6–1 there for long periods of time, month after month after month. The whole Court felt the same. That was done, largely, I think, through the way we worked. For example, I became a great peacemaker on that Court. For example, if there would be some little point submitted in an opinion, say, by Justice Tobriner, and it greatly offended Justice Mosk or Sullivan or someone, I would go to Stanley Mosk and say, "Now, what is it? What's wrong with this?" And he would say, "Well, if you just take out that so-and-so in there, I would sign this, but I cannot sign that opinion with that in there." Then I would go to the other man who was the author of the opinion and say, "Look, if you remove this, is it important to the decision?" and he would say, "Well, no. It really adds very little; it isn't really important at all to the opinion." And I would say, "Why don't you remove it, and you'll get another vote?" With a lot of that fine embroidery work, you'd end up with a unanimous opinion, which is the way I liked it! It spoke for the whole Court. I don't like these 4–3 opinions. I don't like these 5–4 opinions from the United States Supreme Court, when one individual changing his mind, or her mind, now, can make the whole Court go the opposite way. I don't like those, so I tried to avoid them if possible. It was possible, but that takes someone who is willing to be an errand boy on occasion.

GRODY: I think that speaks to an important impression that we have. We think that if the governor or the president appoints someone to the supreme court of the state or the nation, that he's really making a lasting impact. These people usually serve longer than he serves in the office as governor or president.

WRIGHT: That's very true.

GRODY: However, if that had been so significant, Clark or Richardson, Reagan's other two appointments to the bench other than yourself, would have been out rallying the troops, but that didn't happen. The Court has a role, and the chief justice sets a certain tone and direction. In that sense, the Court is really your Court. When Nixon first started making appointments to the United States Supreme Court, it wasn't called the "Burger Court" for the longest time. It was called the "Nixon Court."

WRIGHT: Right, the "Nixon Court."

GRODY: Reflecting on Reagan's impact and Jerry Brown's impact on the Court, is the impact, perhaps, more from Rose Bird? As chief justice she has a different style and way of conducting business than you did, and the same actors, Richardson and Clark, appear to be much more the conservatives, much more the Reaganites than they did under your direction.

WRIGHT: Much more rigid. I think your observation is entirely sound. Rose Bird, and I know her very slightly, has a very different personality. She doesn't operate in the fashion I did. For instance, everything up there now consists of all doors being closed. We had an open door policy, and if I wanted to go down to see Matt Tobriner, Ray Sullivan, or Louis Burke, I thought nothing of just picking up the phone and saying, "You free, Louie? I'll be right in." It could be on some minor matter or an important matter. That doesn't happen anymore, and the kind of feeling that was generated by that, I realize now, was terribly important. Staff also felt that way. If they wanted to see me, they'd call up and say, "Can you see me right now, Chief?" and I'd say, "No, can you come in about fifteen minutes and I'll see you." But I never forgot that one of them had called, and I always arranged to see them, or I said, "Well, I'll be back that way in a few moments anyway to see somebody else." So I'd go in and sit on the edge of the desk and "shoot the breeze" with him and find out what it was that troubled him. It's very conducive to a happy Court.

GRODY: Is it either style or personality or what label do you want to give to it?

WRIGHT: I think it's personality, because I was never even conscious of any style. [laughter]

GRODY: Were you conscious, though, of the way you ran the Court?

WRIGHT: I was conscious that we got things done, and I was conscious that there was great rapport among all the members of the Court and with all of the staff.

GRODY: Your relations with Clark were at least cordial, then?

WRIGHT: Cordial, and as I mentioned, he did not join us frequently in social gatherings of any kind — for lunch, I mean. That would be all we ever had. But that was not unusual, because Justice Thompson, who served on the court of appeal with him for around two years or more, said that he only ate lunch with him once that he could ever remember. So it was nothing unusual. That was by his own choice.

GRODY: Reagan's impact on the bench may be felt for a period of time after he's gone, but here we're talking about your administrative inclinations rather than your substantive legal views that may have had the greatest impact on making that Court work.

WRIGHT: I think probably it did. I hope some of my legal ideas had some impact, too. [laughter]

GRODY: Oh, yes! I would certainly not want to demean them at all. But we have this notion that the judicial appointments by a governor or the president, and especially to the court of last resort, live long after the president or the governor. Yet, I sometimes think that we may exaggerate that because we forget that the Court takes on its own identity as well.

WRIGHT: Of course, certain governors and certain presidents have suffered just by the calendar. For example, Earl Warren was governor of California longer than any man in California history, if my knowledge is correct; yet, he only named one man to the California Supreme Court, only one in all those nine or ten years or so. Pat Brown was on eight years, and he appointed eight or nine members. I mean, we went around the Court once, and two or three [appointments] more, if you'd list them all. Jerry Brown has done the same. So it's hard to tell. As you know, from the turn of the century up to and including

President Reagan, every president has made at least one appointment to the United States Supreme Court with the exception of President Carter.

GRODY: Even Ford, with two years. [laughter]

WRIGHT: And Harding with a very short time. Kennedy, with a relatively short time, made appointments, but Carter served the four years without an appointment, and so the same thing happened, in a lesser way, to Governor Warren and Governor Reagan.

GRODY: One last thing on appointments and retirement. Did you ultimately decide to retire when you did in part to avoid Reagan's naming your successor?

WRIGHT: No, it never entered my head.

GRODY: You know, there's always conjecture.

WRIGHT: There is nothing that goes on in this world that a newspaper reporter cannot conceive of. I found that out long years ago. Some of them are terribly reliable; some of them I wouldn't tell anything to, even though it was favorable information, because I couldn't tell how it would come out. Fortunately, they are some rare ones. Most of them are dependable. Some can conceive of everything and can twist everything in ways that would surprise you at the time. How could they ever think that?

GRODY: I suppose that if you wouldn't hold up your retirement in order to keep Governor Reagan from appointing your replacement, you might also have thought it as improper to retire in order to allow him to make your appointment.

WRIGHT: No question about it.

## SECOND INTERVIEW: JUNE 1, 1982

GRODY: As we ended the last segment of our interview, we were talking about your style of operation as the chief justice. We talked about your role as the peacemaker or, as you put it, your sometimes being an errand boy. Did you have a conscious style of operating or a conscious approach to your job? Was something you saw the chief justice as having a particular function to perform?

WRIGHT: I believe that I didn't even think of it at the time. You just rose to the occasion, and if something demanded that you take a certain course of action, that was the way you proceeded. There wasn't any conscious effort on my part, but I'd had a lot of experience, having run the Los Angeles Superior Court and the criminal courts and many others. I knew that you had to deal with people in the only way that you could effectively deal with them, and that was fundamentally on a one-by-one, one-to-one basis. So I continued to use that approach in my capacity as chief justice.

GRODY: You found, then, that your administrative experience on the Los Angeles Superior Court was a useful experience to have when you went to the California Supreme Court?

WRIGHT: Very much so, because otherwise, I think, I would have been frightened to death. Looking back on it, even shortly after the moment of being sworn into office in Monterey in 1970, I was required to take over the Court instantly, to preside, and it presented no difficulty to me at all. My wife, who was in the audience on that occasion, whispered to her neighbor, "I think he already likes the job." I hadn't been on duty for more than half an hour. So it was an easy transition to be very honest about it.

GRODY: Is that a good criterion to be included amongst other criteria? Should a governor or president, as the case may be, take into account some kind of administrative experience in appointing someone to a presiding judgeship or to the chief justice position?

WRIGHT: Yes, I would think it is almost essential for the chief justice or the presiding officer of any court to have had some experience in an administrative field. To go in there without any background at all would be a devastating experience, in my opinion.

GRODY: Continuing on the subject of leadership, I would like to ask you some questions about your chairing the Judicial Council of California. Although the Judicial Council is not unique, in California it is a rather important judicial institution, and it affords the chief justice a leadership role which I think is not the same as that of the United States Supreme Court. Although the chief justice of the United States may head up the Judicial Conference, it doesn't meet as frequently and it doesn't have as extensive a

charter. How did you find that role as the presiding officer or chairman of the Judicial Council of California?

WRIGHT: Frankly, I had served on the Judicial Council as a member by appointment from Chief Justice Traynor, and so I was aware of how it performed its duties. Taking over the leadership of that was not a particularly difficult job, I found. It necessitated getting a cross section of the judiciary within the state, and I was always looking for the most able individuals I could find to serve on the council. I did not use it as a vehicle to appoint my friends and associates. Most of the individuals who came on were unknown to me except by name. You know the structure of it: there are several Supreme Court justices, a few court of appeal justices, superior court judges, municipal court judges, even several justice court judges, members of the State Bar which are selected by the State Bar Board of Governors, and also representatives of the Legislature, one from the Senate and one from the Assembly. It proved to be a very, very well organized group through the years I was there. I don't think the present chief justice, and this is not meant in criticism, uses it at all in the fashion that it was used by myself and my two predecessors. She is much more prone to appoint her own committees, which are called "chief justice's committees," than to rely upon the Judicial Council.

GRODY: Maybe it's a little tangential from the council leadership, but what are your observations about the use of the lay member, the non-attorney member, on some of these advisory, policy recommending bodies?

WRIGHT: I would say that a limited number of them is healthy. I wouldn't want to see too many, because you would waste so much time explaining to them in sometimes great detail what their functions are and what even the function of the particular group might be. But a few members might serve to bring you down to earth and realize that it isn't an ethereal experience being a lawyer or a judge.

GRODY: Did you find that the legislative members from the Assembly and the Senate who were on the Judicial Council behaved more as attorneys, or did they behave more as the political representatives that they were?

WRIGHT: To be honest, and that's what I want to be, most of them were of little or no value at all. They showed up at the dinners, occasionally attended

the committee meetings, and made contributions only occasionally. There may have been one or two exceptions, but I can't even remember them at this present time.

GRODY: Other than when the council was meeting as a whole, how much of your time was devoted to meetings with or contact with the administrative officer of the courts? That is, in your capacity as chair of the council, but not in the sense of the council actually meeting.

WRIGHT: Well, I would say approximately 33-1/3 percent. Roughly one-third of my time was spent in administrative problems dealing with them. That would include working with the Administrative Office of the Court as well as running the administrative portion of the Supreme Court itself, assigning the cases and working with the clerk's office to see that work gets out. Someone has to do that, and it has to be the chief justice because nobody else has the responsibility but that person. So roughly one-third of my time was spent with administrative details. Of that one-third, probably a major portion of it would be working with the administrative officer of the Court and the other individuals who were employed in that office.

GRODY: One of the aspects of the council's role is to make recommendations to the Legislature. In this regard I'd like your comments on a couple of items relative to Reagan's role as a legislative leader. For instance, the council made recommendations on a few items, and the Legislature responded positively, but the governor responded negatively. For example, there was the council's recommendation for the creation of a state public defender's office, and this actually passed the Legislature, went through both houses, and Governor Reagan vetoed it.

WRIGHT: Yes, I know he vetoed it once, and then on the second time around, I believe, he allowed it to become law without his signature. I don't recall, actually.

GRODY: I don't recall, either. It did become law. I think they may have waited until he left office.

WRIGHT: I couldn't be sure as to when that office was created. It could have been in the first years of Governor Brown's administration.

**GRODY:** The proponents of the public defender's office, after the governor vetoed it that first round, made statements to the effect that they would just wait until there was a more friendly governor in office.

**WRIGHT:** Now that you have refreshed my recollection, I recall very clearly that we did try to get the measure through during one of the last years of Governor Reagan's second term. You were correct in that he did veto it, and we then came to the conclusion that it would be futile to try again as long as he was the governor. So early in the Brown administration, we felt him out as to how he viewed the situation and got encouragement from him, and my recollection was it was then passed, and he signed it without any question.<sup>6</sup>

**GRODY:** Here's an important piece of legislation, something that comes from the judiciary itself, at least through the Judicial Council of California, and it goes through the whole legislative process only for the governor to veto it. Was there no communication between you and the judicial council and the governor or governor's staff, principally through you or through the administrative officer? Wasn't there some contact that they would know that the governor was in opposition to this bill?

**WRIGHT:** It's hard for me to answer that. I do not recall, at this time, that there was any effort made to find out how the governor felt about that issue. Looking back on it, we were, perhaps, a little naive, knowing that Ed Meese was number one man in the office at that time. Having been an old-time prosecutor, he did not particularly view with any great degree of interest a separate public defender's office. He had, of course, dealt with them at trial level in Alameda County, not with the state public defenders, but with the county public defenders. I'm sure that he probably thought it was not worth carrying to the state level. But we did not try to find out from him what the governor's views were, and I'm sure that the governor, very likely, depended upon Ed Meese to advise him and followed his recommendations.

**GRODY:** Did you change your style after that, or did the council not come up with other recommendations?

**WRIGHT:** Well, after that experience, in dealing with the new governor, we did deal differently. We tried to find out in advance what his views were on it, and having more or less a green light, we proceeded accordingly.

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<sup>6</sup> Ch. 1125, Statutes at Large (1975).

GRODY: Did you also rely on the State Bar to do the lobbying, as it were, for the council?

WRIGHT: We kept a man in Sacramento, and they kept one in Sacramento. They worked together and generally we could see eye to eye. When I was chief justice we met with the California State Bar Board of Governors several times a year, and the proposed legislation would be brought up before us after it had been screened by committees. We tried to work out measures that we would both approve. Occasionally, we would be at complete loggerheads, and you knew you were never going to be able to resolve those, so you'd have to let the battle take place. For example, the questioning of jurors. As you know, in English courts the judge does all the questioning of jurors, allowing the attorneys, as best as I could observe, to ask no questions. In this country, in this state in particular, the attorneys like to use that as a method of softening up the jury, of selling their personalities to the jury, to become even kind of chummy with them. It was something that I always disliked but had no control over, because attorneys were allowed to question at length. On the Judicial Council we attempted to pass a rule which would allow the judge to do all the questioning and turn it over to the attorneys at the last minute and say, "Now, are there any questions that you would like to present to the jury?" We found it worked very well, but the Bar did not like it. So they went to Sacramento, and they have a lot more power with the Legislature than we do, and got that measure changed. So it paid if you worked together, but if you were at loggerheads, you had to fight the battle out, as I mentioned earlier.

GRODY: Returning, just for one moment, to Governor Reagan's opposition to the state public defender legislation, do you have any recollections as to why he was opposed to it, other than Meese's influence?

WRIGHT: I think he was opposed to it philosophically, and he may have been opposed to it because it was going to cost the state additional money. But I don't recall the content of his veto message.

GRODY: I recall seeing one news item about it. I think the opposition was to the effect that this would deny a defendant the right to have the same attorney from beginning to end and, consequently, they were opposed to it. That was the only word I remember seeing on Reagan's opposition. Does that ring a bell at all?

WRIGHT: It doesn't, and if that's so, it isn't particularly good reasoning, because the appellate practice and the trial practice are entirely different fields. The appellate lawyer can look upon what the trial lawyer did and find out all the errors which had been committed. You don't find those out if you're looking at your own record, or not likely to.

GRODY: I suppose it might even be an advantage to have a different appellate attorney than to have your same trial attorney carry you on appeal.

WRIGHT: I think it would be and generally is. As you well know, the prosecutor, the district attorney, does not go to the Supreme Court or the courts of appeal, but the attorney general handles the matters. So you have a whole different office handling the appeals from those who were at the trial level. The same thing ought to be true and generally is true from the defense point of view.

GRODY: They also do that at the national level. The solicitor general is the one who handles appeals to the United States Supreme Court. Also along the line of relations between Governor Reagan and the Judicial Council, we had earlier talked about the council's proposal to revise the composition and manner of operation of the Commission on Judicial Appointments. This was a constitutional amendment proposal which got through, I think you said, up to the Senate Finance Committee.

WRIGHT: That is correct. My recollection is that it cleared all the committees excepting the final one, which was the Senate Finance Committee.

GRODY: But the reason it failed there was apparently because they had received word from the governor.

WRIGHT: It was no question. Word came down from the governor's office that he did not favor it.

GRODY: The question again is about the relationship between the governor and the administrative arm of the judiciary, the Judicial Council. Here was a case where the council made a recommendation which did not depend upon the governor.

WRIGHT: My recollection was that it was not the council which made the recommendation. Actually, it arose from a luncheon with Seth Hufstedler and Justice Robert Thompson, an appointee of Governor Reagan who was on the

court of appeal at that time, Ralph Kleps, who was the administrative officer of the court, and myself. Seth, who was the California State Bar president, approached the problem, and so we hammered out this solution. Of course, the work on the drafting was done in the Administrative Office of the Court, but it was not something that arose from the Judicial Council, itself, that we in our meeting debated and said was a good thing to pursue. It came the other way, from the ones who were running the show, Ralph Kleps and myself. There was no opposition to it, however, from the council members.

GRODY: There's an apparent failure, once again, to perceive what the governor's position might be, which could short-circuit a bill or proposal. Interestingly, the governor had nothing to do with constitutional proposals, but it was merely his influence in this case which was adequate enough to have the Senate Finance Committee kill it.

WRIGHT: It was adequate because it was, of course, before the budget had been approved, and the governor in this state, as you know, has the right to blue pencil any item he might want to. So he has a tremendous power up until the time the budget has been adopted, not that he doesn't have considerable power after that, too, but you don't know, if you're a legislator, how you're going to be treated by the governor and his staff if you vote contrary to his wishes prior to the adoption of the budget. So by the governor sending down word, "Do not pass," you tread on a shaky bridge if you try to go against that.

GRODY: Again, I assume there had been no communication.

WRIGHT: No. I'm sure we had none, and both Seth Hufstedler and I always felt that it got the shaft because of personalities. In other words, Mr. Hufstedler had appeared at the Clark [confirmation] hearing and had given a very lengthy and detailed report on behalf of the State Bar, which, frankly, was not a bit favorable to Justice Clark. I had voted against his confirmation, and so I think we felt that perhaps this was a way of getting back at two individuals with one blow. I may be in error, but that's how we felt, anyway.

GRODY: Well, I wouldn't want to accuse you of any sort of paranoia!

WRIGHT: No, no! [laughter] It appears reasonable. However, I venture to say that essentially some plan similar to that will come about in California.

GRODY: As to the relations between the governor and the council or you, the impression I get from our discussion so far is that there is a pretty complete separation there.

WRIGHT: Between the governor's office and ours?

GRODY: Yes.

WRIGHT: Oh, very much so, and we found that to be true historically. Chief Justice Gibson, one of my predecessors, had absolutely no contact with the governor's office. Phil Gibson might have had some close contact with the governor during Pat Brown's administration. I would not be a bit surprised.

GRODY: What about Roger Traynor?

WRIGHT: Oh, Traynor had none with them, absolutely none. I had more than Traynor. Traynor was completely a nonpolitical individual, and I was too, essentially. Phil Gibson, Traynor's predecessor, had been a politician himself and had that approach to getting matters solved.

GRODY: Might that then be more a matter of style that we were talking about before?

WRIGHT: It could well be. I have no idea what the present relationship is between Chief Justice Rose Bird and Governor Jerry Brown on matters such as this. Whether they talk things over, converse or not, I have no idea, but I know it was not done in my time nor was it done in Roger Traynor's time.

GRODY: I think it was in 1971 that you made a recommendation for a special panel to be appointed to study court delay, and one of the articles that I read indicated that Governor Reagan also had made a strong statement about the need for such a panel. Did this just happen, or was that one of the occasions when you had had some conversations with him about the matter?

WRIGHT: Frankly, I don't remember from whom the impetus came, whether [or not] it was from our administrative officer of the Court. In any event, we were both very enthusiastic about it, and a commission was appointed. There were six members appointed, if I remember correctly — this is at least eleven years ago — two by the chief justice, two by the governor, and two by the State Bar. That's the way I recall it. They did a tremendous amount of work and submitted a very fine report. However, as happens in

so many incidents like that, the reports end up in the filing cabinet, and no one recalls it until many years later. Someday they may dig it up and say, "Look, we have the blueprint already here." But I did get substantial support from the governor's office on that.

GRODY: Was there any actual contact between you and the governor's office, or was it just that there were public statements being made in support of it?

WRIGHT: That's right. There were just public statements being made. The distance, you see, between Sacramento and San Francisco clearly prevents any close contact between the two offices, and unless you rely upon the telephone, which I didn't, it was rare that you would ever encounter one another. As I mentioned in my previous interview, I only saw Governor Reagan a very few times during my seven years as chief justice.

GRODY: Your last comments anticipate a question concerning the location of the California State Supreme Court in San Francisco and in Los Angeles for some of its sessions. I gather that you take that physical setting and location as a very significant element in determining the relationship between the California Supreme Court and the governor's office.

WRIGHT: There isn't any question that it has a substantial amount of influence, because if you lived in a rather small city, as Sacramento must be termed to be, you could not help but run across the governor or his aides, members of the Legislature, lobbyists, and all the rest, almost on a daily basis. The Court met in Sacramento for two sessions a year. The members of the Court generally stayed at the Sutter Club, which is a large men's club in Sacramento, and it was full of legislators, lobbyists, and members of the governor's staff. You'd see them every day. They'd be over to your table to speak to you and invite you to stop by and have a drink or something. They would be very friendly. I'm sure that would be the way of life if we were in the same city with them, but several hours away you don't run across one another. The governor has an office in San Francisco, but it was not his [Reagan's] practice, nor was it the practice of Governor [Pat] Brown, to use that office except on very, very rare occasions. My recollection is that it was used only when the governor, himself, was coming down to make a speech for some group in San Francisco, and I don't know that Governor [Jerry] Brown uses it any more frequently.

GRODY: I think he uses his Los Angeles office more frequently.

WRIGHT: Los Angeles, you see, was his home previously, but I don't know that that's what brings him down here. Maybe that's where the large bulk of the population is.

GRODY: Do you find that physical separation to be an advantage to the Court?

WRIGHT: I think it is a great advantage. During the time I was on the Supreme Court, I became well-acquainted with many of the chief justices of many states, and almost without exception they regretted the fact that they were located in the capital city of the state wherein the executive branch and legislative branch of the government were located. They all envied us and said, "My God, how we wished we were separated by miles and miles from the other two branches of government." I think it was a great advantage. There were moves, or talk more than actions, to bring the Supreme Court back to Sacramento; however, there never was the money available to construct a court building with offices, a courtroom, and all the additional facilities that would be needed. It would have taken many, many millions of dollars to build such a structure, and no governor was willing to recommend it. Of course, you know, at one time the Supreme Court was located in Sacramento.

GRODY: Do you know anything about that history?

WRIGHT: Well, I don't know anything about the history between the governor's office and the Supreme Court, no. At that time the Court was a very small group, three members in the early days as I recall. It's a very vivid part of California history, almost livid, I should say. We had some of them who were complete alcoholics; one even who got involved in a duel, and so it was really a very lusty time.

GRODY: I suppose that this helps to explain or at least to clarify your point that you were really relatively unaware of the kinds of positions the governor's office was taking or public statements coming from the governor's office on matters which affected the judiciary.

WRIGHT: Well, actually, there weren't too many occasions when the governor was in disagreement about the judiciary. The several you have already mentioned stand out, but on the increase in the number of judicial positions

and such, I recall no time when the governor's office during the Reagan administration attempted to interpose an objection. They went along very much with what we would decide was necessary. On budget matters we had no difficulty whatsoever. We never had any of our budget items challenged at all. So if you want to include those kinds of things, it was a very good, close relationship.

GRODY: Perhaps I can call upon your paranoia here. Did you note any "before and after" effects with regard to your relationship with the governor's office, let's say, before and after the *Anderson* case and before and after Clark's appointment to the bench?

WRIGHT: No, I never noticed any difference in the relationship between the two offices. I do know that prior to my coming on the bench, the governor had always entertained the Supreme Court during the year at a dinner held, in the old days, in his home. The last one they had occurred a year or so before I went on the bench. Apparently, it was not a very happy occasion, from what I later heard. One of my colleagues, now deceased, Raymond Peters, was, I believe, the one who brought the dinners to a conclusion. The governor tried to be friendly. He [Reagan] came up to a table where some of the members of the Court were seated together with their wives and others and asked if he could join the crowd. Ray, who was a very blunt individual, said, "I'm sorry, these seats are taken," which greatly offended the governor, and I think properly so. Consequently, the Court was never invited back, so I can't be blamed for that! It was bad manners before I came aboard.

GRODY: If I'm not mistaken, Peters was probably at that time one of the more liberal members, if not the most liberal member of the court. Is that right?

WRIGHT: I would say that he probably, together with Matt Tobriner, constituted the very liberal wing of the court, yes.

GRODY: So he did not care "to cotton up" to a conservative governor?

WRIGHT: Well, that could be it. He [Peters] was a rare individual. I had great affection for him, although he and I didn't always see eye to eye. In fact, one of the few times — and I say that without being smug — that I was ever reversed as a trial judge was by an opinion written by Ray Peters. In it

he said, "And what Judge Wright did was atrocious." Well, I never had been accused of doing something that was atrocious before. So when I went on the Supreme Court, I was a little apprehensive as to how I might be treated. The first day of our conference, I was stating rather firmly my opinion on one particular case, and Ray looked at me and said, "Don Wright, you are dead wrong" in the most severe terms you ever heard. I was kind of taken aback. Then I looked, and I saw his eyes had a twinkle in them, and a smile on his face, and from that day on we became great friends, but battled like hell on occasions!

GRODY: I keep coming back to this point, but it seems hard to imagine that you were so thick-skinned as to not be aware, for instance, of what the governor was quoted as saying after the *Anderson* case: "The court is setting itself up as above the people and their legislators." Anthony Amsterdam said the governor was being a demagogue with his remarks. Did none of your colleagues, even off the bench, at lunch, or whatever, ever comment about "that man" in Sacramento?

WRIGHT: No, as a matter of fact, it just had no impact on us at all.

GRODY: That's really interesting that some of the textbook views are in a sense substantiated by what you say, that there's a certain insularity in the judiciary. Its sense of independence may really make it, if not entirely impervious, at least relatively so, to these kinds of political attack.

WRIGHT: Well, we were aware that he was not happy with the decision, but it didn't greatly upset us. The decision was 6-1, as you recall, and Justice Burke, who was in the majority and, in fact, one of the prime instigators of putting this matter at an end if that's the proper word, voted with the majority. So I don't recall that we were particularly surprised or angry. I know that we were not angered, and we felt it was just his personal reaction to it.

GRODY: In your individual case, I imagine that the amount of experience you had had on the bench also made it easier to be somewhat oblivious to this kind of outside comment.

WRIGHT: Yes. I think in my sixteen years' experience on the bench which I had had when I went on the Supreme Court, I had had other people hurl accusations against me. I can't take them seriously or life isn't worth living.

**GRODY:** Governor Reagan not only criticized the Court, but he also commented to the effect that, "Well, Wright was in favor of capital punishment before." In William Boyarsky's book, *Ronald Reagan: His Life and Rise to the Presidency*, published just last year on Reagan, he cites Reagan as saying that you were questioned for hours about your philosophy and that pro-capital punishment was one of the things that they had assumed. You have said, not only to me but elsewhere, that you had hardly ever talked to anybody before you were appointed as chief.

**WRIGHT:** That is absolutely correct. I was not questioned at great length, or at any length, about my philosophy. The subject was not even mentioned, and as I think I related earlier, the only time the subject came up was at the press conference. I am sure my recollection is correct, and if the tapes were available, they would prove me to be correct.

**GRODY:** I think, perhaps, without accusing the governor or his staff of fabricating, the explanation is simple enough: Reagan perceives sometimes what ought to be or assumes that things were done the way they are usually done. Perhaps, this is an explanation of why he would make a blunt statement that you had been questioned for hours when, in fact, you say it never happened.

**WRIGHT:** Well, he has a right to stand by his recollection, but my view is that he is not correct.

**GRODY:** The Reagan administration did have interviews with people, and they had these screening committees, and they did proceed in some manner to examine appointees carefully. At least, that's the impression that we've had about some of them. So it might not be unreasonable for him to assume the same had happened with you, and he misspeaks himself in the fact that it didn't happen actually in this case, but there's really no reason to pursue it.

**WRIGHT:** No, as we mentioned earlier, the governor did rely a lot on staff work, and his staff were very able individuals. My observation of them would lead me to believe that the governor generally accepted the recommendations of the staff. I don't mean to say that he didn't give it an independent review. I'm sure he did. But if one of his high ranking staff members recommended something, he would certainly be inclined to go

along with it. I think that's probably still true as president; he operates in that fashion.

GRODY: Perhaps we could now get a general assessment of the Reagan impact on the judiciary in California. Are there some general or specific points that you might like to note that I've overlooked?

WRIGHT: Well, it would be hard for me to answer that in some ways. I will say that the appointments that the governor made on the whole were of the highest caliber, and the trial judges and the court of appeal justices were very, very capable individuals. In that way, they have made a great impact on the state, but had very little impact upon the Supreme Court, of course, because he was never able to appoint but three of us, and I was not, shall I say, a close disciple of the way he would have liked to have had me be. Justice Clark was not a forceful individual on our Court. As I mentioned earlier, he did continuously vote along one particular way. That leaves us, at this date, only with Justice Richardson, who, if you notice, is practically a minority of one or sometimes two on the present Court. So Governor Reagan never had an opportunity to put his stamp upon the California Supreme Court in the way his predecessor, Pat Brown, had or the way his successor, Jerry Brown, has had. At the present time, six of the appointees on the state supreme court are Jerry Brown's appointees or Pat Brown's. Stan Mosk was appointed by Pat Brown, but the others were all appointed by Jerry Brown.

GRODY: Richardson is the only Reagan appointee on the court at the moment.

GRODY: Has the impact of current attacks on the Supreme Court been reflected in something other than public opinion or popular image? I mean, do you think it has affected the way in which members of the judiciary have responded to their jobs?

WRIGHT: No. I don't think the members of the judiciary, as a whole, have been intimidated, if that's the right word, but I think the members of the public have been greatly misled. Individuals running for the office of governor and from that position on down make these attacks, and if the views they state were absolutely studied, you'd find that they were either trying to deceive the populous or they didn't know what they were talking about. For example, the attacks that say, "These judges are soft on crime," and such are entirely false, because under our determinate sentence law, the

judge has practically no authority at all in the sentencing. If an individual is found guilty of robbery, the law prescribes exactly what the sentence shall be, and there's no way the judge could be soft. It's written right in the penal code what the penalty is going to be for the man or woman. So it makes good speech material and press reviews, but it simply isn't true.

GRODY: You don't see any legitimate purpose except, perhaps, the purpose of getting elected for these attacks?

WRIGHT: That's the only possible purpose. We have at the present time a problem which seems to be so great that we can't cope with it, to wit, the problem of crime. So the easy way to face it is to say, "The courts are to blame for this." The courts are in the position of not being able to respond.

GRODY: There were two other items relative to your time as chief justice that I'd like to ask you about. One we've covered in pieces here and there, but now I would like to cover it more directly. You were chief justice in a transitional period, under two governors.

WRIGHT: Yes.

GRODY: We'd earlier made some comments about Governor Jerry Brown's appointments to the bench. By way of comparing his appointments role and his non-appointments role in relationship to the judiciary, were there things about Reagan that became more apparent when Brown became his successor as far as the judiciary was concerned? For instance, when we weren't on the tape, you mentioned something about the promptness of filling vacancies.

WRIGHT: Yes, in that field, the Reagan administration was infinitely better behaved than the Brown administration. I'm talking about Jerry Brown's administration. As best I can remember, vacancies throughout the court system were promptly filled under Governor Reagan. I don't mean that they were filled just overnight, but there was a reasonable delay, and then the spot was filled. With Governor Brown, when he first came into office, he didn't fill a single vacancy in the first six months. I may have mentioned that the last time; I believe I did. Even in this primary election, the one that is going to take place next week [June 1982], several positions were filled on the very last day before the position would have gone to an open vote of the

people. I don't know how that occurs. It seems almost incredible to me, but that's the way that the present governor operates. It does make it very hard upon the Judicial Council and upon the chief justice, who have the duties of filling in those vacancies with appointed personnel to aid the court. You cannot permit, for instance, a court of any size, even a large one like Los Angeles County, to have eight or ten or twelve vacancies existing and unfilled other than by appointment. I like the way the Reagan administration performed much better than I do the current governor, but that is part of the current governor's philosophy, and there's no way you can change it. I have talked it over with him many times, and he said, "Well, there are other problems that take priority. That's all there is to it." So I don't think he allows it to disturb his thinking process at all.

GRODY: Did you have any greater contacts with Governor Brown than you did with Governor Reagan?

WRIGHT: Oh, yes. Governor Brown was much more available and accessible, frequently at his own instigation. I don't know if in the last interview, either on the tape or off the tape, I recalled one day getting a call from him. He just said, "There are problems involving the judiciary that I'd like to talk over with you." I said, "Well, fine, Jerry." I always called him Jerry because he was young enough to be my son. But I said, "I am not coming up to Sacramento, because all I have to do is walk into your office where there are always press persons around, and then the papers will say, 'What's the chief justice doing up here? There must be something going on, and we have to find out what it is.'" I indicated, "You come to San Francisco frequently. The next time you're coming down, just give me a call, and we'll get together." So on one occasion he telephoned and said he was coming to San Francisco and could he see me, and I said, "Well, of course, you may." He said, "We'll be there by three o'clock." Well, three o'clock came, and he was not there. The telephone rang. He was going to be there at four. It went on until, finally, it was time to close up the office, and he called and said, "I'll surely be there, and I'll be there by eight o'clock. Can we go out someplace and have dinner together at a place where they have Chinese food?" He is very fond of Chinese food, as you know. I said, "Well, I think maybe my secretary has already cleared with your secretary that you should go to the Chief's house. That's as quiet a place as you can find in town," and it

was [laughter]. Knowing that he wanted Chinese food, I went to one of my colleagues, Justice Stanley Mosk, and asked him what I should do. He gave me the name of some caterer to call. They served Chinese food. So I called up, and I was never one to try to pull rank of any kind, but I said, "I really want a very good dinner because the governor's coming to dinner, and I want it to be good." The man on the other end of the line said, "Well, do you want the eight dollar dinner or the ten dollar dinner?" and I thought to myself, "Oh, thunder, it's the governor. We'll have the ten dollar dinner." I said, "There will be four of us," and he knew that, so when I was about finished talking to him I said, "Now, when the man brings the food, that will be forty dollars I owe for the four dinners?" He said, "Oh, no, no. It's just ten dollars for four!" [laughter] So the food arrived about two minutes to eight, and the governor arrived at eight, and we had a very long and heated argument the whole evening through, and the governor finally got sleepy and went home about one-thirty in the morning. But it was really quite an evening.

GRODY: Well, this is notably different from your contacts with Governor Reagan.

WRIGHT: Oh, yes.

GRODY: In this one evening, you probably spent more time with Governor Brown than you did in the whole time you were chief justice under Reagan.

WRIGHT: I spent many times a longer period of time with him.

GRODY: Without breaching confidentiality, what was the general nature of the things with which you were interested? Also, you said he initiated the call.

WRIGHT: He initiated the call, yes. He also initiated another one when he was appointing the new chief justice — I had already left the court. On that particular morning, a Sunday morning, Tony Kline, his legal affairs secretary, called and said, "The governor is going to make an announcement on Monday as to who the new chief justice will be." He said, "He wanted you to know first." I said, "Well, fine. I'm glad to know. Who is it?" He indicated that it would be Rose Elizabeth Bird, whom I did not know, and I said, "I don't think that's a very good appointment for the chief justice spot." Don't forget there were two vacancies on the court, Justice Sullivan's

and my own. We had both retired. Kline said, "I'm sure the governor will want to know that. Where are you going to be?" I said, "I will be over in Marin County." A colleague of mine and an old, old friend, Justice Sims, was giving a farewell party for Justice Sullivan and myself. I said, "I will be home, however, this evening." He said, "Well, the governor is down in Los Angeles. I know he'll want to talk with you." That evening no response came from the governor. I had on my dressing robe and my pajamas and my feet propped up listening to "Upstairs, Downstairs," and the telephone rang. It was the governor, and he said, "Don, Don, I want to talk to you." And I said, "Well, go ahead." I assumed he was still in Los Angeles, but he said, "No. When Tony called me I decided to fly up to see you in person." I said, "Well, come on out, Jerry," so I received the governor in my bedroom slippers, bathrobe, and pajamas! I tried to tell him you should have someone on the Court who is more experienced to take over as chief justice. I had nothing against Rose Bird as a person at all, or against her being named to the Court, but I did think that it was not a good idea to have an outsider take over who had never had a single day in her entire lifetime in a judicial spot. He listened very courteously. I'm not saying that correctly; that's not the right word. He listened very patiently is what I meant to say. He said, "Well, I will give it some thought." I suggested that he appoint either Justice Tobriner or Justice Mosk to the chief justiceship, and put her on as an associate justice. A week later, I guess, he telephoned, and said that he'd given it a lot of thought, but Rose Bird was such a fine administrator that he simply felt he had to appoint her. I said, "Well, you're the governor. You can, of course, do just as you wish." So there was a lot more interplay or interaction between Governor Brown and myself than between myself and Governor Reagan.

**GRODY:** Were there other times when you had contact with Governor Brown's office? In your role as the chairman of the Judicial Council, was there anything in terms of Brown's legislative leadership or concern which was noticeably different from Governor Reagan's?

**WRIGHT:** I suppose the fact that he used to work for the Court, and the fact that he was on such close terms with Justice Tobriner and Justice Mosk, made him seem much more approachable than Governor Reagan. That may have been partly responsible for it.

GRODY: Did you initiate some contacts with him?

WRIGHT: Only a few that I recall, and that was the necessity of filling vacancies where we were having difficulty getting the courts of appeal at full strength. It's not very healthy to have pro tems sit and constitute the majority of the Court. I've been very unhappy recently with the great number of pro tems we've had on the state supreme court, and some decisions with two or three members of the Court pro tems. Decisions have been made with maybe one or two of those members being the swing members, the ones who decided the final way the Court went. It's not a healthy position for the Court to be in, and so I wanted to see those positions filled as quickly as possible on the courts of appeal rather than just having people assigned for the particular case or two.

GRODY: You wouldn't have had occasion to do that with Reagan because that didn't present a problem?

WRIGHT: That's right, and I'm sure if it had presented a problem, I would not have hesitated to call Herb Ellingwood or his predecessors about it, but it did not occur.

GRODY: We've talked more or less about Reagan's impact on the judiciary in California. What is Donald Wright's legacy to the courts?

WRIGHT: Well, [laughter] I suppose when I was chief justice, I thought it was going to be quite important. But as time goes on, I realize, as Dean Pound, my dean at law school, said, "Don't ever forget that you're immortal but only for a while." I have been aware of that ever since I left the Court. As I may have mentioned to you earlier, my life has always seemed to be made up of little compartments: the time I was in college, the time I was in law school, the time I was in practice, the time I was in the Air Corps, the time that I was on the trial court, and the time I was on the appellate court. As I get further away from each of those particular boxes, it's hard for me to believe I was ever part of it, that I was ever even in that box, and I feel that way about the Supreme Court. It just could have happened to somebody else. I think during my period on the Court we wrote some opinions which were important opinions and will have a lasting impression upon the legal system in California.

GRODY: There are at least two aspects of your role. First, there is your role as jurist, your legal views as recorded in majority opinions or otherwise.

Second, there is your administrative role regarding reform of the courts, the use of the Judicial Council to assist efficient operation, et cetera.

**WRIGHT:** That's what the Judicial Council is responsible for: the making of rules for the administration of all the courts in California, a duty they take very seriously. The Legislature so relied upon us that they frequently would pass as law what we promulgated. For example, when all the changes were made in the domestic relations field under the no-fault divorce laws, the Legislature gave us a "just write your own ticket." They said that these things shall be carried out in accordance with the rules as promulgated by the Judicial Council. I don't know if that still goes on, but they frequently did that. We were almost a junior grade legislature because our rulemaking had the force of law.

**GRODY:** Well, perhaps I could then ask a few questions which are not so much related to Governor Reagan but to your general impressions of the Supreme Court and the judiciary. The California Supreme Court for some time had high stature as a prestigious court in terms of other courts around the country. The California Supreme Court is cited; it is relied upon as authority, or if not as authority, certainly as support. The California Supreme Court, initially under Stanley Mosk's impetus, had taken the position that California's constitution may have higher standards on some matters of rights than the United States Constitution. In another entirely different area in which California apparently had some considerable prestige, the Court developed new doctrines of tort liability before you came onto the Court. Was there a conscious effort to continue to develop in these areas in which the California Supreme Court had developed particular prestige?

**WRIGHT:** I can't recall that there was a conscious effort to do so. I wasn't even aware for a considerable period of time that the Court had such a universally accepted rating of being excellent; I wasn't until I read an article in the *Wall Street Journal*, in which the author of the article said that the California Supreme Court was to other state courts what the then UCLA basketball team, which had won four or five national championships in a row, was to other college basketball teams. That was the first time I was aware that we had such national importance. I did realize, reading the *American Bar [Association] Journal* column, "What's New in the Law," I found that

repeatedly California Supreme Court cases were set forth in there in some detail. In several pages they covered maybe eight or ten cases of national importance, and there was scarcely a month went by but what a California Supreme Court decision would be one of those that was covered. So I became aware of it. I was aware, of course, that Roger Traynor, a very brilliant jurist, had developed the new procedures in tort law or the new type of tort law which is accepted law in every state in the country. I'm talking about products liability, integrated insurance contracts, and such. There was no conscious effort on our part that I was ever aware of that, "Well, let's go out and try something new!" Such an approach was never even hinted at. I mentioned last time, perhaps, and I won't go through it again if I did, how we happened to decide *People v. Anderson*. It was just such a troublesome problem. The prisons were getting so full of death penalty inmates that we finally had to do something. As I indicated earlier, we were confronted with that conjunctive "*cruel and unusual*" that the United States Supreme Court had to deal with, and we under the California Constitution still had the disjunctive "*cruel or unusual*." So regardless of how the United States Supreme Court would determine a case, we would have to resolve it on our own. That was what prompted us to go ahead with it. It was not a pose on our part that we were going to go out and do something heroic.

GRODY: Well, I wouldn't mean to suggest it as a pose. I would envision it more as a sense of responsibility. That is, was the California Supreme Court aware that it was a leading court?

WRIGHT: Yes, we were.

GRODY: And that it had a certain responsibility, as it were, to maintain that leadership?

WRIGHT: We not only were aware of that, but you do have, of course, the doctrine of *stare decisis*, and if your predecessors have decided a case in one way, you'd better have very good ground for changing the rules, and there was no reason to change the rules which had been enunciated by Chief Justice Traynor, Chief Justice Gibson, and others. You must remember also that the Court doesn't go out and look for business. We decide those cases only because they are presented to us. They are put at our front door, so there is no way of brushing them aside. Of course, we do have in

California the system where, other than death penalty cases, we only take over those cases that we wish to dispose of. We have discretionary right to review them. If the case presents a novel point of law, you aren't doing your duty, carrying out your responsibilities, unless you take it and resolve it. I'm sure we were aware of that, and being a huge state, the largest in the country, we had more problems than the others. You're not talking about a state like Maine or Vermont.

GRODY: Presently we have attacks being mounted on the California Supreme Court and its decisions by people who are running for public office. Responses to the Court indicate that it has done something particularly striking. For instance, after the death penalty case the California Constitution was later amended. We have before the voters this next week [June 1982] Proposition 8, an initiative constitutional amendment to change or eliminate the exclusionary rule, the so-called Victim's Bill of Rights. It's a political response to the leadership this Court has taken, because the exclusionary rule was something the California Supreme Court developed from our state constitution before the United States Supreme Court developed it in *Mapp v. Ohio* [367 U.S. 643 (1961)]. The California Supreme Court has this history and reputation to which we now see certain political responses. Was there a consciousness of that leadership in the area of constitutional law?

WRIGHT: If there was, it was never discussed. Let's put it that way.

GRODY: That in itself is interesting.

WRIGHT: Yes. Back to the exclusionary rule, the federal government [United States Supreme Court], first wouldn't allow certain types of evidence to come in. They had the exclusionary rule as it applied only in federal courts. It didn't apply to the state courts at all. Then, as you mentioned, the California Supreme Court finally adopted it in California. We used to have the system where you could be tried and convicted in the state court and then be tried for the same offense by a federal court if it was a federal offense. This process was called "The Silver Platter Doctrine." Justice Traynor and the Court decided that the exclusionary rule should apply in California. Then in *Mapp v. Ohio*, the United States Supreme Court made it apply to all the states in the country.

GRODY: About leadership on the Court, there can be intellectual leadership, social leadership, and, I suppose, other forms of leadership within the Court. Was there any particular intellectual leader on your Court? Was there someone to whom the Court looked, for instance, when you got down to some of the really tough stuff?

WRIGHT: Well, I think Justice Sullivan would certainly serve in that capacity. Justice Sullivan was a brilliant jurist, number one. Number two, he was not emotional. Justice Tobriner was a very, very brilliant individual, exceptionally bright, but he also would approach problems in a very emotional manner and sometimes get carried away because of that. That could never happen to Justice Sullivan, and so I think in the end most of us would have looked to Ray Sullivan for that type of leadership, and I think he had a tremendous impact on the Court. I was lucky to have him there the whole time I was on the Court. He and I left the same month. He would meet that criterion. Before him, of course, Justice Traynor did, although Justice Traynor was not the outgoing, friendly person that Justice Sullivan is.

GRODY: Perhaps there are different leaders for different occasions.

WRIGHT: That's right.

GRODY: For instance, I remember reading an article about the California Supreme Court's aggressiveness in interpreting its state constitution regardless of the federal standards. The example was that California found its standards to be higher regarding the exclusionary rule. The article referred to this approach to the California constitution as the "Mosk Doctrine."

WRIGHT: Well, one reason was that Stanley Mosk did first introduce it, to the best of my recollection. Although . . . that isn't an accurate statement, because Justice Traynor had done it earlier. But he [Mosk] was the one who used it as the subject for a speech at the University of Chicago where it was published in legal journals. I think that's probably the reason for Mosk getting the credit or the blame for it, whichever way you want to interpret it. Surely, Stanley Mosk would be one who believed in that doctrine. He made many speeches on it, not only the one I mentioned, but also to state bar associations and to other groups. Actually, the standards which have been imposed by the United States Supreme Court and the California Supreme Court are not that different. There are only a few areas where we have

required a higher standard, and I think most people, if they really understood what's involved, would agree with us. But that's something that politicians never mention. For instance, in the United States Supreme Court case from Florida, in that opinion written by Justice Rehnquist which I mentioned last time, you could be given a pat-down search and, perhaps, even a body search just for a jaywalking ticket. I don't think that most of the citizens of this state would want to submit to such or want to have such to be the law, but it is good campaign rhetoric to accuse the Court of being soft on criminals because of the expansion of the exclusionary rule.

GRODY: Was there any kind of political leadership on the Court? You had mentioned to me last time that Justice Burke had strongly urged that you write the opinion in the *Anderson* case because you were "the Chief." Were there other times when someone was chosen to write an opinion, not because you would get more of a vote, a 6-1 or unanimous vote, but because it was felt that there was something significant about that person's intellectual or legal leadership?

WRIGHT: No, not that I can recall. The manner of assigning the cases is something that the Chief and the Chief alone determines. My way of assigning them, I was told, was very different from the way my predecessor assigned them. If the subject matter was something that was of great interest to my predecessor, he would assign the case to himself, even though all the preliminary work may have been done by one of the other justices. I felt that that was a complete waste of good judicial time. Before I would ever take a case away from a justice who had done all the groundwork, who had looked up the authorities, who had prepared the memo for us to discuss in our conference and for the argument calendars, and who had voted for the result reached, I would always get that justice's approval before I would assign it to someone else. Consequently, it wasn't a way that I would operate, as you mentioned, by saying, "Well, I should assign that to Justice Tobriner because he's had more experience in workmen's compensation cases." We didn't function that way. It was the luck of the draw how you got the cases.

GRODY: It wasn't a sense of specialization, then?

WRIGHT: No. I wrote more criminal cases than would have been my desire, but because the way the Court was set up, all the criminal cases were assigned to the Chief and his staff. So we did all the groundwork on them

and none of the civil cases. The civil cases were parceled out among the other six justices. I felt I should ask the justice who had done the preliminary work, "Could I assign this case to myself?" I wouldn't have to, but I did. Or if the justice to whom it was assigned may not have voted to take the case over, then I would, of course, feel free to take it over for myself.

GRODY: Did you have a social leader? Was there someone who put together the dinners or who smoothed out the arguments or anything like that?

WRIGHT: Well, there wasn't any social leader. We, in the Court, had a friendly relationship in that I was frequently at Justice Sullivan's, or at Justice Tobriner's, or at Justice Mosk's, less often at Justice Burke's, and one reason being that he lived way out in Nicasio, which was a thirty-five or forty mile drive [chuckle]. Only rarely were we at Justice McComb's, I think only once in the entire time. Justice Clark did not maintain a home in San Francisco. I was never in his home. Justice Richardson maintained a home in Sacramento, so when we went to Sacramento we would occasionally have dinner out at his place. It was all very friendly.

GRODY: Did your role as a peacemaker within the Court carry over to any kind of personal things. For instance, one of the reasons you thought you were going to retire early was that you had an unhappy experience on the appellate court, and it was more of a personal unhappy experience rather than a professional unhappy experience.

WRIGHT: Well, I was probably not quite accurate. It was primarily a personal unhappiness, but it was also the fact that I had been in an environment where everything was busy, lots of work going on, lots of communications, and then I ended up in a monastery.

GRODY: You mean from the Los Angeles Superior Court to the appellate court?

WRIGHT: Yes. Before then, I had been the presiding judge of the criminal court, the probate court, and the civil court, and so I was in the midst of activity at all times. Then to fall into this other court where several of the justices wouldn't even speak to one another, and where you were just cemented in with three other individuals, it was not a particularly pleasant experience.

GRODY: You mentioned, without naming names, that there was one judge who just sort of made life miserable. What kinds of things went on, and how did you resolve that situation?

WRIGHT: I just listened. Frankly, he was not a well individual. He had had several difficulties with his health, and then he would like to come into my chambers, and he would come in sometimes day after day and take an hour or two of my time telling about his experience with the presiding justice of our court, who was a fine, outstanding gentleman. I would have to sit there and listen, and the next day he would be back with the same message again, and I would frequently want to say, "Look, you told me all that yesterday," but I was low man on the totem pole, so I just sat and listened. It was not particularly pleasant.

GRODY: That's why I asked about a social leader or one who smoothed things out, because you were sitting on a Court with six other members.

WRIGHT: Well, if there was any such person, I guess I would have played as big a part as any of them. They were all at our home repeatedly, or often, and we had a wonderful relationship with most of the members of the Court.

GRODY: Well, we get the impression, I suppose, from the Commission on Judicial Performance hearings that the "Bird Court" has not been quite so amiable.

WRIGHT: I think that's probably a bit of an understatement.

GRODY: I was asking about leadership and prestige. Did the Supreme Court perceive any of the district courts of appeal as particularly a leader? For instance, did the second district or the first district have a reputation in any particular areas so that the Supreme Court was especially aware of that district court's status?

WRIGHT: Not particularly within a district. The second district, for example, has five divisions in it, and there were two divisions from which opinions came that were of a higher caliber than those which came from the other divisions. In both instances it was done, primarily, because of the character of the justices who were the presiding justices of those divisions. One was Justice Gordon Files and the other was Justice Otto Kaus, who is now a member of the Supreme Court. Because of their intellectual lead-

ership, the opinions from those divisions were of higher quality than from other divisions in the second district. In Sacramento, Judge Leonard Friedman was a brilliant member of the court, and we had those types of individuals sprinkled throughout the entire state. Others were what we might call very mundane.

GRODY: You had said that you had recently finished reading *The Brandeis/Frankfurter Connection*. In reflecting upon your own experience, or that of any of your colleagues, were there any similar kinds of efforts to have that kind of influence?

WRIGHT: I certainly had no such influence with anybody in the executive or the legislative branch of the government, such as in the case of Frankfurter and Brandeis. I might mention that at one time Justice Tobriner was able to exert influence in the Jerry Brown administration. That was based upon the fact that Jerry Brown worked for him as a research attorney when he was first out of law school. I think that Governor Jerry Brown considered Justice Tobriner almost in the same light, and might possibly be more influenced by him than he would be by his own father. Justice Tobriner was a father figure. Justice Mosk at one time had considerable influence with the Brown administration. Beyond that, I don't know of anybody who had any type of direct relationship or any influence with the executive branch of the government. Certainly, I had none. Justice Burke had none; Justice Sullivan had none; Justice Clark, I'm sure, had great influence with the Reagan administration, but what it was, we never knew. I'd have to answer that I'm not aware of any such relationships existing between any of the members of our Court and the two branches of government located in Sacramento as you find in the Brandeis and Frankfurter papers. Those two men, especially Justice Frankfurter, were into almost every act.

GRODY: I suppose we often just don't know, because it's not something that gets publicized until, as in the Brandeis–Frankfurter case, so many, many years later.

WRIGHT: Also, most of us on the Court, and I feel this is true, would have had a repugnance against trying to influence any other branch of the government or to have them try to influence us. It was something we would not have tolerated.

GRODY: I suppose the closest to that, that I can think of recently, and it may not really be applicable, is the little flap about Stanley Mosk's drafting of a state constitutional amendment proposal for some people.

WRIGHT: Yes. I will be honest and frank with you. I would have never been party to that. Stanley is a very close friend of mine, but I think he was ill-advised to accept that assignment. I'm sure there was nothing at all about it that was improper. He was trying to set forth the ideas which he expressed so forcefully in the original *Bakke v. Regents of the University of California* case.<sup>7</sup> Of course, that decision was later reversed by the California Supreme Court in a 4-3 decision. Stanley was trying to get his views across.

GRODY: I suppose it is a matter of apparent impropriety being as evil as real impropriety as far as a justice of the Supreme Court is concerned.

WRIGHT: You not only have to avoid evil, but the appearance of evil. That's correct.

GRODY: I suppose it is hard to draw that line for a layman. For example, one doesn't criticize the justice for making a speech before the bar association, or for writing a law review article such as you did while you were chief, or for delivering addresses at law schools, but if the same ideas and the same points of view are expressed in a different forum or in a different format, such as in the case of Mosk drafting a proposed constitutional amendment, everybody raises his eyebrows.

WRIGHT: There's no question that you're correct. [laughter]

GRODY: The California courts are presently receiving a great deal of heat from some elected public officials, including the incumbent lieutenant governor and the incumbent attorney general. The leading court attacker in our midst is Republican State Senator H. L. Richardson from our area here in southern California, in Arcadia. How do you see all that?

WRIGHT: I think that the people of this country are absolutely frustrated about the situation of crime, and they feel impotent. There seems to be nothing that they can do about it, so they then turn to the courts and say they must be to blame for the present situation. If you would hear some of the remarks made by our lieutenant governor, you would have thought

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<sup>7</sup> 18 Cal. 3d 34 (1976).

crime was created by the courts, and that the crime situation is primarily a result of lenient treatment by the judges of this state. I know it is not true, and if it wasn't for this great amount of frustration, the arguments simply would not sell. But people are longing to have something that they can grab hold of that they can say, "That's the cause of this great crime spree that we're having." I might indicate some figures for just a short time ago, 1979. For every one hundred crimes committed, only thirty of those are reported to the police, and on the average only six persons are arrested. So you only have six percent of the people arrested who commit crimes. Eighty-five percent of the criminal cases which were processed in California Superior Court resulted in convictions. Now, 85 percent of them went to trial, and the courts convicted. Ninety percent resulted from guilty pleas which were negotiated, of course, by the prosecutor, and nine out of the ten convictions were upheld following an appeal. So there's just really only a mere pittance of them that come along that are ever treated by the courts. Nonetheless, the judges seem to be to blame for all of it. In California, in particular, this state imprisons more individuals than any other advanced nation in the world, excepting the USSR and the Union of South Africa, if that country can be called an enlightened country.

GRODY: I suppose there's a habit of scapegoating when times get difficult. Unfortunately, for the courts, your successor, Rose Bird, seems to be getting the greatest end of the attack as an individual.

WRIGHT: No question that she's getting the kind of heat that neither I nor my predecessors ever felt. In fact, with very few exceptions, I never read an editorial about my performance or the performance of my predecessors that was anywhere near the type that are written about her almost repeatedly. I was never, that I recall, an object of publicity for anybody running for public office to say, "We've got to remove this man. We've got to remove this chief justice." In fact, just the contrary. I can't believe that the law isn't being carried out under the present Supreme Court "almost" as well as it was [chuckle] in the times when we were there. I think it's been an unfair attack.

GRODY: I recall your response to criticisms of the death penalty case, the *Anderson* case, in your speech before the State Bar. You said, "You know, to criticize the substance is one thing, but to criticize other things is really

not fair." I suppose Chief Justice Rose Bird is being attacked not so much because anybody is really reading or knowing the substance of what she has said as much as because there are outcomes that people don't like.

WRIGHT: I venture to say that 90 percent of those who are attacking her have never read a complete opinion that she's written. I happen to read them. They are, on the whole, very well done. I don't always concur with the results she reaches but, nevertheless, there were many who did not concur with the opinions I held, to wit, the governor, as you advised me.

GRODY: Do you think that some of this was inadvertently brought on by the chief justice herself, by inviting the Commission on Judicial Performance to investigate the Supreme Court?

WRIGHT: I think that there is no question that that was a horrendous mistake on her part, and everyone with whom I've ever talked feels the same way about it. I think she was ill-advised to present the matter to the commission without even consulting her colleagues. I am told that that is what occurred, and it turned out really to be more of a circus than anything else. As I may have mentioned to you earlier, I was fortunately not in the country when that occurred, and so I did not get the full show which was on every night here on television.

GRODY: Do you think there is any long-term impact from that investigation?

WRIGHT: I really can't answer that one. I don't know. I think it is going to be some time, if ever, before the Court again gets in the position that it once had in this state and throughout the country. I mentioned earlier that the *American Bar Association Journal* used to carry almost month after month some opinion from the California Supreme Court. No such thing occurs, now. It's only rarely that a California opinion is even mentioned by the *Journal*.

GRODY: Do you think that's because the quality of the opinions have changed or because the *Journal* doesn't want to touch the controversial court with a ten-foot pole?

WRIGHT: I don't really know what controls their decision-making process, but I would venture to say it's a little of the latter. They are aware that the California Supreme Court does not occupy, nationally, the status it once held, and for that reason they have just preferred to leave it alone.

That's my own personal opinion; I may well be wrong. I will someday ask a friend of mine who was president of the American Bar a year ago and inquire of him why this has occurred.

GRODY: I would imagine that the Court's first problem after the hearings would have been to solve its internal relations problems.

WRIGHT: Of course, in fairness to the present Court, I can't recall any time in the immediate past history where there's been such a turnover. Very few judges on that Court, excepting Justice Richardson and Justice Mosk, have any lengthy term on the Court at all. They're all recent appointees. In fact, three of them have come up in this year's ballot, indicating that they have been appointed in the last year or so. Until they get the feel of one another's work, until they have been together for a goodly length of time, it's going to be hard to know how the Court's going to perform.

GRODY: Perhaps that is what will pull the California Supreme Court out of its problems, the fact that it has had an unusually high turnover most recently, and you have practically a new Court, again with the exception of Mosk and Richardson. Bird has also been there for a little while.

WRIGHT: Five years now she's been there. Until the members of that Court work together for a longer period of time, we don't know which way they are going to go. There may be a change in direction. I have an idea that Justice Kaus will emerge from that Court as very much a leader, and he'll be to that Court a good deal what Justice Sullivan was to ours.

GRODY: I imagine he must have his work cut out for him, then.

WRIGHT: When you first go on the California Supreme Court, don't forget, you still are something of a neophyte, even though you've had long judicial experience. You always had before then, if you made a mistake, the safeguard of the court of appeal, or the Supreme Court would see to it that it was corrected. When you're on the state supreme court, that isn't true, except in cases where you are dealing with federal problems. It's a good deal like the old trite motto, "The buck stops here." And it does!

GRODY: Do you see the possibility of any of these attacks on the Court becoming more than rhetoric? For instance, was it not too long ago that

there were some efforts to hold up the pay of the Supreme Court justices if they didn't abide by the time limits of getting out a decision?

WRIGHT: Yes, on the ninety-day rule. That is correct. That's something that should be legally corrected. There's no question that the law requires that your opinion come out within ninety days from the time it's submitted, but as a matter of practical operating procedure, it's all but impossible. You have the majority opinion to be written; if there's a dissenting opinion, it has to be written; they have to then make the rounds of all the members of the court for additions and corrections. It just cannot be done in the complicated cases in ninety days. We were accused of using a despicable subterfuge by not submitting the case until we were ready to file it. That procedure was started by Justice Phil Gibson and followed by Justice Traynor and followed by myself. I will say that in most instances we did get the cases filed within the ninety day period.

GRODY: Maybe you could clarify what you mean by "submitting."

WRIGHT: Well, submitting means, in effect, that the people who are presenting the case to you, the plaintiff and defendant or the people and the defendant accused of a crime, have completed their entire case. They have put it in your lap, and they say, "We have nothing further. There are no further briefs. There are no further arguments. It's yours now." So at that point the case stands "submitted" to the Court, and normally they will say, "Your Honor," or "Your Honors;" as the case may be, "we now submit the case." But the presiding judge, the chief justice, will simply say, "We will recess now;" instead of saying, "All right, the matter is submitted." If the Court made such an order as that, then submission time would start to run. But there's no question that when the law was drawn up that they intended the submission to be at the moment I mentioned earlier, that is when all matters are concluded before the Court. Of course, trial judges have always been faced with that. A trial judge has no alternative but to dispose of the matter, and he should dispose of a case in a lot less than ninety days. Is it ninety or sixty? I really have forgotten; it has been so long since I've dealt with those problems. As the presiding judge of Los Angeles County, I got the reports of all the cases outstanding every month. There was only one judge of the 132 judges we had who ever had any cases over the statutorily prescribed period of time. There were some once in a while.

Few would have a case over the time limit, because the judge had to sign an affidavit stating "I have no matters submitted" in order to get his pay. You couldn't get your paycheck unless you had that on file.

GRODY: I raised the question before that a lot of this is political rhetoric, but it may turn into more telling attacks on the Court. The only sign of this was what I considered to be a rather petty effort to withhold the salaries of the justices.

WRIGHT: That's another case where the public actually does not know the way the Court functions. To get around that ninety-day rule, other than the way I mentioned that it was done under my predecessors and myself, is you don't put a case on the calendar for argument until you practically have everything done, until you've written the opinion almost in its final form. But this causes tremendous delay before argument. There's nothing that compels you to put it on the Court's calendar, whether you've had the case one week or two years, so it's just another way to skin the cat.

GRODY: Do you see any other real significant damage that could be done to the Court by these attacks?

WRIGHT: I suppose I am hopeful that we can just say, "This, too will pass." I think that after the June primary some of it will disappear. Several of the more blatant ones will pass into obscurity. We'll undoubtedly have such attacks come the November elections, especially on the governorship, because regardless of whether Deukmejian or Curb ends up with the nomination in the Republican party, they will probably direct such attacks at Mayor Tom Bradley, who undoubtedly will win the nomination for the Democratic party. However, it is going to be a little hard to direct attacks at a man who served many years as a policeman, and who, as well, is very knowledgeable in the law enforcement field. I don't think there's too much that you could say in this battle that will come up then, but believe me, that won't keep them from saying it.

GRODY: Well, in closing I could ask you whether you have looked into the crystal ball as to the future of the courts, but in a sense you've already answered that. Hopefully, the life of the Court as we've known it will continue. Maybe one last question would be appropriate with regard to Governor Reagan, now President Reagan, and that is, do you have any reasons to believe

that his relationship with the judiciary and his whole approach to judicial appointments and other contacts with the judiciary will have changed from how he operated as governor to how he now operates as president?

WRIGHT: I don't know that I'm prepared to answer that because I don't know how the [federal] system functions. I don't know how district judges are selected. I know senators of each state have a tremendous amount to say about the individual who is going to be named. I do know that in a state such as California, where you have a Republican and a Democratic senator, there has to be a division between them as to whether Democrats or Republicans get the nomination. I think when the Republicans have a president that one Democrat is named for every three Republicans. When Carter was president, just the reverse was true.

GRODY: I believe it's actually an even higher ratio.

WRIGHT: I don't know, actually, what it is, but that type of arrangement is made. I also know the American Bar has a strong voice in this. If they appear before the United States Senate Judiciary Committee and claim that someone is not qualified to be a judge, that carries a lot of weight. You're talking about a field that I really know nothing about. I'm sure that the president and William French Smith, the attorney general, especially at the higher court level, try to pick individuals who will very closely carry the same philosophy that those two men presently hold.

GRODY: One thing which is quite different at the United States Supreme Court is longevity. Although we have some longevity on our state supreme court, even so, the turnover there is at a greater rate than at the United States Supreme Court. For instance, although Traynor was on the Court for many, many years . . . .

WRIGHT: Almost thirty years.

GRODY: His tenure as chief justice was relatively short.

WRIGHT: Not quite seven years.

GRODY: A relatively shorter period of time. Similarly, your tenure as chief justice was seven years?

WRIGHT: Seven years.

GRODY: Maybe the effects of the governor's appointments, in that sense, have relatively less impact than when the president appoints the chief justice of the Supreme Court.

WRIGHT: Of course, some of that is caused by the fact that in California you dare not remain past your seventieth birthday because of differentials in retirement benefits, unless you are a pretty wealthy individual. Justice Tobriner stayed beyond seventy years, but Justice Sullivan felt he could not afford to remain on the Court in fairness to his wife, and I could not, either. I have always been an advocate of mandatory retirement at seventy for all judges. Then let them be brought back by way of assignment should their services be needed. You have no such problem in the federal system where they are appointed for life, and I feel certain that two or three members of the United States Supreme Court will stay on that court as long as they have breath. I'm sure that Justice Brennen and Justice Marshall will still be there three years from now or until after the next election for president. I don't know about any of the others. Those two are not particularly well men, but I feel they won't retire.

GRODY: Is it fair to sum up Reagan's impact on the state judiciary as not so unique or different from his predecessors or even his successors? Each has his own style and does what he does, but is there any great significant impact to point him out as different from either his predecessor or his successor?

WRIGHT: Upon the whole judicial structure of California, you're absolutely right, and I think he would measure up well against any of the other governors looked at on a statewide basis. I've repeatedly said that his appointments, generally, were outstanding. He tried to pick individuals who had good legal backgrounds, who had experience, and I would say, overall, that he can no way be faulted on that. On certain individuals, yes, [the appointments were not outstanding], but that happens in any administration. There were, frankly, very few of them in his administration.

GRODY: Do you think there is any ground that we haven't covered?

WRIGHT: No. I think we've pretty well covered the field.

GRODY: Well, thank you very much.



# THE SPOKEN WORD



# THE ARGUMENT OF AN APPEAL BEFORE THE CALIFORNIA SUPREME COURT

BY DONALD R. WRIGHT\*

I cannot adequately express to you how honored I feel to have been selected to deliver the first lecture of the newly created Justice Lester W. Roth lectureship on advocacy in our trial and appellate courts. As many of you must know, a very generous individual who desires to remain anonymous has endowed these lectures through a donation to the Law Center of the University of Southern California, and the lectures will continue annually for the next quarter century. By the year 2004, I am inclined to the view that almost everything that can be said about the skills, duties and responsibilities of the trial and appellate advocates will have been spoken. I am indeed fortunate; I have a clean slate upon which to write; I can map out as broad or narrow a trail as I choose to travel as no one has preceded me.

But first, I cannot allow this occasion to pass into history without paying my own tribute to the great justice and gentleman in whose honor this series of lectures has been created. I was indeed fortunate, when, in 1968,

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\* Chief Justice of California, 1970–1977. Remarks delivered as the First Annual Lester W. Roth Lectureship on Trial and Appellate Advocacy at the University of Southern California, April 18, 1979. Unpublished typescript in the collection of the Law Library of the University of Southern California School of Law.

I was appointed to the court of appeal, to have been placed on the division presided over by Justice Roth. Never was a neophyte given a warmer welcome than was I; no one could have been treated with more thoughtfulness and kindness than was I. Justice Roth did not even chide me when shortly after my arrival on the court, I foolishly fell out of an orange tree, breaking my right arm and incapacitating myself for some weeks from performing the very duties I had been appointed to undertake.

Almost immediately, we became good friends and my wife, Margo, and I cherish the warm relationship that we soon enjoyed, not only with Lester but with Gertrude, his most gracious and charming wife of over a half century.

Justice Roth has presided over Division Two of the Second Appellate District for over fourteen years with great distinction, and his many published opinions are models of legal scholarship, clarity and, generally, of brevity. I shall always be grateful that I served my apprenticeship as an appellate justice under his guidance. He was the finest boss under whom I served in the appellate structure. I say that *not* because he was the *only* boss I ever worked under, but because it would have been impossible to find a warmer, kinder and more helpful human being anywhere in the judiciary of this state. Lester, I personally thank you; I salute you, and my one wish is that the few remarks I make today will be at least partially worthy of you and of the anonymous donor who made these lectures possible.

I have discovered that the subject “Trial and Appellate Advocacy” is an *all* encompassing theme, and many lawyers, judges and professors can talk for hours and hours and even days and days upon various facets of the topic. Rather than taking a hit or miss approach or attempting to cover too broad a field, I intend to confine my remarks primarily to my most recent experiences as a member of the judiciary. It is the area with which I am most familiar, as for a period of seven years ending in 1977 I served as chief justice of California.

But having served as a judge or justice for almost two dozen years, and at every level of the judicial structure, I have, of course, been exposed to almost every type of legal legerdemain which might possibly be termed “advocacy.” Therefore, this afternoon I shall confine my remarks almost exclusively to argument of an appeal before the California Supreme Court, a tribunal before whom many of you have appeared or will appear in the

days and years which lie ahead. Of necessity, of course, I will be compelled to include a few remarks on oral advocacy which would be applicable in any court, trial or appellate.

“Although appellate argument is a common occurrence and represents the culminating competitive effort in the legal contest, it is probably a fact that this is the least qualitative accomplishment of the bar as a whole.”<sup>1</sup> That is one reason I wholeheartedly endorse the clinical programs which have been included in the curricula of this law school and of others throughout this country. And this also is the reason I strongly support the moot court programs which have become of increasing importance since I entered law school a half century ago this fall.

I cannot describe in a few words what makes successful oral advocates. I can tell you how one of our legal giants describes them. Bernard E. Witkin tells us that the successful and “[e]xperienced appellate advocates get their kicks out of winning an appeal on the merits of their clients’ cases or their own skill; *and the reversal or affirmance of a judgment, coupled with a sizable fee,* brings all of the fulfillment which their psyches desire.”<sup>2</sup> I think even the whimsical Bernie would concede that his description is slightly simplified.

Before launching into my “case in chief,” I should define some of the rules or procedures which proscribe the activities of those who would present their clients’ cases to the California Supreme Court. You will forgive me if in the talk I mix my tenses. Sometimes the past tense will be used as frequently as the present. It is difficult to break a habit of some years and I still think of the tribunal most fondly as “my court” or at least, “our court.”

You are probably aware that throughout this nation appellate tribunals are divided between “hot” and “cold” courts. The California Supreme Court and, I believe, most of the divisions of the courts of appeal, are “hot” courts. This means quite simply that at the time argument begins on any matter all of the justices have read a rather lengthy memorandum prepared by a colleague, generally with the assistance of his or her staff. Only that particular justice who is responsible for the preparation of the

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<sup>1</sup> Raymond Wilkins, *Argument of an Appeal*, 33 CORNELL L.Q. 44 (1947) (lecture delivered at Cornell Law School on May 2, 1947).

<sup>2</sup> Bernard E. Witkin, talk to students of Justice Friedman’s class at UC Davis School of Law, November 20, 1978 on “The Joys of Appeal.”

memorandum has *at that time* reviewed the briefs and supporting documents. We will all so do at a later time.

And if that justice is diligent, and almost all whom I have known possess that trait, the calendar memo, as we call it, will state the facts of the dispute in a forthright manner and will indicate how the matter reached our Court. Also contained in the memo will be found a statement of issues that are to be resolved, a résumé indicating what the justice believes the current law *is* or *should be* and a recommendation, sometimes in the alternative, as to what disposition should be made of the appeal. Briefly stated, a justice who has done his homework, who has read the memo and who has made innumerable notes on that memo addressed to himself for use at the time of argument, comes onto the bench with a pretty fair knowledge, occasionally erroneous, as to what the case is all about.

A “cold” court, on the other hand, consists of a tribunal in which the justices or judges generally have little and sometimes no knowledge of what lies ahead and will seek enlightenment from the counsel who appear for argument.

Our California Supreme Court adheres to a rather rigid time allocation, allowing each side one-half an hour to present argument of counsel. In certain instances when we had a matter before us of monumental importance, such as *People v. Anderson*,<sup>3</sup> the first opinion in the United States outlawing the death penalty as being both cruel and unusual, or *Serrano v. Priest*,<sup>4</sup> the first opinion holding that a right to an education is fundamental, or the reapportionment cases, *The Legislature of the State of California v. Reinecke*,<sup>5</sup> we were more generous with time, allowing each side a full hour or more for argument. Appellants may, of course, reserve time for rebuttal, but such time must be deducted from the overall allotment and should be (but seldom is) limited to true rebuttal.

In earlier days when courts, lawyers and litigants apparently had considerable time at their disposal, a single argument might frequently extend for days and days. “It has been stated for instance, that the arguments of Webster, Luther Martin and their colleagues in *McCulloch v. Maryland* consumed six days, while in the *Girard* will case Webster, Horace Benney and others for the

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<sup>3</sup> 6 Cal.3d 628 (1972).

<sup>4</sup> 3 Cal.3d 580 (1971).

<sup>5</sup> 10 Cal.3d. 196 (1973).

whole of ten days assailed the listening ears of the court.”<sup>6</sup> I need not mention that those days are gone forever. Now a clock sits on the podium and the advocate must keep one eye on it, the other on his or her notes.

Further, the Supreme Court of California, except for the death penalty cases, is not required to grant a hearing on any particular petition or on any specific number of petitions presented to it. We are not a court to correct error, and with over eleven hundred judges and justices in California, you may be certain that each may commit an error at least once each week, if not each day. You can easily comprehend that we cannot spend all of our time correcting deviations in evidentiary matters, legal principles, facts and/or procedures.

Our Court was, and I presume still is, a questioning Court, and the advocate can expect to be interrupted frequently, if not constantly. With most of the justices, I defy any human being to guess with any degree of accuracy how a particular justice will vote by the questions he has asked. Other justices are less subtle. Frequently, upon leaving the bench I have remarked, somewhat facetiously, to a colleague, “I thought you made the best argument of the day.” Superb oral advocates such as the late John W. Davis have stated that an advocate should rejoice when the court asks questions. This conclusion, in my opinion, warrants some scrutiny. If the inquiring justice is truly seeking further illumination on a point raised by counsel, or if a member of the court is truly challenging the correctness of counsel’s reasoning, the accuracy of the authorities cited or their application to the case before the court, the advocate should welcome the questioning and, by supplying appropriate answers, be able thereby to score a few points.

And may I assure you from long personal experience that few incidents in the courtroom are more frustrating than, in answer to a question, to receive a reply from counsel such as, “If the court will bear with me for just another moment or two, I will be coming to that,” and then to have the argument end with the question still unanswered. In the situation I have mentioned, counsel should at once indicate what his answer will be when he or she reaches the appropriate part of the argument, and counsel should never, never sit down until the question has been laid to rest.

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<sup>6</sup> Hon. John W. Davis, “The Argument of an Appeal,” from an address delivered before the Association of the Bar of the City of New York, October 22, 1940, reprinted as *Case on Appeal, TRIAL AND APPELLATE PRACTICE HANDBOOK* 93 (1952).

At times it has appeared to me that a justice and an advocate will engage in extended colloquy for no other apparent purpose than for the justice to attempt to convince the advocate of the errors of the latter's reasoning. This may lead to an excellent display of oral fencing, but I have not found it generally to be productive. This occurs at all levels of advocacy from the lowest court in the land to the United States Supreme Court. John W. Davis recalled an instance when a former justice of the Supreme Court engaged counsel in a long series of questions just as the latter began his argument. Chief Justice White was heard to moan audibly, "I want to hear the argument." "So do I, damn him," growled his neighbor, Mr. Justice Holmes.<sup>7</sup>

And one final note on the subject. If the question calls for a negative answer, do not attempt to evade or mislead the court. Answer the question truthfully and quickly. Those you are trying to convince will be gratified that at least one issue has been disposed of and at a saving of time. One further word on the California Supreme Court is that we encourage argument and we do not take kindly to a statement by counsel such as "argument waived" or "submitted on the briefs and petition."

With the general guidelines or, if you will, idiosyncrasies, I have described as mandated by our Supreme Court, please permit me to address a few thoughts on the general subject of argument of an appeal. I have reviewed a great number of books selected for me by your most able librarian, Professor Albert O. Brecht, in preparation for these remarks. Reference after reference was made by various authors to an address delivered before The Association of the Bar of the City of New York almost forty years ago by the Hon. John W. Davis, the extremely talented advocate I mentioned earlier in this talk. For example, Lloyd Paul Stryker in his splendid book, *Art of Advocacy*, published in 1954, sets forth almost verbatim much of the speech of Mr. Davis. As so many references were made to that address, I tracked it down and I, too, shall refer to it from time to time. Generally speaking, Davis' remarks tally almost completely with my own experience of nearly two dozen years as a jurist. One caveat I start with, as does he: never forget that the justices are those at whom you aim your argument and that oral argument should have but one goal — a dedication to be of assistance to the court. All too frequently, I must confess, such is not the case.

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<sup>7</sup> *Id.* at 102.

Davis proposed a decalogue to guide argument. Some points are almost identical to those on the views I have already expressed in speaking of the California Supreme Court. Others of his ten are inapplicable to the California courts; others are so apparent that I shall do no more than mention them.

At the top of his list he proposes that the *advocate in his imagination* should change places with the court, one I confess I never entertained. As Davis said, "courts of appeal are not filled with Demigods. Some members are learned, some less so . . . . In short, they are men and lawyers much like the rest of us . . . . If the places were reversed, and you sat where they do, think what it is you would want to know about the case. How and in what order would you want the story told?"<sup>8</sup> In other words, prepare yourself mentally to tell the justices what the case is all about.

After going through the mental device I have described, state the facts. Of course, this rule is not so important in arguing before the California Supreme Court because, for reasons already revealed to you, the justices are generally well acquainted with such, but the advocate must point out the salient facts, the ones upon which he or she relies. And the facts must be stated with complete candor, or if you wish to characterize it by another term, they must be stated with complete honesty. In my experience, I have observed all too frequently counsel who failed to follow this principle and who were quickly caught up by a member of the Court. Much valuable time and sometimes the cause were lost as a result. Insidious is the lingering doubt that remains in the minds of the justices as they retire to their conference room. Frequently I have heard one of us remark to our colleagues, "But he wasn't honest with us!"

Of course, no one can expect the degree of honesty demonstrated by Abraham Lincoln upon the occasion of his first appearance before the Illinois Supreme Court. His entire argument consisted of the following remarks:

This is the first case I have ever had in this court, and I have therefore examined it with great care. As the court will perceive by looking at the abstract of the record, the only question in the case is one of authority. I have not been able to find any authority to sustain my position, but I have found several cases directly in point

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<sup>8</sup> *Id.* At 97.

on the other side. I will now give these authorities to the court, and then submit the case.<sup>9</sup>

Nothing of a similar nature has ever occurred during my judicial experience, I assure you.

Davis, in his address, stated that after the factual declarations, the advocate should state the law upon which he or she relies. I have no quarrel with that procedure and would most certainly endorse it. If a statement of fact has been properly done, he says,

the mind of the court will already have sensed the legal questions at issue, indeed they may have been hinted at as you proceed. These may be so elementary and well established that a mere allusion to them is sufficient. On the other hand, they may lie in the field of divided opinion where it is necessary to expound them at greater length and to dwell on the underlying reasons that support one or the other view.<sup>10</sup>

If the interpretation of a statute enacted by our Legislature in Sacramento is at issue and the particular law is honeycombed with ambiguities, as is often the case, I frequently fall back upon the spoof of a literary figure, A. P. Herbert, who wrote in one of his classic essays on "The Uncommon Law": "If Parliament does not mean what it says; it must say so." I was so intrigued with this quotation that I once suggested to my good friend, Mr. Justice Mathew O. Tobriner, that he use it in one of his opinions. This he promptly did, thereby foreclosing me from placing it in one of my own writings.

Davis further suggests that the advocate should always go for the jugular vein. "More often than not there is in every case a cardinal point around which lesser points revolve like planets around the sun."<sup>11</sup> Or if you prefer, like the ten moons of Jupiter, revolve around that giant planet. I too urge that the advocate go for the all-important point or points. Counsel who persist on proceeding on the theory that every point, however trivial, should be presented at oral argument may in the end simply put his or her listeners in a condition commonly labeled soporific. Such minor points

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<sup>9</sup> SIR EDWARD ABBOTT PARTY, *SEVEN LAMPS OF ADVOCACY* 19 (1924).

<sup>10</sup> Davis, *supra* note 3, at 100.

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

can well be included in the brief to support and defend, if need be, the principal point covered by counsel at argument.

Several other of the rules formulated by Davis require little or no expansion from me. He enjoins the advocate to read to the court only sparingly and from necessity. You may be amazed at how quickly the mind wanders when counsel begins to read at length from authorities, be they well known or obscure. This is true especially, as is often the case, when he or she mumble the words, omitting anything resembling emphasis, and turns the head away from the microphone.

A further commandment in which I wholeheartedly concur: counsel must know the record from cover to cover as "it is the *sine qua non* of all effective argument."<sup>12</sup> I cannot tell you how many hundreds of times a member of our Court became aware that what counsel was stating *was not* supported by the record. Nothing is more devastating to an otherwise effective argument than to have the advocate fail to respond to a question from the Court: "Where do you find that in the record?" Counsel must either concede defeat or attempt to evade the question. A successful advocate has to be aware of all that has gone before and plan his strategy accordingly. "Statements off the record are just as bad in the oral argument as in the brief. The inevitable *dénouement* may or may not be close at hand, but its effect, whenever it occurs, will be equally baleful."<sup>13</sup> St. Thomas More, in his *Utopia*, wrote, "They have no lawyers among them, for they consider them as the sort of people whose profession is to disguise matter."<sup>14</sup> I feel certain St. Thomas must have had in mind in penning those lines the advocate who speaks or writes off the record. Mr. Justice Cardozo put it this way: "Nothing will forfeit the confidence of the court more effectively than the misstatement of the record or a statement of fact off the record."

The final admonition which I will shortly obey myself: *sit down*. Several of the most successful oral advocates in this state will frequently use only a fraction of the time allotted to them. Having only a few major points to impress upon the Court, they will aggressively focus argument on such issues, and, having conveyed in clear and concise language the facts, the

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<sup>12</sup> *Id.* at 104.

<sup>13</sup> Wilkins, *supra* note 1, at 45.

<sup>14</sup> *Id.* At 46.

issues, and the applicable law, will yield the balance of the time. The effect is often electric and *often* most successful.

As stated by Davis,

The process of appeal from one tribunal to another is very old in the history of human justice. No matter in what form it is carried on, the essentials of an appeal are always the same, and there is nothing new to be said about it. The need for an appellate process arises from the innate realization of mankind that the human intellect and human justice are frail at best. It is necessary therefore to measure one man's mind against another in order to purge the final result, so far as may be, of all passion, prejudice, and infirmity. It is the effort to realize the maximum of justice in human relations; and to keep firm and stable the foundations on which ordered society rests. There is no field of nobler usefulness for the lawyer.<sup>15</sup>

I said early in these remarks that appellate oral argument was probably the least qualitative accomplishment of the bar as a whole, but such need not be the case. As Mr. Justice Cardozo wrote in his essay, "The Game of the Law": "Skill is not won by chance. Growth is not the sport of circumstance. Skill comes by training; and training, persistent and unceasing, is transmuted into habit. The reaction is adjusted ever to the action . . . . The alchemy never fails."<sup>16</sup> May I extend the hope that each of you will become a brilliant oral advocate.

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<sup>15</sup> Davis, *supra* note 3, at 105.

<sup>16</sup> BENJAMIN CARDODO, THE LAW AND LITERATURE AND OTHER ESSAYS 172 (1913).

# BERNARD E. WITKIN ON HIS 80TH BIRTHDAY

BY RAYMOND L. SULLIVAN\*

**I**t was only yesterday — just ten evanescent years ago — that we honored Bernie Witkin on his seventieth birthday. The tributes were thicker than advance sheets; the applause music sweeter than a plaintiff's verdict; the laurels lavished on him a veritable halo transforming, if only for a moment, his puckish visage into a serene presence of uncommon quiescence and incredible demureness. Today he is with us again — as indefatigable and irrepressible as ever. Author and lecturer, critic and wit, doctrinaire and a man for all reasons, this chanticleer of the law — singing it clear, so to speak — now heralds a new decade of unabated vigor. What is this magic of his? What words can sum it all up? Shall we borrow those of the suave lyricist of his youth: "You're the top! You're the Coliseum! You're the top! You're the Louvre Museum,"<sup>1</sup> or shall we take them from his idol of an earlier era and his favorite librettist:

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\* Associate Justice, California Supreme Court, 1966–1977. Remarks delivered at the luncheon honoring Bernard E. Witkin on his 80th Birthday, May 22, 1984. [Editor's note: These remarks appeared in the tribute book prepared for Justice Sullivan's 80th birthday celebration by a group of his former clerks, headed by Ray E. McDevitt, now a past president of the California Supreme Court Historical Society, who graciously made them available for publication. — Selma Moidel Smith]

<sup>1</sup> Cole Porter, "You're the Top," *Anything Goes* (1934).

The law is the true embodiment  
Of everything that's excellent.  
It has no kind of fault or flaw,  
And I, my lords, embody the law.<sup>2</sup>

It has long been our good fortune that our honoree in a large sense is the embodiment of the law. In a long love affair with it, he has composed his still unfinished symphony — *Summary of California Law*, with variations on sundry procedural themes, scored with sound harmonics and performed by him on countless lecture platforms with matchless wit, quip, paradox and interpretation. No cloying *déjà vu* for this artist; no abject submission to archaic rules which might become in Holmes' words: "The government of the living by the dead." His artistry exudes the tonic quality of fresh air with rolling arpeggios of raillery, staccato jabs at false idols, and with it all a melody line of ingenious subtlety, fine-tuning the mirthful mouthful of his message.

Daunted by no target too exalted, he has been known on occasion to direct his talents to this state's highest tribunal. In 1968, in the full flush of youth one might say, he was rhapsodic, suggesting that "perhaps round table would better describe this loose coalition of crusading knights errant and mildly disapproving squires. Here in this contemporaneous Camelot, under the wisdom and restraint of a latter-day King Arthur, a measure of unity is miraculously achieved." In 1974, in the serenity of senior citizenship, he was more jurisprudential: "This is a court," he said, "which is not synthesized or polarized; its collegiality is balanced by a rampant individuality and its blocs fall apart when they come up against irrefutable logic, irresistible social conscience, or individual prior conviction." How does he get away with this? What is his secret? How do we sum him up? I borrow some remarks I made ten years ago:

Few members of the California Bar have had such a pervasive influence on the profession as Bernie Witkin. Few lawyers can look back on such a record of total commitment to the scrutiny, dissection and careful crafting of legal principle. No legal writer and lecturer in our time has so captivated the admiration and respect

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<sup>2</sup> W. S. Gilbert, "The law is the true embodiment," *Iolanthe; or, The Peer and the Peri* (1882).

of the profession with intelligence, sophistication and style. None has pursued with such constant ardor, a calling which, in Holmes' fine phrase, "gives such scope to realize the spontaneous energy of one's soul." Throughout all these years he never seems to change.

And so it is today, and so, we predict, it will be for many years to come. To you, Bernie, and to your lovely Alba, we offer our congratulations, our affection and our every wish for your continued happiness.

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# JUSTICE RAYMOND SULLIVAN ON HIS 80TH BIRTHDAY

BY BERNARD E. WITKIN\*

## YOU'RE THE TOP!

This is for me a day to remember and a time to reciprocate. On two separate occasions (my 70th and 80th birthdays) Ray Sullivan graciously undertook to describe my tenacious hold on life in the law, and to extol my modest talents. It is therefore both my privilege and my right to eulogize Ray Sullivan. And there is an additional reason why it is most fitting that I be chosen to speak for this select group gathered here to honor our esteemed and beloved friend:

I am the most senior ex-law clerk present; indeed, I am probably the oldest ex-law clerk alive in this state.

No one here needs to be reminded that Justice Sullivan, in his many years on the California Court of Appeal and Supreme Court, produced a steady flow of the best legal thinking that can be found in the reports

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\* Remarks delivered at Associate Justice Raymond L. Sullivan's 80th birthday celebration, January 31, 1987. [Editor's note: These remarks appeared in the tribute book prepared for Justice Sullivan's 80th birthday celebration by a group of his former clerks, headed by Ray E. McDevitt, now a past president of the California Supreme Court Historical Society, who graciously made them available for publication. — Selma Moidel Smith]

of American high courts. In his superbly crafted opinions, principles and rules are expounded with clarity, irreconcilable decisions are delicately reconciled, and egregious judicial errors are urbanely transformed into mere differences of viewpoint on distinguishable facts.

But there is more in Sullivan opinions than high quality judicial reasoning; and tonight I propose to offer a few extracts — perhaps familiar to some of you — which demonstrate his versatility, humanity, and emotional depth.

Needless to say, I draw my material from that vast compilation of the distilled wisdom of our creative judiciary — *Witkin's Summary of California Law*, 8th Edition in eight volumes, soon to be the 9th Edition in 13 volumes.

#### First, *THE ERUDITE SULLIVAN*.

For the first time in jurisprudential history, he set forth a definitive classification of the forms of that abominable product of inept opinion writers — DICTUM.

The case is *Hollister Convalescent Hospital v. Rico*,<sup>1</sup> in which a prior unanimous opinion of the Supreme Court — only ten years old — was scrapped in order to restore the hitherto sacrosanct doctrine that the time to appeal, as prescribed by statute or rule, is jurisdictional. How was this done? By describing what the two dissenting justices called “the spirit which animated that opinion” as “UNNECESSARY AND OVERBROAD DICTA,” “ILL-CONSIDERED DICTA,” “ERRONEOUS DICTA,” “PANORAMIC DICTA,” and “PERSISTENT DICTA.”

#### Second, *THE IRATE SULLIVAN*.

Is he all sweetness and light and gentle tolerance, or can this calm philosopher take umbrage and express outrage? You bet; he is, after all, an Irishman; and what could possibly arouse this cultivated Irishman’s ire more than a wholly mistaken conclusion drawn by his associates on the high court?

It happened in *Fracasse v. Brent*,<sup>2</sup> where the majority held that an attorney discharged by his client without cause could not recover the fee specified in his contract of employment. Ray — an old trial lawyer — lowered

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<sup>1</sup> 15 Cal. 3d 660 (1975).

<sup>2</sup> 6 Cal. 3d 784 (1972).

the boom, demonstrating in his dissent that the opinion had no foundation in “logic, authority or fundamental fairness.” This was his mildest castigation: “By their decision today, the majority repudiate a rule supported by an impressive array of authority and replace it with one which will reduce an attorney-client contract to a hollow and meaningless act.”<sup>3</sup>

### Third, *SULLIVAN THE HUMORIST.*

This unsuspected talent of our great stylist appears in *Estate of Russell*,<sup>4</sup> where the testatrix left nearly all her estate to “Chester H. Quinn and Roxy Russell.” Quinn, her close friend, survived her. Roxy, her dog, predeceased her. The deadpan opinion construes the will as an attempted disposition to Quinn and Roxy as tenants in common, with Roxy’s gift void for lack of capacity to take. But then, to avoid misconceptions as to the scope of the decision, footnote 22 adds:

As a consequence, the fact that Roxy Russell predeceased the testatrix is of no legal import. As appears, we have disposed of the issue raised by plaintiff’s frontal attack on the eligibility of the dog to take a testamentary gift and therefore need not concern ourselves with the novel question as to whether the death of the dog during the lifetime of the testatrix resulted in a lapsed gift.

### Fourth, *THE EMPATHIC SULLIVAN.*

In *Castro v. State of California*,<sup>5</sup> in which the English literacy voting requirement of our Constitution was held to be an unconstitutional denial of equal protection to persons literate in Spanish, the justice wound up the opinion with these words:

We cannot refrain from observing that if a contrary conclusion were compelled it would indeed be ironic that petitioners, who are the heirs of a great and gracious culture, identified with the birth of California and contributing in no small measure to its growth, should be disenfranchised in their ancestral land . . . .<sup>6</sup>

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<sup>3</sup> *Id.* at 798.

<sup>4</sup> 69 Cal. 2d 200 (1968).

<sup>5</sup> 2 Cal. 3d 223 (1970).

<sup>6</sup> *Id.* at 243.

Fifth, *THE ECSTATIC SULLIVAN.*

In *Serrano v. Priest*,<sup>7</sup> that our method of financing the public school system by local property taxes was an unconstitutional denial of equal protection, the opinion concludes:

By our holding today we further the cherished idea of American education that in a democratic society free public schools shall make available to all children equally the abundant gifts of learning. This was the credo of Horace Mann, which has been the heritage and the inspiration of this country. “I believe,” he wrote, “in the existence of a great, immortal, immutable principle of natural law, or natural ethics, — a principle antecedent to all human institutions, and incapable of being abrogated by an ordinance of man . . . which proves the *absolute right* to an education of every human being that comes into the world, and which, of course, proves the correlative duty of every government to see that the means of that education are provided for all . . .”<sup>8</sup>

The departure of this gifted scholar and jurist from the Supreme Court left a void which has not been filled. Today, that Court of seven members has only one veteran on it, and the new chief justice, facing the formidable task of organizing a Court and staff to cope with an unbelievable caseload, needs all the help and support that he can possibly get. And a few nights ago, in the interlude between sleep and wakefulness, I had a vision of a super-senior *pro tem* justice — a master of the judicial craft — respected as Holmes and learned as Hand — taking his place beside the Chief and pointing the way out of the wilderness.

But what are my “Words worth” when those of the poet himself, with only the slightest emendation, are both adequate and timely?

Raymond! Thou shouldst be sitting at this hour:

Lucas hath need of thee:

The Court is a fen of stagnant waters:

with calendars clogged and boxes stalled:

While grim-faced law clerks, like lordless Samurai,

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<sup>7</sup> 5 Cal. 3d 584 (1971).

<sup>8</sup> *Id.* at 619.

Scan the Duke's list with wild surmise.  
Your calm voice could give us hope,  
Revive collegiality, restore productivity,  
Keep the peace, and increase the pace.  
Oh raise us up, return to us again;  
And with your blithe spirit and magic pen  
Bring order out of chaos.

(For those of you who may have forgotten it, the original poem follows.)

MILTON! thou shouldst be living at this hour:  
England hath need of thee: she is a fen  
Of stagnant waters: altar, sword, and pen,  
Fireside, the heroic wealth of hall and bower,  
Have forfeited their ancient English dower  
Of inward happiness. We are selfish men;  
O raise us up, return to us again,  
And give us manners, virtue, freedom, power!  
Thy soul was like a Star, and dwelt apart;  
Thou hadst a voice whose sound was like the sea:  
Pure as the naked heavens, majestic, free,  
So didst thou travel on life's common way,  
In cheerful godliness; and yet thy heart  
The lowliest duties on herself did lay.<sup>9</sup>

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<sup>9</sup> William Wordsworth, "London, 1802" (1807).



# APPOINTMENTS TO THE CALIFORNIA SUPREME COURT

EDMUND G. BROWN, SR.\*

MR. LOWENSTEIN<sup>1</sup>: When I run into students, as I occasionally do, who hold the view that successful politicians are all either crooks or sell-outs or wishy-washy or whatever, I like to hold up as one of the primary exhibits against that point of view, Pat Brown. Unfortunately, some of my students now are young enough so they don't know who I'm talking about; but for those who know anything about Pat Brown, it's a very persuasive exhibit indeed. So it is my pleasure to introduce to you the former district attorney of San Francisco, the former attorney general of California, and the former governor of California, Pat Brown.

GOV. BROWN: Thank you very, very much. I am very, very surprised to hear that there are students at the School of Law, the University of

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\* Governor of California, 1959–1967. Remarks delivered at the The Chief Justice Donald R. Wright Memorial Symposium on the California Judiciary at the University of Southern California, November 21, 1985, sponsored by the Judicial Committee of the California State Senate, et al. Published in Proceedings and Papers, Timothy A Hodson, ed. (Sacramento: Senate Office of Research), 25–33. [Editor's Note: The introductory portion of these remarks is included here in part to highlight the prescience of Gov. Pat Brown's comment about the eventual return to public office of his son, Gov. Jerry Brown, whose first two terms had ended in 1983. — Selma Moidel Smith]

<sup>1</sup> Daniel H. Lowenstein, Professor of Law, UCLA School of Law.

California at Los Angeles that haven't heard of Governor Edmund G. Brown, Sr.

MR. LOWENSTEIN: They're getting young enough so pretty soon they won't have heard of Jr. either [laughter].

GOV. BROWN: Oh, he'll be back — don't worry.

My remarks are going to be non-chronological.

I had the great privilege of appointing, I think, nine members to the Supreme Court of the State of California. And I'm going to quickly go over their names just so you'll get a little idea of the philosophy of a governor in making appointments to the highest court in this state.

But you have to go back a little bit with me, because I was admitted to the Bar in October of 1927. I didn't have the privilege of going to college at all. I went directly from high school into law school. I suppose it was because I was always a young man in a hurry. However, not having gone to college gave me somewhat — somewhat, I underline that — of an inferiority complex; and I always felt that there were — I'm not so sure now, but I always felt that there were people that were much smarter than I and I was willing to call upon other people for advice in legislative matters and the tremendous importance of a governor in making appointments.

But, I practiced law for a period of seventeen years before I ever held a public office of any kind. I would appear before judges in various counties around the Bay Area, and I was impressed with some who were so courteous to a young lawyer and some that were so, I'll use the term, ugly. When I became governor, I tried my level best to get a real background on the appointment of all of the judges that I made. But when you appoint, and I think any governor serving a period of eight years will appoint 700 or 800 judges, you can understand that all of the men or women that you appoint are not going to be great jurists.

The fact is, however, that I think those seventeen years of practice in the civil courts before the municipal court, the superior court, appellate courts, and occasionally in the Supreme Court of the State of California, never in the Supreme Court of the United States, and as district attorney, you would run into the many judges that you appeared before or your deputies would make reports upon them. And one of the things that impressed me very much in my appointments was Earl Warren. When I was district

attorney in San Francisco, Governor Warren appointed two young men who were extraordinarily able lawyers in my office — a man by the name of Al Weinberger and a man by the name of Charles Perry — both of whom were Democrats. Now, I mentioned that only to show you that here was a governor that had appointed judges because of their ability — not because of their political affiliation. He had to get their legal reputations from other lawyers and judges in San Francisco. And, Warren's method impressed me very much. I wanted to have a bench of able people, of able men and women. But, the Warren appointments impressed me very, very much.

You have to remember, too, that I became governor after twenty years of Republican governors; Earl Warren was governor, I think, for a period of three terms, almost twelve years. It was sixteen years — no, it was three terms of Earl Warren and a term and a half of Goodwin Knight. But before that, Governor Olson had appointed four judges. He had appointed Chief Justice Phil Gibson. He had appointed Roger Traynor. He appointed Justice Carter. And I can't think of the other judge that he appointed. So here was a Democratic governor appointing four justices. Then Earl Warren, serving eleven years, appointed only one; and Governor Knight only appointed one. And I came along — they had been in office for a long period of time, so there was a natural change in the Supreme Court in the State of California.

I'm pointing this out to you to show how the appointments of a governor, how they can change, how important they can be. I think that Governor Reagan only had two appointments. And I think Jerry — I think my son had five or six. Now, the importance of that is that I've observed in some of the discussion the question whether there should be a change in the method of the appointments to the appellate courts.

I might say, weighing it all and watching the governors going back to Culbert Olson — Olson, Warren, Knight, myself, Reagan, Jerry, and now Governor Deukmejian — I do think that governors are really trying to appoint people that will do a good job in their appointments.

And I think that the fact is that the Supreme Court of the State of California has been regarded as one of the best courts in the United States. Some of the law review writers, some of the other jurists throughout the state feel that it was during my administration that the appointments not only made by me, but the appointments made by Warren, made the

California Supreme Court the best court, even better than the Supreme Court of the United States.

I want to just name the people that I appointed so you get an idea of the kind of people I appointed and the source of the recommendations to me. The first man I appointed was Ray Peters who had been a law secretary to the Court after he left law school. In addition to that, he gave a bar review course; and, he was regarded as a truly brilliant lawyer. I might add that when I was district attorney of San Francisco, I appointed two men and someone sued me, sued me because I made these two appointments illegally. There were two war veterans. They were both San Franciscans. But they worked in the Alameda District Attorney's office. They came to me and sought an appointment and I appointed them. But they had not had two years' experience. The charter of the County of San Francisco provided that they had to have two years' experience. Well, someone sued me for making an illegal appointment and got a judgment against me for \$10,000. I can only tell you that when the salary of the district attorney of San Francisco was only \$8,000 a year and to get a judgment for \$10,000 — so after I lost it, I had to put up a bond of \$20,000 so they wouldn't execute upon my property. And then it went to the appellate court, and I'm not going to go into what happened; but Ray Peters, writing the opinion, reversed that opinion of the superior court. So the first appointment that I made to the Supreme Court of the State of California was Ray Peters.

Now, if you think that was really the motivating force, I think the lawyers will agree that Ray Peters was truly a great jurist. Now, I'm not going into all the others. Tom White had started in the justice court of Los Angeles. He's been in the municipal court; he's been in superior court, the appellate court. And I appointed him. He was an elderly man when I appointed him. I think he was 68 years of age. And when I appointed him, he agreed to resign upon reaching the age of 70.

The next ones were Matt Tobriner, Paul Peek, Stanley Mosk, Louis Burke, and Ray Sullivan. And then I had the great opportunity of appointing Roger Traynor as the chief justice of the Supreme Court of the State of California.

In all of these appointments, of course, you had to get the Qualifications Committee approval, consisting of the chief justice, the senior presiding justice, and the attorney general of the State of California. I didn't

want any jurist or any person I appointed disapproved. There was no formal way of asking for this approval. There was no formal way in the Constitution or any of the codes. So, I would call the chief justice. I would tell him that I intended to appoint blank, what do you think about it? And, going further, I would ask the chief justice for his recommendations. I can tell you that when Chief Justice Gibson resigned I spoke with him, and he highly recommended Roger Traynor to be his successor. And when Roger Traynor became the chief justice, it was my practice to call him and ask him about the appointments. He would then confer with the other members of the Qualifications Commission (the senior presiding justice and the attorney general). I knew before the appointment was announced whether there would be approval.

I really feel that the State of California has the best system of making appointments to the higher courts in the United States. The appointments, of course, to the Supreme Court of the United States must be confirmed by the Senate of the United States. But, you don't have that real Qualifications Commission of people that are working in the law every day — the chief justice, the senior presiding justice, and the attorney general. The attorney general is really the only political figure in the group. And you will observe, I'm not commenting or criticizing in any way at all, you will observe that when Governor Deukmejian was the attorney general, that he disapproved of several of my son's appointments to the Supreme Court. I can't pass on the reasons why he did. But I would call attention to the fact that in the statements made by — in the paper prepared by yourself, that you pointed out the tremendous difference between Associate Justice Clark on the Supreme Court and the other appointment made by Governor Reagan, Chief Justice Wright — two appointments by Governor Reagan, and absolutely philosophically different. And there's no way in the world you're going to avoid the philosophy of the governor in the making of the appointments to the various courts in this state. I'm not talking about the appellate court because I haven't had the time to research the appointments that were made.

I can only tell you that I was tremendously proud of my appointments. In the making of appointments, the question that I would ask was the legal ability of the lawyer. In Southern California I didn't know the ability of too many lawyers. I had a group of lawyers whom I respected and I would

ask them for recommendations. They were lawyers in large firms and individual practitioners. I think I had six Democrats and two Republicans in this group from whom I sought their opinions. They would give their recommendations very, very objectively.

I'm not trying to personalize these remarks, but you have to look at the character of the governor and his political philosophy in trying to find out whether the system that we now have is a good one or a bad one. I really wanted judges that were humane. I wanted people that knew the law but were gentle and understanding. In the seventeen years that I was in private practice, I appeared in courts all over the state. Sometimes the judges were really mean and intolerant, particularly during the first two or three years of my practice. With one of the judges before whom I appeared in a preliminary hearing in the municipal court in San Francisco, I started to put on my case and the judge said, "Counsel, I want you to put your case in this order." This was in a preliminary hearing. And I said, "If the Court pleases, I prepared this case and I'd like to put it on the way I planned." He says, "You put them on in the way that I tell you to put them on or we will not hear anything further in this case." I said, "If the Court pleases, I'm through." And I stopped the case. The person was held to answer. I might say, this man came up, recommended for appointment to the Supreme Court later on [laughter]. He had been appointed to the appellate court by another governor. He came highly recommended to me by one of my large contributors. I could not forget the mean way that he treated me when I was a young lawyer.

The other things that were important were the opinions of other lawyers. I would confer with Roger Traynor after he became the chief justice. And, I might say that he made several recommendations. I accepted every one of them. I made recommendations and he accepted mine, of course, or they wouldn't have been approved by the Qualifications Commission. But, he recommended me to Ray Sullivan, who was in San Francisco. He had been an associate of William Malone who was the Democratic chairman. And I was a little bit, a little bit afraid to, not afraid, that's not the word. I didn't want to appoint a political figure. But Roger Traynor called me, came up to Sacramento, and he told me that Ray Sullivan was a great jurist. And as a result of that, I appointed him. And I think that the bench and bar of California recognize Ray Sullivan as one of the best judges that I had the privilege of appointing.

I'm calling these things to your attention so that you'll be able to see what a governor does in trying to make good appointments. Governor Reagan, in his appointment of the chief justice, later said he was disappointed. He spoke critically of the chief justice, later said he was disappointed. But I think the bench and bar agree with Stanley Mosk's opinion of this great chief justice.

There are so many other things that I could say about the appointments to the Supreme Court, but let me conclude by saying that the appointments by the governor, with the approval of the Qualifications Commission (the chief justice, the senior presiding justice and the attorney general), resulted in excellent appointments to the appellate court and the Supreme Court. This is true, whether it happens to be a Ronald Reagan or a Jerry Brown or a Governor Deukmejian. I think we have a good system. I'm sure that any system could be improved upon. But, as I look back on the appointments to the appellate courts (and I'm not talking about the superior courts — it would take too long to get into that) — that are here today, looking at the origins of the present system of appointments that I think as an old governor that it's a good one. Thank you. [Applause]

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# ARTICLES



# CHIEF JUSTICE DAVID S. TERRY AND THE LANGUAGE OF FEDERALISM

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## I. INTRODUCTION

David S. Terry was one of California's most colorful and controversial judges, serving on the California Supreme Court from 1855 to 1859, two of those years as chief justice. And because of the events that were part of his life, Terry is easy to caricature. After all, in 1856 Terry stabbed a person in the neck with his Bowie knife in his first year on the Supreme Court, for which he was almost hanged by the Vigilance Committee; three years later he shot a U.S. senator dead in a duel; he fought for the Confederacy with the Texas Rangers in the Civil War; he returned to San Francisco and represented, and later married, the mistress of another U.S. senator — one of the wealthiest individuals in the country — in her suit for "divorce"; he knocked a tooth out of a U.S. marshal in the federal circuit court when the "divorce" decision went against his client; and he was shot dead by a deputy U.S. marshal while he was punching a sitting U.S. Supreme Court justice in the face. However, lest we think of Terry as a cartoon character, he is

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also the same person who championed the rights of women at California's second constitutional convention, and who helped a single mother successfully sue a law school when it refused to admit her because she was a woman.

One way of viewing Terry in the context of his times is to look at his life through the lens of federalism — the relationship between the state governments and the federal government — particularly because Terry's life spanned the period from before the Civil War, when "states' rights" were given prominence, until a period after the Civil War, when a federal officer could be protected from state prosecution for murder so long as he was engaged in his federal duties. And while Terry never had occasion to address the concept of federalism as a jurist, federalism ran through many of the arguments he made, or those made against him, or those made about him, as exemplified in the letters, trial transcripts and court decisions discussed below. Although the primary focus of this article will be Terry's life, it will do so with an eye to federalism by looking at three separate events: (1) the attempt to free Terry from the Vigilance Committee in 1856; (2) Terry's attempt to claim state jurisdiction over federal jurisdiction in two trials in the 1880s concerning the legality of an alleged marriage contract between a U.S. senator and his mistress; and (3) the State of California's attempt in 1889 to prosecute the U.S. deputy marshal who shot and killed Terry when Terry was assaulting a U.S. Supreme Court justice. Terry was a formidable man, and the ripples he sent out into the world have had a lasting legal effect.

## II. FEDERALISM AND THE ATTEMPT TO RELEASE TERRY FROM THE VIGILANCE COMMITTEE IN 1856

### A. TERRY'S BACKGROUND AND HIS ELECTION TO THE CALIFORNIA SUPREME COURT

Terry was born on March 8, 1823, in what is now Christian County, Kentucky. Terry's mother left Terry's father when Terry was age 11, and his mother took him and his three brothers to live on his grandmother's plantation just outside of Houston. Terry claimed he fought in the Texas War of Independence from Mexico when he was 13, and that this was where he developed his skills with a Bowie knife. There is no documentation of Terry

actually being enrolled in any of the units that fought in that war. Whether true or not, the Bowie knife became Terry's weapon of choice, and he was known for always carrying it in his breast pocket.<sup>1</sup>

Terry, who grew to be almost six-and-a-half feet tall, had no formal education after age 13. Instead, he was trained as a lawyer by his uncle, who had a law practice in Houston. Terry was a good apprentice, and he became a member of the Texas bar after two years. In 1846, at age 23, he served as a lieutenant of what later became known as the Texas Rangers in the war between the United States and Mexico. Terry settled in Galveston, Texas after the war. In 1847, he ran and lost the election for district attorney of Galveston. Shortly thereafter, he and his brother moved to California, with Terry settling in Stockton in 1849.<sup>2</sup>

After a brief stint as a miner, Terry opened a law office in Stockton with another lawyer from Houston in 1850. Although Terry established a good reputation as a lawyer, he also acquired a reputation for violence. In one case, Terry quarreled with a litigant, stabbing him with his Bowie knife.



DAVID S. TERRY, CHIEF JUSTICE  
OF CALIFORNIA (1857-1859)

<sup>1</sup> See A. Russell Buchanan, *David S. Terry of California: Dueling Judge* (San Marino: The Huntington Library, 1956) at 3–6; Milton S. Gould, *A Cast of Hawks, A Rowdy Tale of Greed, Violence, Scandal, and Corruption in the Early Days of San Francisco* (La Jolla: The Copley Press, 1985) at 15–19. See also A. E. Wagstaff, *Life of David S. Terry: Presenting an Authentic, Impartial and Vivid History of His Eventful Life and Tragic Death* (San Francisco: Continental Publishing Company, 1892) at 34–40.

<sup>2</sup> See Buchanan at 5–8; Gould at 16–18.

Because the judge found it was only a superficial wound, and because Terry paid to have the wound dressed, he was fined only \$50. In another incident, Terry and two friends quarreled with the editor of a Stockton newspaper about something written about Terry, and Terry struck the editor with the handle of his Bowie knife. That cost Terry a fine of \$300.<sup>3</sup>

With the collapse of the Whig Party in the 1850s, there was really only one party in California, which was the Democratic Party. The Democratic Party, however, was deeply divided on the issue of slavery. The pro-slavery “Chivalry Democrats” came primarily from the South, and they were led by Senator William Gwin. The anti-slavery Democrats came primarily from the North, and they were led in California by Senator David Broderick.<sup>4</sup>

During the 1850s, there was the rise of the “Know-Nothing” party in American politics, which was nativist and anti-Catholic, which also meant anti-Irish. The “Know Nothing” moniker came, not, as one might assume, from a general declaration of ignorance, but from the fact it was originally a secret society. In answer to any question about the organization, the response would be, “I know nothing.” In 1855, the Know-Nothing party dropped its cloak of secrecy, held a national convention, and presented slates of candidates. In California, many of the Chivalry Democrats defected to the pro-slavery Know-Nothing Party, including David Terry. In that same year, the Know-Nothing Party won several state offices. J. Neely Johnson, who was age 30, was elected governor. Chief Justice Hugh Campbell Murray, age 30, narrowly won re-election to the Supreme Court. (Justice Murray was first appointed to the Supreme Court when he was 26.) And David Terry, age 32, was elected to the Supreme Court as an associate justice.<sup>5</sup>

At the time of Terry’s election, the California Supreme Court consisted of three justices, each elected to six-year terms. California had no intermediate appellate courts. Serving with Terry and Chief Justice Murray was Solomon Heydenfeldt, who was by far the oldest justice at age 39 (having been 35 when he was appointed). Like Terry, neither Murray nor Heydenfeldt had a college education and neither had been formally educated in the

<sup>3</sup> See Buchanan at 8–13; Gould at 19–20.

<sup>4</sup> See Arthur Quinn, *The Rivals: William Gwin, David Broderick and the Birth of California* (New York: Library of the American West, Crown Publishers, Inc., 1994) at 163–74; Gould at 20–25.

<sup>5</sup> See Quinn at 163–74; Gould at 20–25.



U.S. SENATOR DAVID BRODERICK

law. Terry joined the Court in its first year in Sacramento in 1855. It was in the B.F. Hastings Building on Second and J Streets of what is now Old Sacramento.<sup>6</sup>

## B. THE FORMATION OF THE SAN FRANCISCO COMMITTEE OF VIGILANCE OF 1856

Upon taking his seat as an associate justice, Terry became embroiled with the San Francisco Committee of Vigilance of 1856. However, this was the second incarnation of the Committee. The first Committee of Vigilance was formed in 1851, as the result of several gangs' setting buildings on fire in San Francisco, which they did for the purpose of looting those buildings. The 1851 Committee, said to be composed primarily of businessmen, tried and hanged four men and banished thirty others, most of them former convicts from Australia. After about thirty days, believing it had done its job, the Committee adjourned but did not disband.<sup>7</sup>

In the mid-1850s, tensions again ran high in San Francisco. A series of market panics and bank failures contributed to the unrest. But there was also a sense among the general public that city government was corrupt, and with nearly 500 murders in San Francisco in 1855, that murderers were not being punished. This sense of crimes' going unpunished was fueled in part by James King of William, who, after his own bank failed, founded the *San Francisco Bulletin*. James King led a crusade against corruption, generally, and, more particularly, against U.S. Senator David Broderick, a Tammany Hall politician from New York, members of the Irish immigrant population, and the Catholic Church.<sup>8</sup>

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<sup>6</sup> See J. Edward Johnson, *History of the Supreme Court Justices of California 1850–1900* (San Francisco: Bender–Moss Company, 1963), Vol. I at 43–45, 54; *The California Supreme Court Historical Society Newsletter* (Fall/Winter 2012) at 8–9.

<sup>7</sup> See Gould at 11–13; James T. Coleman, “San Francisco Vigilance Committees,” *Century Magazine*, 43 (November 1891) at 133–50, reprinted in Doyce B. Nunis Jr., *The San Francisco Vigilance Committee of 1856, Three Views* (Los Angeles: The Los Angeles Westerners, 1971) at 30–31; Alan Valentine, *Vigilante Justice* (New York: Reynal & Company, 1956) at 45–81; Gould at 11–13.

<sup>8</sup> See Gould at 35–45; Don Warner, “Anti-Corruption Crusade or ‘Businessman’s Revolution?’ — An Inquiry into the 1856 Vigilance Committee,” *California Legal History*, Vol. 6 (2011), 403–41 at 409.

Two incidents precipitated the formation of the 1856 Vigilance Committee. In November 1855, Charles Cora got into an altercation and shot and killed William Richardson, a federal marshal and hero of the Mexican-American war. Cora was an Italian immigrant who was not only a successful gambler but lived openly and notoriously with the beautiful proprietress of one of San Francisco's most luxurious brothels. Cora was tried for murder, but the jury deadlocked. While waiting to be retried, Cora remained in the San Francisco jail for several months, during which his mistress visited each day with a basketful of culinary comforts. In his newspaper, James King demanded the formation of a new Vigilance Committee to redress Richardson's murder. Yet, in spite of James King's call for a new Vigilance Committee, ostensibly because the jury was corrupt, three of the members of the Cora jury would later become Vigilance Executive members, two of whom had previously voted for manslaughter and acquittal at Cora's trial.<sup>9</sup>

A few months later, James King accused James Casey, a San Francisco supervisor, of having previously spent time at Sing Sing prison in New York. Although the charge was true, Casey demanded that James King retract the allegation. When James King refused to print a retraction, Casey confronted James King on the corner of Washington and Montgomery Streets on May 14, 1856, shooting him point blank in the chest. James King died several days later. Casey was immediately arrested and brought to jail — the same jail where Cora was also awaiting trial.<sup>10</sup>

Within two days of King's shooting, the 1856 Committee of Vigilance was formed, and its membership quickly grew to 5,000. The president of the Vigilance Committee was William T. Coleman, who had been a leader of the 1851 Vigilance Committee. Coleman also owned a successful business on California Street and, indeed, the Vigilance Committee was referred to as a "businessman's revolt." The Vigilance Committee secured a base of operation called "Fort Vigilance," but popularly known as "Fort Gunnybags" because of the sand-filled gunnysacks protecting the structure. Fort Vigilance was on Sacramento Street, across from what is now Embarcadero Two. The building contained a well-equipped command post, detention cells with steel bars, and an arsenal of weapons. On the roof was

<sup>9</sup> See Gould at 35–45; Warner at 410, 436–38.

<sup>10</sup> See Gould at 35–45; Warner at 410–13.

a firehouse bell that clanged to summon the committee's members to arms when danger threatened.<sup>11</sup>

Governor Johnson came to San Francisco and entered into discussions with Coleman and the Executive Committee of the Vigilance Committee. Governor Johnson and the Executive Committee agreed that the sheriff and the Vigilance Committee could jointly guard the San Francisco jail, which housed both Casey and Cora, and that the governor would ensure that Casey be brought to justice. Two days later, however, the Vigilance Committee informed the governor it was withdrawing its guards from the jail. Twenty-five hundred armed Vigilance Committee members then marched to the jail. With its cannon pointed at the jail, the Committee demanded that the sheriff surrender Casey and Cora, which he did. Casey and Cora were taken to Fort Vigilance where they were tried by the Executive Committee, found guilty and hanged in front of the fort on May 18, 1856 as King's funeral cortege passed by. Over the next few weeks, the Committee sentenced dozens of people to banishment, and it tried and executed two more men accused of murder.<sup>12</sup>

### C. TERRY'S "TRIAL" BY THE VIGILANCE COMMITTEE

In opposition to the Vigilance Committee was the loosely organized "Law and Order Party," whose members included, in addition to Governor Johnson, Senator Gwin and Justice Terry, and a number of prominent lawyers and judges. That Governor Johnson, Justice Terry and members of the Chivalry faction were opposed to the Vigilance Committee is not intuitively apparent. The Vigilance Committee was directing a lot of its energy against Senator Broderick, the corruption he symbolized, and the Irish-Americans he led. Moreover, the Committee had hanged James Casey for killing James King, whose newspaper was a sympathizer of the Chivalry faction. Likewise, the Committee would not have expected opposition from the Know-Nothings for hanging Charles Cora, who not only killed a U.S. marshal, but Cora, an immigrant from Italy. Whether the officers of the state were upset because they were being displaced by anyone —

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<sup>11</sup> See Gould at 47–55; Warner at 413–16; Letter from William Tecumseh Sherman to Major Turner, dated May 18, 1856, reprinted in Nunis at 50–55; Valentine at 96–134.

<sup>12</sup> See Gould at 47–55; Warner at 413–16; Nunis at 50–55; Valentine at 96–134.

despite the fact that they may have had similar political leanings — or because they genuinely believed in duly constituted legal proceedings, they immediately set themselves against the Vigilance Committee.<sup>13</sup>

When the Vigilance Committee refused to disband after the hangings, Governor Johnson demanded that General John Ellis Wool, the commander of the federal military garrison at Benicia, release the arms from the federal arsenal to the state militia, commanded by General William Tecumseh Sherman. General Wool refused, stating he needed permission from the president of the United States. Governor Johnson declared San Francisco to be in a state of insurrection, and he appealed to the president, Franklin Pierce, for “arms and ammunition as may be needed for the purpose of suppressing the existing insurrection.”<sup>14</sup> In the meantime, Terry wrote a legal opinion for Governor Johnson, which he presented to General Wool, arguing that the California militia was entitled to federal arms in the event of an emergency. General Wool released one hundred guns, which were put on a boat in Benicia to be delivered to San Francisco. However, the Vigilance Committee was informed, and Committee members captured the boat and brought the arms back to Fort Vigilance. Although the Committee “arrested” the men on the boat, one of whom was Reuben Maloney, it released them after questioning.<sup>15</sup>

When Maloney was released, he got drunk and made several public remarks about what he would do to the Vigilance Committee members. The Committee reconsidered its decision to release Maloney, and it sent its sergeant at arms, Sterling A. Hopkins, to re-arrest him. Maloney sought refuge at the temporary headquarters of the Law and Order party set up in the office of his employer, Dr. Richard P. Ashe. Ashe’s office was located above the Palmer, Cooke & Co. bank on the corner of Washington and Kearny Streets, across from Portsmouth Square. The San Francisco City Hall, which contained the City’s courts, was also located across from Portsmouth

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<sup>13</sup> See John D. Gordan, III, *Authorized By No Law, The San Francisco Committee of Vigilance of 1856 and the United States Circuit Court for the Districts of California* (Pasadena: Ninth Judicial Circuit Historical Society, 1987) at 14; Gould at 47–49, 55, 57–60.

<sup>14</sup> Joseph Ellison, *California and the Nation, 1850–1869, A Study of the Relations of a Frontier Community with the Federal Government* (New York: Da Capo Press, 1969) at 126–27. See also Buchanan at 25–26; Gould at 57–60.

<sup>15</sup> See Gordon at 15–19; Gould at 61–64; Buchanan at 33–36.

Square on Kearny. Besides being Maloney's employer, Dr. Ashe was also a U.S. naval agent, who was responsible for provisioning the navy. Dr. Ashe was also a former Texas Ranger, a former sheriff of Stockton and, more importantly, a good friend of Terry's. Terry happened to be visiting Dr. Ashe at his office before catching his boat back to Sacramento when Hopkins came to arrest Maloney. Dr. Ashe and Justice Terry refused to give Maloney over to Hopkins. Hopkins went back to the Committee at Fort Vigilance and received new orders and reinforcements to bring back Maloney.<sup>16</sup>

Justice Terry, Dr. Ashe, Maloney and three others in the office armed with guns and shotguns, left Dr. Ashe's upstairs office, walked from Washington Street down Kearny Street, and turned left on Jackson Street, heading for the state armory, on the corner of Jackson and what was then Dupont Street (now Grant Street). Hopkins caught up with the Terry party in the middle of the block on Jackson, when Hopkins attempted to "arrest" Maloney. An altercation took place, and Hopkins tried to take Terry's rifle away from him. Someone else's gun went off, and Terry pulled his Bowie knife out of his breast pocket, yelled, "Damn you, if it is a kill, take that," and plunged the knife all the way into Hopkins' neck. Hopkins collapsed and the Terry party continued on to the state armory on the corner of Jackson and Grant. Hopkins' replacements went back to Fort Vigilance and sounded the bell, and within a short time there were approximately 1,500 armed men surrounding the armory. Terry and Maloney agreed to surrender, provided the Vigilance Committee gave them protection from the mob that wanted to lynch them. Terry and Maloney were put into a coach and driven under guard to Fort Vigilance on Sacramento Street.<sup>17</sup>

#### D. TERRY'S ATTEMPT TO HAVE THE FEDERAL GOVERNMENT FREE HIM FROM THE VIGILANCE COMMITTEE

On June 27, 1856, Justice Terry was indicted on seven counts before the Vigilance Committee, which counts included not only the attack on Hopkins, but several other acts of violence, for some of which he had already

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<sup>16</sup> See Gordon at 19–21; Gould at 64–65; Buchanan at 35–36.

<sup>17</sup> See Gordon at 21–22; Gould at 65–69; Buchanan at 36–41; James O'Meara, *The Vigilance Committee of 1850* (San Francisco: James H. Barry, 1887) at 39–40, reprinted in Wagstaff at 97–107.

been tried, found guilty and punished. In his “opening statement,” Terry was eloquent in defending his position to the Vigilance Committee:

You doubtless feel that you are engaged in a praiseworthy undertaking. This question I will not attempt to discuss; for, whilst I cannot reconcile your acts with my ideas of right and justice, candor forces me to confess that the evils you arose to repress were glaring and palpable, and the end you seek to attain is a noble one. The question on which we differ is, as to whether the end justifies the means by which you have sought its accomplishment; and, as this is a question on which men equally pure, upright and honest might differ, a discussion would result in nothing profitable.

....

... The difference between my position and yours is, that, being a Judicial officer, it is my sworn duty to uphold the law in all its parts. You, on the contrary, not occupying the same position or charged with the performance of the same duty, feel that you are authorized, in order to accomplish a praiseworthy end, to violate and set at naught certain provisions of law, while you allow the rest to remain in full force. You, although you may feel assured that you are right, must see that I could not, with any regard to principle or my oath of office, side with you.<sup>18</sup>

Although General Sherman had been appointed head of the state militia, he resigned because the governor could not provide him with any arms or men. The new general of the state militia, Volney E. Howard, demanded that the Vigilance Committee release Terry. Again, as the state militia had practically disbanded, the Vigilance Committee ignored the demand.<sup>19</sup> Governor Johnson wrote to Commander E. B. Boutwell, who commanded a U.S. sloop of war in San Francisco Bay (off of Pier 1), the U.S.S. *John Adams*, asking him to rescue Terry. This was followed by a letter from Justice Terry, himself, to Commander Boutwell making the same request:

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<sup>18</sup> David S. Terry, *Trial of David S. Terry by the Committee of Vigilance, San Francisco* (San Francisco: R.C. Moore, 1856) at 24–25 (“Defence — Statement of David S. Terry”).

<sup>19</sup> Gordon at 15–16, 22–23.

Sir: I desire to inform you that I am a native-born citizen of the United States, and one of the justices of the Supreme Court of the State of California, and that, on the 21st day of June inst. I was seized with force and violence by an armed body of men styling themselves the Vigilance Committee, and was conveyed by them to a fort which they have erected and formidably entrenched with cannon in the heart of the city of San Francisco, and that since that time I have been held a prisoner in close custody, and guarded day and night by large bodies of armed men, . . . . I desire further to inform you that the said committee is a powerful organization of men, acting in open and armed rebellion against the lawful authorities of this State; that they have resisted by force the execution of the writ of *habeas corpus*, and have publicly declared through their organs that their will was the supreme law of the State.

The government of the State has already made ineffectual efforts to quell this rebellion, and the traitors, emboldened by success, have already hung two men and banished a great many others, and some of their members now openly threaten to seize the forts and arsenals of the United States, as well as the ships of war in port, and secede from the Federal Union.

....  
In this emergency I invoke the protection of the flag of my country. I call on your prompt interference with all the powers at your disposal, to protect my life from all impending peril. Let me remind you of the conduct of the noble and gallant Ingraham, when the life and liberty of a man only claiming to be an American Citizen was concerned. From your high character I flatter myself that this appeal will receive your early and favorable consideration.<sup>20</sup>

The letter is interesting insofar as Terry, a member of the southern-sympathizing “Chivalry” faction of San Francisco politics, presumably favored states’ rights. Yet, Terry uses the fact that he is a “native-born citizen of the United States” to “invoke the protection of the flag of my country,” and accuses his captors of having the ulterior motive of intending to capture ships and forts so they can “secede from the Federal Union.” Finally,

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<sup>20</sup> Letter from Terry to Boutwell, June 28, 1856, reprinted in Wagstaff at 114–15.

Terry references the “noble Ingraham” — a captain of an American ship who became something of a hero for threatening to fire on an Austrian ship because it had forcibly taken on board what was thought to be an American citizen (even though it was a Hungarian rebel) — to argue that, as a native-born American, he is entitled to be rescued by the U.S. Navy.<sup>21</sup>

Although Commander Boutwell’s own political views much favored states’ rights, in response to Terry’s letter, Boutwell wrote to the Vigilance Committee the same day. In his June 28, 1856 letter, Boutwell makes clear that the federal government was not afraid to intervene on Terry’s behalf.

Gentlemen: You are either in open rebellion against the laws of your country, and in a state of war, or you are an association of American citizens combined together for the purpose of redressing an evil, real or imaginary, under a suspension of the laws of California. . . . I, as an officer of the United States, request that you will deal with Judge Terry as a prisoner of war, and place him on board my ship. . . . You, gentlemen, I doubt not, are familiar with the case of Kostza. If the action of Captain Ingraham in interfering to save the life of Kostza, who was not an American citizen, met the approbation of his country, how much more necessary it is for me to use the power at my command to save the life of a native-born American citizen, whose only offense is believed to be in his effort to carry out the law, obey the Governor’s proclamation, and in defense of his own life. . . .

Gentlemen of the committee, pause and reflect before you condemn to death, in secret, an American citizen who is entitled to a public and impartial trial by a judge and jury recognized by the laws of his country. . . .<sup>22</sup>

The Vigilance Committee forwarded Commander Boutwell’s letter to his commanding officer, Captain David G. Farragut, who was the Commandant at Mare Island. Captain Farragut wrote to the Committee on July 1, 1856, and reminded them that article V of the Amended Constitution provides that “No person shall be held to answer for a capital or otherwise

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<sup>21</sup> See Ellison at 128.

<sup>22</sup> Letter from Boutwell to the Vigilance Committee, June 28, 1856, reprinted in Wagstaff at 115–16.

infamous crime, unless on presentment or indictment of a grand jury . . . nor be deprived of life, liberty, or property, without due process of law." He also quoted to the Committee that article IV of the U.S. Constitution provides that (paraphrasing) "the United States shall guarantee to each State a republican form of government, and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) shall protect each of them against domestic violence." But Captain Farragut concluded by telling the Committee that "you may be assured, gentlemen, that I shall always be ready to pour oil on the troubled waters, rather than do ought to fan the flame of human passions, or add to the chances of the horrors of civil war."<sup>23</sup> Captain Farragut wrote to Commander Boutwell, admonishing Boutwell for the contents of his own letter to the Vigilance Committee.

Dear Sir: I yesterday received a communication from the Vigilance Committee inclosing a correspondence between yourself and the committee in relation to the release of Judge Terry, and requesting my interposition. Although I agree with you in the opinions therein expressed in relation to constitutional points, I cannot agree that you have any right to interfere in this matter, as I so understood you to think when we parted. The Constitution requires, before an interference on the part of the general government, that the Legislature shall be convened, if possible, and, if it cannot be convened, then upon the application of the executive. Now, I have seen no reason why the legislature could not have been convened long since, yet it has not been done, nor has the Governor taken any step that I know of to call them together.

In all cases within my knowledge the Government of the United States has been very careful not to interfere with the domestic troubles of the States, when they were strictly domestic, and no collision was made with the laws of the United States, and they have always been studious in avoiding, as much as possible, a collision with State's rights principles. The commentators, Kent and Story, agree that the fact of the reference to the President of the

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<sup>23</sup> See Ellison at 129; Letter from Farragut to Vigilance Committee, July 1, 1856, reprinted in Gould at 81–82.



CAPTAIN DAVID G. FARRAGUT,  
UNITED STATES NAVY

United States by the legislative and executive of the State is the great guarantee of State's rights.

I feel no disposition to interfere with your command, but, so long as you are in waters of my command, it becomes my duty to restrain you from doing anything to augment the very great excitement in this distracted community until we receive instructions from the government. All the facts of the case have been fully set before the government by both parties, and we must patiently await the result.<sup>24</sup>

Farragut thus makes clear that not only was the kidnapping of a sitting California Supreme Court justice nothing more than a “domestic” trouble that did not violate federal law, but that the federal government must avoid “as much as possible, collision with State’s rights principles,” insofar as the federal government was “the great guarantee of State’s rights.”

Governor Johnson’s request for federal assistance eventually made its way to President Franklin Pierce, who gave it to Attorney General Caleb Cushing for analysis. Article IV, section 4 of the Constitution, provides that the federal government may interfere within a state “against domestic violence.” The act of February 28, 1795, vests in the president power to carry out this provision in the Constitution; it is left to his discretion to decide when interference is necessary. However, in his analysis to the president, Attorney General Cushing interpreted article IV, section 4 narrowly, and held that the federal government could not help the State of California because such a request must come from the Legislature, unless the Legislature cannot make the request. Yet, Governor Johnson provided no explanation as to why the request to the president came from him and not from the Legislature. Attorney General Cushing also noted that Governor Johnson had asked for arms, and not military forces, which was another reason to deny the request. Attorney General Cushing admitted that an emergency might arise when the president might furnish arms alone, but the circumstances in California “did not afford sufficient legal justification for acceding to the actual requests of the governor of the State of California.”<sup>25</sup>

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<sup>24</sup> Letter from Farragut to Boutwell, July 1, 1856, reprinted in Wagstaff at 117–18.

<sup>25</sup> See Ellison at 132–33.

Upon receipt of the opinion of the attorney general, Secretary of State William L. Marcy wrote to Governor Johnson that he was deeply impressed by the disturbed conditions in San Francisco, and “was prepared, whenever exigency arises demanding and justifying this interposition, to render assistance to suppress insurrection against the government of a State,” but that in the present case the president believed there were “insuperable obstacles” to the action desired of the federal authorities. Likewise, Secretary of the Navy Dobbin instructed Commander Mervine, who commanded the Pacific squadron, to exercise the most “extraordinary circumspection and wise discretion” to prevent a collision between the federal officers and the people of California. Similar instructions were also sent from Secretary of War Jefferson Davis to General Wool that the army was not to interfere with the domestic affairs unless it should be necessary to protect government property.<sup>26</sup>

There is evidence that the Executive Committee of the Vigilance Committee did not want to keep Terry in custody but was afraid of the consequences from its members if it released Terry. Captain Farragut and Commander Boutwell were persuaded to meet with members of the Executive Committee to negotiate the release of Terry, but to no avail.<sup>27</sup> Hopkins, however, who had been receiving round-the-clock care by doctors paid by for Terry’s friends, finally began to recover on July 15, 1856. Eventually the 36-member Executive Committee prevailed over the 100-member Board of Delegates of the Vigilance Committee (who, after trying Terry, had voted to execute him), and on August 7, the Executive Committee read to Terry its verdict, finding him guilty of the stabbing, and that he should resign from the Supreme Court. Terry was discharged, and at first went to a friend’s house. He was later told he should not stay in San Francisco, and he was taken by Commander Boutwell back to Sacramento.<sup>28</sup>

Later that month, the Vigilance Committee of 1856 disbanded itself, and Fort Vigilance was dismantled. The rooms were abandoned — but as a closing scene, a grand review of the military was held near South Park, and the rooms were thrown open to the public and were visited by thousands

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<sup>26</sup> See Ellison at 134–35.

<sup>27</sup> See Wagstaff at 120–30; Gould at 76–77.

<sup>28</sup> See Gould at 85–89.

who could view the ropes used to hang Casey and Cora.<sup>29</sup> Thus closed a chapter of American history, just prior to the civil war, where the federal government, from commandant up the chain of command to the president, used the language of states' rights to prevent federal government intervention into the affairs of a state, even when the largest city on the West Coast had been taken over by an extra-judicial entity that claimed the right to try, banish and execute citizens of the United States.

### III. FEDERALISM AND TERRY'S ATTEMPT TO OVERCOME FEDERAL JURISDICTION IN THE HILL-SHARON TRIALS IN THE 1880S

#### A. AFTER KILLING A U.S. SENATOR IN A DUEL, TERRY FOUGHT FOR THE CONFEDERACY, RETURNING TO CALIFORNIA IN 1869

Terry became chief justice of California in 1857. In that year, Stephen J. Field, age 40, and Peter H. Burnett, age 49, became associate justices of the California Supreme Court. In 1858, Joseph G. Baldwin, age 44, replaced Burnett as an associate justice. Terry wrote over two hundred opinions in his four years on the Court, with his opinions averaging about one page in length.<sup>30</sup>

The Know-Nothing party dissolved, and two factions of the Democratic Party, the pro-slavery faction led by former Senator William Gwin, and an anti-slavery faction led by Senator David Broderick, fought for control of California. Terry was not re-nominated for the Supreme Court at the convention but took the opportunity to denounce Broderick, which was reported in the newspaper. Upon reading the report in the newspaper, Broderick was particularly upset, as he had funded articles in the newspapers supporting Justice Terry, and reportedly stated: "I have hitherto spoken of him as an honest man — as the only honest man on the bench of a miserable, corrupt Supreme Court — but now I find I was mistaken. I take it all back. He is just as bad as the others."<sup>31</sup>

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<sup>29</sup> See O'Meara at 56 (Nunis at 124); Valentine at 170–71.

<sup>30</sup> See Johnson at 55–56, 62–80.

<sup>31</sup> See Gould at 115.

Broderick's statement was reported to Terry, and Terry eventually challenged Broderick to a duel, which took place at 7:00 A.M. on September 13, 1859 near Lake Merced, before a crowd of between fifty and seventy people. Broderick's shot fell far short of Terry, but Terry's shot wounded Broderick in the chest, killing him two days later. Broderick was celebrated as dying for the anti-slavery cause, and a eulogy was given for him at Portsmouth Square, followed by a two-mile funeral entourage that wound itself through San Francisco. Terry, who had resigned his position as chief justice the day before, was acquitted of any wrongdoing in a trial in Marin County Superior Court in 1860.<sup>32</sup>

However, Terry's acquittal did not solve the problem of his reputation, and he practiced mining litigation for a short time in Washoe County, Nevada. Terry returned to Stockton in 1863, and left for Mexico in 1863 en route to fight for the Confederacy in the Civil War, rejoining the Texas Rangers. Terry was wounded in the shoulder, formed a regiment and was commissioned as a colonel. After the civil war, Terry attempted to grow cotton commercially for a couple of years in Mexico, and then returned to Stockton in 1869, ten years after the duel.<sup>33</sup>

Terry built up a successful law practice, with offices in Fresno, Stockton and San Francisco. He was elected a member of the constitutional convention in California in 1878, where Terry, who was anti-corporate, anti-railroad and anti-Chinese labor, commanded the "Sand Lot" element, which yielded California's second Constitution.<sup>34</sup> Terry also championed the rights of women at the convention, and even helped Clara Shortridge Foltz, who would become California's first woman lawyer, sue Hastings College of the Law when it refused to admit her because she was a woman.<sup>35</sup>

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<sup>32</sup> See Gould at 115–35; Quinn at 253–76; Buchanan at 83–110.

<sup>33</sup> See Gould at 137–43; Wagstaff at 221–41.

<sup>34</sup> See Wagstaff at 242–63; Gould at 147–49.

<sup>35</sup> See Barbara Babcock, *Woman Lawyer, The Trials of Clara Foltz* (Stanford: Stanford University Press, 2011) at 46–47. The suit against Hastings was *Foltz v. Hoge*, 54 Cal. 28 (1879).



SARAH ALTHEA HILL

## B. THE STATE COURT TRIAL TO DETERMINE WHETHER HILL WAS LEGALLY MARRIED TO SHARON

In 1884, Terry was brought in as trial counsel for Sarah Althea Hill in the William Sharon–Sarah Althea Hill “divorce” trials.<sup>36</sup> The two cases generated ten California Supreme Court decisions,<sup>37</sup> ten Circuit Court decisions,<sup>38</sup> and two U.S. Supreme Court decisions.<sup>39</sup>

A brief note on the organization of the courts at the time of the Hill–Sharon trials: In 1863, the California Constitution was amended to expand the California Supreme Court

from three to five justices, and the terms were increased from six to ten years. In September 1878, California had a constitutional convention, and Califor-

<sup>36</sup> See Robert H. Kroninger, *Sarah & the Senator* (Berkeley: Howell–North, 1964) at 47.

<sup>37</sup> See *Sharon v. Sharon*, 67 Cal. 185 (1885); *Sharon v. Sharon*, 67 Cal. 185 at 214 (1885); *Sharon v. Sharon*, 67 Cal. 185 at 220 (1885); *Sharon v. Sharon*, 68 Cal. 29 (1885); *Sharon v. Sharon*, 68 Cal. 326 (1885); *Sharon v. Sharon*, 75 Cal. 1 (1888); *Sharon v. Sharon*, 77 Cal. 102 (1888); *Sharon v. Sharon*, 79 Cal. 633 (1889); *Sharon v. Sharon*, 79 Cal. 633 at 701 (1889); *Sharon v. Sharon*, 84 Cal. 424 (1890); *Sharon v. Sharon*, 84 Cal. 433 (1890).

<sup>38</sup> See *Sharon v. Hill*, 20 F. 1 (Cir. Ct. D. Cal. 1884); *Sharon v. Hill*, 22 F. 28 (Cir. Ct. D. Cal. 1884); *Sharon v. Hill*, 23 F. 353 (Cir. Ct. D. Cal. 1885); *Sharon v. Hill*, 24 F. 726 (Cir. Ct. D. Cal. 1885); *Sharon v. Hill*, 26 F. 337 (Cir. Ct. D. Cal. 1885); *Sharon v. Hill*, 26 F. 722 (Cir. Ct. D. Cal. 1885); *Sharon v. Terry*, 36 F. 337 (Cir. Ct. N.D. Cal. 1888); *In re Terry*, 36 F. 419 (Cir. Ct. N.D. Cal. 1888); *In re Terry*, 37 F. 649 (Cir. Ct. N.D. Cal. 1889); *In re Terry*, 39 F. 833 (Cir. Ct. N.D. Cal. 1889).

<sup>39</sup> See *Ex Parte Terry*, 128 U.S. 289 (1888); *Terry v. Sharon*, 131 U.S. 40 (1889).

nia's second constitution, ratified in May 1879, provided for a chief justice and six associate justices, and the terms were increased from ten to twelve years. There was still no court of appeal. During the time of the Hill–Sharon trials, the Superior Court was in the new City Hall then under construction in Civic Center. The Supreme Court was at 121 Post Street, near Kearny Street.<sup>40</sup>

William Sharon was a senator for Nevada (until 1881) who made his wealth from the silver Comstock Lode. He owned the Bank of California, and he owned and lived in the Palace Hotel on Market and New Montgomery Streets. It was one of the largest and most luxurious hotels in the world, and was the center of the city's social life. Sharon also owned the Grand Hotel, which was connected by a covered bridge over New Montgomery Street to the Palace Hotel, commonly referred to as the "Bridge of Sighs." The reference was not to the bridge connecting the Doges Palace in Venice to a prison. Rather, the reference was to the fact that several residents of the Palace Hotel, including Sharon, kept their mistresses at the Grand Hotel, from which they would walk across the enclosed bridge to visit their clients in the Palace Hotel. In 1880, Sharon, then 60 and a widower, kept Hill, then 27, in a room in the Grand Hotel. He paid her \$500 a month. After the relationship ended, Hill refused to move out of the Grand Hotel, and Sharon eventually had the carpet pulled up and her door removed from its hinges.<sup>41</sup>

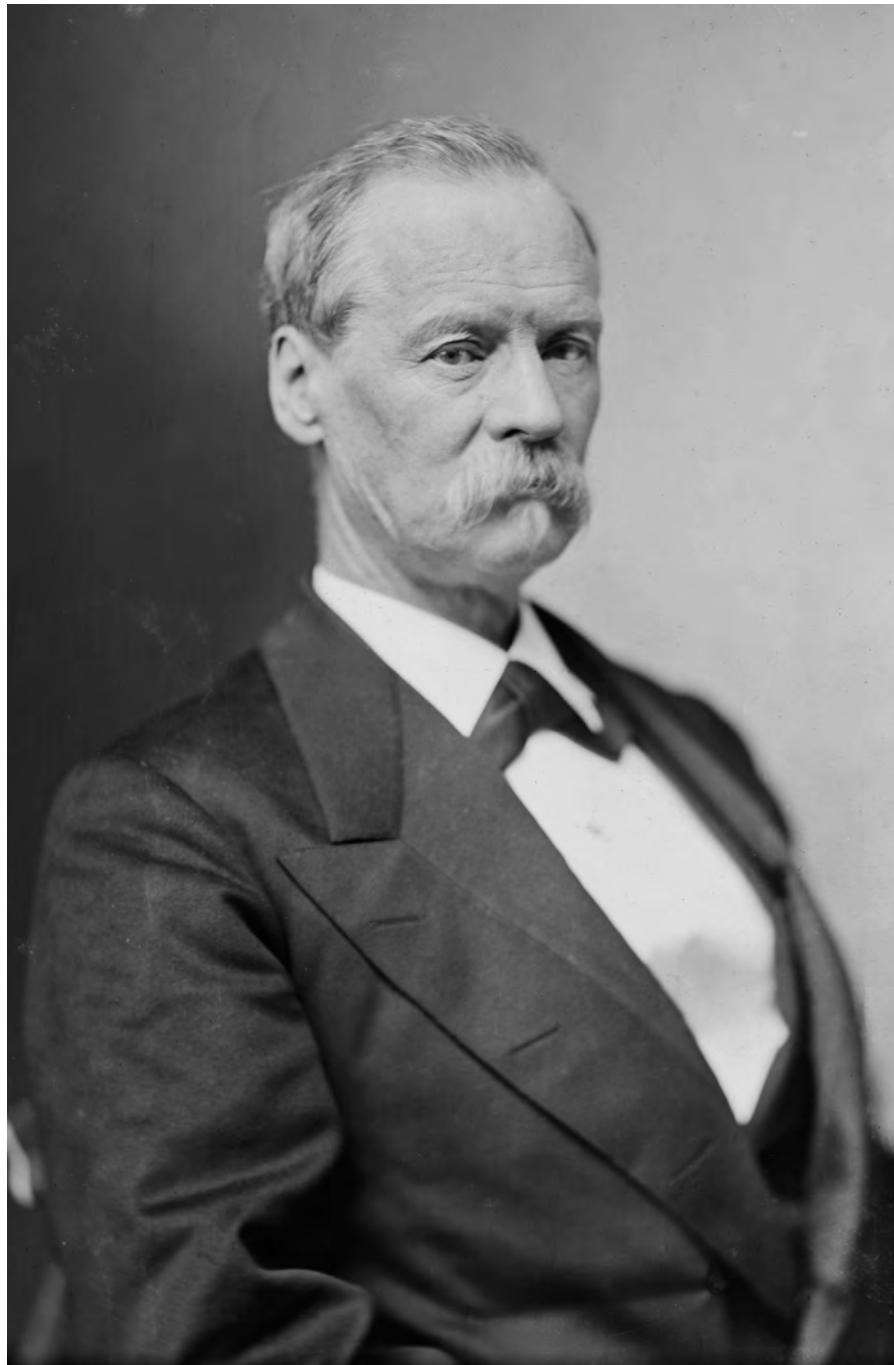
Hill subsequently claimed she had a secret, written contract of marriage with Sharon, and she had Sharon arrested for criminal adultery in September 1883. The contract was in Hill's handwriting with Sharon's signature at the top of the first page, which was lined, and the contract began on what would otherwise be the reverse side of the lined page. It allegedly took place in Sharon's office at the Bank of California, now the Union Bank, on the corner of Sansome and California Streets.<sup>42</sup>

In response, Sharon sued Hill on October 3, 1883 in federal circuit court in San Francisco for a declaration that the marriage contract was a forgery. Federal court jurisdiction was predicated on diversity, although

<sup>40</sup> See The Supreme Court of California, *The Supreme Court of California 2007 Edition* ([www.courtinfo.ca.gov/courts/supreme](http://www.courtinfo.ca.gov/courts/supreme)) at 13.

<sup>41</sup> See Gould at 169–78; Kroninger at 112–13; *Sharon v. Hill*, 26 F. 337, 363 (Cir. Ct. D. Cal. 1885).

<sup>42</sup> See Gould at 198–99; Kroninger at 52–70.



U.S. SENATOR WILLIAM SHARON

Sharon had not lived in Nevada for several years even though he was one of Nevada's senators until 1881.<sup>43</sup> A month later, Hill sued Sharon for divorce in San Francisco County Superior Court, alleging adultery and desertion.<sup>44</sup> Mammy Pleasant, an African-American woman who owned several brothels in the city, apparently financed Sarah's litigation in exchange for a percentage of any recovery.<sup>45</sup>

The trial in the state action lasted six months, from March until September, 1884, involving 111 witnesses. The newspapers noted that it became fashionable to attend the trial, and when Hill was cross-examined, there had been counted among the spectators a marquis, a count, an ex-mayor, the police commissioner, a county supervisor, and the president of the board of education, besides the usual number of lawyers and City Hall employees. The City Hall sidewalk and steps were crowded each morning with celebrity seekers, vying for a glimpse of the principals.<sup>46</sup> Closing arguments took weeks to deliver. Terry's final argument lasted five full court days, equal to 225 pages of text, which was published in full in the *San Francisco Examiner*.<sup>47</sup> He referred to Sharon as the "burro of the Palace Hotel," and a "miserable, lecherous, selfish old scoundrel." Terry closed with: "She goes from this courtroom either vindicated as an honest and virtuous wife or branded as an adventuress, a blackmailer, a perjurer and a harlot."<sup>48</sup>

Judge J. F. Sullivan, a relatively young and inexperienced judge, took the matter under submission for three months and delivered a decision on December 24, 1884. Although Sullivan found there was an unprecedented amount of "frightful perjury" by the witnesses, including Hill, he nevertheless found "that William Sharon by virtue of his secret contract of marriage has become and now is the husband of Sarah Althea, that he has been guilty of willfully abandoning his wife," and he awarded alimony in the amount of \$2,500 a month, and \$55,000 in attorneys' fees.<sup>49</sup> Terry's wife died the same day as the decision in the state court action.<sup>50</sup>

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<sup>43</sup> See Gould at 189–203.

<sup>44</sup> See Kroninger at 22–26.

<sup>45</sup> See Gould at 217; Johnson at 59.

<sup>46</sup> See Kroninger at 71.

<sup>47</sup> See Johnson at 59; Gould at 251.

<sup>48</sup> See Kroninger at 142.

<sup>49</sup> See Gould at 256, 278; Johnson at 60.

<sup>50</sup> See Johnson at 60.

### C. THE FEDERAL TRIAL TO ENJOIN HILL FROM CLAIMING SHE WAS MARRIED TO SHARON

At the time of the Sharon–Hill federal trial, under the Judiciary Act of 1875, district courts had exclusive jurisdiction to hear admiralty and maritime cases, and most federal crimes. Circuit courts, on the other hand, were trial courts for all matters arising under the Constitution and federal law, and the 1875 Act allowed litigants to remove cases filed in state courts between citizens of different states to the circuit court. Circuit courts could also hear appeals from the district courts. A Supreme Court justice was assigned to each circuit, and that justice would hear cases filed in circuit court with other circuit court judges. During the Hill–Sharon trials, the original Appraiser’s Building, built in 1881, housed both the federal district and circuit courts until 1905. It was at Washington and Sansome Streets, where the current Appraiser’s Building is located.<sup>51</sup>

Like the state trial, the federal trial also lasted approximately six months, but it did not begin until February 1885, approximately a month after Judge Sullivan’s decision in superior court.<sup>52</sup> Sarah’s lawyers had previously attempted to have the federal suit dismissed because of the state court action, which the circuit court denied.<sup>53</sup> In going forward with the federal trial, the court designated an “Examiner in Chancery” to hear the evidence and report to the court. On August 11, 1885, the examiner produced 1,731 legal-sized pages of testimony, and Judges Matthew P. Deady and Lorenzo Sawyer (a former chief justice of California), as in the state case, took the matter under submission for three months. During that time, on November 15, 1885, Sharon died.<sup>54</sup> Approximately a month later, on December 26, 1885, the circuit court rendered a 42-page decision by Judge Deady in favor of Sharon, with a 31-page concurrence by Judge Sawyer. Succinctly, Judge Deady found that Hill was Sharon’s hired mistress, not his wife; that Hill’s claims were rooted in perjury; and her “documentary evidence” was crudely fabricated and forged.<sup>55</sup>

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<sup>51</sup> See Bruce A. Ragsdale, *Establishing a Federal Judiciary* (Federal Judicial Center, Federal Judicial History Office, 2007) at 4–8; Federal Judicial Center, [www.fjc.gov](http://www.fjc.gov).

<sup>52</sup> See Gould at 264.

<sup>53</sup> See *Sharon v. Hill*, 22 F. 28, 29–30 (Cir. Ct. D. Cal. 1884).

<sup>54</sup> See Gould at 264–68; Kroninger at 177.

<sup>55</sup> See *Sharon v. Hill*, 26 F. 337, 359 (1885).

Because the state court had previously determined Hill was married to Sharon, and since her “husband” had died, Hill considered herself once again to be a single woman. On January 7, 1886 — a couple of weeks after the federal decision — David Terry married Sarah Althea Hill. His only surviving son refused to attend the wedding. Now that Terry was married to Hill, it was not just his client’s honor he was defending but his wife’s.<sup>56</sup>

#### D. THE CALIFORNIA SUPREME COURT’S RECOGNITION THAT FEDERAL JURISDICTION SUPPLANTED ITS OWN IN THE SHARON–HILL ACTIONS

Sharon had made three appeals from the superior court action. One appeal concerned Judge Sullivan’s denial of Sharon’s motion for a new trial, and the other appeal concerned the judgment itself. Regarding the appeal of the judgment, the only question before the Court was whether, as a matter of law, a valid marriage contract could have a provision making the marriage itself secret. The Court was clear that it was not re-examining the evidence of the trial court but, for the appeal, would assume it was true. On January 31, 1888, the California Supreme Court decided Sharon’s appeal concerning the judgment. In a 4–3 split decision, the Court affirmed the Superior Court’s decision in favor of Hill in a 45-page decision, holding that the Civil Code “does not make it indispensable to the validity of the marriage that the relation between the parties shall be made public.”<sup>57</sup> The dissent, by Justices James D. Thorton, John R. Sharpstein, and Thomas B. McFarland, argued that the marriage statute made no sense unless the assumption of marital rights, duties or obligations was public.<sup>58</sup>

Having had the Supreme Court confirm the state court judgment, Sharon’s estate petitioned the federal court for “revivor,” *i.e.*, to have the judgment revived in the name of Sharon’s representatives. On September 3, 1888, the federal circuit court ordered Hill to hand over the original “marriage contract” for cancellation, and it enjoined her from ever asserting its validity.<sup>59</sup>

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<sup>56</sup> See Gould at 276.

<sup>57</sup> *Sharon v. Sharon*, 75 Cal. 1, 37 (1888).

<sup>58</sup> See *Sharon*, 75 Cal. at 56–78.

<sup>59</sup> See *Sharon v. Terry*, 36 F. 337, 369 (Cir. Ct., N.D. Cal. 1888).



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The following year, on July 17, 1889, the California Supreme Court finally decided the second appeal, which was Sharon's appeal of the superior court's denial of the motion for a new trial in the divorce case.<sup>60</sup> Here, for the first time, the Court would be examining the evidence of the trial court to determine whether a new trial should have been granted. However, the composition of the Court had significantly changed, with the three dissenters — Justices Thorton, Sharpstein and McFarland — now joined by three new justices who were not a party to the previous decision.<sup>61</sup>

However, before reaching the merits of the appeal, the Supreme Court had to address the elephant in the room — that the federal circuit court had already held the “marriage contract” to be a fraud, and had enjoined Hill from using it for any purpose. Writing for the Court, Justice John D. Works addressed this question:

The point made and relied upon by the appellant as to this branch of his case is, that the court below and the federal court had equal and concurrent jurisdiction of the subject-matter and of the parties; that the contract declared to be invalid by the federal court is the basis and foundation of the respondent's action now before us, and that the federal court having first taken cognizance of the case, its judgment must prevail over that of the state court, in which the action was commenced at a later day, no matter in which court final decree was first rendered.

<sup>60</sup> See *Sharon v. Sharon*, 79 Cal. 633 (1889).

<sup>61</sup> See Kroninger at 209.

This presents for our consideration the somewhat novel and important question, whether this court can, upon undisputed evidence of the facts relied upon by the appellant, step aside from the strict line of its appellate jurisdiction to adjudicate upon the effect of these conflicting decrees.

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... The case, as presented by the record on appeal and the offered evidence, is simply this: Conceding that the subject-matter of the two actions was the same, and that the federal court had jurisdiction in the premises, both of which the respondent denies, here are two courts of concurrent jurisdiction, both of which have assumed and are exercising jurisdiction over the same subject-matter and the same parties. The federal court has first taken jurisdiction, but this fact is not called to the attention of the state court in any legal way, and it proceeds to final judgment. Subsequently, the federal court renders a judgment contrary to and in direct conflict with that of the state court. Does this prove that the judgment of the state court is either void or erroneous? Not so. But as a matter of public policy, one or the other of these conflicting judgments must be held to prevail over the other, whether right or wrong; which one is not for us to say. Both of the judgments may be valid, and as they may have been rendered upon different evidence, it may be that neither of them is erroneous. It is purely and solely a question, therefore, as to which one of them shall prevail over the other, and this is a question that cannot be determined on this appeal.<sup>62</sup>

However, the Supreme Court held it did not need to resolve the federalism issue because, based on the evidence, it found that Sharon and Hill did not assume their marital rights, duties and obligations. Rather, “[t]heir acts and conduct were entirely consistent with the meretricious relation of man and mistress, and almost entirely inconsistent with the relation of husband and wife.”<sup>63</sup> The Court thus remanded the action for a new trial in the superior court.

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<sup>62</sup> *Sharon*, 79 Cal. at 647–48.

<sup>63</sup> *Sharon*, 79 Cal. at 663–64.



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CHARLES N. FOX, CALIFORNIA  
SUPREME COURT

while that might be true, the state courts had to honor the federal injunction, and deny Hill any relief, even including the accumulated alimony payments. The opinion was written by Justice Charles N. Fox, who addressed the issue of federal jurisdiction:

The record shows that the circuit court of the United States (the court in which such action was brought) acquired jurisdiction of the persons and subject-matter before the commencement of this action. Consequently, no matter when its judgment was rendered, whether before or after the date of the judgment of any other tribunal subsequently acquiring jurisdiction over the same persons and subject-matter, the final judgment in that case became binding and conclusive as to that subject-matter upon all persons, and upon all other courts and tribunals whatsoever.

The judgment of the court below for alimony and costs was essentially based upon this identical contract or instrument; for the court

Subsequently, Sharon's heirs moved to dismiss the case in the superior court, which was denied and a new trial was set for July 1890. However, before that case could go to trial, the California Supreme Court decided Sharon's third appeal on June 10, 1890, which was the appeal of the trial court's order to pay the accumulated alimony to Hill.<sup>64</sup> Hill's attorney argued that the purpose of the temporary alimony order was to support the spouse through trial, and therefore Sharon had an obligation to pay the accumulated alimony, regardless of the ultimate outcome of the case. Sharon's attorneys argued that,

<sup>64</sup> See *Sharon v. Sharon*, 84 Cal. 424 (1890).

expressly finds that it was the only contract or agreement of marriage between the parties. There could be no marriage without a contract or agreement of the parties. Without marriage there could be no divorce, and without this judgment for divorce, there would have been no judgment for alimony or costs. This judgment in the circuit court was and is the only final judgment on the question of the validity of the contract, upon which this alleged marriage depends. . . .

. . . “The comity which one court owes to another of concurrent jurisdiction should always prevent the one from lending itself as an instrument in permitting a contempt of the process of the other. The one should regard the party attempting to proceed in defiance of the authority of the other as laboring under the same disability to ask for the action of the court as if he was an alien enemy, or under the ban of a decree of outlawry at common law. Such being the opinion we entertain upon this point, we cannot permit the judgment to stand.”

To claim alimony and costs under a judgment based upon that alleged marriage contract was to make a claim under and by virtue of that writing in violation of the injunction.<sup>65</sup>

In summary, because the state trial court ignored federal jurisdiction, the state and federal trials continued on their course. After avoiding the question several times, the California Supreme Court, after some personnel changes, finally acceded to the jurisdiction of the federal court over the subject of the “marriage contract.”

#### IV. FEDERALISM AND THE STATE'S ATTEMPT IN 1888–89 TO PROSECUTE THE U.S. MARSHAL WHO KILLED TERRY

##### A. THE FEDERAL CIRCUIT COURT ALSO DECLares FEDERAL JURISDICTION TO SUPPLANT THE STATE COURT JUDGMENT

Prior to the California Supreme Court's yielding to federal jurisdiction in the state case in 1890, the federal circuit court opined on the same issue in 1888. The circuit court had already declared Hill's “marriage contract”

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<sup>65</sup> *Sharon*, 84 Cal. at 430–31.

to be a fraud, and it enjoined her from asserting any rights based on it.<sup>66</sup> However, as Sharon died just prior to the decision, the decree abated. Sharon's son-in-law, Francis Newlands, sought to "revive" the decision regarding Sharon's estate. Terry argued against the revivor in June 1888 in the circuit court before Stephen Field, Lorenzo Sawyer, and George Myron Sabin, a federal district judge from Nevada.<sup>67</sup> Newlands had been one of Field's managers in Field's effort to obtain the Democratic nomination for president in 1884. As luck would have it, one month after Terry argued against the revivor, but before a decision had been made, the Terrys were passengers in the same train car in which Judge Sawyer happened to be sitting on August 14, 1888. Sarah insulted Sawyer, and when he ignored her, she grabbed his hair and shook his head from side to side, while David Terry gleefully laughed and encouraged her.<sup>68</sup>

Stephen Field was an associate justice on the California Supreme Court when Terry was chief justice. Terry's term would have ended in 1861 but he resigned as chief justice in September 1859 to fight his duel with Senator Broderick. When Terry resigned, Field replaced him as chief justice. In 1863, Congress added an additional seat to the U.S. Supreme Court. Field's friend, Leland Stanford, who was the wartime governor of California, led a movement to name Field to the new vacancy. Field's brother, David Dudley Field, who was one of Lincoln's most influential advisors, asked Lincoln to appoint his brother to the Supreme Court, which he did. As a Supreme Court justice, Field also served as circuit judge for the Ninth Circuit, which included the judicial districts for California, Nevada and Oregon, in which he held court in Los Angeles, San Francisco, Carson City and Portland.<sup>69</sup>

The circuit court announced it would read its decision on the revivor on September 3, 1888, which would decide whether Sarah would have any claim against the Sharon estate. Both Terrys were sitting at counsel table, normally reserved only for lawyers. Because of the "wooling" incident on the train, additional deputy marshals and San Francisco police officers were in the courtroom. Field read the decision but when it became clear that the revivor would be granted, Sarah jumped up and said: "You

<sup>66</sup> See *Sharon*, 26 F. at 378–79.

<sup>67</sup> See *Sharon v. Terry*, 36 F. 337 (Cir. Ct. N.D. Cal. 1888).

<sup>68</sup> See Gould at 278–79.

<sup>69</sup> See Gould at 151–53.

have been paid for this decision.” Judge Field then ordered Sarah to keep her seat, but she continued, saying, “How much did Newlands pay you?” Field ordered Sarah to be removed from the court, but when the marshal attempted to remove her, Terry swung and knocked out one of the marshal’s teeth. While subduing the Terrys, Terry’s Bowie knife and Sarah’s pistol were taken from them. During all of this, Field continued to read the decision.<sup>70</sup> He reconvened the court in the afternoon and sentenced Hill to thirty days in Alameda County jail, and sentenced his former colleague on the California Supreme Court to six months in jail.<sup>71</sup> The sentence was affirmed by the U.S. Supreme Court (with Field abstaining), on November 12, 1888.<sup>72</sup>

In the revivor opinion itself, Judge Field makes clear that the jurisdiction of a federal court, once legally obtained, cannot be ousted by another court:

Having disposed of the objections to the jurisdiction of the circuit court of the United States in the original suit of *Sharon v. Hill*, we proceed to consider how far the judgment therein is affected, or should have been affected, if at all, by the judgment in the state court. William Sharon, being a citizen of Nevada, had a constitutional right to ask the decision of the federal court upon the case presented by him, and it would be a strange result if the defendant, who was summoned there, could, by any subsequent proceedings elsewhere, oust that court of its jurisdiction and rightful authority to decide the case. The constitution declares that the judicial powers of the United States shall extend to controversies between citizens of different states, — a provision which had its origin in the impression that local attachments and prejudices might injuriously affect the administration of justice in the state courts against the claims of citizens of other states. *Railway Co. v. Whitton*, 13 Wall. 270, 289. So valuable has the right of citizens of other states than the one

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<sup>70</sup> See Gould at 281–86; Kroninger at 201–04; Transcript of Record, *Cunningham v. Neagle*, Supreme Court of the United States, filed October 22, 1889 (reprinted by The Making of Modern Law) at 57–59 (affidavit of U.S. Marshal J.C. Franks) (“Transcript of Record”).

<sup>71</sup> See *In re Terry*, 36 F. 419 (Cir. Ct. N.D. Cal. 1888).

<sup>72</sup> See *Ex Parte Terry*, 128 U.S. 289 (1888).

in which suits are brought against them to have their cases heard in a federal court always been regarded, that, at the very outset of the government, congress provided, and in different acts since has renewed the provision, that when a citizen of another state is sued in a state court, he may, upon proper application, accompanied by an offer of good and sufficient surety for entering copies of the proceedings and his appearance in the federal court, have the case removed to that court, and tried or heard there; and all the acts of congress have declared that it shall be the duty of the state court in such a case to accept the surety, and to proceed no further in the cause. Any subsequent proceedings there are null and void, and will be so treated by the federal courts. . . . The jurisdiction of the federal court having attached, the right of the plaintiff to prosecute his suit to a final determination there cannot be arrested, defeated, or impaired by any proceeding in a court of another jurisdiction. This doctrine we hold to be incontrovertible. It is essential to any orderly and decent administration of justice, and to prevent an unseemly conflict of authority, which could ultimately be determined only by superiority of physical force on one side or the other.<sup>73</sup>

When the sheriff made known his intention to release Terry based on good behavior credits, Judge Sawyer, on February 1, 1889, found reasons to make Terry serve the full six months.<sup>74</sup> Terry tried to sue the U.S. marshal for false imprisonment, which was quashed by another judge. Allegedly at Field's instigation, the U.S. attorney had a federal grand jury indict Terry for assault. Terry moved to dismiss the charge on the basis that the grand jury was coerced. District Judge Ogden Hoffman upheld the indictment.<sup>75</sup>

## B. THE SHOOTING OF TERRY AND THE WRIT OF HABEAS CORPUS TRIAL

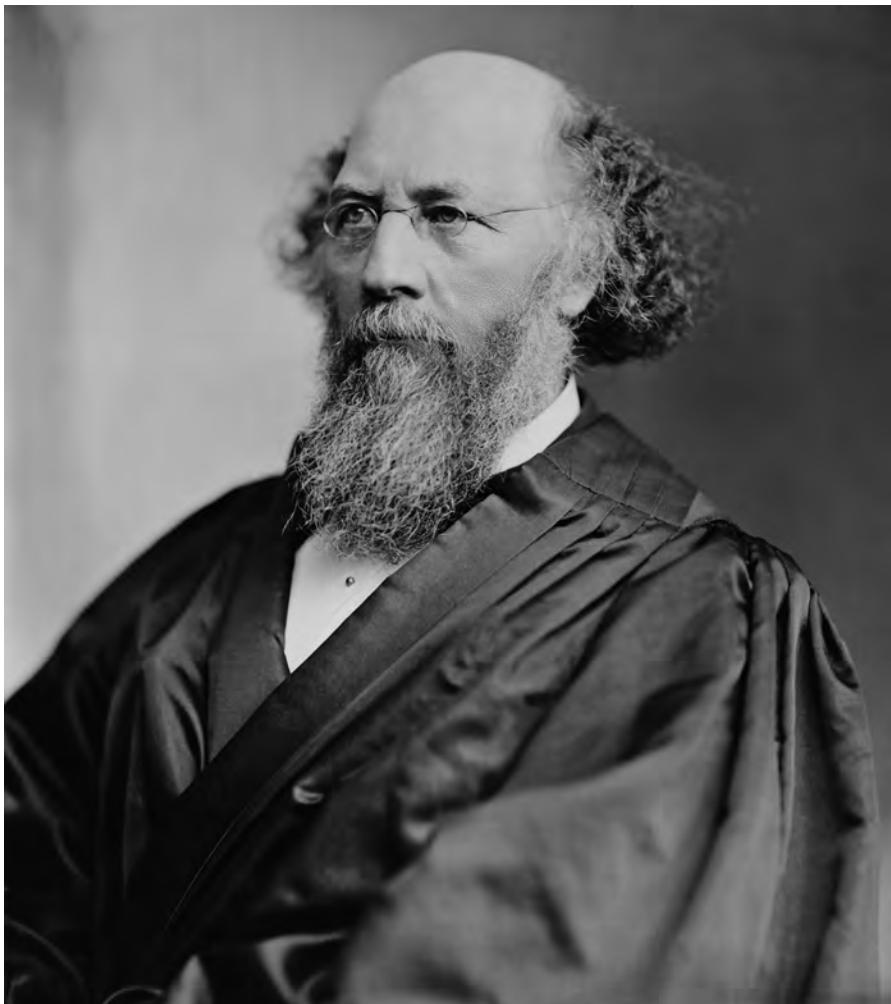
Because Terry clearly was not penitent, and because word reached Justice Field that Terry had made threats against him, a deputy U.S. marshal, David Neagle, was appointed to accompany Field, then age 73, on his trips to California to sit

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<sup>73</sup> *Sharon v. Terry*, 36 F. 337, 354–55 (Cir. Ct., N.D. Cal. 1888).

<sup>74</sup> See *In re Terry*, 37 F. 649 (Cir. Ct., N.D. Cal. 1889).

<sup>75</sup> See *United States v. Terry*, 39 F. 355 (N.D. Cal. 1889); Kroninger at 205–06.



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on the circuit court. Marshal Neagle was born on Telegraph Hill in San Francisco and, although he was only 5 feet, 4 inches tall — almost a foot shorter than Terry — he was formerly the marshal of Tombstone, Arizona, during the time that the Wyatts had their gunfight at the O.K. Corral. Neagle was also the primary person who removed Terry's Bowie knife from his hand in the circuit court following the attempt to remove Hill from the courtroom.<sup>76</sup>

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<sup>76</sup> See Gould at 295–97.

In early August 1889, Field held court in Los Angeles, and then, with Deputy U.S. Marshal Neagle, boarded an overnight train to San Francisco on August 13, to hold circuit court in San Francisco, during which he would hear Terry's appeal of the revivor judgment. The Terrys boarded the train in Fresno. The train stopped at Lathrop (near Stockton) at a hotel for breakfast. While Field and Neagle were eating their breakfast, the Terrys walked in. After spotting Field, Terry went up behind him and punched him twice before Neagle jumped up and shot Terry through the heart, claiming Terry was reaching for his Bowie knife in his breast pocket. Neagle surrendered to a local police officer in Lathrop and was taken to jail in Stockton, where he was charged with murder. Field proceeded to San Francisco where a *Chronicle* reporter found him in his room at the Palace Hotel "as calm as though the killing of a man at breakfast were an everyday occurrence."<sup>77</sup>

Field was by no means indifferent to his bodyguard's fate. He most likely played a role in preparing a petition for a writ of habeas corpus directing the San Joaquin County sheriff to deliver Neagle to the jurisdiction of the federal court in San Francisco. The writ was issued by Circuit Judge Sawyer. A special train had been chartered by Neagle's protectors to take him to San Francisco, which picked him up from the Stockton station at 3:30 A.M.<sup>78</sup> A habeas corpus hearing was held before Circuit Judge Sawyer and District Judge Sabin at the Appraiser's Building, where the circuit court was located, at Sansome and Washington Streets, which lasted two weeks, and where several witnesses testified.<sup>79</sup> A week later, on September 16, 1889, Judge Sawyer read his opinion, in which he carefully framed the jurisdictional issue before the court.

The homicide in question, if an offense at all, is, it must be conceded, an offense under the laws of the state of California, and the state, only, can deal with it, *as such, or in that aspect*. It is not claimed to be an offense under the laws of the United States. But if the killing of Terry by Neagle, was an "act done . . . in pursuance of a law of the United States," within the powers of the national government, then it *is not*, and *it cannot* be, an offense against

<sup>77</sup> See Kroninger at 216, 213–17; Gould at 209–305; Transcript of Record at 324–43 (testimony of David Neagle).

<sup>78</sup> See Gould at 309; Kroninger at 222–23.

<sup>79</sup> See Gould at 317–22; Kroninger at 223–29.

the laws of the state of California, no matter what the statute of the state may be, the laws of the United States being the supreme law of the land. A state law, which contravenes a valid law of the United States, is, in the nature of things, necessarily void — a nullity. It must give place to the “supreme law of the land.” In legal contemplation, there can no more be two valid laws, which are in conflict, operating upon the same subject-matter,

at the same time, than, in physics, two bodies can occupy the same space at the same time. But, as we have seen by the authorities cited, it is the exclusive province of the judiciary of the United States, to, ultimately, and, conclusively, determine any question of right, civil or criminal, arising under the laws of the United States. It is, therefore, the prerogative of the national courts to, conclusively, construe the national statutes, and determine, whether the homicide in question, was the result of an “act done in pursuance of a law of the United States,” and, when that question has been determined in the affirmative, the petitioner must be discharged, and the state has nothing more to do with the matter. All we claim, is, the right to determine the question, was the homicide the result of “an act done in pursuance of a law of the United States?” and if so, discharge the petitioner. As incidental to, and involved in, that question, it is necessary to inquire, whether the act of the petitioner, was performed under such circumstances as to justify it. If it was, then, he was in the line of his duty. If not, then, he acted



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outside his duty. We do not make the inquiry, at all, for the purpose of determining, whether the act was an offense, or justifiable under the statutes of the state. We do not assume to consider the case, in that aspect, at all. We simply determine, whether it was an act, performed in pursuance of a law of the United States. Nor do we act, in this matter, because we have the slightest doubt, as to the impartiality of the state courts, and their ability, and disposition, to, ultimately, do exact justice to the petitioner. We have not the slightest doubt, or apprehension in that particular; but, there is a principle involved. The question, is, has the petitioner *a right* to have his acts adjudged, and, if found to have been performed in the strict line of his authority, and duty, *a further right*, to be protected, by that sovereignty, whose servant he is, and whose laws he was executing? If he has that right, then, there is no encroachment upon the state jurisdiction, and this court must, necessarily, entertain his petition, and determine his rights under it, and under the laws of the United States. It has no discretion. It cannot decline to hear him without an utter disregard of one of the most important duties imposed upon it by the constitution, and laws of the United States. What the state tribunals might, or might not, do, in this particular instance, is not a matter for a moment's consideration.<sup>80</sup>

In determining whether Neagle acted “in pursuance of a law of the United States” when he killed Terry, Judge Sawyer asked two questions. First, was Neagle acting under a federal law and, second, if he was, did he shoot Terry in pursuance of that law. But there was no federal law that specifically authorized a U.S. marshal to protect a judge outside of the courtroom, and, so the sheriff of San Joaquin County argued, because Terry was not killed in a courthouse, California had jurisdiction over the matter. Judge Sawyer rejected this “geographical” notion of jurisdiction and, instead, found that the federal law in question can be implied in the power of the sovereign.

The power to keep the peace is a police power, and the United States have the power to keep the peace in matters affecting their sovereignty. There can be no doubt, then, that the jurisdiction

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<sup>80</sup> *In re Neagle*, 39 F. 833, 843–44 (Cir. Ct., N.D. Cal. 1889).

of the United States is not affected, by reason of the place, — the locality, — where the homicide occurred.

....

.... If the executive department of the government cannot protect one of these judges, while in the discharge of his duty, from assassination, by dissatisfied suitors, on account of his judicial action, then it cannot protect any of them, and all the members of the court may be killed, and the court, itself, exterminated, and the laws of the nation by reason thereof, remain unadministered, and unexecuted.<sup>81</sup>

The second inquiry was whether the “the killing was necessary.” After recounting the events leading to Terry’s death, Judge Sawyer had no trouble in finding that the homicide was justifiable, rebuking an “eastern law journal” that had come to a different conclusion.

[I]t is not for scholarly gentlemen of humane and peaceful instincts — gentlemen, who, in all probability, never in their lives, saw a desperate man of stalwart frame and great strength in murderous action — it is not for them sitting securely in their libraries, 3,000 miles away, looking backward over the scene, to determine the exact point of time, when a man in Neagle’s situation should fire at his assailant, in order to be justified by the law. . . . The homicide was, in our opinion, clearly justifiable in law, and in the forum of sound, practical common sense, — commendable. Let him be discharged.<sup>82</sup>

When Judge Sawyer concluded reading his opinion from the bench, Justice Field sprang to his feet to shake hands with Neagle and presented him with a gold watch engraved with the inscription: “Stephen J. Field to David Neagle, as a token of appreciation of his courage and fidelity to duty under circumstances of great peril at Lathrop, Cal. on the fourteenth day of August, 1889.”<sup>83</sup>

The San Joaquin County sheriff, supported by the California attorney general, appealed to the U.S. Supreme Court, challenging Judge Sawyer’s

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<sup>81</sup> *In re Neagle*, 39 F. at 848, 859.

<sup>82</sup> *In re Neagle*, 39 F. at 864.

<sup>83</sup> See Gould at 322.

decision that California had no power to prosecute federal employees committing state crimes while acting within the scope of their federal duties. The Supreme Court deemed the matter significantly weighty to allow two full days of argument, on March 4 and 5, 1890. Field recommended that Joseph H. Choate, considered the leading advocate of the time, represent the United States, which he did without fee. California Attorney General G. A. Johnson appeared for the state.<sup>84</sup> The Court delivered its opinion on April 14, 1890, with Justice Samuel Freeman Miller writing for the majority in a 6–2 decision (Field abstained), and concluded that article II, section 3 of the Constitution, directing that the president “shall take care that the laws be faithfully executed,” gave him ample implied power to authorize federal marshals to protect federal judges.<sup>85</sup>

Although the issue before the Court was, at least in part, purely an issue of law, the Court went into exhaustive detail to document its opinion that, but for Marshal Neagle’s intervention, Justice Field would be a dead man. The Court discussed the Sharon–Hill lawsuits; the findings of the federal court against Hill as to fraud, perjury and forgery; the hair-pulling incident by Hill against Judge Sawyer; the events in the circuit court leading to the six-month contempt sentence of Terry; and the threats Terry made against Field, concluding it was “a settled purpose on the part of Terry and his wife, amounting to a conspiracy, to murder Justice Field.”

[I]t is urged against the relief sought by this writ of habeas corpus, that the question of the guilt of the prisoner of the crime of murder is a question to be determined by the laws of California, and to be decided by its courts, and there exists no power in the government of the United States to take away the prisoner from the custody of the proper authorities of the State of California and carry him before a judge of the court of the United States, and release him without a trial by jury according to the laws of the State of California. That the statute of the United States authorizes and directs such a proceeding and such a judgment in a case where the offence charged against the prisoner consists in an act done in pursuance of a law of the United States and by virtue of its authority, and where the imprisonment of

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<sup>84</sup> See Gould at 327.

<sup>85</sup> See *In re Neagle*, 135 U.S. 1, 63–64 (1890).



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the party is in violation of the Constitution and laws of the United States is clear by its express language.

....

.... To the objection made in argument, that the prisoner is discharged by this writ from the power of the state court to try him for the whole offence, the reply is, that if the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he *cannot* be guilty of a crime under the law of the State of California. When these things are shown, it is established that he is innocent of any crime against the laws of the State, or of any other authority whatever. There is no occasion for any further trial in the state court, or in any court. The Circuit Court of the United States was as competent to ascertain these facts as any other tribunal, and it was not at all necessary that a jury should be impaneled to render a verdict on them.

....

The result at which we have arrived upon this examination is, that in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the judge would have ended in the death of the latter; that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.<sup>86</sup>

By relying on the implied constitutional powers, Justice Miller's opinion is one of the broadest statements of the power of the federal government to immunize its officers in the performance of their duties. The dissent, led

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<sup>86</sup> *In re Neagle*, 135 U.S. at 69–70, 75–76.



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U.S. SUPREME COURT

by Associate Justice Lucius Quintus Cincinnatus Lamar, focused on the dangers of granting immunity to federal officials whose authority is only implied by the Constitution:

The gravamen of this case is in the assertion that Neagle slew Terry in pursuance of a law of the United States. He who claims to have committed a homicide by authority must show the authority. . . . The right claimed must be traced to legislation of Congress; else it cannot exist.

....

.... If the act of Terry had resulted in the death of Mr. Justice Field, would the murder of him have been a crime against the United States? Would the government of the United States, with all the supreme powers of which we have heard so much in this discussion, have been competent, in the present condition of its statutes, to prosecute in its own tribunals the murder of its own Supreme Court justice, or even to inquire into the heinous offence through its own tribunals? If yes, then the slaying of Terry by the appellee, in the necessary prevention of such act, was authorized by the law of the United States, and he should be discharged; and that, independently of any official character, the situation being the same in the case of any citizen. But if no, how stands the matter then? The killing of Terry was not by authority of the United States, no matter by whom done; and the only authority relied on for vindication must be that of the State, and the slayer should be remanded to the state courts to be tried. The question then recurs, Would it have been a crime against the United States? There can be but one answer. Murder is not an offence against the United States, except when committed on the high seas or in some port or harbor without the jurisdiction of the State, or in the District of Columbia, or in the Territories, or at other places where the national government has exclusive jurisdiction. It is well settled that such crime must be defined by statute, and no such statute has yet been pointed out. The United States government being thus powerless to try and punish a man charged with murder, we are not prepared to affirm that it is omnipotent to discharge from trial and give immunity from any liability to trial where he is accused

of murder, unless an express statute of Congress is produced permitting such discharge.

We are not unmindful of the fact that in the foregoing remarks we have not discussed the bearings of this decision upon the autonomy of the States, in divesting them of what was once regarded as their exclusive jurisdiction over crimes committed within their own territory, against their own laws, and in enabling a federal judge or court, by an order in a *habeas corpus* proceeding, to deprive a State of its power to maintain its own public order, or to protect the security of society and the lives of its own citizens, whenever the amenability to its courts of a federal officer or employé or agent is sought to be enforced. We have not entered upon that question, because, as arising here, its suggestion is sufficient, and its consideration might involve the extent to which legislation in that direction may constitutionally go, which could only be properly determined when directly presented, by the record in a case before the court of adjudication.<sup>87</sup>

## V. CONCLUSION

So what can we say about the concept of federalism in the thirty-plus years between the time Terry was a justice of the California Supreme Court and the time the U.S. Supreme Court ruled that California had no right to try the person who killed Terry? In 1856, the federal government rejected state and local officials' requests for help when the Vigilance Committee armed itself (in part, with U. S. Army rifles taken by force from the state militia) and took over San Francisco. In effect, the federal government stood by, in the face of an armed rebellion in the West's largest city, using the language of states' rights to justify its non-intervention.

The federal government's refusal to intervene, however, took place five years before the Civil War began. The Sharon–Hill trials and *In re Neagle* decisions took place more than twenty years after the end of the Civil War. In the Sharon–Hill appeals we see jurisdictional wrangling between the state and federal courts, with the federal courts finally winning that battle.

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<sup>87</sup> *In re Neagle*, 135 U.S. at 89, 98–99.

*In re Neagle*, on the other hand, is the counterpoint to the federal government's refusal to help suppress the Vigilance Committee, with a federal court so assertive vis-à-vis state jurisdiction, that it released deputy marshal Neagle from being subject to any state proceedings over the killing of David Terry because it determined that Neagle had acted in the course and scope of his federal duties — never mind that neither the circuit court nor the Supreme Court could point to any federal statute that would trump California's right to try Neagle. While Terry never directly opined on federalism, his life and death reflected the changes in that concept.

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# FIFTY YEARS OF THE WASHINGTON–GILBERT PROVOCATIVE ACT DOCTRINE:

*Time for an Early Retirement?*

MITCHELL KEITER\*

The usual challenge in determining criminal liability is the age-old uncertainty: “Who done it?” But assigning blame may prove controversial even where the facts are undisputed. It may be clear that A directly inflicted the fatal wound, but in response to a wrongful action of B. For example, a bank robber’s waving a gun prompts a security guard to shoot — and inadvertently kill a customer. Should the robber or the guard be liable for the homicide? The use of civilian populations in urban warfare as human shields has highlighted the distinction between the direct or actual cause of death (the guard) and the proximate or legal cause (the robber).

Direct causation is neither necessary nor sufficient for homicide liability; proximate causation combines with a guilty mental state (*mens rea*) to produce homicide liability.<sup>1</sup> Whereas direct causation is a question of fact, proximate causation is a policy question, which seeks to assign liability

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<sup>1</sup> *People v. Sanchez*, 26 Cal.4th 834, 845 (2001). The more culpable the offender’s mental state, the higher the degree of homicide.

fairly and justly.<sup>2</sup> When a defendant is charged with homicide for a death directly inflicted by an intermediary, judges and juries must decide if the intermediary's response was a "dependent" or "independent" intervening variable. Intervening variables are independent if they are "unforeseeable," and "an extraordinary and abnormal occurrence."<sup>3</sup> But the intervening variable is dependent if it is a "normal and reasonably foreseeable result of defendant's original act."<sup>4</sup> Jurors may thus agree on what happened but disagree on whom to blame.

Fifty years ago, the California Supreme Court decided two cases that reshaped homicide liability. In *People v. Washington*<sup>5</sup> and *People v. Gilbert*,<sup>6</sup> the Court distinguished between direct proximate causation and indirect proximate causation, holding that only the former supported application of the felony-murder rule, which otherwise held felons strictly liable for all homicides committed during the felony.<sup>7</sup> The decisions immunized defendants from felony-murder liability if a resisting victim or officer directly caused the death, even if the felon was the proximate cause.

In creating this exception to the felony-murder rule, the Supreme Court also created an exception to the exception: murder liability was proper even where an innocent party directly caused death so long as the defendant committed a highly dangerous act (like shooting) that proximately caused the fatal response. Such a "provocative" act would demonstrate implied malice, sufficient to support murder liability without resort to the felony-murder rule.<sup>8</sup> Although *Washington* and *Gilbert* designed

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<sup>2</sup> *People v. Cervantes*, 26 Cal.4th 860, 872 (2001).

<sup>3</sup> *Id.* at 871.

<sup>4</sup> *Id.*

<sup>5</sup> 62 Cal.2d 777 (1965).

<sup>6</sup> 63 Cal.2d 690 (1965).

<sup>7</sup> Cal. Penal Code, §189; see Miguel Méndez, *The California Supreme Court and the Felony Murder Rule: A Sisyphean Challenge?*, 5 CAL. LEGAL HIST. 241 (2010) (Méndez); Mitchell Keiter, *Ireland at Forty: How to Rescue the Felony-murder Rule's Merger Limitation from Its Midlife Crisis*, 36 W. ST. L. REV. 1, 28 (2008) (Ireland at Forty).

<sup>8</sup> See Part IA. In contrast to express malice, which involves a specific intent to kill, implied malice involves an intent to do an act, the natural and probable consequences of which are dangerous to life (the objective component), with conscious disregard of the danger to human life (the subjective component). *People v. Knoller*, 41 Cal.4th 139, 152–53, 156–57 (2007); see Méndez, *supra* note 7, at 244.

the provocative act doctrine as a substitute for the felony-murder rule to establish malice for homicides committed during section 189 felonies, the doctrine has become the default means for establishing murder liability for all homicides committed by an intermediary, even where there was no section 189 felony.<sup>9</sup>

Yet in the half-century since *Washington* and *Gilbert*, the Supreme Court has disavowed all the premises that produced those decisions, and restored the law to the status quo ante.<sup>10</sup> The Court has recharacterized the purpose of the felony-murder rule, the requisite connection between the felony and the homicide, the definition of implied malice (and whether brandishing a weapon may reflect it), whether an unreasonable response breaks the chain of causation, and, most significantly, whether defendants may be held liable for factors beyond their control. Paradoxically, *Washington–Gilbert*'s reach has expanded as its underpinnings collapsed.

This disavowal of *Washington–Gilbert*'s foundation accorded with a judicial and legislative emphasis on public safety, prompted by an increase in crime in the late 1960s and 1970s. The law is now more inclined to authorize punishment for not only intended harms but also unintended ones, so long as they are reasonably foreseeable. Conduct less culpable than the *Washington* defendant's now supports murder liability in indirectly caused homicides.<sup>11</sup>

But the provocative act doctrine remains, more entrenched than ever. Courts have addressed new factual circumstances by reconfiguring jury instructions (often incorrectly) — or bypassing the doctrine altogether. Although this patchwork development may achieve desired results in individual cases (or not), the law would enjoy greater consistency if courts followed the same formula for intermediary cases that applies in all others: A defendant who proximately causes death is liable for homicide in accordance with his mental state (*mens rea*).<sup>12</sup>

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<sup>9</sup> See Part I.B. The enumerated felonies of section 189 currently include arson, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, rape, and specified sex offenses.

<sup>10</sup> See Part II.

<sup>11</sup> See Part III.

<sup>12</sup> See Part IV.

## I. THE DEVELOPMENT OF THE PROVOCATIVE ACT DOCTRINE

For more than a century, homicide liability has required proximate, not direct, causation of death.<sup>13</sup> In *People v. Lewis*,<sup>14</sup> the defendant shot the victim in the intestines, “sending him toward a painful and inevitable death he apparently decided to hasten by slitting his own throat.”<sup>15</sup> The victim may have been the direct cause of death, but blame, and thus proximate causation, lay with the defendant: “Even if the deceased did die from the effect of the knife wound alone, no doubt the defendant would be responsible . . . [if the fatal] wound was caused by the wound inflicted by the defendant in the natural course of events.”<sup>16</sup> Liability remained with the defendant even where the victim’s death was not inevitable, as in *Lewis*, so long as it was a natural and probable consequence of the defendant’s misconduct.<sup>17</sup>

The Supreme Court refined the intermediary causation rule in *People v. Fowler*, where Fowler struck Duree with a club, left him for dead on the roadway, and a motorist then inadvertently drove over the body.<sup>18</sup> The Court reaffirmed the *Lewis*-derived rule that regardless of whether the club or the car inflicted the fatal wound, the defendant proximately caused Duree’s death, as it was “the natural and probable result of the defendant’s . . . leaving Duree lying helpless and unconscious in a public road, exposed to that danger.”<sup>19</sup> Unless the driver intentionally ran over Duree, Fowler was the proximate cause.

*Fowler* further established that liability was the product of causation and *mens rea*. With proximate causation established, Fowler’s liability depended on the mental state with which he struck Duree: If in “self-defense, it would be justifiable. If it was felonious, it would be murder or manslaughter, according to the intent and the kind of malice with which

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<sup>13</sup> Cervantes, 26 Cal.4th 860, 869.

<sup>14</sup> 124 Cal. 551 (1899).

<sup>15</sup> Cervantes, 26 Cal.4th 860, 869.

<sup>16</sup> *Id.*, quoting Lewis, 124 Cal. 551, 555.

<sup>17</sup> *People v. Williams*, 27 Cal. App. 297, 299 (1915) .

<sup>18</sup> 178 Cal. 657, 667–69 (1918).

<sup>19</sup> *Fowler*, 178 Cal. 657, 669.

it was inflicted.”<sup>20</sup> *Fowler* thus confirmed that murder liability depended on the offender’s mental state, not the direct or indirect manner of killing. *Fowler* continues to provide the formula for assigning liability for indirectly caused homicides falling outside the “provocative act” framework.<sup>21</sup>

#### A. INTERMEDIARY HOMICIDES DURING FELONIES

Indirect proximate causation first supported murder in the felony-murder context in *People v. Harrison*.<sup>22</sup> In robbing a store, Harrison shot at employee Jones, who returned fire and inadvertently killed the store owner.<sup>23</sup> The court of appeal held that Harrison was the proximate cause of death, because it was a “normal human response” for individuals “shot at or threatened by robbers” to return fire, so the death was the “natural, foreseeable result” of the robbery.<sup>24</sup> *Harrison* followed *Fowler* by aligning the defendant’s liability with his culpable mental state. Because the homicide occurred during a Penal Code section 189 felony, the offense was first degree murder.<sup>25</sup>

*Washington* involved similar facts. Attempting to rob a gas station, Ball pointed a gun at Carpenter, who fired his own gun and killed Ball.<sup>26</sup> A jury convicted Ball’s accomplice Washington of first degree murder for the indirectly caused homicide.<sup>27</sup> *Washington* differed slightly from *Harrison*, as that case affirmed murder liability regarding “the death of an innocent bystander.”<sup>28</sup> Because the *Washington* decedent was neither innocent nor a bystander, the Supreme Court could have preserved *Harrison*’s reasoning while reaching a different result. But the Court refused to consider “the fortuitous circumstance” of whether the decedent was a felon or innocent victim, as it “would make the defendant’s criminal liability turn upon the marksmanship of victims and policemen.”<sup>29</sup>

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

<sup>21</sup> Cervantes, 26 Cal.4th 860, 872 n.15.

<sup>22</sup> 176 Cal. App. 2d 330, 332–37 (1959).

<sup>23</sup> *Harrison*, 176 Cal. App. 2d 330, 336.

<sup>24</sup> *Id.* at 336, 345 (internal citation omitted).

<sup>25</sup> *Id.* at 332.

<sup>26</sup> *Washington*, 62 Cal.2d 777, 779.

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

<sup>28</sup> *Harrison*, 176 Cal. App. 2d 330, 336.

<sup>29</sup> *Washington*, 62 Cal.2d 777, 780.

*Washington* sought to limit not indirect causation liability but the reach of the felony-murder rule, finding it “should not be extended beyond any rational function that it is designed to serve.”<sup>30</sup> The rule could operate to impute malice only where a felon directly inflicted death, as a homicide committed by a resisting victim or officer would not be committed to further the felony.<sup>31</sup> Nonetheless, murder liability was proper for intermediary homicides where (implied) malice could be shown without the felony-murder rule: “Defendants who initiate gun battles may also be found guilty of murder if their victims resist and kill.”<sup>32</sup> This actual (rather than imputed) malice depended on the defendant’s commission of what would become known as a “provocative act.”

In theory, *Washington* rejected using the felony-murder rule to establish the malice element of homicide. But in practice, it also diminished the effect of the felony in proving the causation element. *Washington* endorsed the conclusion that *Harrison*, in assigning causation to the armed robber whose gunfire prompted a lethal response, had taken a “very relaxed view of the necessary causal connection between the defendant’s act and the victim’s death. . . .”<sup>33</sup> In other words, because the *Harrison* defendant initiated the gun battle, there was (barely) sufficient causation there. By contrast, the *Washington* defendant only “pointed a revolver directly at Carpenter” and did not shoot first, so there was insufficient causation.<sup>34</sup>

*Gilbert* more fully developed the provocative act doctrine.<sup>35</sup> Both *Gilbert* and accomplice *Weaver* entered a bank armed; the former shouted, “‘Everybody freeze; this is a holdup.’”<sup>36</sup> After collecting money, *Gilbert* grabbed a hostage and fatally shot an officer while escaping, while another officer fatally shot *Weaver*.<sup>37</sup> Without the benefit of the not yet decided *Washington*, the trial court misinstructed the jury. *Gilbert* thus explained the principles of indirect causation liability for the benefit of the retrial. First, the Court emphasized that malice could appear, not through the

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<sup>30</sup> *Id.* at 783.

<sup>31</sup> *Id.* at 781, 783.

<sup>32</sup> *Id.* at 782.

<sup>33</sup> 62 Cal.2d 777, 782 n.2.

<sup>34</sup> *Washington*, 62 Cal.2d 777, 779.

<sup>35</sup> *Cervantes*, 26 Cal.4th 860, 868.

<sup>36</sup> *Gilbert*, 63 Cal.2d 690, 696–97.

<sup>37</sup> *Id.* at 697.

operation of the felony-murder rule, but through the commission of a provocative act “likely to cause death.”<sup>38</sup> The homicide could thus be attributed to the dangerous act rather than the felony. Proximate causation would remain with the defendant because the responsive shooting was a “reasonable response” to the provocative act.<sup>39</sup>

Although *Washington* specifically limited the felony-murder rule, and expressly endorsed murder liability where the defendant exhibited implied malice, the opinion included dicta noting a deeper problem with intermediary homicide liability.

In every robbery there is a possibility that the victim will resist and kill. The robber has little control over such a killing once the robbery is undertaken . . . To impose an additional penalty for the killing would discriminate between robbers, not on the basis of any difference in their own conduct, but solely on the basis of the response by others that the robber’s conduct happened to induce.<sup>40</sup>

This reasoning could apply outside the felony-murder context; for example, Fowler had little control over whether a driver would fatally injure Duree. Although the Supreme Court continued to limit its application of the provocative act doctrine to section 189 felonies, the court of appeal soon followed *Washington*’s dicta to its logical end.

## B. INTERMEDIARY HOMICIDES OUTSIDE THE FELONY-MURDER CONTEXT

*Washington* created an exception to the felony-murder rule, as section 189 would not cover homicides directly caused by innocent intermediaries during felonies, and then an exception to that exception, as even those homicides could support murder liability if there was a “provocative act.” But the court of appeal soon construed the provocative act doctrine as the default vehicle for indirect causation liability. In a case where the defendant and his brother were brutally beating a deputy sheriff when another deputy

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<sup>38</sup> *Id.* at 704–05.

<sup>39</sup> *Id.* Although commission of a section 189 felony could not establish the malice element of murder, it could be used to fix the degree as first degree murder in accordance with the statute. *Id.* at 705.

<sup>40</sup> *Washington*, 62 Cal.2d 777, 781.

fatally shot the brother, the court of appeal observed that the *Washington–Gilbert* “limitation upon the felony-murder doctrine” did not bar murder liability where the elements of the crime of proximate causation and malice “can be established without resort to that doctrine.”<sup>41</sup> Citing *Gilbert*, the court affirmed murder liability based on the officer’s “reasonable and foreseeable response.”<sup>42</sup>

The court of appeal elaborated on this analysis in *In re Aurelio R.*<sup>43</sup> A gang member drove his cohorts into another gang’s territory and they shot at rivals, who fired back and killed a passenger.<sup>44</sup> The court of appeal affirmed second degree murder liability, not through *Fowler*’s proximate causation-and-malice framework, but through the *Washington–Gilbert* provocative act framework, even though the felony in which the homicide occurred was not a section 189 felony like robbery but attempted murder.<sup>45</sup> That offense itself reflected express malice, so the court of appeal held there was no need for another provocative act to show malice.<sup>46</sup>

The *Aurelio R.* court apparently believed *Washington–Gilbert* was the only legal tool for holding the defendant liable for the homicide he proximately caused. But the decision disregarded *Fowler* and simply assumed *Washington* and *Gilbert* governed, even though their point was to limit the felony-murder rule.

Two Supreme Court decisions followed, which used the *Fowler* framework rather than *Washington–Gilbert* to affirm intermediary homicide liability in factually unusual cases. The defendant in *People v. Roberts* stabbed a victim (Gardner), who went into hypovolemic shock and in that irrational condition fatally stabbed a third party (Patch).<sup>47</sup> Rival gang-members in *People v. Sanchez* engaged in a shootout, and it was uncertain whose bullet killed a bystander.<sup>48</sup>

In determining “the evidence sufficed to permit the jury to conclude that Patch’s death was the natural and probable consequence of defendant’s

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<sup>41</sup> Velasquez, 53 Cal. App. 3d 547, 554, quoting *People v. Antick*, 15 Cal.3d 79, 87 (1975).

<sup>42</sup> *Id.* at 554–55.

<sup>43</sup> 167 Cal. App. 3d 52 (1985).

<sup>44</sup> *In re Aurelio R.*, 167 Cal. App. 3d 52, 55–56.

<sup>45</sup> *Id.* at 57–58.

<sup>46</sup> *Id.* at 60–61.

<sup>47</sup> 2 Cal.4th 271, 294–95, 316 n.9 (1992).

<sup>48</sup> 26 Cal.4th 834, 838 (2001).

act,”<sup>49</sup> *Roberts* cited prior cases from both California and elsewhere where the defendant attacked the victim, whose instinctive response to evade the defendant’s attack resulted in a fatality. In the “prototypical” case of *Letner v. State*,<sup>50</sup> the defendant shot someone on a boat who dove out to avoid the gunfire and drowned. Whereas *Letner* (like the *Lewis* suicide) involved the death of the targeted victim, other cases involved the targeted victim’s directly killing a third party. In *Madison v. State*, the defendant threw a grenade near one person, who reflexively kicked it toward another, who died in the ensuing explosion.<sup>51</sup> And in *Wright v. State*, the defendant shot at a driver, who, while “ducking bullets,” fatally drove into a pedestrian.<sup>52</sup> These cases supported *Roberts’* conclusion that a defendant would be the proximate cause of death so long as such harm was reasonably foreseeable, even if the precise manner of death was not the one contemplated.

*Roberts* signified a return to prior case law. It cited many of the authorities upon which *Harrison* relied (including *Letner* and *Madison*). Although it did not cite *Fowler* directly, it applied its equation of “proximate causation-times-*mens rea* equals liability.” It actually went beyond *Fowler* in holding the defendant’s proximate causation could combine not only with malice to establish a murder but also with a premeditated and deliberate intent to kill to show murder in the first degree.<sup>53</sup>

The Supreme Court expressly revived the *Fowler* rule in *Sanchez*. As in *Aurelio R.*, the court of appeal had incorrectly deemed the provocative act theory indispensable for assigning liability. The jury had convicted both defendants of first degree murder for the bystander’s death in the shoot-out, but the court of appeal held the law could not support first degree murder liability for both defendants.<sup>54</sup> If the actual shooter was guilty of murder, the other shooter would not be guilty under the provocative act theory, but if the provocateur was guilty of murder, it would relieve the actual shooter of liability.<sup>55</sup>

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<sup>49</sup> *Roberts*, 2 Cal.4th 271, 321.

<sup>50</sup> 299 S.W. 1049 (Tenn. 1927).

<sup>51</sup> 130 N.E.2d 35, 38 (Ind. 1955)

<sup>52</sup> 363 So.2d 617, 618 (Fla. Dist. Ct. App. 1978).

<sup>53</sup> *Roberts*, 2 Cal.4th 271, 320.

<sup>54</sup> *Sanchez*, 26 Cal.4th 834, 839.

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

The Supreme Court rejected the court of appeal's reliance on the provocative act framework and instead used *Fowler*'s formula. Both shooters could be the concurrent, and thus proximate, cause of death, so both defendants could be guilty of murder — in the first degree.<sup>56</sup> Just as the *Fowler* Court did not know whether the defendant or the driver inflicted the fatal wound, so too did the *Sanchez* Court not know which shooter fired the fatal shot. As in *Fowler*, it did not matter. “[I]t is proximate causation, not direct or actual causation, which, together with the requisite mens rea (malice), determines defendant's liability for murder.”<sup>57</sup>

*Sanchez*'s companion case *People v. Cervantes* held likewise: “If a defendant proximately causes a homicide through the acts of an intermediary and does so with malice and premeditation, his crime will be murder in the first degree.” *Fowler* and *Sanchez* differed in that the intermediary in the former case acted with an apparently innocent mental state, but neither *Sanchez* shooter did. But the proximate causation–times–mens rea formula could establish liability in either case.

Quoting the language from *Sanchez* and *Cervantes* in the two preceding paragraphs, the Supreme Court finally authorized provocative act murder liability where the underlying felony was attempted murder in *People v. Concha*.<sup>58</sup> Three assailants chased the intended victim who fought back and killed one of them.<sup>59</sup> The Supreme Court authorized first degree murder convictions for the two surviving assailants if they acted with premeditation and deliberation.<sup>60</sup> Although the Court's prior provocative act cases had involved implied malice rather than express malice, *Concha* recalled that once there was murder liability based on proximate causation and malice, section 189 could fix the degree.<sup>61</sup> If the commission of an enumerated felony could support first degree murder

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<sup>56</sup> Section 189 supported first degree murder liability for murders committed with premeditation or by intentionally shooting from a vehicle with an intent to kill. *Sanchez*, 26 Cal.4th 834, 849.

<sup>57</sup> *Sanchez*, 26 Cal.4th 845, 849.

<sup>58</sup> 47 Cal.4th 653, 662–63 (2009).

<sup>59</sup> *Concha*, 47 Cal.4th 653, 658.

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

<sup>61</sup> *Id.* at 663.

liability through section 189, so too could the element of premeditation and deliberation.<sup>62</sup>

Provocative act murder is not an independent crime, but merely a “shorthand,” used for the “subset” of homicides that occur when an intermediary’s response causes death.<sup>63</sup> Although the Supreme Court returns to the *Fowler* rule of proximate causation–times–*mens rea* when the provocative act doctrine does not properly describe the crime (as in *Roberts* and *Sanchez*), it has become the default means to determine liability. Yet the Court has already disavowed all the major premises that generated the *Washington–Gilbert* rule.

## II. THE RISE AND FALL OF THE WASHINGTON–GILBERT FOUNDATION

*Washington* and *Gilbert* reflected the Court’s reservations about finding both the malice and proximate causation elements of murder based on only the defendant’s commission of a section 189 felony. The *Washington* majority and the dissent disagreed regarding four premises. The majority held (1) The purpose of the felony-murder rule is to deter negligent or accidental killings, not the commission of the felonies themselves; (2) The rule applies only where the homicide is committed in furtherance of the felony; (3) Pointing a gun at another person does not evince implied malice; and (4) A defendant cannot be held liable for the act of an intermediary over whose responsive conduct he has little control. Finally, *Gilbert* added that a victim who resists must act reasonably for proximate causation, and thus liability, to remain with the felon.<sup>64</sup>

None of these positions is good law today (nor was prior to *Washington* and *Gilbert*). The Court’s subsequent case law has vindicated the dissent’s points concerning (1) the purpose of the felony-murder rule; (2) the requisite relation between the felony and the homicide; (3) the construction of implied malice; and (4) a defendant’s responsibility for harms purportedly beyond his control. Subsequent case law has also abandoned *Gilbert*’s “reasonable response” requirements.

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<sup>62</sup> *Id.*

<sup>63</sup> People v. Gonzalez, 54 Cal.4th 643, 649 n.2 (2012); Concha, 47 Cal.4th 653, 663.

<sup>64</sup> *Gilbert*, 63 Cal.2d 690, 704–05.

## A. THE DEMISE OF THE WASHINGTON PREMISES

### 1. *The Additional Purpose of the Felony-Murder Rule*

The Court has broadened the purpose of the felony-murder rule since *Washington*. The dissent there observed that felons' potential liability for indirect killings was "one of the most meaningful deterrents to the commission of armed felonies."<sup>65</sup> The majority rejected the argument as a matter of policy; the rule's only purpose was "to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit."<sup>66</sup> Deterring the felonies themselves was not a proper goal.<sup>67</sup>

The Court has since adopted the dissent's position. The rule now serves both to deter felons from killing negligently or accidentally and to deter commission of the underlying felonies.<sup>68</sup> The Court recently recalled its conclusion that "[t]he knowledge that a murder conviction may follow if an offense such as furnishing a controlled substance or tainted alcohol causes death 'should have some effect on the defendant's readiness to do the furnishing.'"<sup>69</sup>

The felony-murder rule's broader purpose supports a broader reach. And the deterrence imperative advocated by the *Washington* dissent also applies to provocative acts committed outside section 189 felonies: "[S]ociety has an interest in deterring people from initiating these deadly confrontations — gang warfare as well as shootouts with the police. More people will be deterred if they know when the smoke clears they will be held accountable for all the dead bodies . . . ."<sup>70</sup>

The law now accepts the imperative of deterring felonies and other provocative acts, as urged in Justice Burke's dissent.

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<sup>65</sup> *Washington*, 62 Cal.2d 777, 785 (Burke, J., dissenting).

<sup>66</sup> *Id.* at 781.

<sup>67</sup> *Id.*

<sup>68</sup> *People v. Chun*, 45 Cal.4th 1172, 1189 (2009); *People v. Robertson*, 34 Cal.4th 156, 171 (2004), disapproved on another ground in *People v. Chun*. Although *Chun* referenced the second degree felony-murder rule, it cited *Washington*, a first degree felony-murder case.

<sup>69</sup> *Chun*, 45 Cal.4th 1172, 1193, citing *People v. Mattson*, 4 Cal.3d 177, 185 (1971) (internal quotations omitted).

<sup>70</sup> *In re Aurelio R.*, 167 Cal. App. 3d 52, 60.

## 2. *The Loosening Relation between the Felony and the Homicide*

Another change concerns the relation between the felony and the homicide. The *Washington* majority excluded killings by victims or officers from the reach of felony-murder liability. It reasoned that if the intermediary committed a homicide, it did not further the felony. “Indeed, in the present case the killing was committed to thwart the felony.”<sup>71</sup> The *Washington* dissent disputed there was any requirement that the killing must take place to commit the felony. “[T]hen what becomes of the rule . . . that an accidental and unintended killing falls within the section? How can it be said that such a killing takes place *to perpetrate* a robbery?”<sup>72</sup>

The Supreme Court began to backtrack from the *Washington* majority’s position in *Pizano v. Superior Court*, suggesting that a victim’s defensive killing actually was part of the felonious design.<sup>73</sup> *Pizano* distinguished a hypothetical killing by an officer from the robber’s malicious act in shooting that prompted it. Although the *killing* was committed to thwart the robbery, “*the act which made the killing a murder attributable to the robber — initiating the gun battle — was committed in the perpetration of the robbery.*”<sup>74</sup> The Supreme Court reiterated this distinction in *People v. Billa*, where one of three coconspirators committing arson of a truck (for insurance fraud purposes) accidentally burned to death.<sup>75</sup> The Court contrasted the *act* of setting the fire, which was committed in the perpetration of the felony, with the *result* of the conspirator’s death, which was not.<sup>76</sup>

The Supreme Court expressly referenced *Washington* in describing how it no longer follows its rule. Although the meaning of “*to perpetrate*” (and its non-application to indirect killings) was central to *Washington*’s rationale, the Court has since broadened the reach of the rule.

In [Washington], the defendant and a cofelon, James Ball, attempted to rob Carpenter, . . . [who killed Ball in self-defense]. . . .

[T]his court reversed [defendant’s felony-murder conviction] because “the killing [was] not committed . . . in the perpetration or

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<sup>71</sup> *Washington*, 62 Cal.2d 777, 781.

<sup>72</sup> *Id.* at 787 (Burke, J., dissenting).

<sup>73</sup> 21 Cal.3d 128 (1978).

<sup>74</sup> *Pizano*, 21 Cal.3d 128, 139 n.4 (italics in original).

<sup>75</sup> 31 Cal.4th 1064, 1067 (2003).

<sup>76</sup> *Billa*, 31 Cal.4th 1064, 1071; see also *People v. Mejia*, 211 Cal. App. 4th 586, 614 (2012).

attempt to perpetrate robbery . . ." This was so, we explained, because the killing was not in furtherance of the robbery. *The view of the felony-murder rule that the killing must somehow advance or facilitate the robbery has, however, been superseded by later cases.* [W]e [have] held there need be only a logical nexus between the felony and the killing.<sup>77</sup>

There is such a logical nexus between robberies and the lethal responses they often cause. Having abandoned the "committed in the perpetration of" requirement that justified requiring direct causation for felony-murder liability, the Court should abandon the direct causation rule itself.

### 3. *The Expansion of Implied Malice*

Post-*Washington* law has also undermined the case's holding regarding implied malice. The Court has broadened its construction of the implied malice necessary to invoke the *Washington–Gilbert* doctrine regarding both facts and law.

First, the Court lowered the threshold needed to show implied malice to encompass the *Washington* facts. *Washington* acknowledged that felons who "initiate gun battles" evince such implied malice.<sup>78</sup> But the majority rejected the dissent's broader conception of the verb "initiate": "If a victim . . . seizes an opportunity to shoot first when confronted by robbers with a deadly weapon . . . any 'gun battle' is initiated by the armed robbers."<sup>79</sup> The majority instead concluded there was no malice because the robber merely "pointed a revolver directly" at the employee.<sup>80</sup>

Again, history has vindicated Justice Burke's dissent. In a case where the defendant pulled from his waistband a gun, which "fired as it was drawn,"<sup>81</sup> the court of appeal "held that although the act of intentionally firing a handgun could support a finding of malice, the act of intentionally brandishing a handgun, as a matter of law, could not support such

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<sup>77</sup> People v. Dominguez, 39 Cal.4th 1141, 1162 (2006) (emphasis added), quoting *Washington*, 62 Cal.2d 777, 781.

<sup>78</sup> *Washington*, 62 Cal.2d 777, 782.

<sup>79</sup> *Id.* at 785 (Burke, J., dissenting).

<sup>80</sup> *Id.* at 779.

<sup>81</sup> 4 Cal.4th 91, 98–99 (1992).

a finding.”<sup>82</sup> Arguably, *brandishing* is even less dangerous than *directly pointing* the weapon at the intended victim. But on review all seven Supreme Court justices held that, depending on the facts, brandishing could reflect implied malice. A fortiori, so may pointing a gun directly at an intended robbery victim. The *Washington* facts would produce a different result if the crime occurred today.

Even more significant legally was *People v. Medina*,<sup>83</sup> which clarified the meaning of “natural and probable consequence,” the term that governs both implied malice and proximate causation. Street gang members verbally challenged a rival gang member by asking “Where are you from.”<sup>84</sup> After a scuffle, the victim attempted to leave but one of the defendants fatally shot him as he drove away.<sup>85</sup> The Supreme Court affirmed the jury’s conclusion that the homicide was a natural and probable consequence of the verbal challenge.<sup>86</sup>

*Medina* explained that the implied malice element of a “natural and probable consequence” was one that was “reasonably foreseeable,”<sup>87</sup> whereas *Washington* had construed the requisite risk needed to show implied malice as exceeding the “reasonably foreseeable” standard. In *Washington*, implied malice did not appear simply because death/serious injury “was a risk reasonably to be foreseen and that the robbery might therefore be regarded as a proximate cause of the killing;”<sup>88</sup> implied malice required that the act involve “a high degree of probability that it will result in death.”<sup>89</sup> Under this former standard, “the defendant or his confederate must know [the provocative] act has a ‘high probability’ not merely a ‘foreseeable possibility’ of eliciting a life-threatening response from the third party.”<sup>90</sup> The

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<sup>82</sup> Nieto Benitez, 4 Cal.4th 91, 96. *Washington* reversed the conviction rather than remand for a new trial that would apply the new rule.

<sup>83</sup> 46 Cal.4th 913 (2009).

<sup>84</sup> *Medina*, 46 Cal.4th 913, 916–17.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 920–22.

<sup>87</sup> *Id.* at 920.

<sup>88</sup> *Washington*, 62 Cal.2d 777, 781.

<sup>89</sup> *Id.* at 782, quoting *People v. Thomas*, 41 Cal.2d 470, 480 (Traynor, J., concurring) (1953).

<sup>90</sup> *In re Aurelio R.*, 167 Cal. App. 3d 52, 57.

reasonable foreseeability needed to show proximate causation was not enough to show implied malice.

But *Medina* equated the likelihood of harm needed to show implied malice with the likelihood of harm needed to establish proximate causation. A conclusion that great bodily injury or death was reasonably foreseeable thereby establishes *both* proximate causation and the objective element of implied malice. A perpetrator who acts with knowledge of the danger and conscious disregard is guilty of second degree murder if he kills under these circumstances; if he is subjectively unaware of the danger, he is guilty of involuntary manslaughter.<sup>91</sup> It is now enough that the killing was a risk reasonably to be foreseen.

#### *4. Defendants May Be Held Liable for Consequences Beyond Their Control*

The most fundamental area of disagreement in *Washington* concerned indirect causation. As noted, the majority objected to imposing liability for victims' responses.

In every robbery there is a possibility that the victim will resist and kill. The robber has *little control* over such a killing once the robbery is undertaken as this case demonstrates. To impose an additional penalty for the killing would discriminate between robbers, not on the basis of any difference in their own conduct, but solely on the basis of the response that the robber's conduct happened to induce.<sup>92</sup>

Justice Burke's dissent disagreed as a matter of fact and law. He observed numerous ways that a defendant could exercise control, such as dropping his weapon, not using it, or surrendering.<sup>93</sup> As a matter of law, he observed the law often imposes liability for consequences beyond the offender's control. "A robber has *no* control over a bullet sent on its way after he pulls the trigger." Some victims will jump out of the way; some will be hit. Some will be saved by paramedics and surgeons; some will not.

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<sup>91</sup> People v. Butler, 187 Cal. App. 4th 998, 1008–09 (2010).

<sup>92</sup> *Washington*, 62 Cal.2d 777, 781.

<sup>93</sup> *Id.* at 790 (Burke, J., dissenting).

The debate resembles the one faced by the United States Supreme Court regarding victim impact statements in capital trials' penalty proceedings. Just as some but not all robbery victims will resist, and those who do will shoot with varying degrees of accuracy, so too will some but not all relatives testify, and those who do will speak with varying degrees of persuasiveness. In 1987, the high court followed a California decision and precluded the admission of such statements because their use for sentencing purposes discriminated among killers based on factors beyond their control.

We think it obvious that *a defendant's level of culpability depends not on fortuitous circumstances such as the composition of the defendant's family, but on circumstances over which he has control.* . . . [T]he fact that a victim's family is irredeemably bereaved can be attributable to no act of will of the defendant other than his commission of the homicide in the first place.<sup>94</sup>

This decision analyzed sentencing as *Washington* had analyzed liability.

Four years later, the high court reversed course and authorized admission of victim impact statements.<sup>95</sup> The Court held juries could consider evidence concerning not only the offender's subjective blameworthiness but also the crime's objective harm, as the criminal law had long based liability on such harm, even when it was beyond the intent, control or even awareness of the offender.<sup>96</sup>

Post-*Washington* cases also imposed murder liability based on victims' reactions beyond the felon's control. The Supreme Court affirmed a felony-murder conviction where the defendant gave methyl alcohol to a victim who drank it and died.<sup>97</sup> The court of appeal likewise affirmed felony-murder convictions where a victim suffered a fatal heart attack during the

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<sup>94</sup> Booth v. Maryland, 482 U.S. 496, 505, n.7 (1987), quoting People v. Levitt, 156 Cal. App. 3d 500, 516–17 (1984) (italics added).

<sup>95</sup> Payne v. Tennessee, 501 U.S. 808, 819 (1991).

<sup>96</sup> *Id.* at 819; see also at 835–36 (Souter, J., concurring) ("Criminal conduct has traditionally been categorized and penalized differently according to consequences not specifically intended, but determined in part by conditions unknown to a defendant when he acted.").

<sup>97</sup> Mattison, 4 Cal.3d 177, 180–81.

robbery.<sup>98</sup> All these defendants were thus guilty of murder “solely on the basis of the response that the [felon]’s conduct happened to induce.”<sup>99</sup> The cases thus confirmed the traditional rule that a defendant “takes his victim as he finds him.”<sup>100</sup>

The California Supreme Court in *Roberts* extended this rationale beyond cases where the victim’s medical reactions led to his own death. *Roberts* followed the logic of the *Washington* dissent rather than that of the *Washington* majority. That the *Roberts* defendant had no control over his victim’s going into shock after being stabbed did not preclude liability for the ensuing stabbing.<sup>101</sup> *Roberts* approvingly cited *Wright*,<sup>102</sup> where the defendant was liable for the homicide that occurred when she shot at a driver who then lost control of his vehicle and killed a pedestrian. Some drivers might have been able to retain control of their automobile, whereas others would lack that ability. The shooter’s non-control over the driver’s subsequent conduct posed no barrier to liability. *Roberts* likewise cited *Fowler*, where the driver was also an innocent instrumentality of death, and proximate causation (and liability) lay with the defendant, who had no control over whether the driver would see the victim and rescue him, or not see him and inflict the fatal blow.

*Medina* expressly considered the victim’s potential response in evaluating the natural and probable consequences of the defendant’s conduct. Whether death was a natural and probable consequence (as required to show implied malice) depended on not only the direct risk posed by the defendant’s conduct but also the indirect risk inherent in the victim’s response. The *Washington* majority had held that malice appeared where defendants “initiate gun battles,” as that posed a direct danger to life. But the majority refused to find malice when the robber did not initiate, attributing the gunfire to the victim who fired first. Notwithstanding the foreseeability of death, the Court rejected murder liability for a felon’s conduct that *would not have led to death but for the victim’s reaction*.

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<sup>98</sup> People v. Hernandez, 169 Cal. App. 3d 282 (1985); People v. Stamp, 2 Cal. App. 3d 203 (1969).

<sup>99</sup> *Washington*, 62 Cal.2d 777, 781.

<sup>100</sup> *Stamp*, 2 Cal. App. 3d 201, 211.

<sup>101</sup> *Roberts*, 2 Cal.4th 271, 321.

<sup>102</sup> 363 So.2d 617 (Fla. Dist. Ct. App. 1978).

But *Medina* broadened the requisite natural and probable consequence to encompass not only the offender's act but also the victim's response. “[I]t was or should have been reasonably foreseeable to these gang members that the violence would escalate even further depending on Barba's response to their challenge.”<sup>103</sup> This followed from *Sanchez*'s holding that proximate cause could lie with the defendant, even though his actions would not have caused death but for his antagonist's response.<sup>104</sup> The Supreme Court expressly connected this logic to the provocative act doctrine: “The danger addressed by the provocative act doctrine is not measured by the violence of the defendant's conduct alone, but also by the likelihood of a violent response.”<sup>105</sup>

The evaluation of natural and probable consequences must encompass direct and indirect consequences. A defendant who falsely shouts “Fire!” in a crowded theater endangers life, not directly, through the emission of breath, but indirectly, by creating the probability that a second person will react by fatally trampling a third. So long as the shouter perceives the danger, he acts with malice. The same result must obtain when someone shouts “Robbery!” or “This is a holdup!” The indirect danger to victims is at least as great.

*Roberts* rejected *Washington*'s claim that it is unfair to impose murder liability based on a response beyond the defendant's control. Because victim resistance is a predictable response to violent conduct,<sup>106</sup> the defendant properly bears responsibility for all its natural and probable consequences.

## B. THE DEMISE OF GILBERT'S REASONABLE RESPONSE REQUIREMENT

*Gilbert* further reduced the likelihood of felons' murder liability for intermediary homicides, as the case appeared to reject liability unless the victim's response was reasonable. “[T]he victim's self-defensive killing or the police officer's killing in the performance of his duty cannot be considered an independent intervening cause for which the defendant is not liable, for

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<sup>103</sup> *Medina*, 46 Cal.4th 913, 927 (italics added).

<sup>104</sup> *Sanchez*, 26 Cal.4th 834, 846–48, citing *People v. Kemp*, 150 Cal. App. 2d 654, 659 (1957).

<sup>105</sup> *Gonzalez*, 54 Cal.4th 643, 657.

<sup>106</sup> *People v. Thomas*, 53 Cal.4th 771, 813 (2012).

it is a reasonable response to the dilemma . . . ”<sup>107</sup> The decision hinted that an unreasonable response would be an independent variable.

Not only did *Gilbert* appear to hold the response must be reasonable for the felon to be liable, it also appeared to describe which responses are — and are not — reasonable. Because the *Gilbert* trial preceded *Washington’s* rule requiring a provocative act as a basis for malice, the jury was not instructed that it needed to base malice on the shooting rather than just impute it from the robbery. The missing instruction “withdrew from the jury the crucial issue of whether the shooting of Weaver was in response to the shooting of Davis or solely to prevent the robbery.” Retrial was thus needed for the jury to find a malicious act, but the quoted sentence appeared to hold that unlike a homicide committed by an officer in response to a felon’s shooting, which could support the felon’s murder liability, a homicide committed “solely to prevent a robbery” could not.

More than a decade later, the Court minimized the significance of the responder’s reasonableness in *Pizano v. Superior Court*.<sup>108</sup> Two men robbed a home and took a resident hostage, and the neighbor, not seeing the hostage, fatally shot him in an attempt to foil the robbery.<sup>109</sup> The defense claimed that the neighbor’s motivations in shooting “solely to prevent the robbery” precluded murder liability under *Gilbert*.<sup>110</sup> But the Court accepted the people’s argument that “whether a killing was ‘in reasonable response’ to the malicious conduct should be treated as ‘an objective proximate cause determination, and not a subjective response determination.’”<sup>111</sup> *Pizano* thus denied that the response needed to be reasonable for the felon to be liable.<sup>112</sup>

But if *Pizano* retreated from *Gilbert’s* apparent insistence on reasonableness, it confirmed that liability would ordinarily depend on the intermediary’s subjective motivation: whether he killed in response to “the felon’s additional malicious conduct” or just “the felony itself.”<sup>113</sup> Murder

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<sup>107</sup> *Gilbert*, 63 Cal.2d 690, 705.

<sup>108</sup> 21 Cal.3d 128 (1978).

<sup>109</sup> *Id.* at 132.

<sup>110</sup> *Id.* at 137.

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

<sup>112</sup> *Id.* at 138.

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

liability required not just that the defendant commit a malicious act (and proximately cause death), it required that the act — rather than the felony — be the precise proximate cause of death.<sup>114</sup> *Pizano* concluded that the defendant's taking a hostage was the proximate cause of the victim's death even if the intermediary's motive was to prevent a robbery, because the defendant placed that victim in harm's way.<sup>115</sup>

*Roberts* further undercut any possible "reasonableness" requirement, as the intermediary could not reason at all.<sup>116</sup> What mattered simply was whether the defendant proximately caused the victim's death, i.e. whether death was a natural and probable consequence.

The court of appeal expressly rejected a reasonable response requirement in *People v. Gardner*,<sup>117</sup> where one drug dealer shot a second, which prompted a third to shoot in response.<sup>118</sup> *Gardner* recalled *Lewis*<sup>119</sup> and *Fowler*,<sup>120</sup> and then *Pizano* and *Roberts*, in holding the "reasonable response" requirement was a "shorthand phrase" for the element of proximate causation.<sup>121</sup> *Gardner* did not distinguish between killing to prevent a homicide or to prevent a robbery; the defendant could be liable whenever death was a natural and probable consequence of his act.<sup>122</sup>

The decision in *People v. Schmies*<sup>123</sup> further linked defendant's initial misconduct with the lethal outcome, and reduced the likelihood that an intervening variable would be "independent" and break the causal chain. The defendant fled from a traffic stop, generating a pursuit that ended with a fatal collision between an officer's car and a bystander's.<sup>124</sup> The defendant wished to introduce the Highway Patrol's pursuit policies to show the officer acted unreasonably, but the court found that the officer's

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<sup>114</sup> *Id.* at 139.

<sup>115</sup> *Id.*

<sup>116</sup> *Roberts*, 2 Cal.4th 271, 321.

<sup>117</sup> 37 Cal. App. 4th 473 (1996).

<sup>118</sup> As in *Sanchez*, 26 Cal.4th 834, it was uncertain who fired the fatal shot. *Gardner*, 37 Cal. App.4th 473, 475.

<sup>119</sup> 124 Cal. 551 (1899).

<sup>120</sup> 178 Cal. 657 (1918). It was the first time in the three decades since *Gilbert* that a published decision analyzed *Fowler* with regard to this issue.

<sup>121</sup> *Gardner*, 37 Cal. App. 4th 473, 476–81.

<sup>122</sup> *Id.* at 480–81.

<sup>123</sup> 44 Cal. App. 4th 38 (1996).

<sup>124</sup> *Id.* at 43.

noncompliance would not preclude liability: “[T]o exonerate defendant it is not enough that the officer’s conduct must be *unreasonable*; rather it must be sufficiently extraordinary as to be *unforeseeable*.<sup>125</sup>

Schmies thus offered a *Gilbert*-like bank robbery hypothetical that imposed murder liability on the defendant even if the guard’s response was unreasonable. Like an officer’s overly aggressive chase, a victim’s shooting at an armed robber is not “so extraordinary that it was unforeseeable, unpredictable and statistically extremely improbable.”<sup>126</sup>

The Supreme Court expressly endorsed the view that breaking the causal chain required not just unreasonableness, but unforecastability;<sup>127</sup> *Gilbert*’s “reasonable response” was indeed a “shorthand phrase” for “objective proximate cause” or “natural and probable consequence.”<sup>128</sup> To break the causal chain and absolve the defendant of liability, the intermediary’s response had to be an “extraordinary and abnormal occurrence.”<sup>129</sup> Forecastability was enough to support homicide liability: “If proximate causation is established, the defendant’s level of culpability for the homicide in turn will vary in accordance with his criminal intent.”<sup>130</sup>

Defendants can no longer evade liability for their conduct’s natural and probable consequences by citing intermediaries’ unreasonableness. A defendant whose methamphetamine production started a fire proximately caused the deaths of two firefighting pilots who crashed trying to extinguish the fire, even though (1) one pilot’s blood-alcohol count exceeded FAA standards; (2) the pilot failed to make required radio contact; (3) the plane was negligently maintained.<sup>131</sup> “The relevant question is whether, when recklessly starting the forest fire, [defendant] Brady could reasonably anticipate that aircraft would be summoned to extinguish the fire and that a fatal collision might result.”<sup>132</sup> By contrast, if the pilot intentionally caused the crash (as if Fowler intentionally ran over his victim), that would

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<sup>125</sup> *Id.* at 52 (italics added).

<sup>126</sup> *Id.* at 56.

<sup>127</sup> People v. Crew, 31 Cal.4th 822, 847 (2003).

<sup>128</sup> Gardner, 37 Cal. App. 4th 473, 479.

<sup>129</sup> Cervantes, 26 Cal.4th 860, 871, quoting People v. Armitage, 194 Cal. App. 3d 405, 420 (1987).

<sup>130</sup> *Id.* at 872 n.15.

<sup>131</sup> People v. Brady, 129 Cal. App. 4th 1314, 1331–32 (2005).

<sup>132</sup> *Id.* at 1334.

be so unforeseeable as to relieve the defendant of liability — and impose it on the “intermediary” who directly caused death.<sup>133</sup>

Just as the law no longer holds that unreasonable responses are independent intervening variables, it also no longer deems unreasonable a victim’s resistance to a robbery. The law at the time of *Washington* and *Gilbert* held, “Any civilized system of law recognizes the supreme value of human life, and excuses or justifies its taking only in cases of apparent absolute necessity.”<sup>134</sup> It was permissible to kill to prevent only felonies that presented a danger of great bodily harm.<sup>135</sup> *Gilbert* could therefore distinguish killings to prevent death from killings to prevent a robbery.

But the Supreme Court soon clarified that although the law forbade killing *to prevent the loss of property*, it permitted killing *to prevent a robbery*. A homeowner could not set up a spring gun to prevent a burglary when the resident was away because there was no risk of physical harm to the absent burglary victim.<sup>136</sup> But forcible and violent crimes like robbery or rape created a presumption that the victims were at risk for death or great harm.<sup>137</sup> If a gun-waving robber demanded money, the clerk could legitimately choose to kill the robber and eliminate the risk to himself rather than desist and possibly increase it. Victims could doubt a robber’s promise that they could avoid harm by complying with the robber’s demands, and did not need to expose themselves to added danger by giving the robber “the courtesy of the first shot.”<sup>138</sup> As the Supreme Court later quoted from a Florida case, “When an opportunity arose to get the ‘drop’ on the robbers, the proprietor was entitled to act upon it in resistance of the robbery.”<sup>139</sup>

Legislation reified this shift. A 1984 law created a presumption that a resident who used force against an unlawful and forcible intruder acted

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<sup>133</sup> Cervantes, 26 Cal.4th 860, 874; Sanchez, 26 Cal.4th 834, 869; Brady, 129 Cal. App. 4th 1314, 1334 n.11.

<sup>134</sup> People v. Jones, 191 Cal. App. 2d 478, 482 (1961).

<sup>135</sup> *Id.* at 481.

<sup>136</sup> People v. Ceballos, 12 Cal.3d 470, 478–79 (1974).

<sup>137</sup> *Id.* at 475.

<sup>138</sup> People v. Reed, 270 Cal. App. 2d 37, 45.

<sup>139</sup> Kentucky Fried Chicken v. Superior Court, 14 Cal.4th 814, 825 (1997), quoting Schubowsky v. Hearn Food Store, Inc., 247 So.2d 484 (Fla. Dist. Ct. App. 1971).

under a reasonable fear of imminent peril.<sup>140</sup> As a burglary victim is presumed to have a need for self-defense, a fortiori, so does a robbery victim. The Supreme Court thus relied on post-*Washington* authorities to conclude that robbery victims' "resistance was in the public interest even where it resulted in harm to third parties."<sup>141</sup> Resistance to a violent felony now is not only reasonably foreseeable, it is reasonable.

### C. THE REJECTION OF WASHINGTON–GILBERT'S PREMISES RESTORED THE STATUS QUO ANTE

*Washington* and *Gilbert* were historical aberrations. In rejecting murder liability for an armed robber who pointed a gun at his victim and proximately caused death, the Court did more than disapprove *Harrison*; it rejected the prior law on the five major questions described above. The following decades thus merely restored the status quo ante.

*Washington* held a defendant acts with malice when he "initiates" a gunfight, but pointing a gun at the victim was not enough.<sup>142</sup> In holding otherwise, the Supreme Court did not invent a new position but relied on a 1923 precedent.<sup>143</sup> In each case the defendant brandished a firearm in apparent violation of Penal Code section 417.<sup>144</sup> Even though the defendant did not point the gun at the victim, there was nonetheless evidence from which the jury could have found implied malice.<sup>145</sup> *Washington*'s holding that even pointing a gun at the victim could not establish implied malice was a temporary aberration.

Similarly aberrational was *Washington*'s conclusion that the felony-murder rule applied only if the killing occurred to further the felony.<sup>146</sup> The Supreme Court had earlier rejected a defendant's contention that felony-murder liability attached only when the killing occurred "in pursuance of," "while committing," or "while engaged in" the felony.<sup>147</sup> To the

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<sup>140</sup> *People v. Hardin*, 85 Cal. App. 4th 625, 633 (2000).

<sup>141</sup> *Kentucky Fried Chicken*, 14 Cal.4th 824, citing *Yingst v. Pratt*, 220 N.E.2d 276 (Ind. 1996).

<sup>142</sup> *Washington*, 62 Cal.2d 777, 782.

<sup>143</sup> *People v. Hubbard*, 64 Cal. App. 2d 27 (1923).

<sup>144</sup> *Nieto Benitez*, 4 Cal.4th 91, 105; *Hubbard*, 64 Cal. App. 2d 27, 37.

<sup>145</sup> *Hubbard*, 64 Cal. App. 27, 33, 37.

<sup>146</sup> *Washington*, 62 Cal.2d 777, 781.

<sup>147</sup> *People v. Chavez*, 37 Cal.2d 656, 669 (1951).

contrary, felony-murder liability attached so long as the felony and the homicide were part of a “continuous transaction.”<sup>148</sup> The Court’s recent “logical nexus” requirement merely restored the prior law.<sup>149</sup>

The *Chavez* decision also indirectly supports the conclusion that the pre-*Washington* felony-murder rule encompassed both contemporary purposes: the deterrence of inadvertent killings during felonies and deterrence of the felonies themselves. The people’s evidence showed *Chavez* killed after committing a burglary and/or rape, whereas *Chavez* contended he killed intentionally but in a heat of passion.<sup>150</sup> Therefore, when the Court justified a broad application by asserting that the felony-murder rule “was adopted for the protection of the community and its residents,”<sup>151</sup> it was referring to the protection provided, not by deterring inadvertent killings, but by the deterrence of dangerous felonies.

Especially aberrational was *Washington*’s objection to imposing liability on defendants for the conduct of third parties over whom they had little control.<sup>152</sup> Obviously, the *Fowler* defendant had no control over whether the driver ran over Duree’s body or avoided it. Accordingly, *Roberts* reflected the prior rule that homicide liability required only proximate causation, not control over the direct cause.<sup>153</sup>

Finally, prior to *Gilbert*, the Supreme Court had required only foreseeability, not reasonableness, in determining whether responsive conduct was a dependent or independent intervening cause. Just one year earlier, the Court observed, “Even assuming that the officers as reasonable and prudent persons should have been aware of the alleged surrender, it was reasonably foreseeable that during the sudden terror created by the defendant’s behavior the officers might act imprudently.”<sup>154</sup> A responding party’s “mere negligence . . . is no defense even though it is the sole cause of death because it is a foreseeable intervening cause.”<sup>155</sup>

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<sup>148</sup> *Id.* at 670.

<sup>149</sup> *Dominguez*, 39 Cal.4th 1141, 1162.

<sup>150</sup> *Chavez*, 37 Cal.2d 656, 665, 667.

<sup>151</sup> *Id.* at 669.

<sup>152</sup> *Washington*, 62 Cal.2d 777, 781.

<sup>153</sup> *Roberts*, 2 Cal.4th 271, 321.

<sup>154</sup> *People v. Mitchell*, 61 Cal.2d 353, 362 (1964).

<sup>155</sup> *People v. McGee*, 31 Cal.2d 229, 240 (1947).

The Supreme Court once again recognizes that (1) the felony-murder rule is designed to deter the commission of felonies; (2) pointing (or even brandishing) a gun may show implied malice; (3) the felony-murder rule covers all homicides where there is a logical nexus between the felony and the homicide; (4) offenders may be liable for harms beyond their control; and (5) unreasonable but foreseeable responses do not break the chain of causation. Ironically, reliance on the provocative act doctrine has expanded as its logical foundations have collapsed.

### III. THE SHIFT IN PENAL PRIORITIES

#### A. THE TENSION BETWEEN SUBJECTIVE CULPABILITY AND OBJECTIVE DANGER IN DETERMINING LIABILITY

The past half-century has seen the erosion of not just the specific premises underpinning *Washington* and *Gilbert* but the philosophical zeitgeist that generated it. The criminal law has long tried to balance two competing priorities. As the Court explained in 1884, criminal punishment could seek to protect “personal security and social order” or to make “an accurate discrimination as to the moral qualities of individual [defendant’s] conduct.”<sup>156</sup> These aims may conflict regarding punishment for intentional conduct that produces unintended but foreseeable harms. Should the law punish defendants only for their subjectively intended consequences, or also for objectively foreseeable ones?

Each position enjoys support,<sup>157</sup> and the Supreme Court has oscillated between them.<sup>158</sup> Receiving support from the recently published Model Penal Code, the subjectivist model neared its apex in the 1960s. The Court modified doctrines that had enhanced public safety by deterring dangerous behavior, and instead determined liability with an almost exclusive focus on the offender’s mental state.<sup>159</sup>

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<sup>156</sup> *People v. Blake*, 65 Cal.275, 277 (1884).

<sup>157</sup> Compare Méndez, *supra* note 7, at 245–50 (2010) with Mitchell Keiter, *With Malice Toward All: The Increased Lethality of Violence Reshapes Transferred Intent and Attempted Murder Law*, 38 U.S.F. L. REV. 261, 263–68 (2004).

<sup>158</sup> See Mitchell Keiter, *How Evolving Social Values Have Shaped (And Reshaped) California Criminal Law*, 4 CAL. LEGAL HIST. 393 (2009) (*Evolving Values*).

<sup>159</sup> *Id.* at 404–20.

The felony-murder rule was one such doctrine. In the 1950s, the Court endorsed a broad construction, observing, “The statute was adopted for the protection of the community and its residents, not for the benefit of the lawbreaker.”<sup>160</sup> But the Court constricted the doctrine in *Washington* by requiring a felon’s direct causation.

The Court further limited the doctrine four years later in *People v. Ireland*.<sup>161</sup> Before *Ireland*, a defendant who assaulted the victim with a dangerous weapon in a manner endangering life, and did so without justification or mitigation (e.g. heat of passion), would be guilty of murder if the victim died; the law imposed liability for the foreseeable if unintended consequence of death.<sup>162</sup> The rule deterred the dangerous condition that naturally and probably led to death. But citing *Washington*’s dictum about constraining felony-murder liability, *Ireland* barred reliance on the doctrine to impose murder liability for a fatal assault, as the rule would prevent the jury from considering the defendant’s (subjective) diminished capacity defense.<sup>163</sup> The Court further limited the felony-murder rule in *People v. Wilson*,<sup>164</sup> where it barred application of the (first degree) felony-murder rule for the section 189 felony of burglary where it was committed for purpose of assault.

The Court revised other doctrines to limit liability for unintended fatal consequences. Perhaps the best example was the very issue that presented the tension between promoting “personal security” and ensuring “an accurate discrimination” of the offender’s moral qualities: voluntary intoxication.<sup>165</sup> The law initially had imposed full accountability on the offender for the consequences of his conduct, notwithstanding his absent rational faculties, which he himself had chosen to abandon.<sup>166</sup> But critics argued the fault lay

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<sup>160</sup> Chavez, 37 Cal.2d 656, 669.

<sup>161</sup> 70 Cal.2d 522 (1969).

<sup>162</sup> *Jackson v. Superior Court*, 62 Cal.2d 521, 526 (1965) cited in *Ireland at Forty*, *supra* note 7, at 28 (2008).

<sup>163</sup> *Ireland*, 70 Cal.2d 522, 539. Actually, the quoted *Jackson* language appeared to permit the defendant to introduce evidence (like diminished capacity) that would mitigate the homicide to manslaughter.

<sup>164</sup> 1 Cal.3d 431 (1969).

<sup>165</sup> *Blake*, 65 Cal. 275, 277.

<sup>166</sup> “He must be held to have purposely blinded his moral perceptions, and set his will free from the control of reason — to have suppressed the guards and invited the mu-

not with the drinker but the drink, which “robbed you of your mind, your freedom, your very self,”<sup>167</sup> and the Supreme Court expanded the exculpatory effect of extreme intoxication.<sup>168</sup> The debate mirrored the felony-murder debate: did the inebriate (like the felon) deserve murder liability because he intentionally “set in motion a chain of events [where the homicide] was the natural result,”<sup>169</sup> or should he avoid murder liability because, having commenced the crime, he “has little control over” its fatal conclusion?<sup>170</sup>

After crime rose substantially in the decade after *Washington*, the pendulum swung back to a more public safety-oriented philosophy.<sup>171</sup> The public (and the Legislature) abolished the diminished capacity defense.<sup>172</sup> The Court tempered its efforts to rein in the felony-murder rule; in addition to the changes described in Part II, the Court expressly overruled *Wilson* in part on public safety grounds.<sup>173</sup> And the Legislature abolished voluntary intoxication as a defense to implied malice murder.<sup>174</sup> In sum, there was more inclination to punish offenders for the unintended but foreseeable consequences of their intended acts.

#### B. (MISTER) WASHINGTON GOES TO SMITH: HOW THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE SUPERSEDED WASHINGTON

Furthering this trend was the natural and probable consequences doctrine (NPC), which holds an aider and abettor (or coconspirator) liable for not

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tiny; and should therefore be held responsible as well for the vicious excesses of the will, thus set free, as for the acts done by its prompting.” *Roberts v. People*, 19 Mich. 401 (1870).

<sup>167</sup> Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of The Intoxication Defense*, 87 J. CRIM. LAW & CRIMINOLOGY 482, 490 (1997), quoting LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 148 (1993).

<sup>168</sup> A defendant could introduce evidence showing that his intoxication precluded his forming a specific intent to kill, and thereby mitigate his homicide to involuntary manslaughter. *People v. Mosher*, 1 Cal.3d 379, 391 (1969); *People v. Gorshen*, 51 Cal.2d 716, 733 (1959).

<sup>169</sup> *Harrison*, 176 Cal. App. 2d 330, 345.

<sup>170</sup> *Washington*, 62 Cal.2d 777, 781.

<sup>171</sup> *Evolving Values*, *supra* note 158, at 420–21.

<sup>172</sup> *Id.* at 428.

<sup>173</sup> *People v. Farley*, 46 Cal.4th 1053, 1120 (2009): “Individuals within any type of structure are in greater peril from those entering the structure with the intent to commit an assault, than are individuals in a public location who are the target of an assault.”

<sup>174</sup> *Evolving Values*, *supra* note 158, at 425–27.

only the planned crime but also any other committed by the perpetrator that is its natural and probable consequence.<sup>175</sup> The doctrine recognizes the special dangers posed when multiple offenders combine to commit a crime, and thus it developed in conspiracy law as “a protection to society, for a group of evil minds planning and giving support to the commission of a crime is more likely to be a menace to society than where one individual alone sets out to violate the law.”<sup>176</sup> Like extreme intoxication, the use of a partner can override an individual’s capacity to maintain control over the course of events.<sup>177</sup>

The case that most extensively reviewed the doctrine involved a defendant who sent several armed agents to obtain information from the victim “at any cost.”<sup>178</sup> But instead of obtaining information, the agents killed him.<sup>179</sup> Although the homicide frustrated rather than furthered the object of the conspiracy by eliminating the source of information, the defendant was convicted of not only conspiracy to commit an aggravated assault but also first degree murder.<sup>180</sup> Following the policy that “conspirators and aiders and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put in motion,” the court of appeal affirmed, because “a homicide result[ing] from a planned interrogation undertaken ‘at any cost’ by armed men confronting an unwilling source is unquestionably the natural and probable consequence of that plan.”<sup>181</sup> In other words, if the defendant had wanted to be judged on his own conduct, he should have interrogated the victim himself. By enlisting others, he ran the risk that they would extend the assault beyond his limited design.

The case cited *Washington*, and both appeared to distinguish the propriety of holding a defendant liable for homicides committed by an

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<sup>175</sup> See Kimberly R. Bird, *The Natural and Probable Consequences Doctrine: “Your Acts Are My Acts!”*, 34 W. St. U. L. REV. 43 (2006).

<sup>176</sup> *People v. Welch*, 89 Cal. App. 18, 22 (1928).

<sup>177</sup> “[W]hen an accomplice chooses to become a part of the criminal activity of another, she says in essence, ‘your acts are my acts,’ and forfeits her personal identity.” Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 111 (1985).

<sup>178</sup> *People v. Luparello*, 187 Cal. App. 3d 410, 443 (1986).

<sup>179</sup> *Id.* at 419.

<sup>180</sup> *Id.* at 419–20.

<sup>181</sup> *Id.* at 438, 443.

accomplice with the impropriety of such liability for homicides committed by a (resisting) victim. But the distinction is not above question. In both cases, the homicidal conduct may be undesired, unplanned, and contrary to the defendant's purpose (i.e. killing the victim prevented the discovery of information, just as the *Washington* victim's killing a robber impeded the crime). But it is also reasonably foreseeable. If the goal of deterring foreseeable harms supports liability for a defendant when his cofelon departs from the plan and shoots the clerk, why should the defendant not be just as liable when the clerk shoots the cofelon? One answer is that the NPC rule serves to deter criminal combinations, so criminals bear special risks for using partners, and receive tacit "rewards" for acting alone. By contrast, one would think, section 189 felonies cannot be committed without a victim. But the same logic could apply for felons who commit crimes like burglary, arson or train-wrecking when no one is present to reduce the risk of a resistance that endangers bystanders. And the law could similarly reward robbers who commit their crimes under conditions minimizing risks to bystanders. If there is less risk that a victim's resistance will endanger bystanders during times when there are few if any customers than one committed during a bank's peak hours, why should the law shield the robber from liability for the foreseeable consequences of the latter danger?

*Medina* showed how an accomplice and victim could combine to escalate a dangerous conflict.<sup>182</sup> The defendant challenged the victim about his gang affiliation; when the victim responded, a fight ensued that ended in fatal gunshots.<sup>183</sup> The Supreme Court observed that the natural and probable consequence derived from the *combination* of the initial challenge and the victim's answer:

Even if the three aggressors did not intend to shoot [the victim] when they verbally challenged him . . . it was . . . reasonably foreseeable . . . that the violence would escalate further depending on [the victim's] response to their challenge. . . . [R]etaliation was likely to occur and . . . escalation of the confrontation to a deadly level was reasonably foreseeable. . . .

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<sup>182</sup> 46 Cal.4th 913.

<sup>183</sup> *Id.* at 917.

The *Washington* distinction between liability for homicides directly committed by an accomplice and non-liability for homicides directly committed by the victim is not so stark, especially in cases where it is unclear who fired the fatal shot.<sup>184</sup>

The Court's decision in *People v. Smith* further blurred the distinction between cases supporting liability based on an accomplice's escalating the violence and cases opposing liability based on the victim's escalation. The defendant's brother had joined a competing gang, and to leave the gang he needed to be "jumped out" (beaten).<sup>185</sup> Defendant decided to attend (with armed colleagues) to ensure his brother was not hurt too much, but they agreed they would not shoot unless shot at first.<sup>186</sup> The beating escalated to an exchange of gunfire, which killed the defendant's cousin and friend.<sup>187</sup>

The Court held that substantial evidence supported the conclusion that the defendant aided and abetted the crimes of disturbing the peace and assault or battery, of which the fatal shooting was a natural and probable consequence.<sup>188</sup> Although the rival gangs were normally enemies, they combined to stage the jump-out, and the deaths were a natural and probable consequence. This supported the defendant's liability for murder, even if the jury could not identify the actual killer, so long as it concluded that whoever it was acted with malice.<sup>189</sup>

*Smith* demonstrates how much the law has changed since *Washington*. Both cases involved a defendant who participated in a crime where an antagonist's fire killed the defendant's colleague. Washington's cofelon committed an armed robbery by directly pointing a gun at the victim, but the Court rejected liability because he had "little control" over the victim's response.<sup>190</sup> Smith committed lesser crimes (disturbing the peace and assault or battery) and the evidence did not establish whether he brandished his gun before the rival gang began shooting, after it did, or not at all.<sup>191</sup> And whereas the *Washington* victim's fire was in response to the robber's

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<sup>184</sup> See, e.g., *Sanchez*, 26 Cal.4th 834.

<sup>185</sup> *People v. Smith*, 180 Cal. Rptr. 3d 100, 103-05 (2014).

<sup>186</sup> *Id.* at 5.

<sup>187</sup> *Id.* at 6.

<sup>188</sup> *Id.* at 8-9, 17, 19.

<sup>189</sup> *Id.* at 19.

<sup>190</sup> *Washington*, 62 Cal.2d 777, 781.

<sup>191</sup> *Smith*, 180 Cal. Rptr. 3d at 105.

pointing the gun at him, the *Smith* evidence did not indicate the rival gang shot in self-defense or with justification. But it was evident that Smith had no more control over his antagonists' shooting than Washington had over the robbery victim's. Nearly a half-century after *Washington*, the California Supreme Court endorsed murder liability "solely on the basis of the response by others that the [criminal]'s conduct happened to induce."<sup>192</sup>

#### IV. HOW THE PROVOCATIVE ACT DOCTRINE UNDULY RESTRICTS LIABILITY

The Supreme Court has tried to minimize the significance of the provocative act doctrine, explaining that it is not a special form of murder, just a shorthand description for homicides committed through an intermediary. The Court has insisted that categorizing some intermediary killings as "provocative act" homicides does not matter, because all homicides ultimately depend on the proximate causation-times-*mens rea* formula. "[W]hether or not a defendant's unlawful conduct is 'provocative' in the literal sense when it proximately causes an intermediary to kill through a dependent intervening act, a defendant's liability for the homicide will be fixed in accordance with his *mens rea*."<sup>193</sup> Yet the doctrine's results often diverge from those produced by the *Fowler* formula.

Sometimes this occurs just due to the complicated nature of the doctrine. Trial judges must adjust the instruction(s) to accommodate the specific facts of the case, and with dozens of possible adjustments to make, there will be occasional errors. On other occasions, the instruction does not accommodate an unusual fact pattern, so a defendant may evade liability. The doctrine does not appear to support murder liability for two defendants for the same homicide unless they are accomplices — which is why *Sanchez* could produce two first degree murder convictions only through bypassing the doctrine.<sup>194</sup> Similarly, the prescribed instruction does not currently accommodate the event (as in *Sanchez*) that the direct cause is indeterminate. No instruction addresses the event that an intermediary

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<sup>192</sup> *Washington*, 62 Cal.2d 777, 781.

<sup>193</sup> *Cervantes*, 26 Cal.4th 860, 872 n.15.

<sup>194</sup> *Sanchez*, 26 Cal.4th 834, 858 (Werdegar, J., concurring).

directly inflicts a serious injury short of death.<sup>195</sup> Most problematically, although the Court has emphasized that the crime is manslaughter where a defendant causes death through an intermediary without malice,<sup>196</sup> no current instruction offers juries that option, thereby creating an undesirable all-or-nothing choice.<sup>197</sup>

Problems may thus arise where the instructions do not appear to address the specific factual circumstances of a case, and even more problems arise when they do — with instructions that mis-describe the law. Current instructions describe the law based on older holdings and ignore more recent developments.

#### A. THE ELEMENTS OF A PROVOCATIVE ACT

This reliance on outdated law affects the very definition of a provocative act; current instructions demand a “high probability that the act will provoke a deadly response.”<sup>198</sup> The “high probability” language derives from a 1953 concurring opinion defining implied malice, cited in *Washington*.<sup>199</sup> The Supreme Court has since made clear that the implied malice instruction should instead provide the “natural and probable consequence” phrase.<sup>200</sup> Although the court of appeal distinguished the two standards in holding there must be “a high probability — not merely a foreseeable possibility — of eliciting a life-threatening response,”<sup>201</sup> the Supreme Court later explained that the “natural and probable consequence” element of implied malice is satisfied upon a showing of a “reasonable foreseeability”: “The consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough.”<sup>202</sup> But the instruction preserves more the restrictive “high probability” standard rejected by the Supreme Court.

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<sup>195</sup> See *People v. Monk*, 56 Cal.2d 280, 296 (1961).

<sup>196</sup> *Cervantes*, 26 Cal.4th 860, 872 n. 15; *Fowler*, 178 Cal. 657, 669.

<sup>197</sup> See *People v. Barton*, 12 Cal.4th 186, 196 (1995).

<sup>198</sup> CALCRIM 560, 561.

<sup>199</sup> *Washington*, 62 Cal.2d 777, 782, quoting *People v. Thomas*, 41 Cal.2d 470, 480 (Traynor, J., concurring) (1953).

<sup>200</sup> *People v. Knoller*, 41 Cal.4th 139, 152 (2007).

<sup>201</sup> *People v. Briscoe*, 92 Cal. App. 4th 568, 582 (2001).

<sup>202</sup> *Medina*, 46 Cal.4th 913, 920.

The instruction offers further potential for confusion as the requirement of a “deadly response” also demands that the high probability of fatality derives from the *response*, even though the risk has often (usually) appeared from the provocateur’s direct action. In other words, firing a gun during a robbery is dangerous to human life mostly because it could directly kill, and only secondarily because it might prompt responsive fire.<sup>203</sup> The doctrine thus has been turned upside down; as explained by *Washington* and *Gilbert*, the Court originally measured danger with regard only to its direct consequences, ignoring the risk of a response. Now the instruction does the opposite, excluding any consideration of the act’s direct risk. But the danger presented by both the act and the response must be measured to judge whether death was a natural and probable consequence.<sup>204</sup>

## B. THE “MERE” COMMISSION OF A FELONY

Another major problem is the requirement that the requisite provocative act “must be an act beyond that necessary simply to commit the crime.”<sup>205</sup> Nothing supports this artificial prerequisite. Murder liability requires proximate causation and malice.<sup>206</sup> *Washington* simply barred reliance on the felony-murder rule as automatic proof of malice. In other words, the jury needed to determine whether the natural and probable consequences involved death or great bodily harm because the “mere” commission of a felony was *not automatically malicious*.

But the doctrine now holds that mere commission of a felony is *automatically not malicious*. Rather than invite jury consideration of the facts, the rule may foreclose it. Nothing in law or logic supports the idea that death can never be a natural and probable consequence of the “mere” commission of a crime committed through force or threat of force like robbery, rape or kidnapping.<sup>207</sup>

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<sup>203</sup> Nor is it evident from the instruction that if the response prompts return fire from the provocateur that this “third round” will qualify as the requisite “response” to the provocative act, as it will be responding to the victim’s legitimate self-defense.

<sup>204</sup> Medina, 46 Cal.4th 913, 927.

<sup>205</sup> CALCRIM 560. This requirement is absent where the crime itself requires express malice (e.g. attempted murder).

<sup>206</sup> Sanchez, 26 Cal.4th 834, 845.

<sup>207</sup> The requirement is especially problematic because it is unclear what is “necessary” to commit a crime.

The requirement is anachronistic in light of the Supreme Court's concluding that the "reasonable foreseeability" element of proximate causation is coextensive with the "natural and probable consequences" element of implied malice.<sup>208</sup> Therefore, the "life-threatening act" required to show malice "is essentially a shorthand definition that *restates* the proximate cause requirement of provocative act murder."<sup>209</sup> If the harm is reasonably foreseeable, the act is by definition sufficiently "life-threatening" to satisfy the objective element of implied malice. Because an act may be "provocative" due to not only its own level of violence but also the likelihood of a violent response, the "mere" commission of a forcible felony presents a sufficient risk from which a jury may find malice. As current law holds that the victim's violent resistance need not have been a "strong probability" but only a "possible consequence,"<sup>210</sup> Washington's observation that "[i]n every robbery there is a possibility that the victim will resist and kill" is no longer an argument against murder liability for intermediary homicides but one that compels its imposition.

### C. THE ANTICK EXCEPTION

The third problem flows from the Court's decision in *People v. Antick*.<sup>211</sup> When officers confronted Antick and accomplice Bose after an apparent burglary, Bose committed the provocative act of shooting at an officer, who returned fire and killed Bose.<sup>212</sup> Notwithstanding the general rule that felons are vicariously liable for their accomplices' acts, *Antick* precluded vicarious liability for Antick based on Bose's act.<sup>213</sup> This restriction followed the rule that an accomplice's liability derived from that of the direct perpetrator. Antick's liability would thus derive from Bose's, but Bose could not be liable for his own death. This exception to the provocative act liability (an exception to an exception to an exception) is deficient on several levels.

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<sup>208</sup> Medina, 46 Cal.4th 913, 920.

<sup>209</sup> Gonzalez, 54 Cal.4th 643, 657 (italics added).

<sup>210</sup> Cervantes, 26 Cal.4th 860, 871.

<sup>211</sup> 15 Cal.3d 79 (1975).

<sup>212</sup> Antick, 15 Cal.3d 79, 83.

<sup>213</sup> *Id.* at 91.

First, it conflicts with *Washington's* declaration that it does not matter which person is killed.<sup>214</sup> Had Antick and Bose been joined by another accomplice (conveniently alphabetized as “Caldwell”),<sup>215</sup> but only Bose committed a provocative act, Antick would not be liable for Bose’s death as it occurred. But if the officer had killed Caldwell instead of Bose, Antick would be liable for Caldwell’s death. In other words (as noted in Part I), Antick’s liability would “turn upon the marksmanship of victims and policemen.”

Second, current instruction mis-describes the *Antick* exception. It informs juries that an element of the crime is that the provocative act must have been committed by the defendant or a surviving perpetrator, presumably to follow *Antick*.<sup>216</sup> But although *Antick* held that a deceased accomplice may not be liable for his own death, he may be liable for the death of a police officer or other innocent victim. So the defendant may be guilty if the decedent’s provocative act proximately caused both his own death and that of a non-accomplice.<sup>217</sup>

More importantly, two cases have cast doubt upon *Antick*’s continuing validity. *Antick* relied on a case where the defendant Ferlin hired an arsonist who accidentally died while setting the fire.<sup>218</sup> That decision rejected felony-murder liability, as the Court denied “that defendant and deceased had a common design that deceased should accidentally kill himself.”<sup>219</sup> But as noted above, *Billa* addressed the staged traffic accident by distinguishing the fatal *outcome*, which was not part of the felonious design, from the *acts* leading to death, which were. *Billa* limited *Ferlin* and endorsed liability “where one or more surviving accomplices were present at the scene and active participants in the crime.”<sup>220</sup> These conditions appeared to describe the *Antick* facts, so the premises underlying its

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<sup>214</sup> See *Washington*, 62 Cal.2d 777, 781; the complete text of the citation in note 29 *supra* reads: “A distinction based on the person killed, however, would make the defendant’s criminal liability turn upon the marksmanship of victims and policemen. A rule of law cannot reasonably be based on such a fortuitous circumstance.”

<sup>215</sup> See *People v. Caldwell*, 36 Cal.3d 210 (1984).

<sup>216</sup> CALJIC 8.12.

<sup>217</sup> *People v. Garcia*, 69 Cal. App. 4th 1324, 1331 (1999).

<sup>218</sup> *People v. Ferlin*, 203 Cal. 587 (1928).

<sup>219</sup> *Id.* at 597.

<sup>220</sup> *Billa*, 31 Cal.4th 1064, 1072.

exception, like the *Washington-Gilbert* foundations described in Part II, might be obsolete.

But the most profound problem with the “*Antick* exception” is that the Supreme Court has rejected the very concept that an accomplice’s liability derives from the direct perpetrator’s.<sup>221</sup> The Court used the facts of Shakespeare’s *Othello* to show how an accomplice may be liable for an offense for which the direct perpetrator is not.<sup>222</sup> Under the facts of the play, accomplice Iago might be liable for murder even though perpetrator Othello might be guilty of only manslaughter (because he acted in a heat of passion). The analysis concerned examples where the perpetrator was not liable for the full crime committed by the aider and abettor due to a personal defense that applied only to the perpetrator, e.g. insanity, heat of passion, duress, imperfect self-defense.<sup>223</sup> But as the Court disapproved “any interpretation of *People v. Antick* . . . that is inconsistent with this opinion,” the death and consequent unprosecutability of a deceased provocateur could be another such personal immunity from liability.

#### D. A COMMON STANDARD FOR ALL INDIRECT CAUSATION HOMICIDES

The Supreme Court has embraced the proximate causation–times–*mens rea* formula of determining liability in homicide cases — including those committed by intermediaries who are not literally provoked.<sup>224</sup> But it continues to authorize a different, and in practice more stringent, test for liability where the intermediary is “literally provoked.” Why should there be a different test for “literal” provocation?

It is possible that *Washington*’s real objection to murder liability was not that the consequences were *beyond the robber’s control* but that they were *within the victim’s control*. Unlike some of the preceding intermediary homicide cases, *Washington* involved what was arguably discretionary resistance. Of course, the *Fowler* driver (like the *Roberts* defendant) did not exercise any choice at all. And other cases did not involve any real

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<sup>221</sup> *People v. McCoy*, 25 Cal.4th 1111 (2001).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 1121, citing *People v. Taylor*, 12 Cal.3d 686, 692 n.6, 697 n.13, disapproved on other grounds in *People v. Superior Court (Sparks)*, 48 Cal.4th 1 (2010).

<sup>224</sup> See *Sanchez*, 26 Cal.4th 834; *Roberts*, 2 Cal.4th 271.

choice. Whereas nearly everyone dying a slow and painful death like the *Lewis* victim could be expected to accelerate the process, nearly everyone being shot at would try to avoid the bullets as in *Letner* (and *Wright*), and nearly everyone near a live grenade could be expected to kick it away as in *Madison*, many if not most robbery victims would *not* pull a gun and begin firing.<sup>225</sup> *Washington's* recognition that “[i]n every robbery there is a possibility that the victim will resist and kill”<sup>226</sup> implicitly found such aggressive resistance by a victim was a minority consequence, and thus outside the “normal” course of events. Unlike the other victims, it could be argued that the robbery would not have inevitably caused death in *Washington*, but for the victim’s escalating the conflict by firing the first shot.<sup>227</sup>

But post-*Washington* cases have recognized that it is not unreasonable for a robbery victim to use force when most effective rather than place trust in a felon’s peaceful intentions. And even if it were, such unreasonableness is reasonably foreseeable, and therefore does not break the chain of causation. If a felon is liable when his robbery causes the victim to suffer a heart attack, a fortiori, the felon may be liable when the robbery causes the victim to resist.

Proximate causation is proximate causation, whether the case involves “literal provocation” or not. The law should provide uniform instruction for all indirect causation homicides.

#### IV. CONCLUSION: MEND IT OR END IT?

The paradox of the provocative act doctrine is that its reach has expanded as its rationales have collapsed. Assailants are indeed liable for consequences over which they have no control. They are likewise liable when their victims act unreasonably. And if the natural and probable consequences of an

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<sup>225</sup> Unlike the *Madison* intermediary, who kicked the grenade toward another innocent bystander, the robbery victims in *Harrison* and *Washington* aimed at their assailants.

<sup>226</sup> *Washington*, 62 Cal.2d 777, 781.

<sup>227</sup> *Washington* was less inclined than *Harrison* to find the victim’s response “an impulsive act of avoidance” based on “the sudden terror of the moment,” as in *Harrison*. The robbery victim in *Washington* was already on alert for the possibility of a robbery when the robber appeared, and the victim thus had already prepared his weapon. *Id.* at 779.

act are lethal (i.e. death is reasonably foreseeable), it establishes both proximate causation and the objective element of malice. Resistance to violent felonies is reasonably foreseeable, so proximate causation — and liability — rest with the felon.

How should these changes affect the application of the doctrine? As the doctrine was specifically conceived to limit the felony-murder rule,<sup>228</sup> one option would return its restrictive effect to that context exclusively; the Supreme Court did not affirm a provocative act murder outside the felony-murder context until 2009.<sup>229</sup> This could prevent undue reliance on a disfavored doctrine, but not otherwise impede the ordinary application of the proximate causation–times–*mens rea* formula.<sup>230</sup>

Another possible reform could limit the doctrine to those cases where a cofelon (rather than an innocent party) dies. The Court has formally denied a meaningful distinction between cofelons and innocent victims. “One may have less sympathy for an arsonist who dies in the fire he is helping to set than for innocents who die in the same fire, but an accomplice’s participation in a felony does not make his life forfeit or compel society to give up all interest in his survival.”<sup>231</sup> But this argument does not extend to crimes that provoke a self-defensive response like robbery, rape or kidnapping. These felonies are punishable by substantial prison terms, yet killing to prevent their commission is justifiable homicide, for which no sentence is imposed. In other words, a violent felon does forfeit the protection of the law because he may be killed without penalty. If an officer kills to prevent a violent felony, there is no need for a criminal prosecution. But if he misses and kills an innocent person, there is an unjustifiable homicide demanding prosecution. It matters who dies.

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<sup>228</sup> Cervantes, 26 Cal.4th 871, 872 n.15.

<sup>229</sup> Concha, 47 Cal.4th 653.

<sup>230</sup> On the other hand, the Supreme Court has since moved away from its aggressive efforts to limit the reach of section 189’s felony-murder rule. In *People v. Wilson*, 1 Cal.3d 431, 440 (1969), the Supreme Court rejected felony-murder liability for a burglary where the intended felony was an assault (which could not by itself support felony-murder liability). Forty years later, the Court concluded it could not narrow the statutorily prescribed reach of section 189, and disapproved *Wilson* for doing so. *People v. Farley*, 46 Cal.4th 1053, 1117–20 (2009).

<sup>231</sup> Billa, 31 Cal.4th 1071.

But abolition may be preferable to piecemeal tinkering. The doctrine has taken half a century to reach its current state through natural evolution, as it expanded to react to new factual circumstances like *Pizano*'s human shield, *Aurelio R.*'s express malice, and *Concha*'s premeditation. A doctrine established as an exception to an exception, designed to confine the reach of the felony-murder rule, has become the default vehicle for imposing liability for intermediary homicides. And due to its imperfect design and instructional lacunae, the doctrine cannot cover every factual predicate to ensure that the desired formula of proximate causation–times–*mens rea* always obtains. The law prescribes the provocative act doctrine to decide liability, except in those cases like *Roberts* and *Sanchez* where it doesn't fit, and trial courts must then haphazardly return to the proximate causation–times–*mens rea* formula, without any guidance from the Supreme Court. Using that formula in every case — as a first resort — will ensure greater consistency and justice in homicide prosecutions.

*Washington* described a doctrine that is “unnecessary,” “erodes the relation between criminal liability and moral culpability,” and “should not be extended beyond any rational function that it is designed to serve.”<sup>232</sup> Because the proximate causation–times–*mens rea* formula of *Roberts* and *Sanchez* suffices to impose liability for intermediary homicides commensurate with the offender’s *mens rea*, the *Washington–Gilbert* provocative act doctrine is unnecessary. Due to loopholes through which some offenders might escape liability, and the lack of a manslaughter option for cases where either the offender kills indirectly while in a heat of passion (voluntary manslaughter), or where the natural and probable consequences of the provocateur’s act are lethal but the defendant does not subjectively realize it (involuntary manslaughter), the doctrine erodes the link between liability and culpability. And because the *Washington–Gilbert* doctrine was conceived to limit the reach of the felony-murder rule, it has been extended beyond any rational function it was designed to serve. Although the quotation from *Washington* referred to the felony-murder rule, the quote now describes that case’s own creation.



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<sup>232</sup> *Washington*, 62 Cal.2d 777, 783.

# THE JUDICIAL GIVE AND TAKE:

*The Right to Equal Educational Opportunity  
in California*

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## INTRODUCTION

After the U.S. Supreme Court held that education is not a fundamental right under the Equal Protection Clause of the U.S. Constitution in *San Antonio Independent School District v. Rodriguez*,<sup>1</sup> litigants turned to state Equal Protection Clauses to serve as guarantors of educational equality. In subsequent years, some state courts have expanded the content of state-level equal protection doctrine to include students' fundamental right to equal educational opportunity.<sup>2</sup> Central to this doctrine is that the principle of equal opportunity can and should be applied to areas of life where the state government provides services that are integral to the functioning of a democratic society and the opportunities of its citizens.

The California Supreme Court declared education a fundamental right under the state constitution in its 1976 decision in *Serrano v. Priest*.<sup>3</sup> Since then, there has been a surge of state-level education litigation in California, which has shown no signs of slowing. Despite the mounting caselaw, the contours of California students' right to equal education remains unclear. Although the California Constitution creates an enforceable right to "basic educational equality,"<sup>4</sup> the state courts have not succinctly stated the programs, services, resources, or funding necessary to satisfy this right.

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<sup>1</sup> 411 U.S. 1, 33 (1973).

<sup>2</sup> In a frequently cited article on the use of state constitutions to protect individual rights, Justice Brennan encouraged state courts to provide more expansive protections for substantive individual rights than those provided by the federal constitution. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977) ("Of late, however, more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased. This is surely an important and highly significant development for our constitutional jurisprudence and for our concept of federalism."); *see also* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986) [hereinafter Brennan, *The Bill of Rights and the States*] (recognizing that state courts have interpreted state constitutional provisions as providing greater protections than similar provisions, including the Equal Protection Clause, found in the federal constitution).

<sup>3</sup> 18 Cal.3d 728 (1976) (en banc).

<sup>4</sup> See *Butt v. State of California*, 4 Cal.4th 668, 681 (1992) ("[T]he state itself has broad responsibility to ensure basic educational equality under the California Constitution.").

California educates a highly diverse population of over 6.2 million students.<sup>5</sup> In recent years, California students have ranked near the bottom in fourth and eighth grade math and reading scores compared to students in other states.<sup>6</sup> Eighty-one percent of Californians believe educational quality is a problem in California's K-12 public schools.<sup>7</sup> Californians are also very concerned about inequities among students based on income, race, and English proficiency.<sup>8</sup> Given the concerns over the quality and equality of education in California, it is imperative to define the scope of the state's duty to provide an education to students. For almost forty years, students, parents, and advocacy groups have turned to California's courts for guidance on the states' educational obligation, yet the caselaw remains equivocal.<sup>9</sup>

This article reviews the thirty-five year history of California education equal protection litigation in an effort to identify what is contained within and excluded from students' fundamental right. This article seeks to answer the question: What constitutes "basic" educational equality in California's public schools? An in-depth review of the case history reveals that California courts oscillated between granting and taking away benefits which affect students' full enjoyment of their right to a basic education. The vacillation is ongoing. Litigants continue to bring challenges under California's Equal Protection Clause, attempting to push the courts to more concretely define the scope of students' fundamental right to education, with variable success.<sup>10</sup> Many of the recent cases are still at the

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<sup>5</sup> See National Center for Education Statistics, U.S. Department of Education, NAEP State Profiles: Summary of NAEP Results for California 1990–2013 (last visited Nov. 30, 2014), <http://nces.ed.gov/nationsreportcard/states>.

<sup>6</sup> See *id.*

<sup>7</sup> See Mark Baldassare, et al., *PPIC Statewide Survey: Californians & Education* 20 (2014), available at [http://www.ppic.org/content/pubs/survey/S\\_414MBS.pdf](http://www.ppic.org/content/pubs/survey/S_414MBS.pdf).

<sup>8</sup> See *id.* at 17 (finding that a majority of Californians are concerned about teacher shortages in low-income areas, that low-income students are less likely to be ready for college, and that English language learners score lower than other students on standardized tests).

<sup>9</sup> See James E. Ryan, *A Constitutional Right to Preschool?*, 94 CAL. L. REV. 49, 85 (2006) ("If courts are willing, as they should be, to determine whether state constitutions create a right to equal or adequate educational opportunities, they must be committed to defining the content of those opportunities.").

<sup>10</sup> See *Vergara v. State of California*, No. BC484642 (Cal. Super. Ct. filed May 14, 2012); *Campaign for Quality Educ. v. State of California*, No. RG10524770 (Cal. Super.

trial level or have settled out of court. In pursuing basic educational equal protection challenges, plaintiffs confront the difficulty of developing a cogent legal strategy which relies on the courts' existing jurisprudence while pushing for a robust interpretation of students' fundamental right.

This article suggests that plaintiffs seeking to raise the minimum standard of education necessary to satisfy students' fundamental right should pursue claims left open by the gaps in the courts' existing Equal Protection Clause jurisprudence. Part I explores the education clauses of California's constitution. First, this section provides an introduction to the caselaw under California's constitutional education clauses as well as the case history establishing the state as the entity ultimately responsible for California's education system. Second, this background is necessary to understand the rise of California's Equal Protection Clause, and not the constitutional education clauses, as the guarantor of students' basic equity of educational opportunity. Finally, the article explores the rationales behind the courts' embrace of equal protection doctrine, and the rejection of the substantive rights identified in the education clauses, examining the roles of state judicial power, equal protection policies, and the state's education system.

Whereas Part I examines the role of the California Constitution's education clauses, Part II explores the state's Equal Protection Clause. First, this Part identifies the three key cases that expanded students' right to equal educational opportunity in the last forty years. Because the courts lack an analytical structure to evaluate basic educational equality claims, this article proposes a two-part test to use as a tool for analyzing prior caselaw granting education rights under the Equal Protection Clause, and as a framework to more logically structure future claims, hopefully with a greater likelihood of success. Conversely, the next subpart details the history of state caselaw that contracted students' fundamental right to education, thereby excluding rights and services from the protection of strict scrutiny. Finally, in order to demonstrate the utility of the suggested two-part test, the final section uses three recent cases challenging the provision of basic educational equity in California to demonstrate that a coherent and identifiable structure can help ensure the success of an equal

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Ct. filed July 12, 2010); Robles-Wong v. State of California, No. RG10-515768 (Cal. Super. Ct. filed May 20, 2010); Reed v. State of California, No. BC 432420 (Cal. Super Ct. filed Feb. 24, 2010).

protection claim and perhaps expand it to encompass qualitative claims of educational inadequacy.

## I. THE EDUCATION CLAUSES

California's constitution, like many other states', includes two provisions that provide the foundation for education litigation. First, every state, including California, has an education clause in its constitution, which obligates the state to create and maintain a public school system.<sup>11</sup> Second, as introduced in Part I.C and discussed in detail in Part II, the state constitution contains provisions that parallel the federal Equal Protection Clause, which can be used to challenge the inequality of education among students.<sup>12</sup>

### A. THE EDUCATION CLAUSES OF THE CALIFORNIA CONSTITUTION

Since its ratification in 1849, the California Constitution has included several clauses relating to the state's role in the education system. Specifically, the education provisions of article IX outline two basic principles. First, the people of California recognize the value and importance of an educated citizenry, and have vowed to protect it. Second, the Constitution makes the

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<sup>11</sup> See CAL. CONST. art. IX, §§ 1, 5. Every state constitution includes an education clause, although they vary from state to state in form, scope, and responsibility. See William E. Thro & R. Craig Wood, Commentary, *The Constitutional Text Matters: Reflections on Recent School Finance Cases*, 251 ED. LAW REP. 510, 510 (2010). The education clauses from each state constitution are collected in an appendix to Allen Hubsch, Note, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1343 (1992).

<sup>12</sup> See CAL. CONST. art. I, § 7(a) ("A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . . ."); *id.* § 7(b) ("A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens . . . ."); *id.* art. IV, § 16(a) ("All laws of a general nature have uniform operation."). For an overview of Equal Protection Clauses in all fifty states, see Randal S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 LAW & INEQ. 239, 251–60 (1999). For some examples of other states' Equal Protection Clauses that parallel the federal standard, see ILL. CONST. art. I, § 2 ("No person shall . . . be denied the equal protection of the laws"); N.Y. CONST. art. I, § 11 ("No person shall be denied the equal protection of the laws of this state or any subdivision thereof").

state, and in particular the Legislature, responsible for the creation, financing, and maintenance of the state's education system.

The Constitution states that “[a] general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.”<sup>13</sup> This section of article IX, section 1 demonstrates the state's textual commitment to a robust educational program, and the Legislature must use “all suitable means” to carry it out.<sup>14</sup> The California Supreme Court declared that this provision indicates that the citizens of California recognize “the advantages and necessities of a universally educated people as a guaranty and means for the preservation of the rights and liberties of the people.”<sup>15</sup>

Since 1849, the California Constitution endowed the Legislature with the responsibility of “provid[ing] for a system of common schools” and ensuring that local school districts offer education free of charge.<sup>16</sup> These basic mandates found in article IX, section 5 create California’s free public school system and place it under the control of the state legislature. Separate constitutional provisions set out more specific educational requirements, including the Legislature’s appointment of the superintendent of public instruction<sup>17</sup> and State Board of Education,<sup>18</sup> who make the

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<sup>13</sup> CAL. CONST. art. IX, § 1.

<sup>14</sup> In her discussion of state education constitutional provisions, Erica Black Grubb categorizes these clauses into four groups. See Erica Black Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 HARV. C.R.-C.L.L. REV. 52, 66–70 (1974). Grubb places California’s education provisions in the second to most protective category, in which the textual commitment to education is very strong. *Id.* at 68. She points to the inclusion of the language “all suitable means,” as well as the emphasis on the relationship between education and the exercise of basic rights. *Id.* at 68–69.

<sup>15</sup> *Piper v. Big Pine Sch. Dist. of Inyo Cnty.*, 193 Cal. 664, 668 (1924). *See also Ward v. Flood*, 48 Cal. 36, 50 (1874) (“[The] advantage or benefit thereby vouchsafed to each child, of attending a public school is, therefore, one derived and secured to it under the highest sanction of positive law. It is, therefore, a right — a legal right — . . . and as such it is protected, and entitled to be protected by all the guaranties by which other legal rights are protected and secured to the possessor”).

<sup>16</sup> CAL. CONST. OF 1849 art. IX, § 3; CAL. CONST. art. IX, § 5. *See also N.J. CONST. art. VIII, § 4(1)* (“The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools.”).

<sup>17</sup> CAL. CONST. art. IX, § 2.

<sup>18</sup> *Id.* § 7.

executive, administrative, and policy decisions for the school system.<sup>19</sup> In addition, the Constitution directs the Legislature to set up the education finance system,<sup>20</sup> the adoption and distribution of free textbooks,<sup>21</sup> the minimum teachers' salary,<sup>22</sup> and the incorporation and organization of local school districts.<sup>23</sup> These specific provisions provide substance and detail to the primary mandate found in section 5. Via the education clauses of the Constitution, California has inextricably intertwined itself with the educational system, making the state responsible for major aspects of public school structure and governance.

## B. LITIGATING EDUCATION RIGHTS UNDER CALIFORNIA'S EDUCATION CLAUSES

Because the education clauses include two textual assurances — that education is an essential right of the people and that the state is responsible for the education system — these constitutional provisions have been the subjects of extensive litigation. Plaintiffs have relied on these clauses to protect and expand their educational rights.<sup>24</sup> Setting aside a handful of limited successes, California courts have not been willing to set out a minimum level of education necessary to satisfy these constitutional provisions. As discussed *infra* in Part I.C, the courts instead have chosen to use the state's equal protection doctrine to define students' educational rights.

A review of a few key cases is useful to understand the courts' reluctance to rely on these clauses to grant a substantive individual right and their eventual turn to the California Equal Protection Clause to uphold

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<sup>19</sup> As agents of the Legislature, the State Board of Education acts as "the governing and policy determining body," CAL. EDUC. CODE § 33301(a)), and the superintendent of public instruction is vested with all executive and administrative functions, *id.* § 33301(b).

<sup>20</sup> CAL. CONST. art. IX, § 6.

<sup>21</sup> *Id.* § 7.5.

<sup>22</sup> *Id.* § 6.

<sup>23</sup> CAL. CONST. art. IX, § 14.

<sup>24</sup> See Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 311 (1991). For a complete analysis of how the wording of a state education clause can affect a challenge to the school funding system, see William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 EDUC. L. REP. 19 (1993).

students' right to education.<sup>25</sup> The remainder of this section discusses litigation advancing adequacy or equality arguments<sup>26</sup> under the two education clauses: (1) article IX, section 5 which requires the Legislature to provide a free system of public schools,<sup>27</sup> and (2) article IX, section 1 which is a description of the goals and purposes of public schools.<sup>28</sup>

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<sup>25</sup> For a review of caselaw under the education articles in states outside of California, see Hubsch, *supra* note 11, at 1336–42; see also Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 B.Y.U. EDUC. & L.J. 1, 15–18 (1997) (reviewing case history from multiple states brought under the education clauses); Josh Kagan, *A Civics Action: Interpreting “Adequacy” in State Constitutions’ Education Clauses*, 78 N.Y.U. L. REV. 2241, 2257–69 (2003) (summarizing judicial approaches to interpreting state education clauses).

<sup>26</sup> Historically, education litigation has relied on two distinct approaches. First, in equality suits, plaintiffs assert that all children are entitled to equal educational opportunities or resources. The theory is that equality in resources, money, and opportunities will lead to equal education outcomes, and the analysis involves a comparison between schools or districts in order to measure equality among them. Plaintiffs rely on state equality guarantees extrapolated from state education clauses or on equal protection theories in states where education is a fundamental right. See Jared S. Buszin, Comment, *Beyond School Finance: Refocusing Education Reform Litigation to Realize the Deferred Dream of Education Equality and Adequacy*, 62 EMORY L.J. 1613, 1618 (2013); Alan E. Schoenfeld, Note, *Challenging the Bounds of Education Litigation: Castaneda v. Regents and Daniel v. California*, 10 MICH. J. RACE & L. 195, 222–25 (2004); Kelly Thompson Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 405–11 (2000) (summarizing the history of caselaw relying on equity arguments).

Second, in adequacy suits, plaintiffs argue that schools failed to provide a minimally adequate education as required by the state constitution. Central to these cases is inadequate educational quality, measured in terms of inputs such as teacher quality or curricular resources or outputs such as test scores or dropout rates. See Kagan, *supra* note 25, at 2248–55 (describing the types of inputs and outputs courts can use to measure adequacy). In adequacy suits, plaintiffs assert that the state set a particular quality standard and the schools failed to measure up. See Cochran, *supra*, at 411–17 (summarizing the history of caselaw relying on adequacy arguments). These two approaches — equality and adequacy arguments — are often combined in one lawsuit. See William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & POL. 525, 534–37 (1998); see generally Richard J. Stark, *Education Reform: Judicial Interpretation of State Constitutions’ Education Finance Provisions—Adequacy vs. Equality*, 1991 ANN. SURV. AM. L. 609 (1992) (describing the adequacy and equity approaches to education litigation and arguing that courts often intermingle the two approaches, making it difficult to identify the proper standard to apply).

<sup>27</sup> CAL. CONST. art. IX, § 5.

<sup>28</sup> *Id.* § 1.

### 1. *The Undefined Promise of a Free System of Common Schools*

Several cases have been litigated under section 5 which requires the Legislature to “provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year . . .”<sup>29</sup> This clause can be further broken down into two constituent parts: the free school clause and the common schools clause.

The key California case under the free schools clause is *Hartzell v. Connell*.<sup>30</sup> Due to budget shortfalls, a local school district began charging students fees to participate in extracurricular activities, including dramatic productions, musical performances, and athletic teams.<sup>31</sup> After reviewing extensive caselaw establishing the broad purposes of education,<sup>32</sup> the California Supreme Court determined that extracurricular activities are an integral component of public education and that schools cannot charge a fee

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<sup>29</sup> *Id.* § 5. The requirement that the school be kept up “at least six months” has been extended by statute to a minimum of 180 days per school year. *See CAL. EDUC. CODE § 46200.*

<sup>30</sup> 35 Cal.3d 899 (1984).

<sup>31</sup> *Id.* at 902. The school district’s program also included a fee-waiver program for students with financial need. *Id.* at 904.

The factual scenario presented in *Hartzell* repeated itself in 2010 as a budget crisis ravaged the state, pushing schools to take unconstitutional measures to support its programs. In *Doe v. State of California*, students alleged that school districts across the state charged illegal fees for educational materials. For example, schools required that students pay for Advanced Placement exams, purchase required workbooks and lab manuals, and buy compulsory physical education uniforms. Complaint at 2, No. BC445151 (Cal. Super. Ct. Dec. 9, 2010), available at <http://www.schoolfunding.info/news/litigation/CA-ACLUcomplaint.pdf>. The complaint sought to enforce the free schools clause of the California Constitution and “ensure that public school districts do not require students to pay fees or purchase assigned materials for credit courses.” *Id.* at 18. The students dismissed the lawsuit following the enactment of Assembly Bill 1575, 2012 Cal. Legis. Serv. Ch. 776 (West), which made clear that school fees are illegal and set up a statewide complaint system to identify offending schools. *See Press Release, ACLU Wins Fight to Protect Constitutional Right to Free Public Education in California, ACLU OF SOUTHERN CALIFORNIA*, Oct. 1, 2012, <https://www.aclusocal.org/aclu-wins-fight-to-protect-constitutional-right-to-free-public-education-in-california>.

<sup>32</sup> The *Hartzell* Court examined the role played by education in the state’s constitutional scheme, determining that education “prepares students for active involvement in political affairs,” “prepares individuals to participate in the institutional structures — such as labor unions and business enterprises,” and “serves as a unifying social force.” 35 Cal.3d at 907–08.

for student participation.<sup>33</sup> The Court interpreted the free schools clause, holding that “[e]ducational opportunities must be provided to all students without regard to their families’ ability or willingness to pay fees or request special waivers.”<sup>34</sup> Although the Court relied on the free school clause for its ultimate holding,<sup>35</sup> the language of the decision borrows heavily from equal protection doctrine, signaling the Court’s embrace of equality principles as opposed to an interpretation of the education clauses.<sup>36</sup>

In early California case history, some Supreme Court decisions hinted at the possibility that the common schools clause could be a basis for litigating students’ right to educational opportunity. In 1893 in *Kennedy v. Miller*, the Court interpreted the system of common schools to “import[] a unity of purpose as well as an entirety of operation, and the direction to

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<sup>33</sup> *Id.* at 911–12.

<sup>34</sup> *Id.* at 913. The Court explained that the waiver provision did not cure the constitutional problem because waiver applications resulted in “stigma” and are a “degrading experience” for needy students and families. *Id.* at 912.

*See also* Cal. Ass’n for Safety Educ. v. Brown, 30 Cal. App. 4th 1264 (1994) (finding that fees charged by a high school for driver training course violated free school guarantee of the California Constitution because driver training was “educational” in character). *But see* Helena F. v. W. Contra Costa Unified Sch. Dist., 49 Cal. App. 4th 1793, 1800 (1996) (holding state’s constitutional obligation to provide free education does not encompass duty to provide schools that are geographically convenient to parent, where district’s policy was to temporarily place late enrollees in schools outside of their attendance zone); Arcadia Unified Sch. Dist. v. State Dept. of Educ., 2 Cal.4th 251 (1992) (finding that a statute authorizing charges for school-provided transportation did not violate the free school guarantee because transportation is not an educational activity or an essential element of school activity). A further discussion of the *Arcadia* case and its implications for the California Equal Protection clause can be found at notes 179 to 185 and the accompanying text.

<sup>35</sup> However, a lengthy concurrence to *Hartzell* written by Chief Justice Bird advances an additional support for the holding under the equal protection guarantee of the California Constitution. *See Hartzell v. Connell*, 35 Cal.3d 899, 921–28 (1984) (Bird, C.J., concurring). *See infra* note 176 and accompanying text for a full discussion of the concurrence and its implications for students’ basic right to an education in California.

<sup>36</sup> The practice of applying equality principles in education clause litigation is widespread. *See Peter Enrich, Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 139 (1995) (“In a number of other states, as several commentators have observed, emphasis on the analysis of state education clauses has increased during the past decade. But even with this shift in the primary textual basis of the suits, many litigants and courts have continued to look for the old equality-based arguments in the new education-based texts.”).

the Legislature to provide ‘a’ system of common schools means one system which shall be applicable to all the common schools within the state.”<sup>37</sup> The *Kennedy* Court’s reading of this clause suggests that the text could be a vehicle for challenging legislative decisions that result in unequal schools, as any resulting inequality could undermine the school system’s unity. Further elaboration on the utility and meaning of the clause came thirty years later in *Piper v. Big Pine School District of Inyo County*,<sup>38</sup> in which the Court ordered a school district to admit a Native American girl into its public schools. The Court reasoned that the California Constitution provides all citizens with the right to attend a system of common schools, consisting of a uniform course of study in which pupils advance from one grade to another and are admitted from one school to another pursuant to a system of educational progression.<sup>39</sup> The Court went so far as to declare that the right to attend a system of common schools is an “enforceable right[] vouchsafed to all who have a legal right to attend the public schools.”<sup>40</sup> The Court’s rationale in *Piper* suggests that the system of common schools clause could have provided a basis for litigants to contest the adequacy of their public schools.

However, the early hopes for the utility of the common schools clause were dashed by the 1970s. In addition to their equal protection arguments, plaintiffs in California’s seminal school finance case, *Serrano v. Priest (Serrano I)*,<sup>41</sup> alleged that the state’s school finance system violated the common

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<sup>37</sup> *Kennedy v. Miller*, 97 Cal. 429, 432 (1893).

<sup>38</sup> 193 Cal. 664 (1924).

<sup>39</sup> *Id.* at 669.

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

<sup>41</sup> *Serrano I*, 5 Cal.3d 584 (1971) (en banc). Part I.C discusses *Serrano I* more deeply. However, a cursory review of the facts will be helpful to better understand its use here. In *Serrano I*, plaintiffs claimed the state’s public school financing system violated the Constitution because it was primarily based on wealth generated from local property taxes. *Id.* at 589. Students who attended schools in neighborhoods with lower property tax revenues received fewer educational opportunities than students who attended schools in prosperous areas. *Id.* at 599–600. After determining that education is a fundamental right and classification by wealth is suspect, the *Serrano I* Court applied strict scrutiny and struck down the finance system because it “classifies its recipients on the basis of their collective affluence and makes the quality of a child’s education depend upon the resources of his school district and ultimately upon the pocketbook of his parents.” *Id.* at 614.

schools clause because the financing method produced separate systems where each district offered a distinct educational program depending on the district's wealth.<sup>42</sup> Although it cited the *Kennedy* and *Piper* decisions, the *Serrano I* Court went on to hold that the common schools provision does not require equal school spending.<sup>43</sup> The Court found that article IX, section 6, which provides for the levying of school district taxes, controlled the school financing system, and to avoid conflicting interpretations, section 5 should not be construed to apply.<sup>44</sup> The *Serrano I* Court's brief discussion of the clause closed it off to future education litigation, limiting the application of the common schools clause to maintaining basic uniformity and progression of grades throughout the state.<sup>45</sup>

Subsequent cases solidify the demise of the common schools clause as a means to pursue students' basic right to education in California. In *Wilson v. State Board of Education*,<sup>46</sup> plaintiffs challenged the Charter Schools Act (the "Act")<sup>47</sup> under several state constitutional provisions. Plaintiffs maintained that the Act violated article IX, section five because it granted charter schools complete control over essential functions of the education system, thereby abdicating the state's responsibility to maintain a system of common schools.<sup>48</sup> The court rejected the argument, reasoning that although the Act delegated educational functions to charter schools, it did not relinquish any power over the system.<sup>49</sup> The court found that the "curriculum and courses of study are not constitutionally prescribed. Rather, they are details left to the Legislature's discretion. Indeed, they do not

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<sup>42</sup> *Id.* at 595.

<sup>43</sup> *Id.* at 595–96.

<sup>44</sup> *Id.* at 596.

<sup>45</sup> See *Robles-Wong v. State of California*, No. RG10-515768 (Cal. Super. Ct. Jan. 14, 2011) (rejecting funding disparity arguments under the education clauses and citing to *Serrano I* for the proposition that these clauses were considered and dismissed as irrelevant by the Supreme Court). It is notable that in *Serrano I* plaintiff used the education clauses to make equity arguments, contending the school finance system produced disparate district outcomes. Whereas in *Robles-Wong*, the litigants relied on the clauses to make adequacy arguments, asserting that all California students are denied an adequate education in violation of these clauses.

<sup>46</sup> 75 Cal. App. 4th 1125 (1999).

<sup>47</sup> CAL. EDUC. CODE § 47600, et seq.

<sup>48</sup> 75 Cal. App. 4th at 1135.

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

constitute part of the system but are merely a function of it.”<sup>50</sup> The court interpreted the common schools clause as a broad delegation of power to the Legislature to determine the content of education, not an enforcement mechanism for plaintiffs seeking a declaration of minimum educational rights.<sup>51</sup>

## 2. *The Legislature’s Broad Discretion to Promote Educational Goals*

Similarly, courts refuse to rely on article IX, section 1 as a basis for defining students’ substantive educational rights. Arguably, the language of the section, namely that “the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement,”<sup>52</sup> creates a strong textual basis for declaring that California students have the right to receive a basic education.<sup>53</sup> However, California courts have been unwilling to interpret the provision as an affirmative right to a minimum level of education.<sup>54</sup> Instead, courts have interpreted

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<sup>50</sup> *Id.*

<sup>51</sup> A 2006 case in the California Court of Appeal, *Levi v. O’Connell*, 144 Cal. App. 4th 700 (2006), similarly narrowed the applicability and scope of the common schools clause. There, the mother of an extremely gifted 13-year-old college student sought to require the state to pay for her son’s state college education. The court dismissed her claim under article IX, section 5, defining the “system of common schools” as encompassing only “a single standard and uniform system of free public K-12 education,” not including college or university grades even for exceptionally advanced students. *Id.* at 708.

<sup>52</sup> CAL. CONST. art. IX, § 1.

<sup>53</sup> See Thro, *supra* note 24, at 53–40; see generally Jensen, *supra* note 25 (arguing that state education clauses should be used as a basis for declaring minimum education rights in conformity with the clauses’ textual commitment to education and their degree of specificity).

<sup>54</sup> See, e.g., *Serrano v. Priest (Serrano II)*, 18 Cal.3d 728, 775 (1976) (en banc) (refusing to rely on article IX, section 1 to uphold the state’s school finance system); *Long Beach City Sch. Dist. v. Payne*, 219 Cal. 598, 606 (1933) (refusing to rely on article IX, section 1 to invalidate a tax statute that imposed a penalty on school districts that had unpaid taxes); *Robles-Wong v. State of California*, No. RG10-515768 (Cal. Super. Ct. Jan. 14, 2011) (granting a demurrer without leave to amend on claims under article IX, sections 1 and 5, declaring that the provisions do not create a mandatory duty which can be judicially enforced); *Williams v. State of California*, No. 312236, slip op. at 3 (Cal. Super. Ct. July 10, 2003), available at [http://www.decentschools.org/court\\_papers.php](http://www.decentschools.org/court_papers.php) (dismissing plaintiffs’ cause of action under article IX, section 1 because it found that the provision did not “[confer] a direct right on a litigant to sue for its enforcement” and the “language of the provision is addressed to the Legislature”).

this provision as a grant of broad discretion to the Legislature to determine the programs and services that will further the identified goals.<sup>55</sup> This view of section 1 is in conformity with the courts' emphasis on the state, and in particular the Legislature, as the arbiter of the education system.

Despite the courts' prior unwillingness to rely on the education clauses to set forth a quality standard, a pending case before the California Court of Appeal directly presents the issue to the court. In a joint appeal, *Robles-Wong v. State of California*<sup>56</sup> and *Campaign for Quality Education v. State of California*<sup>57</sup> ask the court to decide: "Does the fundamental right to an education under article IX of the California Constitution entitle students to an education of a qualitative level . . . ?"<sup>58</sup> Appellants assert that California's education clauses, like those in twenty-two other states, provide a legal right to challenge the quality of education provided to California students.<sup>59</sup> Appellants propose that courts rely on the academic content standards developed by the state as the means by which to assess whether the qualitative right is fulfilled.<sup>60</sup> The appeal is fully briefed and awaits the court's decision. Based on the discussion above, precedent does not weigh in appellants' favor. Nonetheless, if appellants can convince the court to establish a qualitative standard under the education clauses, it could affect the future of education litigation in California.

### *3. The Role of the Legislature to Educate All California Children*

Even though courts have been disinclined to impute a substantive right to a basic education into the education clauses, they have frequently relied on them for the proposition that the state, and in particular the Legislature, is

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<sup>55</sup> See *Cal. Teachers Ass'n v. Hayes*, 5 Cal. App. 4th 1513, 1528 (1992) (interpreting article IX, section 1 as "plac[ing] a similarly broad meaning upon education" and giving the Legislature broad discretion to define required programs and services).

<sup>56</sup> No. A134424 (Cal. Ct. App. appeal docketed Feb. 1, 2012).

<sup>57</sup> No. A134423 (Cal. Ct. App. appeal docketed Feb. 1, 2012).

<sup>58</sup> Corrected Appellants' Opening Brief at 5, *Campaign for Quality Educ. v. State of California*, No. A134423 (Cal. Ct. App. July 27, 2012), *consolidated with Robles-Wong v. State of California*, No. A134424 (Cal. Ct. App. July 27, 2012). For a detailed discussion of the trial court's decision on the equal protection claim in *Robles-Wong* and *CQE*, see *infra* Part II.C.

<sup>59</sup> *Id.* at 4, 29–30.

<sup>60</sup> *Id.* at 44–45.

the guarantor of education for California's students. The text of the education clauses<sup>61</sup> and the interpretive caselaw demonstrate that the state has authority over the education system and it delegates to the Legislature the task of defining the content of the educational guarantee. As will be discussed in Part I.C, the state and legislative roles prove key to the courts' decision to rely on the Equal Protection Clause as the thrust of the state's education jurisprudence and to the courts' declaration of education as a fundamental right.

A long history of California caselaw supports the proposition that the ultimate responsibility for education and the operation of the public schools lies with the state, rather than local or municipal governments. As early as 1893, the California Supreme Court declared, "education and the management and control of the public schools [are] a matter of state care and supervision."<sup>62</sup> This notion has been repeated and reaffirmed throughout California's history.<sup>63</sup> Courts ground the state's educational duty in the Constitution, specifically article IX, sections 1 and 5.<sup>64</sup> In reaffirming the supremacy of the state in education matters, courts have gone as far as finding the state liable for education violations at the district level. In *Butt v. State of California*,<sup>65</sup> the California Supreme Court upheld the state's duty to ensure that students in one school district received a full school term. After recounting the case history defining the state's preeminent role in the educational system, the *Butt* Court held that the "State itself bears the ultimate authority and responsibility to ensure that its district-based system of common schools provides basic equality of educational opportunity."<sup>66</sup>

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<sup>61</sup> See *infra* notes 52 to 73 and accompanying text for a discussion of article IX of the California Constitution, which demonstrates a textual commitment of the education system to the state.

<sup>62</sup> *Kennedy v. Miller*, 97 Cal. 429, 431 (1893).

<sup>63</sup> See, e.g., *Hall v. City of Taft*, 47 Cal.2d 177, 179 (1956); *Esberg v. Badaracco*, 202 Cal. 110, 115–16 (1927); *Whisman v. S.F. Unified Sch. Dist.*, 86 Cal. App. 3d 782, 789 (1978).

<sup>64</sup> See *Piper v. Big Pine Sch. Dist. of Inyo Cnty.*, 193 Cal. 664, 669 (1924) ("The education of the children of the state is an obligation which the state took over to itself by the adoption of the Constitution. To accomplish the purposes therein expressed the people must keep under their exclusive control, through their representatives, the education of those whom it permits to take part in directing the affairs of state.").

<sup>65</sup> 4 Cal.4th 668, 680–81 (1992).

<sup>66</sup> *Id.* at 685. See also *Vergara v. State of California*, No. BC484642, at \*6 (Cal. Super. Ct. Dec. 13, 2013) (rejecting state defendants' argument that summary judgment

Within the statewide education system, the Legislature's power over the public schools has been variously described as "exclusive," "plenary," "absolute," "entire," and "comprehensive, subject only to constitutional constraints."<sup>67</sup> Article IX, sections 1 and 5 identify the Legislature as the branch responsible for education.<sup>68</sup> In addition, the Constitution grants the Legislature authority over key aspects of public school structure and governance, including apportioning the State School Fund,<sup>69</sup> incorporating and organizing school districts,<sup>70</sup> and prescribing the qualifications of local superintendents.<sup>71</sup> In this manner, the California Constitution confers on the state legislature the duty to define the content of the educational guarantee.<sup>72</sup> Courts have found that this constitutional authority includes broad discretion to determine the organization, management, and support of the public school system, as well as the programs and services necessary to accomplish the constitutional goals.<sup>73</sup>

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is warranted because local school districts control teacher retention and citing *Butt* for the proposition that "public education is uniquely a fundamental concern of the State").

<sup>67</sup> See Hall, 47 Cal.2d at 181; Pass Sch. Dist. v. Hollywood City Sch. Dist., 156 Cal. 416, 419 (1909); San Carlos Sch. Dist. v. State Bd. of Educ., 258 Cal. App. 2d 317, 324 (1968); Town of Atherton v. Superior Court, 159 Cal. App. 2d 417, 421 (1958); *see also* Wilson v. State Bd. of Educ., 75 Cal. App. 4th 1125, 1134–35 (1999) ("There can thus be no doubt that our Constitution vests the Legislature with sweeping and comprehensive powers in relation to our public schools, including broad discretion to determine the types of programs and services which further the purposes of education.") (internal quotations omitted).

<sup>68</sup> See CAL. CONST. art. IX, § 5 ("The *Legislature shall* provide for a system of common schools . . .") (emphasis added); *id.* § 1 ("[T]he *Legislature shall* encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.") (emphasis added).

<sup>69</sup> See *id.* § 6.

<sup>70</sup> See *id.* § 14.

<sup>71</sup> See *id.* § 3.1.

<sup>72</sup> The delegation of educational responsibility to the Legislature is not unique to California. See Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education As A Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1402 (2010) ("[T]he language of state educational clauses consistently indicates that the responsibility for providing education rests with the state or, more specifically, with the state legislature.").

<sup>73</sup> See MacMillan v. Clarke, 184 Cal. 491, 496 (1920); Wilson v. State Bd. of Educ., 75 Cal. App. 4th 1125, 1134–35 (1999) ("There can thus be no doubt that our Constitution vests the Legislature with sweeping and comprehensive powers in relation to our public

The structure of California's education system — with the state ultimately responsible for educating all California children and the Legislature specifically managing public school affairs — provided a foundation for the courts to declare education a fundamental right in California and the state Equal Protection Clause as the mechanism to protect this substantive individual right.

### C. LITIGATING EDUCATION RIGHTS UNDER THE CALIFORNIA EQUAL PROTECTION CLAUSE

Although state courts closed off the education clauses as a means for litigating education rights, the California Supreme Court embraced claims for equal educational opportunity under the Equal Protection Clause. Prior to the U.S. Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*,<sup>74</sup> California public school children and their parents challenged the constitutionality of California's public school financing system under the Equal Protection Clauses of the state and federal constitutions in *Serrano I*.<sup>75</sup> In striking down the funding scheme, the California Supreme Court determined that the right to an education in California public schools is a fundamental right which cannot be conditioned on wealth.<sup>76</sup>

The Supreme Court set forth a two-part test to hold education fundamental for California students. At step one, the Court examined the importance of education in the state, identifying its significance to the individual and society.<sup>77</sup> Citing federal and state decisions,<sup>78</sup> the Court concluded that

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schools including broad discretion to determine the types of programs and services which further the purposes of education.") (internal citations omitted); Cal. Teachers Ass'n v. Hayes, 5 Cal. App. 4th 1513, 1528 (1992) (same).

<sup>74</sup> 411 U.S. 1, 33 (1973) (finding that education is not a fundamental right under the federal constitution).

<sup>75</sup> *Serrano I*, 5 Cal.3d 584 (1971) (en banc).

<sup>76</sup> *Id.* at 614. An examination of the case's implications for students' minimal education rights is discussed *infra* in Parts I.3 and II.1.

<sup>77</sup> *Id.* at 605.

<sup>78</sup> The *Serrano I* Court spends several pages discussing decisions by the United States Supreme Court and the California Supreme Court that "while not legally controlling on the exact issue before us — are persuasive in their accurate factual description of the significance of learning." *Id.* at 605. The cited cases include: *Brown v. Board of Education*, 347 U.S. 483 (1954), for the proposition that education is one of the most important functions of the state and must be made available on equal terms (*Serrano*

education is “a major determinant of an individual’s chances for economic and social success in our competitive society” and influences a “child’s development as a citizen and his participation in political and community life.”<sup>79</sup> In step two, the Court looked for a nexus between the right to an education and other rights guaranteed under the federal and state constitutions.<sup>80</sup> Specifically, the Court compared the right to education with defendants’ rights in criminal cases and the right to vote.<sup>81</sup> The Court found that education has a “greater social significance than a free transcript or a court-appointed lawyer” has to a criminal defendant because education affects more people and supports “every other value” in a democracy.<sup>82</sup> Moreover, there is a link between voting and education as they both are integral to full participation in, and the functioning of a democracy.<sup>83</sup> Here, the Court explicitly relied on one of California’s education clauses, article IX, section 1, for the proposition that the drafters of the California Constitution recognized education as “essential to the preservation of the rights and liberties of the people” in the same way that voting preserves other basic civil and political rights.<sup>84</sup>

Two years later, in *Rodriguez* the U.S. Supreme Court upheld Texas’ public school financing system, which was substantially similar to California’s.<sup>85</sup> In reaching its conclusion, the Court held *inter alia* that education

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*I*, 5 Cal.3d at 606), *San Francisco Unified School District v. Johnson*, 3 Cal.3d 937 (1971), and *Jackson v. Pasadena City School District*, 59 Cal.2d 876 (1963) — two racial integration cases the Court cited to demonstrate the damaging outcomes resulting from an unequal education, including “unequal job opportunities, disparate income, and handicapped ability to participate in . . . our society” (*Serrano I*, 5 Cal.3d at 606 (quoting *Johnson*, 3 Cal.3d at 950); and *Manjares v. Newton*, 64 Cal.2d 365 (1966), and *Piper v. Big Pine School District of Inyo County*, 193 Cal. 644 (1924), cases where public schools excluded minority students, which portended to the Court that “surely the right to an education today means more than access to a classroom.” *Serrano I*, 5 Cal.3d at 607.

<sup>79</sup> *Serrano I*, 5 Cal.3d at 605.

<sup>80</sup> *Id.* at 607.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 608.

<sup>84</sup> *Id.* (quoting CAL. CONST. art. IX, § 1).

<sup>85</sup> *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 6–17 (1973). Just as in *Serrano I*, in *Rodriguez* parents of public school students claimed that Texas’ public school financing system denied equal protection because it produced unequal spending between school districts in the state. The districts collected property taxes on the basis

was not a fundamental interest entitled to strict scrutiny under the federal Equal Protection Clause.<sup>86</sup> The Court asked whether the interest was explicitly or implicitly guaranteed or protected by the terms of the federal constitution.<sup>87</sup> Finding that the Constitution did not include an education clause and that the Court could not imply a federal constitutional education right based on its nexus to other rights, the Court concluded that education was not a fundamental right entitled to strict scrutiny.<sup>88</sup>

The *Rodriguez* Court stated several rationales to support its holding. First, the Court found that it lacked the “specialized knowledge and expertise” necessary to solve the difficult questions of educational policy that these cases presented.<sup>89</sup> Second, federalism counseled against “interference with the informed judgments made at the state and local levels.”<sup>90</sup> The Court found that the Texas system and education systems generally are primarily matters of local district control, and therefore, the state has limited responsibility for disparities between school districts.<sup>91</sup> Out of respect for federalism and local control over education, the Legislature and by extension local school districts should be afforded great deference in the way it funds and manages education.<sup>92</sup> Finally, the Court classified unequal education as a social or economic ill, similar to unequal housing or welfare, which warrants only rational basis review.<sup>93</sup> All three of the

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of assessed property values which resulted in sizable disparities in the amount of tax resources available to each school district. Although the state provided contributions to districts to reduce the disparity, substantial inequalities remained. *Id.* at 15–16.

<sup>86</sup> *Id.* at 33–34.

<sup>87</sup> *Id.* at 33.

<sup>88</sup> *Id.* at 35. In rejecting the nexus theory, the Court refused to find that “education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote,” explicitly rejecting the argument the California Supreme Court found persuasive in *Serrano I*. *Id.*

<sup>89</sup> *Id.* at 42.

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

<sup>91</sup> *Id.* at 50.

<sup>92</sup> *Id.* at 42, 49–51.

<sup>93</sup> *Id.* at 32–33. See Black, *supra* note 72, at 1396 (“[T]he [Rodriguez] Court treated education as a low-level interest that placed no obligations on the State. In effect, the Court treated education as being equivalent to a state-sponsored bus voucher that the State might freely offer or withhold.”); Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 850 (1985) (“The Court was not persuaded that educational activities in general are more essential to the meaningful exercise

Court's rationales supported its overarching precept that "the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."<sup>94</sup>

The reasoning and outcome in *Rodriguez* prompted the defendants in *Serrano I* to challenge the California Supreme Court's decision that education was a fundamental right. When *Serrano v. Priest (Serrano II)*<sup>95</sup> returned to the Supreme Court, it reexamined its analysis and holding that California students' have a fundamental right to equal educational opportunity. Finding that *Rodriguez* removed the federal ground for declaring education a fundamental interest, the Court upheld the *Serrano I* decision on the basis that the state grounds were "wholly intact."<sup>96</sup> The *Serrano II* Court made clear that state equal protection doctrine is "possessed of an independent vitality which . . . may demand an analysis different from that which would obtain if only the federal standard were applicable."<sup>97</sup> The Court rejected the test for fundamentality used in *Rodriguez*<sup>98</sup> and reaffirmed the test and reasoning used in *Serrano I*.<sup>99</sup>

In several respects, the *Serrano II* Court rejected the rationales relied on in *Rodriguez*. First, the California Supreme Court rejected being characterized as an amateur in the field of school financing, and instead relied on the trial record, expert opinions, briefing, and amici curiae to equip it with the necessary knowledge.<sup>100</sup> Second, the Court found federalism

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of constitutional rights than are housing and welfare. The Court expressed concern that application of strict scrutiny to all claims involving education could lead to strict scrutiny for other social welfare programs as well.").

<sup>94</sup> *Id.* at 30.

<sup>95</sup> *Serrano II*, 18 Cal.3d 728 (1976) (en banc).

<sup>96</sup> *Id.* at 763.

<sup>97</sup> *Id.* at 764.

<sup>98</sup> *Id.* at 767. In rejecting the *Rodriguez* approach for declaring a right fundamental, the *Serrano II* Court stated that whether the right is implicitly or explicitly guaranteed by the California Constitution is immaterial to the Court's determination of whether the right is fundamental. *Id.*

<sup>99</sup> *Id.* at 767–68. The Court clarified that the test used in *Serrano I* examines whether the right is one of the "individual rights and liberties which lie at the core of our free and representative form of government." *Id.*

<sup>100</sup> *Id.* at 767. This explanation appears specious, as the U.S. Supreme Court was equipped with similar documents, facts, and expert testimony, making both the state

concerns inapposite because the state confronted the constitutionality of its own financing scheme.<sup>101</sup> In addition, in California local school districts do not have ultimate control over the education system; instead, education is within the province of the state.<sup>102</sup> Thus, the *Rodriguez* Court's assumption that education matters should be left in the hands of school district leaders is inapplicable to California where the state has the "constitutional power and responsibility for ultimate control" of the schools.<sup>103</sup> Finally, the *Serrano II* Court affirmed the *Serrano I* Court's application of the two-step test that *Rodriguez* rejected, analyzing the "indispensable role which education plays in the modern industrial state" in determining that education is fundamental.<sup>104</sup> As in *Serrano I*, the *Serrano II* Court in part relied on an education clause in the California Constitution, article IX, section 1, to affirm that education is "essential" to Californians.<sup>105</sup> Although California's education clauses do not provide the legal grounds for the Court's declaration of a fundamental right to education,<sup>106</sup> they do provide support for the Court's decision to reach this holding under the California Equal Protection Clause.<sup>107</sup>

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and federal supreme courts equally expert in the field of school funding. The courts' disparate level of comfort with education policy could stem from the fact that state courts hear education cases more frequently than federal courts. Since state entities enact the majority of education statutes and regulations, state courts have more opportunities to grapple with education policy issues and therefore feel more equipped to handle cases in the field. See Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 93 (1989) ("In the past decade and a half, however, the federal judicial shadow has begun to shorten, and the state courts have begun to be exposed to the light of judicial challenges which represent the forefront of education litigation.").

<sup>101</sup> *Serrano II*, 18 Cal.3d at 767.

<sup>102</sup> See *supra* Parts I.2.B and C.

<sup>103</sup> *Wilson v. State Bd. of Educ.*, 75 Cal. App. 4th 1125, 1135 (1999).

<sup>104</sup> *Serrano I*, 5 Cal.3d 584, 605 (1971) (en banc).

<sup>105</sup> See *Serrano II*, 18 Cal.3d at 767–68, 775 (discussing in part CAL. CONST. art. IX, § 1).

<sup>106</sup> See *supra* Part I.B.

<sup>107</sup> Cf. *Serrano II*, 18 Cal.3d at 678 n.48 ("We do not suggest, of course, that the treatment afforded particular rights and interests by the provisions of our state Constitution is not to be accorded significant consideration in determination of [whether a right is fundamental]. We do suggest that this factor is not to be given conclusive weight."). As discussed in note 98, *Serrano II* refused to adopt the fundamental rights test used in *Rodriguez* which required the Court to examine whether the right was

### *1. The Equal Protection Clause, Not the Education Clauses, Protects Students' Fundamental Right to Education*

California courts have not provided a clear justification for allowing claims to basic educational opportunity under the Equal Protection Clause, as opposed to the education clauses. However, guidance from federal precedent, the pull of equality arguments, and the constitutionally-defined structure of California's education system provide support for California courts' embrace of the Equal Protection Clause as a means to define students' education rights.

If they chose to rely on state education clauses as the main source for education rights, California courts would have to generate constitutional interpretations, doctrine, and principles where none existed before. This places an enormous burden on state judges tasked with defining the meaning of a constitutional clause for the first time. Instead of inventing state constitutional doctrine, state courts can apply established equal protection concepts found in federal constitutional caselaw.<sup>108</sup> In the area of equality litigation specifically, federal law is substantially more developed than state law.<sup>109</sup> State courts are grateful for the guidance and structure provided by federal equal protection doctrine when analyzing education equality claims. Moreover, as a general rule, courts avoid devising new constitutional principles when established principles will dispose of the

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implicitly or explicitly guaranteed by the Constitution. The Court feared that this test could be used to declare every affirmative right mentioned in the California Constitution as fundamental. Therefore, for the *Serrano II* Court, the explicit inclusion of education clauses in the Constitution was persuasive evidence of the right's fundamental status, but it was not sufficient.

<sup>108</sup> See Michael D. Blanchard, *The New Judicial Federalism: Deference Masquerading As Discourse and the Tyranny of the Locality in State Judicial Review of Education Finance*, 60 U. PITTS. L. REV. 231, 288 (1998) ("[S]tate decisions regarding provisions in the state constitution similar to clauses in the Federal Constitution are often interpreted under the same analytic framework utilized by the Supreme Court."); Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1196–97 (1985); Note, *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1344–49 (1982).

<sup>109</sup> See Molly McUsic, *supra* note 24, at 312 ("Most state courts have little state history or previous case authority to rely on when interpreting their equal protection clauses."); Ratner, *supra* note 93, at 829 n.215; Williams, *supra* note 108, at 1218 ("The [state] courts developed relatively little in the way of equality 'doctrine.'").

case.<sup>110</sup> State courts therefore may shy away from new education clause jurisprudence, knowing that they could reach the outcome under established equal protection principles. Finally, state courts face considerable pressure to harmonize their decisions with federal precedents.<sup>111</sup> Some of this pressure may come from the state judges' and citizens' sense that the federal judiciary is more qualified, thorough, or experienced. Historically, civil rights cases guaranteeing equality were filed in federal court under the U.S. Constitution. Thus, judges and litigants turn to federal, and not state, precedent to interpret the meaning of equality. Recognizing state courts' reliance on federal jurisprudence, a state court judge noted, "We simply cannot reason or argue about what state constitutional law should be without resort to principles of federal constitutional law, for the very vocabulary of constitutional law is a federal vocabulary."<sup>112</sup>

A second explanation for the courts' reliance on equal protection doctrine as opposed to the text found in the state's education clauses is the strong pull equality arguments have on our legal and political sensibilities.<sup>113</sup> Because the Equal Protection Clause has long been used in support of basic civil rights,<sup>114</sup> arguments that conform to the style and structure of equal opportunity resonate with the public. The shared societal belief in equality provides further explanation for the California courts' reliance on the Equal Protection Clause in education cases.

A final justification for the courts' selection of equal protection principles is the constitutionally-defined structure of California's education

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<sup>110</sup> See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–49 (1936) (Brandeis, J., concurring).

<sup>111</sup> See Note, *supra* note 108, at 1460 ("Most education claims . . . are decided by some method that relates state constitutional law to the 'higher' law in our system — the federal Constitution."); Brennan, *The Bill of Rights and the States*, *supra* note 2, at 551 ("As tempting as it may be to harmonize results under state and national constitutions, our federalism permits state courts to provide greater protection to individual civil rights and liberties if they wish to do so."); see also Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 356 (1984).

<sup>112</sup> The Honorable Edmund B. Spaeth, Jr., *Toward A New Partnership: The Future Relation Ship of Federal and State Constitutional Law*, 49 U. PITTS. L. REV. 729, 736 (1988).

<sup>113</sup> See Enrich, *supra* note 36, at 143.

<sup>114</sup> See *Plyer v. Doe*, 457 U.S. 202 (1982); *Loving v. Virginia*, 388 U.S. 1 (1967); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

system. The education clauses assign the state legislature and state executive officials plenary authority over the provision and content of education.<sup>115</sup> The separation of powers doctrine, found in article III, section 3, restrains the courts' authority to interfere with the constitutional roles of the executive and Legislature.<sup>116</sup> Given these constitutional constraints, courts hesitate to restrict the state's exclusive ability to determine what constitutes a "system of common schools"<sup>117</sup> or the suitable "promotion of intellectual, scientific, moral, and agricultural improvement."<sup>118</sup> As outlined in the education clauses and the separation of powers clause, courts must respect the discretion committed to the other branches and officials to determine the content and structure of education.<sup>119</sup> This structure forced judges to look elsewhere in the Constitution to protect education rights.

More broadly, courts interpreting the California Constitution have repeated:

Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature. Two important consequences flow from this fact. First, the entire law-making authority of the state, except the people's right of initiative and referendum, is vested in

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<sup>115</sup> See *supra* notes 52 to 73 and accompanying text.

<sup>116</sup> CAL. CONST. art. III, § 3 ("The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.").

<sup>117</sup> *Id.* art. IX, § 5.

<sup>118</sup> *Id.* § 1.

<sup>119</sup> See, e.g., *Wilson v. State Bd. of Educ.*, 75 Cal. App. 4th 1125, 1137 (1999) (holding that the Charter Schools Act was within the Legislature's discretion and deferring to the Legislature's finding that charter schools are part of the public school system under article IX); *Cal. Teachers Ass'n v. Hayes*, 5 Cal. App. 4th 1513, 1533 (1992) (relying on the state's constitutional structure and deferring to the legislative determination that funds granted to early childhood education and child development agencies were within the scope of the constitutional provision requiring moneys be applied "for the support of school districts"). Courts in states with education clauses similar to California's likewise grant legislatures wide discretion to enact education legislation. See *Hubsch, supra* note 11, at 1326 ("The single most difficult issue facing advocates of educational entitlement is state judicial deference to the state legislatures' efforts to establish and maintain a state-wide system of education. . . . [S]ome state supreme courts have cited explicit constitutional language, which they interpret as favoring exclusive legislative responsibility for education, as justification for deferring to such legislatures.").

the Legislature, and that body may exercise any and all legislative powers which are not expressly, or by necessary implication denied to it by the Constitution . . . . Secondly, all intendments favor the exercise of the Legislature's plenary authority: If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used.<sup>120</sup>

This understanding of the state constitution undergirds the courts' hesitation to rely on the education clauses to strike down education legislation. The first consequence identified by the courts mirrors the language and interpretation of the education clauses. That is, the Legislature is vested with the entirety of the education powers. The second consequence supports the courts' willingness to grant the Legislature full discretion to act pursuant to the education clauses, and to bar legal challenges to state action under these clauses. Not only is the Legislature vested with full educational authority, but the court also construes all doubt in favor of the legislative enactment. Moreover, the court will not read into the constitutional language any restrictions that are not plainly evident from the text. Therefore, the court must interpret the education clauses — which are phrased as positive grants of legislative authority and do not include any restrictive or limiting language — in the manner most favorable to the Legislature. Should plaintiffs challenge the Legislature's ability to act or its failure to act pursuant to the education clauses, the court will likely uphold the Legislature's decision, as there are no explicit restrictions on the Legislature's education clause powers.<sup>121</sup> Given the text of the education clauses, the separation of powers

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<sup>120</sup> *Hayes*, 5 Cal. App. 4th at 1531–32 (quoting *Pac. Legal Found. v. Brown*, 29 Cal.3d 168, 180 (1981)) (internal citations omitted). See also William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1656–57 (1989) (“[W]hile the federal Constitution is one of limited powers — the federal government can only do those things explicitly or implicitly specified in the document — state constitutions establish limitations on otherwise unlimited power; the states can do anything except that prohibited by the federal or state constitutions.”).

<sup>121</sup> In *Arcadia Unified School District v. State Department of Education*, 2 Cal.4th 251 (1992), plaintiffs challenged a statute authorizing school districts to charge fees for

doctrine, and the interpretation of the California Constitution, the education clauses were not a feasible means for the courts to identify students' right to basic educational opportunities.

Unlike the education clauses, the Equal Protection Clause does not limit the courts' ability to override the Legislature's educational determinations. First, the Equal Protection Clause is a restriction and limitation on the Legislature's power, not a positive grant of authority. "A person *may not be . . . denied equal protection of the laws . . .*"<sup>122</sup> Moreover, California courts reiterate that the Legislature's power over the public school system is "plenary, subject only to constitutional restraints."<sup>123</sup> Since the constitutional restraints noted by the courts are not found in the education clauses, as discussed above, they must find their source in non-education sections, such as the Equal Protection Clause. The historical role of the equal protection doctrine as an external limit on the exercise of legislative power supports this construction.<sup>124</sup> In two key education cases, the California Supreme Court stated that the Equal Protection Clause limits the Legislature's control

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pupil transportation. *Id.* at 259–60. The California Supreme Court upheld the statute under the free schools clause of the California Constitution in part because "it is our duty to uphold [the legislative enactment] unless its unconstitutionality is clear and unquestionable." *Id.* at 265. Thus, the *Arcadia* Court echoed that the education clauses should be resolved in favor of the legislative action. This case also involved challenges under the Equal Protection Clause which is discussed more fully at notes 179 to 185 and accompanying text.

<sup>122</sup> CAL. CONST. art. I, § 7(a) (emphasis added). The Equal Protection Clause of the California Constitution incorporates several clauses. See *Butt*, 4 Cal.4th at 678 (defining the equal protection guarantee of the California Constitution as including article I, sections 7 (a), (b) and article IV, section 16).

<sup>123</sup> *Wilson*, 75 Cal. App. 4th at 1134 (citing *Hall v. City of Taft*, 47 Cal.2d 177, 180–81 (1956) and *Hayes*, 5 Cal. App. 4th at 1524); *Butt*, 4 Cal.4th at 681.

<sup>124</sup> For a survey of the early history of the Equal Protection and Due Process Clauses as a judicial check on legislative action, see Charles Grove Haines, *Judicial Review of Legislation in the United States and the Doctrine of Vested Rights and of Implied Limitations of Legislatures*, 3 TEX. L. REV. 1, 23 (1924) ("Due process and equal protection, then, combined were being construed with broad enough scope to prevent all arbitrary legislative and administrative acts, and like certain other implied limits on legislatures, the equal protection principle was made an essential part of the concept of due process of law."). See also Sonja Ralston Elder, *Standing Up to Legislative Bullies: Separation of Powers, State Courts, and Educational Rights*, 57 DUKE L.J. 755, 766 (2007) ("It is precisely because each branch of government is charged with different duties that the courts' deference to the legislative and executive branches must have limits: without

over education.<sup>125</sup> In both cases, the Court declares that legislative actions authorized by the education clauses are nonetheless subject to constitutional invalidation under the Equal Protection Clause.<sup>126</sup>

## *2. Declaring Students' Minimum Right to Education under the Equal Protection Clause*

In *Serrano I* and *II*, the California Supreme Court settled on the Equal Protection Clause as the means to litigate students' education rights. In subsequent caselaw, California courts have expanded equal protection principles to permit claims alleging both inequity and inadequacy in the public school system.

When the Court finds that a legislative action impinges on a fundamental right, strict scrutiny prohibits a difference in treatment unless it is necessary to achieve a compelling government interest.<sup>127</sup> In *Serrano I*, the Court found that the state's education finance system impinged on students' fundamental right to education because the quality of a child's education differed depending on the wealth of her parents and neighbors.<sup>128</sup>

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such limits, the courts could not fulfill their function as the ultimate protector of the people's rights.”).

<sup>125</sup> See *Butt*, 4 Cal.4th at 685 (“The State claims it need only ensure the six-month minimum term guaranteed by the free school clause . . . . Whatever the requirements of the free school guaranty, the equal protection clause precludes the State from maintaining its common school system in a manner that denies the students of one district an education basically equivalent to that provided elsewhere throughout the State.”); *Serrano II*, 18 Cal.3d 728, 775 (1976) (en banc) (“[A]rticle IX, section 1 . . . neither mandate[s] nor approve[s] a [finance] system such as that before us, and therefore the only conflict which here appears is that between the requirements of our state equal protection provisions and the proven realities of the present, legislatively created California public school financing system — a conflict which the trial court, by holding that system to be invalid, properly resolved”).

<sup>126</sup> See *Serrano II*, 18 Cal.3d at 772–73 (“By its exercise of [its article IX] power, [the Legislature] has created a system whereby disparities in assessed valuation per ADA among the various school districts result in disparities in the educational opportunity available to the students within such districts. . . . It is that action, which we reiterate is the product of Legislative determinations, that we today hold to be in violation of our state provisions guaranteeing equal protection of the laws.”).

<sup>127</sup> See *id.* at 761; see also *Hardy v. Stumpf*, 21 Cal.3d 1, 7 (1978) (“[W]hen state action . . . abridges some fundamental right, such action becomes subject to strict judicial scrutiny and the state must show a compelling state interest in justification.”).

<sup>128</sup> See *Serrano I*, 5 Cal.3d 584, 614 (1971) (en banc).

In other words, the education offered to students in a low-income district, such as Baldwin Park, was unequal to the education provided to students in, for example Beverly Hills, where property values were high.<sup>129</sup> Applying strict scrutiny to the unequal system, the Court found the funding scheme was not necessary to achieve any compelling state interest.<sup>130</sup>

Twenty years later in *Butt v. State of California*,<sup>131</sup> the Court revisited the constitutional standard set forth in *Serrano I* and *II* and expanded its protection of students in cases implicating a fundamental right to education. In *Butt*, a school district intended to close six weeks early due to fiscal mismanagement and insufficient funding.<sup>132</sup> The California Supreme Court stated the closure would deny the district's students their right to "basic educational equality" and ordered the state to ensure the schools remained open for the remainder of the prescribed school year.<sup>133</sup> In this manner, the Court expanded on the traditional analysis employed in equal protection cases, namely, comparing similar groups of students to determine whether one or more were denied educational opportunities available to others.<sup>134</sup> The Court supplemented this equality inquiry with an adequacy standard. In order to identify whether a class of students was denied an educational opportunity, the Court asked whether the "quality of the [educational] program, viewed as a whole, falls fundamentally below prevailing statewide standards."<sup>135</sup> If an identifiable group receives an educational program which fails to meet this adequacy standard, the Court applies strict scrutiny to the action.<sup>136</sup> In declaring that all students are entitled to "basic educational equality," the *Butt* Court established a minimum level of educational

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<sup>129</sup> *Id.* at 594–95.

<sup>130</sup> *Id.* at 610–11.

<sup>131</sup> 4 Cal.4th 668 (1992).

<sup>132</sup> *Id.* at 673.

<sup>133</sup> *Id.* at 704.

<sup>134</sup> See *Cooley v. Superior Court*, 29 Cal.4th 228, 253 (2002) ("The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.") (internal citations omitted).

<sup>135</sup> *Id.* at 686–87.

<sup>136</sup> See *id.* at 692 ("Because education is a fundamental interest in California, denials of basic educational equality on the basis of district residence are subject to strict scrutiny.").

quality which the state is obligated to provide all California students on equal protection grounds.<sup>137</sup>

Uniquely, the California courts have used the state's Equal Protection Clause to establish a baseline, or minimum standard for educational quality in the state.<sup>138</sup> Traditionally, the Equal Protection Clause was only a vehicle for educational equality arguments, including, for example, claims of disparate resources or funding among schools or districts throughout the state. The California Supreme Court expanded equal protection doctrine declaring that California students deserve a basic level of education and the state is responsible for providing it. The California courts thus transformed the state's fundamental right to education under the Equal Protection Clause, construing it not only as a basis for equality arguments but also as a basis for adequacy arguments.<sup>139</sup> According to the Court, all California students deserve an education which does not fall fundamentally below statewide standards.<sup>140</sup> However, California courts have not set forth any criteria to identify "prevailing statewide standards" or established any guidelines for

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<sup>137</sup> *Id.* at 692 ("[T]he State is obliged to intervene when a local district's fiscal problems would otherwise deny its students basic educational equality, unless the State can demonstrate a compelling reason for failing to do so.").

<sup>138</sup> But see *Serrano v. Priest (Serrano III)*, 20 Cal.3d 25, 36, n.6 (1977) ("The equal protection-of-the-laws provisions of the California Constitution mandate nothing less than that all such persons shall be treated alike. If such uniformity of treatment were to result in all children being provided a low-quality educational program, or even a clearly *inadequate* educational program, the California Constitution would be satisfied.") *Serrano III* ruled on plaintiffs' claim for attorneys' fee; therefore, this footnote is arguably dicta. Nevertheless, *Butt*, 4 Cal.4th 686 (1992), impliedly overrules this footnote in *Serrano III* by incorporating adequacy language into its holding.

<sup>139</sup> See Enrich, *supra* note 36, at 114 (In *Butt*, "[t]he court strained to avoid casting the issue in adequacy terms, relying instead on students' rights to 'basic' educational equality," even where the result was to provide a spendthrift school district with a disproportionate share of state funds. Still, the case serves as a reminder that solutions focused on equalization do not resolve, and may in fact exacerbate, concerns about adequacy."). For a similar conflation of adequacy and equality arguments by the New Jersey Supreme Court, see *Robinson v. Cahill*, 62 N.J. 473 (1973), where the court characterized its constitutional education requirement in terms of equality, and then declared a qualitative standard: "A system of instruction in any district of the State which is not thorough and efficient falls short of the constitutional command." *Id.* at 513.

<sup>140</sup> See *Butt*, 4 Cal.4th at 687.

examining students' "basic educational equity."<sup>141</sup> The goal of the remainder of this article is to explore the courts' varied holdings on "basic educational equality" under the state's Equal Protection Clause and to suggest arguments which may push the court to raise the minimum bar.

## II. THE EQUAL PROTECTION CLAUSE

### A. THE COURTS GIVE: EXPANDING STUDENTS' RIGHTS UNDER CALIFORNIA'S EQUAL PROTECTION CLAUSE

There are three precedential cases which upheld claims to enforce students' right to basic educational equity. The three courts addressed whether an allegedly inadequate educational program or service should be incorporated into California's right to basic educational equity. Although their factual scenarios differ, the courts' analyses can similarly be broken down into a two-part test.<sup>142</sup> First, the court factually compares the students who purportedly lack a given resource with students whose educational program includes said resource.<sup>143</sup> The court asks whether the allocation of the resource to the district or school falls fundamentally below the distribution made to its peers.<sup>144</sup> The courts' analysis under the first part can involve numeric or statistical comparisons: for example, the amount of money districts spend on education. Second, the court examines whether a deficiency in the given resource results in inferior educational quality

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<sup>141</sup> See *Thro*, *supra* note 26, at 544 (arguing that if the court establishes that education is a fundamental right, "then the analysis must proceed to determining the nature of that standard or right").

<sup>142</sup> This test is not explicitly identified by the courts. Instead, it is the author's interpretation of the caselaw viewed through modern cases and looking backward. This test is an attempt to harmonize the reasoning from the precedent in order to provide litigants with a cogent means of understanding the court's past jurisprudence and uniformly applying it to upcoming and potential cases.

<sup>143</sup> See *Butt*, 4 Cal.4th at 686 ("A finding of constitutional disparity depends on the individual facts.").

<sup>144</sup> *Id.* at 685 ("[T]he equal protection clause precludes the State from maintaining its common school system in a manner that denies the student of one district an education basically equivalent to that provided elsewhere throughout the state."). In a straightforward example, the court may ask whether a school's average number of instructional minutes per day falls fundamentally below the number of minutes spent by all other schools in the district.

outcomes. In essence, the court looks for a link between the unequal distribution of the resource and unequal educational attainment.<sup>145</sup> If the court answers both parts of the test affirmatively, then it applies strict scrutiny to the state action and will likely find that the students' fundamental right to education has been infringed and strike down the statute or action.

In the *Serrano* cases, the California Supreme Court found that the state's education finance system deprived students of equal educational opportunities in violation of their fundamental right to education.<sup>146</sup> First, the Court compared the results of the state funding formula in districts with large and small local tax bases, examining the monetary disparities in per-pupil expenditures.<sup>147</sup> The Court found that "districts with small tax bases simply cannot levy taxes at a rate sufficient to produce the revenue that more affluent districts reap with minimal tax efforts."<sup>148</sup> Thus, some students had access to schools with substantial monetary resources, while other students did not. Second, the Court equated the revenue disparity between school districts with an equivalent differential in educational quality.<sup>149</sup> The Court held that the state financial aid distribution formula was unconstitutional because it made the quality of a child's education dependent upon the resources of her school district, where students in

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<sup>145</sup> Building on the example in note 144, the court can ask whether the reduction in instructional minutes results in insufficient preparation for state exams, ineligibility for promotion to the succeeding grade, or an inability to cover key educational material.

<sup>146</sup> See *Serrano II*, 18 Cal.3d 728, 765–66 (1976) (en banc); *Serrano I*, 5 Cal.3d 584, 614 (1971) (en banc).

<sup>147</sup> See *Serrano I*, 5 Cal.3d at 594–95. The Court described that under the funding formula Baldwin Park Unified School District expended \$577.49 to educate each student, while Beverly Hills Unified School District paid out \$1,231.72 per pupil. *Id.*

<sup>148</sup> *Id.* at 598.

<sup>149</sup> See *Serrano II*, 18 Cal.3d at 747 ("Substantial disparities in expenditures per pupil among school districts cause and perpetuate substantial disparities in the quality and extent of availability of educational opportunities."); *Serrano I*, 3 Cal.3d at 600–01 ("[P]oorer districts are financially unable to raise their taxes high enough to match the educational offerings of wealthier districts."); *see also id.* at 601 n.16. *But see Buszin, supra* note 26, at 1630 ("Evidence indicates that equalizing finances between districts in California did not equalize educational outcomes among students across districts in the wake of the Serrano school finance decisions.").

wealthy districts could obtain a higher quality of education compared to their peers in lower-income districts.<sup>150</sup>

In *Butt*, the Court held the state responsible for ensuring that a school district had the necessary funds to complete the final six weeks of the school term.<sup>151</sup> The Court found that the local district's "unplanned truncation" of the school year fell fundamentally below prevailing statewide standards and denied students basic equality of educational opportunities.<sup>152</sup> The Court first compared the length of the contested school year in the Richmond Unified Schools to the duration at most other schools.<sup>153</sup> The Court found that nearly every other school district in California held classes on at least 175 days, while Richmond would lose approximately one-fifth of that time.<sup>154</sup> Based on teachers' declarations, the Court linked this disparity in instructional days to "extreme and unprecedented disparities in educational service and progress," thereby impeding academic promotion, high school graduation, and college entrance.<sup>155</sup> Because plaintiffs would lose an unprecedented amount of instruction time compared to their statewide peers, the Court found that the district's program fell fundamentally below prevailing statewide standards and that the state had the ultimate responsibility to ensure that plaintiffs' school did not violate their constitutional right to receive a basic equality of educational opportunity.<sup>156</sup>

Under a broad but plausible reading of *Butt*, the case stands for the proposition that students' basic right to education necessarily includes the opportunity to receive relatively equal instruction time. Alternatively, *Butt* may provide students with an equal protection claim against the state when a state or local action causes an unplanned and substantial reduction

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<sup>150</sup> See *Serrano II*, 18 Cal.3d at 748 (finding that students in high-wealth districts had access to a "higher quality staff, program expansion and variety, beneficial teacher-pupil ratios and class sizes, modern equipment and materials, and high-quality buildings"); *id.* ("[D]ifferences in dollars do produce differences in pupil achievement.").

<sup>151</sup> See *Butt*, 4 Cal.4th at 692.

<sup>152</sup> *Id.* at 686.

<sup>153</sup> *Id.* at 686–87.

<sup>154</sup> *Id.* at 687 n.14.

<sup>155</sup> *Id.* at 687. The teachers' declarations evidenced that the unplanned closure would prevent teachers from completing necessary instruction and grading required for, for example, success on the SATs, eligibility for advanced-level courses, promotion to the succeeding grade, and awarding of high school diplomas. *Id.* at 687 n.14.

<sup>156</sup> *Id.* at 692.

in educational services. The latter interpretation of *Butt* provides litigants with a forceful basis to challenge state actions which impinge on students' basic right to educational equity.

Most recently, in *O'Connell v. Superior Court*,<sup>157</sup> the California Court of Appeal addressed students' fundamental right to education under the Equal Protection Clause. Plaintiffs moved to enjoin the state from denying diplomas to public high school students who were otherwise eligible to graduate, but had not passed the California High School Exit Exam ("CAHSEE").<sup>158</sup> The court noted that over 40,000 students in the class of 2006, more than nine percent had not passed the CAHSEE. Non-passage was even higher among vulnerable subgroups.<sup>159</sup> The students claimed that the disparity in passage rates was due to the state's failure to provide non-passing students with the educational resources necessary to enable them to do well on the exam.<sup>160</sup> Affirming the trial court's conclusion that plaintiffs established a likelihood of success on their equal educational opportunity claim, the appeals court accepted the lower court's finding that the resources available to students in schools serving English learners and economically needy neighborhoods were unequal to the resources available to students in non-disadvantaged schools.<sup>161</sup> Due to the schools' scarcity of resources, non-passing students did not have an equal opportunity to learn the tested material.<sup>162</sup> In an unusually broad pronouncement of the content of students' basic education right, the appeals court accepted the trial court's implicit conclusion that the "right of equal access to education includes the right to receive equal and adequate instruction regarding all specific high school graduation requirements imposed by the state, including passing both portions of the CAHSEE."<sup>163</sup>

*Serrano I* and *II*, *Butt*, and *O'Connell* are successful challenges to state actions which failed to provide students with basic educational equity. In

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<sup>157</sup> 141 Cal. App. 4th 1452 (2006).

<sup>158</sup> *Id.* at 1457.

<sup>159</sup> *Id.* at 1460 n.5. Among the noted subgroups, Hispanics had a 15 percent non-passage rate, African Americans were at 17 percent, economically disadvantaged students were at 14 percent, and 23 percent of English language learners failed the exam. *Id.*

<sup>160</sup> *Id.* at 1464.

<sup>161</sup> *Id.* at 1465.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

these cases, the courts apply an implicit two-part test to examine whether the state's laws or policies compromise students' fundamental right to equality of the educational experience. Litigants can adapt this test and the positive precedent to novel education claims under the Equal Protection Clause.

### B. THE COURTS TAKE AWAY: ELIMINATING STUDENTS' RIGHTS FROM CALIFORNIA'S EQUAL PROTECTION CLAUSE

After the state court declared education a fundamental right protected by the Equal Protection Clause, litigants petitioned the courts to recognize several concomitant benefits which are integral to enjoying the right granted in *Serrano* and similarly require the application of strict scrutiny. In one case after another, the California courts struck down these attempts, thereby limiting students' education rights to a strict conception of only those resources, programs, and services which are inherently incorporated in the educational character of primary and secondary schooling.

In the *Serrano I* opinion, the Court hints at its unwillingness to expand the Equal Protection Clause to include any benefits beyond education. The state asked the Court to follow the District of Massachusetts which held that Boston did not violate the Equal Protection Clause when it failed to provide federal subsidized lunches at all of its schools.<sup>164</sup> The Court found the Massachusetts decision inapplicable because it did not concern the right to an education.<sup>165</sup> "Availability of an inexpensive school lunch can hardly be considered of such constitutional significance."<sup>166</sup> Thus, free and reduced school lunches, even for low-income and needy students, are not included in California's fundamental right to education.

In 1981 in *Gurinkel v. Los Angeles Community College District*,<sup>167</sup> the court addressed whether the fundamental right identified in *Serrano*

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<sup>164</sup> *Serrano I*, 5 Cal.3d 584, 598 n.13 (1971) (en banc).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> 121 Cal. App. 3d 1 (1981). In *Gurinkel*, plaintiff entered the United States from France and subsequently married a California resident. *Id.* at 4. Plaintiff registered to attend classes at a community college and was required to pay greater student tuition

encompassed college and/or community college education.<sup>168</sup> The court found that the state's equal protection doctrine did not encompass a fundamental right to higher education, relying on the fact that college is not compulsory and extends into adulthood.<sup>169</sup> Without much explanation, the court excised a student's right to higher education from the fundamental right to public school education.<sup>170</sup>

A few years later in *Steffes v. California Interscholastic Federation*,<sup>171</sup> a high school student claimed that an athletics rule that rendered the student ineligible to play varsity sports for one year after his transfer to a new school was unconstitutional.<sup>172</sup> The student argued strict scrutiny should apply because it implicated the fundamental right to a public school education, which includes the right to participate in interscholastic athletics.<sup>173</sup> The court found otherwise, declaring that participation in athletic activities is not encompassed in students' fundamental right to education and upholding the rule under rational basis review.<sup>174</sup> To reach its holding, the court relied on the majority opinion in *Hartzell v. Connell*,<sup>175</sup> which had the opportunity but chose not to "address the question whether extracurricular activities are encompassed within the *Serrano* concept of education

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because she was classified as a nonresident. *Id.* Plaintiff challenged the nonresident tuition statutes arguing they placed an unconstitutional burden on her fundamental right to a community college education. *Id.*

<sup>168</sup> *Id.* at 5.

<sup>169</sup> *Id.* at 6.

<sup>170</sup> The *Gurfinkel* court suggested that it might recognize a fundamental right to higher education if the plaintiff provided evidence to support it or if the Legislature defined it. *Id.* at 6 n.3. The court found plaintiff's evidence insufficient because she did not provide any proof that a college education was necessary to function in society or to compete in the job market. *Id.* The court felt that the "ascertainment of such data could well be the subject of a legislative fact-finding hearing." *Id.* See Schoenfeld, *supra* note 26, at 208–10 (arguing that an application of the *Serrano* criteria to higher education in California's contemporary political economy would likely result in the court's finding that it was a fundamental right or at least a very important one).

<sup>171</sup> 176 Cal. App. 3d 739 (1986).

<sup>172</sup> *Id.* at 743.

<sup>173</sup> *Id.* at 746.

<sup>174</sup> *Id.* at 748.

<sup>175</sup> 35 Cal.3d 899 (1984).

as a fundamental right.”<sup>176</sup> Instead, the *Hartzell* Court struck down the district’s imposition of extracurricular fees under the free schools clause.<sup>177</sup> Since *Hartzell* did not conclude that extracurricular activities are encompassed within the fundamental right, the *Steffes* court refused to declare that participation in athletic activities was entitled to the highest degree of constitutional protection.<sup>178</sup>

Finally, in *Arcadia Unified School District v. State Department of Education*,<sup>179</sup> the California Supreme Court upheld a statute that allowed a school district to charge parents for the transportation of their students to school. Plaintiffs argued that the statute violated California’s Equal Protection Clause because it classified families on the basis of wealth and burdened the students’ exercise of their fundamental right to education.<sup>180</sup> The Court disagreed holding that the transportation fees did not discriminate against the poor because the statute, on its face, did not prevent any child from attending school due to his or her inability to pay.<sup>181</sup>

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<sup>176</sup> *Steffes*, 176 Cal. App. 3d at 746–47 (discussing *Hartzell*, 35 Cal.3d 899). A detailed concurrence by Chief Justice Bird, who also authored the majority opinion, argued that the fees imposed by the district affected students’ fundamental interest in education. *Hartzell*, 35 Cal.3d at 921 (Bird, C.J., concurring). Justice Bird described that the fundamentality of a given activity is not dependent upon “the formalities of credit, grading, or diplomas.” *Id.* at 922. Rather, participation in extracurricular activities confers benefits on the individual and society, including the development of leadership and citizenship, preparedness for future employment, and growth of teamwork and cooperation. *Id.* at 923. Justice Bird also found that the imposition of the fee classified on the basis of wealth. *Id.* at 924–26. The structure and form of Justice Bird’s opinion opens up the possibility that courts may be willing to include subsidiary benefits within a students’ fundamental right to an education.

<sup>177</sup> *Steffes*, 176 Cal. App. 3d at 747 (quoting *Hartzell*, 35 Cal.3d at 911). See *supra* notes 30 to 36 and accompanying text for a fuller discussion of the *Hartzell* court’s analysis under the free schools clause.

<sup>178</sup> See *Steffes*, 176 Cal. App. 3d at 748; see also *Jones v. Cal. Interscholastic Fed’n*, 197 Cal. App. 3d 751 (1988) (upholding under rational basis review an athletic rule that precluded a student repeating a grade from participating in the varsity football program). Cf. *Ryan v. Cal. Interscholastic Fed’n-San Diego Section*, 94 Cal. App. 4th 1048 (2001) (extending the holding in *Steffes* and finding that under the state due process clause a plaintiff who was excluded from interscholastic athletics failed to identify the deprivation of a statutorily conferred benefit or interest).

<sup>179</sup> 2 Cal.4th 251 (1992).

<sup>180</sup> *Id.* at 266.

<sup>181</sup> *Id.*

The statute included a categorical exemption from the charges for indigent parents.<sup>182</sup> If plaintiffs could identify children who were unable to attend school because they could not afford to pay the fees, the Court left open the possibility of an as-applied challenge.<sup>183</sup> The dictum in *Arcadia* begs the question: Would the failure to provide any school transportation violate the Equal Protection Clause of the California Constitution if children are deprived of the ability to attend school?<sup>184</sup> *Arcadia* upholds the right to charge for transportation, but it does not definitively exclude transportation from a students' fundamental right to education, particularly if the provided transportation or lack thereof effectively excludes a student from receiving an education. Nevertheless, *Arcadia*'s holding bars claims for free transportation under a student's right to basic educational equity.<sup>185</sup>

The cases exclude education-related rights from students' fundamental right to equal access to education. Basic educational equality does not include school lunch, higher education, athletic activities, or free transportation. Litigants must therefore use the gaps in existing caselaw to push courts to recognize resources that are essential for students to benefit from basic educational equity. The final section of this article explores some of these gaps using three recent California cases which provide insight into litigation strategies which build on the test outlined in Part II.A.

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<sup>182</sup> *Id.* at 255 n.4.

<sup>183</sup> *Id.* at 266. For an early California case in which the Court required a school district to provide bus service to eight remote students, see *Manjares v. Newton*, 64 Cal.2d 365 (1966). The Court concluded that the board's refusal to provide transportation to these students was an abuse of discretion because it completely deprived the students of their right to attend school. *Id.* at 374. The Court described that no other children in the district were similarly situated, and therefore the board placed an unjustifiable burden on plaintiffs' education. *Id.* The holding and reasoning in *Manjares* analogizes to the as-applied challenge offered by the *Arcadia* court.

<sup>184</sup> See *Arcadia*, 2 Cal.4th at 264 n.11. Based on California precedent, the answer is likely yes. See *Manjares v. Newton*, 64 Cal.2d 365 (1966) (summarized at note 183); *Piper v. Big Pine Sch. Dist. of Inyo Cnty*, 193 Cal. 644 (1924) (exclusion of an Indian girl from local school district violated her right to attend school).

<sup>185</sup> The plaintiffs in *Arcadia* also brought a claim under the free schools clause. See *Arcadia*, 2 Cal.4th at 259–60. The Court rejected the claim that students are entitled to free transportation under *Hartzell* because transportation is not an “activity [that] is educational in character.” *Id.* at 262.

### C. WHERE DO WE GO FROM HERE? ADAPTING THE POSITIVE PRECEDENT TO NEW CLAIMS FOR BASIC EDUCATIONAL EQUITY

In May 2010, two sets of plaintiffs filed actions in California Superior Court alleging that the state's education finance system violated California equal protection doctrine by failing to "provide all California school children equal access to the State's prescribed educational program and an equal educational opportunity to become proficient in the State's academic standards."<sup>186</sup> The court heard the two actions, *Robles-Wong v. State of California* and *Campaign for Quality Education v. State of California* (CQE), together and after a series of amended pleadings, the court ruled on the state's demurrers on July 26, 2011.<sup>187</sup>

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<sup>186</sup> Robles-Wong v. State of California, No. RG10-515768, at \*54 ¶ 7 (Cal. Super. Ct. May 20, 2010). The companion case which alleges similar causes of action albeit on slightly different facts is *Campaign for Quality Education v. State of California*, No. RG10524770, at ¶ 218 (Cal. Super. Ct. August 4, 2010) (alleging that the state's funding system fails to ensure that plaintiffs have "an equal opportunity to obtain an education that prepares them to learn the content standards and for civic, economic, and social success").

<sup>187</sup> The procedural history of the cases is lengthy. A selected chronology of the cases helps sequence the issues discussed herein:

*Robles-Wong* and *CQE* filed actions in summer 2010, pleading several causes of action under the education clauses, article IV, section 8(a) implicating the duty to set apart monies to support the school system, and, at issue here, California's Equal Protection Clause. See *Robles-Wong v. State of California*, No. RG10-515768, at 53–54 ¶¶ 1–9 (Cal. Super. Ct. May 20, 2010); *Campaign for Quality Educ. v. State of California*, No. RG10524770, at ¶¶ 197–209 (Cal. Super. Ct. July 12, 2010). After minor amendments to the complaints, the Superior Court issued two orders on January 14, 2011 dismissing all causes of action, but granting leave to amend the equal protection claims. See *Robles-Wong v. State of California*, No. RG10-515768 (Cal. Super. Ct. Jan. 14, 2011); *Campaign for Quality Educ. v. State of California*, No. RG10524770 (Cal. Super. Ct. Jan. 14, 2011). Both plaintiffs groups filed amended complaints on March 16, 2011, which stated one cause of action under California's Equal Protection Clause. See *Robles-Wong v. State of California*, No. RG10-515768 (Cal. Super. Ct. Mar. 16, 2011); *Campaign for Quality Educ. v. State of California*, No. RG10524770 (Cal. Super. Ct. Mar. 16, 2011). On July 26, 2011, the court again dismissed plaintiffs' equal protection claims with leave to amend. See *Robles-Wong v. State of California*, No. RG10-515768, 2011 WL 3322890 (Cal. Super. Ct. July 26, 2011); *Campaign for Quality Educ. v. State of California*, No. RG10524770 (Cal. Super. Ct. Aug. 2, 2011) (incorporating the *Robles-Wong* order in full). This article deals with the most recent set of pleadings and the subsequent court orders dismissing the equal protection claims [continued next page].

Relying on California's Equal Protection Clause, plaintiffs in *Robles-Wong* and *CQE* contend that California's school funding system renders schools unable to provide all of their students with an "adequate and equal opportunity" to learn the state-mandated academic content standards and to obtain a meaningful education that prepares them for participation in the economic, social and civic life of our society.<sup>188</sup> The conflation of equality and adequacy standards was successful in *Butt*; however, in these cases, the trial court was reticent to rely on *Butt* to declare a broad adequacy standard using equal protection principles. This article suggests that the court's inability to harmonize plaintiffs' argument with the two-part test defined above caused the dismissal of the claims. The court's repeated dismissals of plaintiffs' equal protection claims with leave to amend buttresses the notion that the court needed plaintiffs to restructure their theory of the case in conformity with a familiar analysis and rationale.<sup>189</sup>

First, the trial court could not factually compare students with and without sufficient funding or educational resources to determine whether plaintiffs' schools fell fundamentally below what most other students

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Plaintiffs in both cases declined to amend their complaints and instead filed a joint appeal on January 25, 2012. *See Corrected Appellants' Opening Brief at 26, Campaign for Quality Educ. v. State of California, No. A134423 (Cal. Ct. App. July 27, 2012), consolidated with Robles-Wong v. State of California, No. A134424 (Cal. Ct. App. July 27, 2012).* The appeal seeks review of the lower court's determination solely as to plaintiffs' causes of action under the education clauses. *See id.* at 26–27; *see also supra* notes 56–60 and accompanying text.

<sup>188</sup> *See Campaign for Quality Educ. v. State of California, No. RG10524770, ¶ 126 (Cal. Super. Ct. Mar. 16, 2011); see also Robles-Wong v. State of California, 2011 WL 3322890, at 3* (because the document, as reproduced by Westlaw, is not internally paginated, the article cites the page numbers available on the printable version of the document). *CQE's Second Amended Complaint specifically identifies inadequate resources which render the school system unconstitutional, including insufficient and under-trained staff, inadequate instructional programs, inadequate data systems and teacher quality, lack of access to preschool. See Campaign for Quality Educ. v. State of California, No. RG10524770, ¶¶ 127–44 (Cal. Super. Ct. Mar. 16, 2011).*

<sup>189</sup> *See supra* note 187 discussing the procedural history of the cases; *see also* John Fensterwald, *Robles-Wong Lawyers Reframe Case*, THOUGHTS ON PUB. EDUC. (Mar. 17, 2011), <http://toped.svrfoundation.org/2011/03/17/robles-wong-lawyers-reframe-case> (noting that the trial judge "left open the opportunity for the plaintiffs to take a different, though narrower, tack and make the case that all students must have an equal opportunity to master the standards that the state has deemed to be basic elements of a sound education").

received.<sup>190</sup> The court rebuked plaintiffs for failing to plead facts showing the resources which are “actually provided” in plaintiffs’ school and in other schools across the state.<sup>191</sup> Instead, plaintiffs supplied evidence comparing the funding and resources California public schools currently provide with that provided in the past.<sup>192</sup> Since prevailing statewide standards can change over time, the court found these facts failed to state an equal protection claim. Plaintiffs also attempted to compare the resources California students actually receive, with those needed to master academic standards.<sup>193</sup> Because the latter calculation was theoretical and unquantifiable, the court could not engage in a direct comparison.

In *Butt*, on which the *Robles-Wong* court primarily relies, the court of appeal held that a district’s failure to meet prevailing statewide standards could only be determined by examining the individual facts.<sup>194</sup> Plaintiffs tried to sidestep this factual determination by arguing that the prevailing statewide standard may be established by legislation alone. Plaintiffs argued that by adopting statewide academic standards, requiring that schools teach to these standards, and demanding students’ proficiency in these standards, the Legislature established a measurable prevailing standard to assess basic educational equity.<sup>195</sup> The court rejected this argument, insisting that the prevailing statewide standard be based on a factual showing of the level of education actually provided to most students in the state.<sup>196</sup> Outside of *Butt*, the court’s understanding of the prevailing statewide standards test originates in the education clauses. As discussed in Part I.B, California’s interpretation of the education clauses gives the Legislature broad discretion to determine the content of education in

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<sup>190</sup> See *Robles-Wong*, 2011 WL 3322890, at 4 (“The question, then, is whether plaintiffs have pleaded facts showing that plaintiff districts and students in plaintiff districts are receiving fewer educational resources compared to most other students and/or students in most other districts. They have not, in several respects.”).

<sup>191</sup> See *id.*

<sup>192</sup> See *id.* at 5 (explaining that the pleadings allege that California schools suffered reductions in resources compared to what they previously enjoyed).

<sup>193</sup> See *id.* at 3–4.

<sup>194</sup> *Butt v. State of California*, 4 Cal.4th 668, 686 (1992) (“A finding of constitutional disparity depends on the individual facts.”).

<sup>195</sup> See *Robles-Wong*, 2011 WL 3322890, at 6 n.3.

<sup>196</sup> *Id.* at 4.

the state, including statewide standards. Part of this broad discretion includes the Legislature's ability to change its chosen standards to conform to changing social, economic, or political pressures.<sup>197</sup> However, constitutional standards are not so flexible. If courts linked legislatively-created education standards to the constitutional prevailing statewide standard, then the constitutional standard becomes a moving target, changing with the whims of the Legislature. Not only is this standard judicially unmanageable, but it also creates a surge in education litigation, as plaintiffs can plead new claims with each statutory change.<sup>198</sup> Thus, the court was reasonably reticent to accept plaintiffs' claim linking the state content standards to the prevailing statewide standards. Because the court was unable to apply part one of the test, it could not find that the facts plausibly alleged that students' fundamental right was impinged.

The *Robles-Wong* court also found insufficient facts to allege a violation of the second part of the test. Drawing all inferences in favor of plaintiffs, the court could not identify whether the alleged deficiency in funding and resources resulted in inferior education outcomes.<sup>199</sup> The pleadings provided statistics comparing California students' performance with students in other states. As the court noted, this comparison is useless under the California Equal Protection Clause.<sup>200</sup> The complaints also supplied swaths of statistics showing that millions of California students, specifically minority, poor, and language learners, fail to achieve proficiency on

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<sup>197</sup> See Cal. Teachers Ass'n v. Hayes, 5 Cal. App. 4th 1513, 1528 (1992) ("[U]nder our Constitution the Legislature is given broad discretion in determining the types of programs and services which further the purposes of education."); *Butt*, 4 Cal.4th at 688 ("The Constitution has always vested 'plenary' power over education not in the districts, but in the State, through its Legislature, which may create, dissolve, combine, modify, and regulate local districts at pleasure.").

<sup>198</sup> See, e.g., Lilliam Mongeau, *Common Core Standards Bring Dramatic Changes to Elementary School Math*, EdSOURCE (Jan. 20, 2014), <http://edsource.org/2014/common-core-standards-bring-dramatic-changes-to-elementary-school-math-2/63665#.VHP8DHF9yw> ("The new standards, adopted in California and 44 other states, have ushered in a whole new set of academic standards for math, with significant changes in the early grades . . .").

<sup>199</sup> See *Robles-Wong*, 2011 WL 3322890, at 5.

<sup>200</sup> *Id.*

state standardized tests and fail to graduate from high school.<sup>201</sup> However, the pleadings failed to link poor student performance with resource deficiencies, including low per-pupil spending.<sup>202</sup> Plaintiffs allege that millions of California students lack basic skills and that California schools have subpar and erratic student spending, but they do not allege a connection between underfunded schools and unprepared students.<sup>203</sup> Without a causal or at least corollary link between the resource and an outcome, the court cannot find an equal protection violation.<sup>204</sup>

In sum, the court was unable to identify facts in the complaints which could plausibly satisfy either part of the test proposed by this article. The court summarizes plaintiffs' failure on both parts: "The Amended Complaints, if true, establish neither that plaintiffs' educational opportunity is inferior to the opportunity enjoyed by most other California students, nor that, as a result, students in plaintiffs' districts perform worse on the CST/CAHSEE standards than most other California students."<sup>205</sup>

By comparison, in *Reed v. State of California*,<sup>206</sup> plaintiffs' claims neatly tracked the two-part test, resulting in the trial court's grant of a preliminary injunction that paved the way for a successful settlement.<sup>207</sup> Teacher layoffs in 2009 heavily affected the three middle schools attended

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<sup>201</sup> See Campaign for Quality Educ. v. State of California, No. RG10524770, ¶¶ 80–94 (Cal. Super. Ct. Mar. 16, 2011).

<sup>202</sup> See *id.* ¶¶ 111–13.

<sup>203</sup> Arguably, such a connection does not exist. See Buszin, *supra* note 26, at 1630 & nn.120–21 ("[E]conomists have found that increases in per-pupil expenditures have not led to better academic achievement over the course of three decades.").

<sup>204</sup> Instead of comparing resources to outcomes, at the trial level and on appeal, plaintiffs argue that the allocation of funds to districts lacks rationality or coherence and fails to align with the state's academic content standards. See Corrected Appellants' Opening Brief at 2, Campaign for Quality Educ. v. State of California, No. A134423 (Cal. Ct. App. July 27, 2012), *consolidated with* Robles–Wong v. State of California, No. A134424 (Cal. Ct. App. July 27, 2012). However, an irrational funding system does not necessarily violate equal protection. Rather, the funding system must include a classification that affects two or more similarly situated groups in an unequal manner. See Cooley v. Superior Court, 29 Cal.4th 228, 253 (2009). Because the pleadings fail to show the effect of the funding scheme on any group or groups of students, the claim must fail.

<sup>205</sup> See *Robles–Wong*, 2011 WL 3322890, at 5.

<sup>206</sup> No. BC432420 (Cal. Super. Ct. filed Feb. 24, 2010).

<sup>207</sup> Reed v. State of California, No. BC-432420 (Cal Super. Ct. May 13, 2010).

by the *Reed* plaintiffs.<sup>208</sup> Plaintiffs claimed that the dramatic reduction in the schools' educators violated their right to basic educational equity, as the teaching force in other schools in the district remained relatively unscathed.<sup>209</sup> *Reed* plaintiffs brought a class action suit to enjoin the school district from laying off teachers at the three middle schools.<sup>210</sup>

First, the trial court pointed to numerous statistics demonstrating that plaintiffs lacked a full teaching staff, while other district schools experienced limited or no change in the number of full-time teachers. Of the teaching staffs at plaintiffs' three middle schools, 60, 48, and 46 percent received layoff notices, while the districtwide layoff average was only 17.9 percent.<sup>211</sup> In addition, the court notes that at the start of the school year the three schools had eighteen, twenty-six, and sixteen vacant teaching positions, while other district middle schools had no or few vacancies.<sup>212</sup> Finally, to highlight the disparity still further, the number of educators assigned to teach courses for which they were untrained was rising at plaintiffs' schools, while dropping at other district middle schools.<sup>213</sup> The data clearly demonstrates that plaintiffs' middle schools fell below prevailing district standards in terms of number of layoffs, vacancies, and misassigned teachers. Plaintiffs' schools lacked teachers, while most comparable schools were replete with teachers.

Next, the court went into detail describing the dire education outcomes that resulted from the inadequate teaching force at plaintiffs' schools. Purely in terms of standardized tests, plaintiffs' middle schools ranked in the bottom ten percent of all schools statewide.<sup>214</sup> More to the point, the court qualitatively described the inferior educational opportunities available to students at the affected schools, demonstrating a direct relationship between high teacher turnover and substandard educational opportunities.<sup>215</sup> Quoting from plaintiffs' declarations, the trial court indicates that in classes where substitutes took the place of full-time teachers, "little or

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<sup>208</sup> *Id.* at 1.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 7–8.

<sup>211</sup> *Id.* at 3.

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

<sup>213</sup> *Id.* at 4.

<sup>214</sup> *Id.* at 2.

<sup>215</sup> *Id.* at 4.

no instruction took place,” substitutes “failed to test the students” or “gave tests but never graded them,” and “showed movies during class.”<sup>216</sup> The cumulative effects of continuous substitute teachers resulted in students’ missing large units of instruction in core academic subjects, severe academic disruption, and adverse social and psychological effects.<sup>217</sup> Using plaintiff’s detailed factual record embodied in the complaint and amended declarations, the trial court was easily able to identify a clear link between the lack of a full-time teaching staff and detrimental effects on students’ learning and achievement. The court found “a distinct relationship between high teacher turnover and the quality of educational opportunities afforded” and concluded that the unequal distribution of layoffs deprived students faced with an unstable teaching staff of their fundamental right to education.<sup>218</sup>

Once the court identified sufficient evidence to show “a real and appreciable impact on plaintiff’s fundamental right to equal educational opportunity,” it proceeded to apply strict scrutiny.<sup>219</sup> The lower court found that the district’s asserted interest in laying off teachers in accordance with the seniority system was not compelling.<sup>220</sup> The court found that teachers do not have a vested interest in the application of a layoff system that results in equal protection violations.<sup>221</sup> Thus, the court granted plaintiffs’ motion for a preliminary injunction and enjoined future layoffs at the three middle schools.<sup>222</sup>

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<sup>216</sup> *Id.* at 5.

<sup>217</sup> *Id.* at 5–6.

<sup>218</sup> *Id.* at 4.

<sup>219</sup> *Id.* at 6–7.

<sup>220</sup> *Id.* at 7. Through their union, teachers bargained for the application of the last in, first out policy (“LIFO”), which resulted in strict seniority-based layoff. LIFO was also incorporated into the state Education Code. *See CAL. EDUC. CODE § 44955.*

<sup>221</sup> *Reed v. State of California*, No. BC-432420, at 7 (Cal Super. Ct. May 13, 2010).

<sup>222</sup> *Id.* at 9–10. Subsequent to the issuance of the preliminary injunction, the parties entered into a consent decree to prevent teacher layoffs at forty-five district schools. *See Press Release, Judge Approves Landmark Settlement in Reed v. State of California*, ACLU OF SOUTHERN CALIFORNIA, Jan. 21, 2011, available at <http://www.aclu-sc.org/releases/view/103060>. The trial court approved the consent decree and entered judgment. *See Reed v. United Teachers Los Angeles*, 208 Cal. App. 4th 322, 328 (2012), *review denied* (Oct. 24, 2012). The Los Angeles teachers’ union, United Teachers Los Angeles (“UTLA”), objected to the consent decree at the trial level and appealed the judgment.

At first glance, it is possible to conclude that the failure of *Robles-Wong* and the success of *Reed* have less to do with the framework provided by the two-part test and more to do with the inclusion of adequacy elements in *Robles-Wong*, and their exclusion from *Reed*. However, a closer look at *Reed* reveals that it also included adequacy claims that, as in *Butt*, were upheld by the court. In *Butt*, the issue of adequacy arose when the Court held that a school year with 145 school days fell fundamentally below the standard 175-day school year, which the parties agreed was adequate.<sup>223</sup> The adequacy question was simple: Was a 145-day school year basically equivalent to a 175-day term? The answer was equally simple: No. The *Butt* Court further addressed the adequacy question in reasoning that the minimum standard of education required that schools operate without “extensive educational disruption.”<sup>224</sup>

The adequacy question also arose in *Reed*. The resource compared in *Reed* was teachers, and the question was whether an inexperienced or substitute teacher was equivalent to a full-time, senior teacher.<sup>225</sup> The court’s answer was also: No. To reach that answer, the court had to do more than count missing instructional days. As in *Butt*, the *Reed* court examined the “educational disruption” caused by teacher turnover and an influx of

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*See id.* The court of appeal sided with UTLA, holding that since the consent decree potentially abrogated union members’ seniority rights, out of respect for due process, the union was entitled to a decision on the merits. *Id.* at 329–30. The appeals court remanded the action to the trial court for further proceedings. *Id.* at 338. Thereafter, in April 2014, all parties, including UTLA, reached a second settlement agreement. *Reed v. State of California*, No. BC-432420 (Cal Super. Ct. May 9, 2014), available at <http://achieve.lausd.net/cms/lib08/CA01000043/Centricity/domain/381/reed%20v.%20lausd%20et%20al/Reed%20-%20Final%20Settlement%20and%20Release%20of%20all%20Claims.pdf>. The revised settlement applies to thirty-seven schools and provides them with additional administrators, counselors, instructional coaches, mentor teachers, professional development, and principal retention and recruitment bonuses. *Id.* at 3–8. The settlement permits the district to “maintain staffing stability and continuity of instruction” at the settlement schools in the event of future teacher layoffs, but it does not require the district to comply. *Id.* at 9. Thus, the settlement is less protective of students’ fundamental right to education than the preliminary injunction issued by the trial court.

<sup>223</sup> See *Butt v. State of California*, 4 Cal.4th 668, 688 n.14 (1992).

<sup>224</sup> *Id.* at 687.

<sup>225</sup> *Reed*, No. BC-432420, at 3–6 (Cal Super. Ct. May 13, 2010).

untrained and short-term teachers.<sup>226</sup> The court found that the instruction provided by plaintiffs' teachers was appalling and teacher turnover harmed educational continuity and teacher–student relationships.<sup>227</sup> From this evidence, the court concluded that a student's basic right to educational equity includes the right to be taught by a "stable, consistent teacher corps."<sup>228</sup> Since the merits of the case never reached an appellate court, *Reed* provides no precedential value. Nevertheless, litigants can embrace the structure employed by the court in order to incorporate adequacy principles into California's equal protection education jurisprudence.

In another plaintiffs' victory, the superior court in *Vergara v. State of California*<sup>229</sup> recently struck down five California statutes as unconstitutional under the state Equal Protection Clause. Plaintiffs challenged statutes which guarantee teachers tenure after two years, require a lengthy and expensive process to dismiss teachers, and lay off teachers in order of seniority.<sup>230</sup> Plaintiffs claimed these statutes result in "grossly ineffective teachers obtaining and retaining permanent employment, and that these teachers are disproportionately situated in schools serving predominately low-income and minority students."<sup>231</sup>

After an eight-week bench trial, the court issued a game-changing opinion which relies heavily on the two-part test to explicitly incorporate adequacy standards into the equal protection doctrine.<sup>232</sup> First, the court identified the resource at issue — grossly ineffective teachers — and compared students assigned such teachers and those who are not.<sup>233</sup> The undisputed evidence showed that at minimum one to three percent of California teachers are grossly ineffective, equaling between 2,750 and 8,250

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<sup>226</sup> See *id.*

<sup>227</sup> See *id.*

<sup>228</sup> *Id.* at 5.

<sup>229</sup> No. BC484642 (Cal. Super. Ct. judgment entered Aug. 27, 2014), available at [http://studentsmatter.org/wp-content/uploads/2014/08/SM\\_Final-Judgment\\_08.28.14.pdf](http://studentsmatter.org/wp-content/uploads/2014/08/SM_Final-Judgment_08.28.14.pdf).

<sup>230</sup> *Id.* at 3.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 2 ("[T]his Court is directly faced with issues that compel it to apply [equal protection] principles to the quality of the educational experience.").

<sup>233</sup> *Id.* at 8; see *Vergara v. State of California*, No. BC484642, at 7 (Cal. Super. Ct. Dec. 13, 2013), available at <http://studentsmatter.org/wp-content/uploads/2013/12/MSJ-Tentative.pdf>.

educators.<sup>234</sup> Thus, students taught by a grossly ineffective teacher are a discrete minority allocated a resource which falls fundamentally below the vast majority of their peers who receive an effective (or at least not grossly ineffective) teacher. Unlike in prior cases, where plaintiffs defined the resource neutrally (school days, teacher turnover, funding), the *Vergara* plaintiffs framed the resource as a detriment which necessarily harmed their education. Once the court accepted this premise, it simplified the analysis in part two of the test. Unlike in some earlier cases, the parties agreed that “grossly ineffective teachers substantially undermine the ability of that child to succeed in school.”<sup>235</sup> Thus, the parties conceded the link between the resource and inferior educational outcomes. Finding that the inferior educational outcomes caused by grossly ineffective teachers constituted a denial of students’ fundamental right to education, the court highlighted the lost learning opportunities for students with incompetent teachers and the cost to students’ lifetime earnings.<sup>236</sup>

In sum, the court found that “the employment of grossly ineffective teachers [] results in an equal protection violation in every instance that a student is assigned such a teacher.”<sup>237</sup> The court went on to analyze whether there was a causal link between the challenged statutes and the employment of grossly ineffective teachers.<sup>238</sup> Concluding that such a link existed, the court applied strict scrutiny to each statute and found them unconstitutional under the Equal Protection Clause of the California Constitution.<sup>239</sup>

*Vergara* marks another step toward the inclusion of quality-based standards into California’s equal protection analysis. The *Vergara* court accepted the argument that failed in *Robles-Wong*. Relying on the education clauses, *Vergara* explicitly added an adequacy component to the standard outlined in *Butt*: “[T]he Constitution of California is the ultimate guarantor of a *meaningful, basically equal educational opportunity* being afforded to the students of this state.”<sup>240</sup> The import of this notable shift in

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<sup>234</sup> *Vergara*, No. BC484642, at 8 (Cal. Super. Ct. Aug. 27, 2014).

<sup>235</sup> *Id.* at 7.

<sup>236</sup> *Id.*

<sup>237</sup> *Vergara v. State of California*, No. BC484642, at 7 (Cal. Super. Ct. Dec. 13, 2013).

<sup>238</sup> *Vergara*, No. BC484642, at 3 (Cal. Super. Ct. Aug. 27, 2014).

<sup>239</sup> *Id.* at 9–14.

<sup>240</sup> *Id.* at 7 (emphasis added).

analytical focus remains unclear, as defendants appealed the lower court's decision on August 29, 2014.<sup>241</sup>

A comparison of plaintiffs' litigation strategies in *Reed*, *Robles-Wong*, and *Vergara* demonstrates that courts are willing to uphold new claims under students' fundamental right to education. However, those claims are more likely to be successful if the pleading, form, and underlying factual basis conform to the two-part test implicitly used by the *Serrano*, *Butt*, and *O'Connell* courts. Moreover, if litigants plead in conformity with the two-part test, providing sufficient factual evidence to support both prongs, the court may be willing to uphold adequacy arguments within the framework of the equal protection doctrine.

## CONCLUSION

Although California courts overlook the education clauses in cases involving students' qualitative rights to education, they have not relinquished their role as a check on the state's actions or inactions involving the public schools. The Equal Protection Clause has assumed prominence in California's case history and continues to define and refine students' fundamental right to an education. While the cases appear disconnected and inconsistent, this article suggests that an application of a two-part test, which examines (1) whether plaintiffs substantially lack an education resource as compared to their peers and (2) whether this resource deficiency results in inferior education outcomes, may provide some clarity in identifying whether students' fundamental right has been infringed. The structure and predictability of the two-part test may provide a blueprint for future litigators to use when making claims under students' right to basic educational equity. The most recent cases in this area expose the possibility that equal protection jurisprudence, employing the two-part test in particular, is flexible enough to incorporate qualitative claims and to set a minimum educational standard for California students.



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<sup>241</sup> *Vergara v. State of California*, No. B258589 (Cal. Ct. App. appeal docketed Sept. 4, 2014).



# LEGAL HISTORY IN THE MAKING



## THE (F)LAW OF KARMA:

*In Light of Sedlock v. Baird, Would Meditation Classes in Public Schools Survive a First Amendment Establishment Clause Challenge?*

BRADFORD MASTERS\*

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## INTRODUCTION

This is a boom time for meditation classes in public schools.<sup>1</sup> The last fifteen years have seen a growing number of schools instructing K-12 students in various kinds of meditation techniques.<sup>2</sup> Educators in at least ninety-one schools across thirteen states have implemented meditation programs for students.<sup>3</sup> Programs include Quiet Time,<sup>4</sup> Inner Kids Program,<sup>5</sup> Mindful Schools,<sup>6</sup> and MindUP.<sup>7</sup>

The benefits of meditation are widely acknowledged in the United States.<sup>8</sup> A nascent but equally promising body of literature shows that

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<sup>1</sup> *Infographic: Meditation in Schools Across America: As a Growing Body of Research Points to Positive Outcomes from Meditation in Schools, Programs are Spreading Across the Country*, EDUTOPIA, <http://www.edutopia.org/stw-student-stress-meditation-schools-infographic> (last visited Nov. 11, 2013) [hereinafter *Infographic*] (noting that at least thirteen states currently implement meditation classes in schools).

<sup>2</sup> John Meiklejohn et al., *Integrating Mindfulness Training into K-12 Education: Fostering the Resilience of Teachers and Students*, 3 MINDFULNESS 291, 292 (2012).

<sup>3</sup> *Infographic*, *supra* note 1.

<sup>4</sup> *Schools*, DAVID LYNCH FOUND., <http://www.davidlynchfoundation.org/schools.html> (last visited Nov. 11, 2013); David L. Kirp, *Meditation Transforms Roughest San Francisco Schools*, SFGATE (Jan. 12, 2014, 6:37 PM), <http://www.sfgate.com/opinion/openforum/article/Meditation-transforms-roughest-San-Francisco-5136942.php>.

<sup>5</sup> *Inner Kids*, SUSAN KAISER GREENLAND, <http://www.susankaisergreenland.com/inner-kids.html> (last visited Nov. 11, 2013).

<sup>6</sup> *What is Mindfulness?*, MINDFUL SCHS., <http://www.mindfulschools.org/about-mindfulness/mindfulness/> (last visited Nov. 11, 2013).

<sup>7</sup> *MindUP*, HAWN FOUND., <http://thehawnfoundation.org/mindup/> (last visited Oct. 4, 2013), (explaining that MindUP is currently in 1,000 schools across the United States). Mindfulness meditation classes also appear in the burgeoning area of curriculum development called Social and Emotional Learning (“SEL”), which some call the “missing piece” in education. Maurice J. Elias, *The Connection Between Academic and Social-Emotional Learning*, in THE EDUCATOR’S GUIDE TO EMOTIONAL INTELLIGENCE AND ACADEMIC ACHIEVEMENT 4, 6 (Maurice J. Elias & Harriett Arnold eds., 2006).

<sup>8</sup> *Meditation: An Introduction*, NAT’L CTR. FOR COMPLEMENTARY AND ALT. MED. (June 2010), available at <http://nccam.nih.gov/health/meditation/overview.htm>; Richard J. Davidson et al., *Alterations in Brain and Immune Function Produced by Mindfulness Meditation*, PSYCHOSOMATIC MED., 564, 564, 569 (2003) (linking mindfulness meditation to significant positive changes in brain and immune function); Phillip M. Keune & Dora Perczel Forintos, *Mindfulness Meditation: A Preliminary Study on Meditation Practice During Everyday Life Activities and its Association with Well-Being*, 19 PSYCHOL. TOPICS 373, 374 (2010) (documenting the salutary effect of meditation on human health); *Research: Major Research Studies and Findings*, UNIV. OF MASS. MED.

meditation benefits children by reducing test anxiety, increasing attention span, and boosting academic performance.<sup>9</sup> Other studies show that meditation programs in schools reduce misbehavior and aggression between students.<sup>10</sup> Critics, however, claim that meditation and other allegedly spiritual practices are a modern-day Trojan Horse bringing religion past the schoolhouse gate.<sup>11</sup> Given the broad discretion of a school board to select its public school curriculum,<sup>12</sup> what framework should guide educators considering the legality of starting or continuing a state-sponsored meditation program? The timely question now facing public school districts is whether teaching meditation techniques is a violation of the First Amendment Establishment Clause.<sup>13</sup>

“Meditation” is a family of techniques that focus attention on the present moment.<sup>14</sup> This paper will focus on mindfulness meditation (“MM”)<sup>15</sup>

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SCH., <http://www.umassmed.edu/Content.aspx?id=42426> (last visited Dec. 31, 2013) (discussing the work of Dr. Jon Kabat-Zinn over the past thirty-four years).

<sup>9</sup> Meiklejohn, *supra* note 2, at 298; Kimberly A. Schonert-Reichl & Molly Stewart Lawlor, *The Effects of a Mindfulness-Based Education Program on Pre- and Early Adolescents’ Well-Being and Social and Emotional Competence*, 1 MINDFULNESS 137–39 (2010); THE QUIET TIME BROCHURE, DAVID LYNCH FOUND. 20–21, available at <http://www.davidlynchfoundation.org/pdf/Quiet-Time-Brochure.pdf> [hereinafter *Brochure*] (collecting research findings on the Transcendental Meditation program in schools).

<sup>10</sup> Vanessa Vega, *Promising Research on Meditation in Schools*, EDUTOPIA (Feb. 22, 2012), <http://www.edutopia.org/stw-student-stress-meditation-schools-research> (collecting research on meditation programs in schools).

<sup>11</sup> Charles C. Haynes, *In Public Schools, Religion by Any Other Name is Still Religion*, FIRST AMENDMENT CTR. (Apr. 26, 2009), <http://www.firstamendmentcenter.org/in-public-schools-religion-by-any-other-name-is-still-religion>.

<sup>12</sup> *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

<sup>13</sup> See U.S. CONST. amend. I. This paper does not address meditation in the context of moment-of-silence statutes. By “meditation,” this paper means to address a stand-alone classroom activity apart from the typical moment of silence observed during morning announcements. For a discussion on the latter, see Debbie Kaminer, *Bringing Organized Prayer in Through the Back Door: How Moment-of-Silence Legislation for the Public Schools Violates the Establishment Clause*, 13 STAN. L. & POL’Y REV. 267 (2002).

<sup>14</sup> Keune & Forintos, *supra* note 8, at 374; Betsy L. Wisner et al., *School-based Meditation Practices for Adolescents: A Resource for Strengthening Self-Regulation, Emotional Coping, and Self-Esteem*, 32 CHILD. & SCHS. 150, 152 (2010); Antoine Lutz et al., *Attention Regulation and Monitoring in Meditation*, 12 TRENDS IN COGNITIVE SCI. 163, 163 (2008).

<sup>15</sup> JON KABAT-ZINN, *MINDFULNESS FOR BEGINNERS: RECLAIMING THE PRESENT MOMENT — AND YOUR LIFE* 135–52 (2012) (describing the basics of mindfulness meditation techniques).

and Transcendental Meditation (“TM”).<sup>16</sup> In MM, the meditator directs her attention to an internal or external object, such as the breath, an emotion, or a bodily sensation.<sup>17</sup> MM cultivates a nonjudgmental awareness of the present moment.<sup>18</sup> The goal of MM is to experience clarity, acceptance, and relaxation.<sup>19</sup> In TM, the practitioner does not focus, concentrate, or otherwise try to control the mind.<sup>20</sup> Instead, the meditator allows the mind to naturally settle inward through an effortless and automatic process called “self-transcending.”<sup>21</sup> The goal of TM is to create an experience of restful alertness.<sup>22</sup>

Meditation exists in both religious and secular contexts.<sup>23</sup> Various forms of meditation form the core of Zen, Hinduism, and Buddhism.<sup>24</sup>

<sup>16</sup> *What is TM: The Technique*, TRANSCENDENTAL MEDITATION, <http://www.tm.org/meditation-techniques> (last visited Nov. 11, 2013). See also HERBERT BENSON, THE RELAXATION RESPONSE 10 (1975) (discussing mantra-based meditation not requiring a special Sanskrit mantra). See also *How NSR Works*, NAT. STRESS RELIEF/USA, <http://www.nsrusa.org/how-it-works.php> (last visited Oct. 5, 2013) (discussing mantra-based meditation technique similar to Transcendental Meditation).

<sup>17</sup> See *What is Mindfulness?*, ASS’N FOR MINDFULNESS EDUC., <http://www.mindfuleducation.org/what-is-mindfulness/> (last visited Nov. 11, 2013) (describing mindfulness meditation techniques such as watching the breath, emotions, thoughts, physical sensations, and sound).

<sup>18</sup> Lutz, *supra* note 14, at 163; Meiklejohn *supra* note 2, at 293; Wisner, *supra* note 14, at 151.

<sup>19</sup> Meiklejohn *supra* note 2, at 293; Bhante Gunaratana, *Mindfulness Versus Concentration*, VIPASSANA FELLOWSHIP, [http://www.vipassana.com/meditation/mindfulness\\_in\\_plain\\_english\\_16.php](http://www.vipassana.com/meditation/mindfulness_in_plain_english_16.php) (last visited Dec. 31, 2013) (discussing the subtle difference between concentration and mindfulness).

<sup>20</sup> *How is Transcendental Meditation Different?*, TRANSCENDENTAL MEDITATION, <http://www.tm.org/tm-is-different> (last visited Jan. 30, 2014).

<sup>21</sup> See Jonathan Shear, *State-Enlivening and Practice-Makes-Perfect Approaches to Meditation*, 39 BIOFEEDBACK 51, 53 (2011); *How is Transcendental Meditation Different?*, *supra* note 20.

<sup>22</sup> See Shear, *supra* note 21, at 53.

<sup>23</sup> See Wisner, *supra* note 14, at 152; *Meditation: An Introduction*, *supra* note 8.

<sup>24</sup> Wisner, *supra* note 14, at 151; *Hinduism Basics*, HINDU AM. FOUND., [http://www.hafsite.org/resources/hinduism\\_101?q=resources/hinduism\\_101/hinduismBasics](http://www.hafsite.org/resources/hinduism_101?q=resources/hinduism_101/hinduismBasics) (last visited Nov. 11, 2013). Other religions also have associated meditative practices. ARYEH KAPLAN, MEDITATION AND KABBALAH 5–15 (1982) (discussing Kabbalistic meditations); Mark Link, *St. Ignacius’ Call of the King: A Prayerful Meditation*, in PARTNERS 22–23 (2011), available at [http://bin.jesuits-chgdet.org/wp-content/uploads/2011/03/Partners\\_SP04\\_page22-23\\_IgSpiritlty.pdf](http://bin.jesuits-chgdet.org/wp-content/uploads/2011/03/Partners_SP04_page22-23_IgSpiritlty.pdf) (discussing Christian meditations); Kelly

Secular meditation techniques, on the other hand, seem not to contain any spiritual or religious teachings.<sup>25</sup> An example is the Mindfulness-based Stress Reduction program (MBSR) at the University of Massachusetts.<sup>26</sup> The clinic offers treatment for a wide range of physical and psychiatric diagnoses.<sup>27</sup> But is it truly possible to secularize meditation? Is meditation inherently religious? These questions are at the heart of whether or not teaching meditation in public schools is a violation of the First Amendment Establishment Clause.<sup>28</sup>

Although no court has squarely addressed whether meditation in public schools violates the Establishment Clause, some courts have spoken to the issue tangentially.<sup>29</sup> In 1979, the Third Circuit, in *Malnak v. Yogi*, addressed the constitutionality of TM in combination with a course called Science of Creative Intelligence (SCI).<sup>30</sup> The court held that SCI/TM, as a unit, violated the Establishment Clause.<sup>31</sup> Though *Malnak* is instructive, the holding does not reach the constitutionality of the TM technique apart from its association with SCI.<sup>32</sup> There is no comparable case for MM, though a recent San Diego County Superior Court decision concerning yoga, *Sedlock v. Baird*, may provide some guidance.<sup>33</sup> The court held that yoga, in general, was religious, but that the yoga as-taught did not violate the Establishment Clause.<sup>34</sup> The comparison of MM to yoga is apt for two reasons. First, both have historical roots in Hinduism, Buddhism, and

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Cramer, *Sufi Meditation*, PROJECT MEDITATION, [http://www.project-meditation.org/a\\_mtl/sufi\\_meditation.html](http://www.project-meditation.org/a_mtl/sufi_meditation.html) (last visited Dec. 31, 2013) (discussing Sufi meditations).

<sup>25</sup> Wisner, *supra* note 14, at 152; FAQ, CTR. FOR CONTEMPLATIVE MIND IN SOC'Y, <http://www.contemplativemind.org/about/faq> (last visited Oct. 5, 2013) (disclaiming affiliation with any religion).

<sup>26</sup> *Stress Reduction Program*, UNIV. OF MASS. MED. SCH., <http://www.umassmed.edu/cfm/index.aspx> (last visited Dec. 31, 2013) (discussing MBSR).

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

<sup>28</sup> See U.S. CONST. amend. I.

<sup>29</sup> See, e.g., *Malnak v. Yogi*, 592 F.2d 197, 200 (3d Cir. 1979) (discussing TM in the context of more comprehensive school elective course).

<sup>30</sup> *Id.* at 213.

<sup>31</sup> *Id.* at 197–98.

<sup>32</sup> *Id.*

<sup>33</sup> *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL, 2013 WL 6063439, at \*1 (Cal. Super. Ct. C.D. July 1, 2013).

<sup>34</sup> Statement of Decision at 27, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. Sep. 23, 2013).

Vedic teachings.<sup>35</sup> Second, secular American culture has assimilated both practices to some degree.<sup>36</sup>

This paper will provide an analytical framework for judges, school district administrators, and other educational stakeholders to examine the constitutionality of meditation programs in public schools. Part I will provide a summary of the relevant legal background of the Establishment Clause.<sup>37</sup> Part II will summarize and analyze *Sedlock v. Baird* — not for precedential value, but as an example of how a modern court might deal with a similar question about meditation.<sup>38</sup> Part III draws on the background principles of Part I as well as the rationale in *Sedlock v. Baird* to discuss the probable outcome of a First Amendment challenge to meditation classes in public schools.<sup>39</sup> This paper argues that schools can offer both MM and TM in a way that does not violate the First Amendment Establishment Clause.<sup>40</sup>

## I. BACKGROUND

The Establishment Clause of the First Amendment states, “Congress shall make no law respecting an establishment of religion . . .”<sup>41</sup> The Fourteenth Amendment Due Process clause incorporates the Establishment Clause against the states.<sup>42</sup> State constitutions contain analogous provisions protecting religious freedom.<sup>43</sup>

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<sup>35</sup> *Yoga and Meditation*, SANATAN SOC’Y, [http://www.sanatansociety.org/yoga\\_and\\_meditation.htm#.UIB7\\_Ra6KsY](http://www.sanatansociety.org/yoga_and_meditation.htm#.UIB7_Ra6KsY) (last visited Oct. 5, 2013) (discussing the main yogic traditions and their connection to Vedic and Hindu philosophy and religion).

<sup>36</sup> Declaration of Mark Singleton at 4, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. May 20, 2013).

<sup>37</sup> See discussion *infra* Part I (explaining the relevant Establishment Clause jurisprudence).

<sup>38</sup> See discussion *infra* Part II (discussing *Sedlock v. Baird* in detail).

<sup>39</sup> See discussion *infra* Part III (applying the legal principles in Parts I and II to determine whether MM and TM classes in public schools would survive an Establishment Clause challenge).

<sup>40</sup> See discussion *infra* Parts III A.2, B.2.

<sup>41</sup> U.S. CONST. amend. I.

<sup>42</sup> *Id.*; U.S. CONST. amend. XIV, § 1.

<sup>43</sup> E.g., CAL. CONST. art. I, § 4 (“The Legislature shall make no law respecting an establishment of religion.”); N.J. CONST. art. I, ¶ 4 (“There shall be no establishment of one religious sect in preference to another”).

### A. DEFINING “RELIGION”

The threshold issue in Establishment Clause violations is whether the challenged governmental activity is “religious.”<sup>44</sup> The Constitution does not contain a definition of “religion.”<sup>45</sup> The Supreme Court has assiduously avoided the formulation of a definition of religion.<sup>46</sup> Some have argued that the very act of defining religion would be unconstitutional because it would limit religious protection for new or unusual belief systems.<sup>47</sup>

Courts have thus approached the notorious question of “what is religion?” with trepidation.<sup>48</sup> James Madison called religion “the duty which we owe to our Creator and the manner of discharging it.”<sup>49</sup> This definition of religion in relation to the Creator persisted through the turn of the twentieth century.<sup>50</sup> Courts routinely recognized religion in the form of formal, mainstream monotheistic belief system such as Christianity, Judaism, or Islam.<sup>51</sup> Courts have struggled, however, to define religion beyond the original theistic understanding of a Supreme Being.<sup>52</sup>

In 1961, the Supreme Court signaled that the definition of religion was not limited to those solely founded on beliefs of a Supreme Being.<sup>53</sup> In *dictum*, the Court recognized non-theistic religions such as Buddhism, Taoism, Ethical Culture, and Secular Humanism.<sup>54</sup> In *United States v. Seeger* and *Welsh v. United States*, the Supreme Court upheld a broad interpretation of the definition of religious belief in the context of a provision of the Universal Military Training and Service Act.<sup>55</sup> The Court examined whether

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<sup>44</sup> *Alvarado v. City of San Jose*, 94 F.3d 1223, 1226–27 (9th Cir. 1996).

<sup>45</sup> See generally U.S. CONST. (containing no definition of religion).

<sup>46</sup> *Malnak*, 592 F.2d 197, 200 (3d Cir. 1979).

<sup>47</sup> Joel Incorvaia, *Teaching Transcendental Meditation in Public Schools: Defining Religion for Establishment Purposes*, 16 SAN DIEGO L. REV. 325, 331 (1979).

<sup>48</sup> *Alvarado*, 94 F.3d at 1227.

<sup>49</sup> JAMES MADISON, SELECTED WRITINGS OF JAMES MADISON 22 (Ralph Ketcham ed., 2006).

<sup>50</sup> *Malnak*, 592 F.2d at 201.

<sup>51</sup> See e.g., *Davis v. Beason*, 133 U.S. 333, 342 (1890).

<sup>52</sup> See *Malnak*, 592 F.2d at 201.

<sup>53</sup> *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961).

<sup>54</sup> *Id.* See also *Fellowship of Humanity v. Cnty. of Alameda*, 153 Cal. App. 2d 673, 684 (1st Dist. 1957).

<sup>55</sup> See *United States v. Seeger*, 380 U.S. 163, 187–88 (1965); *Welsh v. United States* 398 U.S. 333, 341–45 (1970).

a conscientious objector could claim religious belief status.<sup>56</sup> The test was whether the personal conviction was sincere and meaningful, and had a place in the person's life that paralleled that of traditionally recognized religions.<sup>57</sup> Some commentators feared this definition of religion would be so broad that certain secular ideals, such as the provision for the general health and welfare of society, would lead to invalidation of government programs.<sup>58</sup>

This expansive view of religion was reined in somewhat in *Wisconsin v. Yoder*, where the Supreme Court held that deep and sincere adherence to a secular way of life, by itself, would qualify merely as a philosophical or personal choice, not a religious one.<sup>59</sup> By way of example, the Court mentioned that Henry David Thoreau's rejection of modern society at Walden Pond was not religious.<sup>60</sup> Thoreau's beliefs were personal and meaningful, but not based on religious views.<sup>61</sup> Courts have continued to grapple with how and when to recognize a deeply held set of personal beliefs as religion for the purposes of the Constitution.<sup>62</sup>

The most influential case addressing whether a set of beliefs is a religion is *Malnak v. Yogi*.<sup>63</sup> Judge Adams, in a widely cited concurrence,

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<sup>56</sup> *Seeger*, 380 U.S. at 164–65; *Welsh*, 398 U.S. at 335.

<sup>57</sup> *Seeger*, 380 U.S. at 165–66; *Welsh*, 398 U.S. at 339–40.

<sup>58</sup> *Incorvaia, supra* note 47, at 331.

<sup>59</sup> *Wisconsin v. Yoder* 406 U.S. 205, 215–16 (1972). The Court held that the Amish were exempt from the general requirement that children attend public schools. *Id.* The Court focused on how the Amish way of life is inseparable from their religious faith, is practiced in an organized group, and provides prescriptions for daily living found in the Bible that permeate virtually their entire daily life. *Id.*

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

<sup>61</sup> *Id.*

<sup>62</sup> *PLANS, Inc. v. Sacramento City Unified Sch. Dist.*, 752 F. Supp. 2d 1136, 1145–46 (E.D. Cal. 2010) (finding that anthroposophy, also known as Waldorf education, is not a religion); *United States v. Meyers*, 95 F.3d 1475, 1485 (10th Cir. 1996) (finding that Church of Marijuana is not a religion); *United States v. DeWitt*, 95 F.3d 1374, 1376 (8th Cir. 1996) (finding that out-of-body travel through use of psychedelic drugs is not a religion); *Wiggins v. Sargent*, 753 F.2d 663, 666 (8th Cir. 1985) (finding that White supremacy group might be a religion); *Africa v. Com. of Pa.* 662 F.2d 1025, 1033–34 (3d Cir. 1981) (finding that raw foods diet is not a religion); *Friedman v. S. Cal. Permanente Med. Grp.*, 102 Cal. App. 4th 39, 70 (2d Dist. 2002) (finding that veganism is not a religion); *Strayhorn v. Ethical Soc. of Austin*, 110 S.W.3d 458 (Tex. App. 2003) (finding that Ethical Culture is a religion).

<sup>63</sup> See *Friedman*, 102 Cal. App. 4th at 60–61 (discussing the wide acceptance of the *Malnak* test); *Malnak*, 592 F.2d 197, 207–08 (3d Cir. 1979).

proposed a modern definition of religion later incorporated by the Second, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits.<sup>64</sup> The “*Malnak* test” provides three useful indicia courts can use to decide when a belief system is religious.<sup>65</sup> This next Section addresses the *Malnak* opinions from the trial court and court of appeals in turn.<sup>66</sup>

### 1. Malnak I

In *Malnak I*, the District Court for the District of New Jersey examined whether a novel set of beliefs was a religion, where the defendants themselves denied the religiousness of their beliefs.<sup>67</sup> The plaintiffs were a group of parents who sued a New Jersey public high school for an alleged violation of the Establishment Clause.<sup>68</sup> The parents objected to an elective course that combined TM with substantive instruction in a body of knowledge called SCI.<sup>69</sup> The companion textbook contained 225 pages describing the field of “creative intelligence.”<sup>70</sup> The textbook defined “creative intelligence” as an omnipresent, omnipotent, unmanifest, eternal, and unseen universal force that spontaneously gives rise to all that is, and forms the basis of all knowledge.<sup>71</sup>

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<sup>64</sup> *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1304 (11th Cir. 2007) (adopting *Malnak* test); *Friedman*, 102 Cal. App. 4th at 6061 (collecting cases adopting the *Malnak* test from Third, Eighth, Ninth, and Tenth Circuits); *Strayhorn*, 110 S.W.3d at 469 (adopting the *Malnak* test for the Fifth circuit). The Tenth Circuit slightly reorganized and tweaked the *Malnak* test. *Meyers*, 95 F.3d 1475, at 1482–83 (factors included ultimate ideas, metaphysical beliefs, moral or ethical system, comprehensiveness of beliefs, and accoutrements of religion); *Altman v. Bedford Cent. Sch. Dist.*, 45 F. Supp. 2d 368, 285 (S.D.N.Y. 1999), 245 F.3d 49 (2d Cir. 2001) (using *Malnak* test in the Second Circuit).

<sup>65</sup> *Malnak*, 592 F.2d at 207–08.

<sup>66</sup> See discussion Part I.A.1–2.

<sup>67</sup> *Malnak v. Yogi*, 440 F. Supp. 1284, 1327 (D.N.J. 1977).

<sup>68</sup> *Id.* at 1287.

<sup>69</sup> *Id.* at 1289–1306 (discussing the SCI textbook in exacting detail).

<sup>70</sup> *Id.* at 1290.

<sup>71</sup> *Id.* at 1290, 1294–96. The SCI textbook explained that creative intelligence is the source of everything in the universe. *Id.* at 1291. The textbook stated that during regular practice of meditation, the meditator becomes suffused with the fifty qualities of creative intelligence, such as happiness, kindness, universality, and insight. *Id.* at 1290. The textbook teaches that the purpose of life is to establish contact with this pure and perfect field in order to attain bliss-consciousness. *Id.* at 1296.

The school district defendants argued that the key criterion should be the group's subjective characterization of their own beliefs.<sup>72</sup> The district court, however, rejected a subjective test because it would not let courts apply a fair and uniform standard.<sup>73</sup> The court stated that merely renaming similar beliefs as philosophy or science did not cause the beliefs to shed their religiosity.<sup>74</sup> The court likened the concept of creative intelligence to Christian, Buddhist, and Hindu conceptions of God.<sup>75</sup> The district court opted not to offer a new legal definition of religion.<sup>76</sup> The court instead analogized to existing Supreme Court cases.<sup>77</sup> Although the SCI teachings "wear novel labels," the court explained, the teachings fall well within the concepts covered in earlier cases.<sup>78</sup>

Besides the textbook, the court examined the instruction ceremony for TM called the "puja."<sup>79</sup> The puja was a mandatory one-on-one teaching ceremony where upon its completion the student received an individualized TM mantra from the TM teacher.<sup>80</sup> Attendance at a puja was a requirement to receive a mantra.<sup>81</sup> The teacher performed a ceremony in front of a picture of Guru Dev, the teacher who charged Maharishi Mahesh Yogi with bringing TM to the West.<sup>82</sup> At the end of a Sanskrit chant,<sup>83</sup>

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<sup>72</sup> *Id.* at 1310–11, 1316–21.

<sup>73</sup> *Id.* at 1318.

<sup>74</sup> *Id.* at 1322.

<sup>75</sup> *Id.* at 1321–22.

<sup>76</sup> *Id.* at 1320.

<sup>77</sup> *Id.* at 1315 (collecting cases). See also Incorvaia, *supra* note 47, at 331 (noting that courts try to avoid defining religion because it necessarily limits the flexibility of future courts to decide whether a novel set of beliefs constitutes a religion).

<sup>78</sup> *Malnak*, 440 F. Supp. at 1325.

<sup>79</sup> *Id.* at 1305–1312.

<sup>80</sup> *Id.* at 1305, 1323 n.25.

<sup>81</sup> *Id.* at 1305. The TM teacher met the student off-premises on a Sunday. *Id.* The student brought a white handkerchief, flowers and fruit. *Id.*

<sup>82</sup> *Id.* The student joined the teacher in a small, closed room in front of an eight-by-twelve color picture of Guru Dev, the deceased teacher who had been the preserver and disseminator of TM prior to Maharishi Mahesh Yogi. *Id.* A small table covered with a white cloth held a brass candleholder, a brass incense holder, and three brass dishes, containing water, rice and sandal paste. *Id.*

<sup>83</sup> *Id.* at 1306–07.

the teacher imparted the TM mantra to the student.<sup>84</sup> Teachers told the students that the ceremony was a secular expression of gratitude and not a religious exercise or prayer.<sup>85</sup>

After an in-depth textual analysis of the puja, the district court concluded that the puja was religious.<sup>86</sup> The court observed that the chant included an invocation to Hindu deities.<sup>87</sup> The defendants' attempts to compare the chant to the Hippocratic oath were unavailing.<sup>88</sup> The court reasoned that the gods invoked in the Hippocratic oath (Apollo, Asclepius, Hygeia, and Panacea) belonged to a dead religion.<sup>89</sup> By comparison, the court noted that present-day believers in Hinduism number in the millions of people.<sup>90</sup> The defendants appealed the district court's ruling to the Third Circuit.<sup>91</sup>

## 2. Malnak II

On appeal, the Court of Appeals for the Third Circuit affirmed.<sup>92</sup> The majority, in a per curiam opinion, deferred to the lower court's finding that the SCI/TM course was religious.<sup>93</sup> Judge Adams, however, was uncomfortable disposing of the case simply by analogizing the novel set of beliefs to past precedent.<sup>94</sup> Adams' concurrence sets forth three indicia — not as a definitive test — but as a useful guide in determining whether a set of beliefs is a religion.<sup>95</sup> The first factor is whether the nature of the ideas concerns fundamental or imponderable issues such as humankind's ultimate place in the world.<sup>96</sup> The second factor is the degree of comprehensiveness

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<sup>84</sup> *Id.* at 1305. The student observed the teacher singing a Sanskrit chant that offered thanks to Hindu deities. *Id.*

<sup>85</sup> *Id.* at 1306, 1310–11.

<sup>86</sup> *Id.* at 1305–12, 1327.

<sup>87</sup> *Id.* at 1311.

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

<sup>89</sup> *Id.* at 1311–12.

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

<sup>91</sup> Malnak, 592 F.2d 197, 200 (3d Cir. 1979).

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

<sup>93</sup> *Id.* at 197–200.

<sup>94</sup> *Id.* at 200.

<sup>95</sup> *Id.* at 207–10.

<sup>96</sup> *Id.* at 208 (citing PAUL TILLICH, DYNAMICS OF FAITH 1–2 (1958)).

of the belief system.<sup>97</sup> For example, an isolated teaching is not part of a comprehensive system.<sup>98</sup> The third factor looks at formal signs or symbols normally associated with organized religions, such as ceremonies, sacred objects, holidays, or an organized clergy.<sup>99</sup> Adams urged courts to be sensitive and flexible, and to use these guidelines to avoid ad hoc justice.<sup>100</sup>

To Adams, SCI/TM met all three factors.<sup>101</sup> SCI/TM met the first factor because the nature of the ideas of SCI discussed the basis of life itself.<sup>102</sup> Second, SCI was sufficiently comprehensive because it claimed to chart a way through the world toward ultimate truth.<sup>103</sup> SCI was more than an isolated teaching, such as the Big Bang theory or a patriotic view.<sup>104</sup> Third, SCI/TM had enough signs of formality to overcome its lack of traditional rites.<sup>105</sup> SCI/TM had trained teachers, an organization that actively sought to expand the teaching, and a formal ceremony in the puja.<sup>106</sup>

Notably, Adams put less emphasis on the puja than did the majority.<sup>107</sup> For Adams, the puja, by itself, was not dispositive of SCI/TM's religiousness.<sup>108</sup> In a footnote, he considered the puja to have less force as an indicator of religiousness than did the majority.<sup>109</sup> As opposed to the majority, Adams found reasons that the puja might not be religious.<sup>110</sup> The puja was performed only once for each student, without understanding by

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<sup>97</sup> *Id.* at 208–09.

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

<sup>99</sup> *Id.* at 207–10. For more discussion on this factor, see Steven Chananie, *Belief in God and Transcendental Meditation: The Problem of Defining Religion in the First Amendment*, 3 PACE L. REV. 147, 159–60 (1983), and Marjorie Gilman Baker, *Constitutional Law — Establishment Clause — Teaching of Science of Creative Intelligence/Transcendental Meditation in Public Schools Violates Establishment Clause*, 10 SETON HALL L. REV. 614, 627 (1980).

<sup>100</sup> *Malnak*, 592 F.2d at 210.

<sup>101</sup> *Id.* at 214.

<sup>102</sup> *Id.* at 213.

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

<sup>104</sup> *Id.* at 209, 213.

<sup>105</sup> *Id.* at 214.

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

<sup>107</sup> *Id.* at 203 n.14.

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

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

<sup>110</sup> *Id.* at 202–04.

the student or teacher, entirely in Sanskrit, off-premises, not during school hours, on a Sunday, and as an elective.<sup>111</sup>

Courts today continue to rely on the three indicia of the *Malnak* test to determine whether a novel belief system is a religion.<sup>112</sup> In a challenge to meditation classes in public schools, a court would likely invoke the *Malnak* test as a preliminary matter to decide the threshold question of whether or not the activity was religious.<sup>113</sup> If the activity is not religious, that is the end of the matter.<sup>114</sup> If the activity is religious, courts next address whether the activity violates the Establishment Clause.<sup>115</sup>

## B. LEMON TEST

The Supreme Court has distilled its Establishment Clause jurisprudence in the three-part *Lemon* test.<sup>116</sup> To be valid, the challenged governmental practice must have a valid secular purpose, must have a principal or primary effect that does not advance or inhibit religion, and must not foster excessive entanglement by the state in its surveillance, administration, or maintenance of the activity.<sup>117</sup> While various courts have criticized and tweaked the *Lemon* test over the years, no court has overruled it.<sup>118</sup>

In *Lemon*, the Court examined a state statute providing state financial support to private Catholic schoolteachers on the condition that they used only secular class materials, taught secular subjects, and refrained

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<sup>111</sup> *Id.* at 203. Student affidavits stated that the students believed that the chant had no religious meaning. *Id.*

<sup>112</sup> See *supra* note 64 and accompanying text (detailing which circuits have adopted the *Malnak* test).

<sup>113</sup> *Malnak*, 592 F.2d at 207–10. See, e.g., *Alvarado v. City of San Jose*, 94 F.3d 1223, 1226–27 (9th Cir. 1996) (using the *Malnak* test to determine if New Age beliefs form a religion).

<sup>114</sup> See *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1378 (9th Cir. 1994) (assuming, without deciding, that Wicca is a religion, and then proceeding to the *Lemon* test); *Alvarado*, 94 F.3d at 1226–27 (same).

<sup>115</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); *Brown*, 27 F.3d at 1378; *Alvarado*, 94 F.3d at 1226–27.

<sup>116</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

<sup>117</sup> *Id.*

<sup>118</sup> See e.g., *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1017 (9th Cir. 2010) (reaffirming that the *Lemon* test is the benchmark for Establishment Clause violations); *Freedom from Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 19 n.16 (1st Cir. 2010) (noting that the Supreme Court has never expressly rejected the *Lemon* test).

from teaching religion.<sup>119</sup> The *Lemon* court decided it would be impossible to police the arrangement properly because it would require continuing surveillance to make sure that the teachers in private religious schools were not infusing their classes with religion.<sup>120</sup> The Court acknowledged that despite the best efforts of the nuns, everything about the teaching environment added to the likelihood that there would be some religious instruction.<sup>121</sup> Besides the proximity to nearby churches, and the school buildings containing crucifixes and religious paintings, religious organizations ultimately controlled employment decisions.<sup>122</sup> The Supreme Court recognized that total separation of church and state is not possible or required.<sup>123</sup> The fact that the very purpose of the sectarian school was to commingle religious teachings with other instruction, however, made impossible the assumption that no religious teaching would make its way through.<sup>124</sup>

The first prong of the *Lemon* test assesses government's actual purpose in promulgating the challenged activity.<sup>125</sup> Usually this prong is easy to meet as long as the stated purpose is not a total sham.<sup>126</sup> The second prong asks whether a reasonable, objective observer would find that the challenged government activity had the primary effect of endorsing religion.<sup>127</sup> In the second prong, the government's intent is irrelevant.<sup>128</sup> The court must ask if the government-sponsored activity actually endorses religion.<sup>129</sup> For schoolchildren, the proper test is whether a reasonable, objective observer in the position of an elementary school student would think

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<sup>119</sup> *Lemon*, 403 U.S. at 606–11.

<sup>120</sup> *Id.* at 619–21.

<sup>121</sup> *Id.* at 618–20.

<sup>122</sup> *Id.* at 615.

<sup>123</sup> *Id.* at 614.

<sup>124</sup> *Id.* at 636–37.

<sup>125</sup> *Id.* at 612.

<sup>126</sup> See *Edwards v. Aguillard*, 482 U.S. 578, 587–88 (1987) (holding that state legislature's pretext of "academic freedom" was a sham, where the Act prohibited the teaching of evolution in public schools).

<sup>127</sup> *Lemon*, 403 U.S. at 612; *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 75 (2d Cir. 2001).

<sup>128</sup> *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1378 (9th Cir. 1994).

<sup>129</sup> *Id.*

that the school is approving of or disapproving of religion.<sup>130</sup> A court will not apply a subjective standard for elementary school children.<sup>131</sup> Although schools cannot inculcate religion, they can teach about it from a historical, literary, or cultural standpoint.<sup>132</sup> A government does not have to be hostile to religion, merely neutral.<sup>133</sup> Lastly, the third prong of the *Lemon* test asks whether there is excessive government entanglement.<sup>134</sup>

### C. *ALVARADO V. CITY OF SAN JOSE*

In *Alvarado v. City of San Jose*, the Ninth Circuit used the *Malnak* and *Lemon* tests to address the issue of whether a novel set of beliefs was religious.<sup>135</sup> The court held that a city-sponsored statue of the “Plumed Serpent” — the ancient Aztec deity, Quetzalcoatl — was not an Establishment Clause violation.<sup>136</sup> The court’s analysis in *Alvarado* is a model of how a future court might address the question of meditation in public schools.<sup>137</sup>

In relevant part, the court considered whether “New Age” is a religion.<sup>138</sup> The plaintiff’s evidence was a limited collection of New Age writings that

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<sup>130</sup> *Id.* at 1379. In *Brown*, 27 F.3d at 1384, the Ninth Circuit held that a school district did not violate the establishment clause for teaching elementary school students from a book series that included stories about witchcraft. In *Brown*, parents challenged thirty-two selections (“Selections”) from a book series that contained references to witchcraft, which the parents claimed refers to the religion of Wicca. *Id.* at 1377. The Selections asked students to discuss witchcraft, create spells, or role-play as witches or sorcerers. *Id.* In response to the complaint, the school district appointed a curriculum review committee, which included a Christian minister. *Id.* The review committee concluded it did not have the evidence or expertise to establish a connection between the Selections and Wicca. *Id.* For the purposes of defining “religion,” the *Brown* court assumed, without deciding, that witchcraft (a.k.a. “Wicca”) was a religion. *Id.* at 1378. *But see Fleischfresser v. Dir. of Sch. Dist.* 200, 15 F.3d 680, 688 (7th Cir. 1994) (finding no pagan “religion” in elementary school book series which included make-believe and fantasy characters such as wizards and giants).

<sup>131</sup> *Brown*, 27 F.3d at 1379 (recognizing that following a subjective standard would make each child a roving curriculum review committee).

<sup>132</sup> *Altman*, 245 F.3d at 76.

<sup>133</sup> *Welsh v. United States*, 398 U.S. 333, 372 (1970).

<sup>134</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971); *Agostini v. Felton*, 521 U.S. 203, 233 (1997).

<sup>135</sup> *Alvarado v. City of San Jose*, 94 F.3d 1223, 1227, 1231 (9th Cir. 1996).

<sup>136</sup> *Id.* at 1232.

<sup>137</sup> *See id.* at 1226–32.

<sup>138</sup> *Id.* at 1229–32.

included general definitions of New Age beliefs.<sup>139</sup> New Age concepts met the first *Malnak* factor, “ultimate concern,” because New Age beliefs pull liberally from various spiritual and religious traditions that seek to answer the imponderable questions of life.<sup>140</sup> New Age failed the second factor, “comprehensiveness,” because New Age is an unorganized patchwork of beliefs without a central doctrine that purports to answer all of one’s questions.<sup>141</sup> To the contrary, it appeared to the court that since “anyone’s in, and ‘anything goes,’” there is no shared belief system among adherents.<sup>142</sup> Similarly, New Age failed the third Adams factor because New Age does not have any comprehensive set of signs or symbols.<sup>143</sup> New Age has no formal or informal organization, no agreed-upon central text or creed, and no common rituals or objects of worship.<sup>144</sup> Thus, in finding that New Age was not a religion, the *Alvarado* court’s inquiry ended without the need to proceed to the *Lemon* test.<sup>145</sup> If the court had found New Age to be a religion, however, the *Alvarado* court would have used the *Lemon* test in the same way that it did for the other challenged activity in the case.<sup>146</sup>

In sum, the *Alvarado* court gives a practical illustration of how a modern court would approach the question of meditation in public schools.<sup>147</sup> The court first asks whether the challenged governmental activity is religious.<sup>148</sup> If the activity is not religious, that is end of the matter.<sup>149</sup> If the activity is religious, the court applies the *Lemon* test.<sup>150</sup> With this framework in mind, Part II examines how a recent San Diego County Superior Court

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<sup>139</sup> *Id.* at 1229–30.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 1230.

<sup>143</sup> *Id.* at 1229–30.

<sup>144</sup> *Id.*

<sup>145</sup> See *id.*

<sup>146</sup> *Id.* at 1232 (using the *Lemon* test to reject the claim that the resemblance of the Plumed Serpent to the Zapatista’s religious symbols had the primary effect of advancing religion).

<sup>147</sup> See *id.*

<sup>148</sup> *Id.* at 1226–27.

<sup>149</sup> *Id.*; *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1378 (9th Cir. 1994).

<sup>150</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); *Alvarado*, 94 F.3d at 1226–27; *Brown*, 27 F.3d at 1378.

case addressed whether teaching yoga in public schools violates the Establishment Clause.<sup>151</sup>

## II. *SEDLOCK V. BAIRD*

Since the time of the *Malnak II* decision, no state or federal court has considered the issue of meditation classes in public schools.<sup>152</sup> Without any cases directly on point, it is instructive to consider substantively analogous cases, such as those involving yoga instruction. Yoga is similar to meditation because both practices cultivate awareness and acceptance of the present moment.<sup>153</sup> Both practices derive from Eastern religion and philosophy.<sup>154</sup> Both practices also enjoy a certain amount of secular integration in our modern American society.<sup>155</sup> *Sedlock v. Baird* is the only case that has squarely addressed the issue of yoga in public schools.<sup>156</sup> In *Sedlock*, the court held that yoga, in general, is religious, but that the school

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<sup>151</sup> Statement of Decision at 27–28, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. July 1, 2013).

<sup>152</sup> *Malnak*, 592 F.2d 197, 197 (3d Cir. 1979).

<sup>153</sup> CYNDI LEE, YOGA BODY, BUDDHA MIND 11–12 (2004) (discussing the union between yoga and meditation).

<sup>154</sup> CANDY GUNTHER BROWN, THE HEALING GODS 47 (2013); Matthew Moriarty et al., *Yoga and the First Amendment: Does Yoga Promote Religion?*, 60 FED. L. 68, 72–73 (2013).

<sup>155</sup> See Jill Lawson, *Romancing the Om: A Look Into Yoga in America*, HUFFINGTON POST (Aug. 30, 2012, 7:30 AM), [http://www.huffingtonpost.com/jill-lawson/yoga-america\\_b\\_1830809.html](http://www.huffingtonpost.com/jill-lawson/yoga-america_b_1830809.html); Robert Piper, *10 Reasons Why Meditation Is America's New Push-Up for the Brain*, HUFFINGTON POST (May 3, 2013, 8:20 AM), [http://www.huffingtonpost.com/robert-piper/mindfulness-meditation-benefits\\_b\\_3158080.html](http://www.huffingtonpost.com/robert-piper/mindfulness-meditation-benefits_b_3158080.html).

<sup>156</sup> *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL, 2013 WL 6063439, at \*1 (Cal. Super. Ct. C.D. July 1, 2013). See also *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 60, 65–66, 74–75, (2d Cir. 2001) (agreeing with district court that yoga exercises instructed by a Sikh minister did not advance religion because no religious concepts or ideas were advanced). In *Altman*, 245 F.3d at 65–66, 74–75, the Second Circuit dismissed the yoga claim on mootness grounds, but did not disturb the district court's finding. Although the district court cited to the *Malnak* and *Lemon* tests in its rule statement, the court did not fully analyze the yoga program under these frameworks. *Id.* at 378, 385. The court simply concluded that the yoga presentation did not advance any religious concepts and that it was just a breathing and relaxation exercise. *Id.* at 385.

district's yoga program did not violate the Establishment Clause.<sup>157</sup> As a mere state trial court decision, *Sedlock* has limited precedential value.<sup>158</sup> On appeal, however, it may develop into a significant case and serve as a bellwether for other yoga and meditation challenges.<sup>159</sup>

## A. FACTS

The parents of two elementary school students sued the Encinitas Unified School District (EUSD), alleging that the teaching of yoga violated the Establishment Clause.<sup>160</sup> The school had recently received a \$533,000 donation from the Pattabhi Jois Foundation, an Encinitas-based nonprofit<sup>161</sup> founded by the late Ashtanga yoga teacher, K.P. Pattabhi Jois.<sup>162</sup> The Jois Foundation's goal was to promote yoga as an alternative to traditional physical education classes.<sup>163</sup> The Sedlocks argued that the Jois Foundation

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<sup>157</sup> Statement of Decision at 14, 28, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. July 1, 2013).

<sup>158</sup> See Sara B. Allman, *Stare Decisis in California State Court: The Decisions that Bind Us*, MARIN LAW., Apr. 2011, at 6, 19, available at [http://www.saraballman.com/pdf/Marin\\_Lawyer\\_April\\_2011\\_-\\_Stare\\_Decisis.pdf](http://www.saraballman.com/pdf/Marin_Lawyer_April_2011_-_Stare_Decisis.pdf) (explaining that where intermediate appellate court opinions conflict, state trial courts can choose which one to follow).

<sup>159</sup> See Notice of Appeal at 1, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. Oct. 30, 2013); Mark Movsesian, *Yoga in Public Schools, American and Indian*, FIRST THOUGHTS (Dec. 9, 2013, 8:18 AM), <http://www.firstthings.com/blogs/firstthoughts/2013/12/09/yoga-in-public-schools-american-and-indian/>; Paul Brandeis Raushenbush, *Yoga as Religion Debate Reaches India as Court Considers Ancient Discipline in Physical Education*, HUFFINGTON POST (Oct. 29, 2013, 10:52 AM EDT), [http://www.huffingtonpost.com/2013/10/29/yoga-religion-\\_n\\_4173701.html](http://www.huffingtonpost.com/2013/10/29/yoga-religion-_n_4173701.html); Jared Whitlock, *Lawyer Appeals Judge's Ruling over Yoga in Schools*, THE RANCHO SANTA FE NEWS, Nov. 6, 2013, at A1 (noting a comment about the pending India Supreme Court decision made by Dean Broyles, the attorney for the *Sedlock* plaintiffs).

<sup>160</sup> Notice of Appeal, *supra* note 157, at 1–2. The court's analysis of the First Amendment of the United States Constitution was sufficient analysis for the comparable California constitutional provision. See *Barnes-Wallace v. City of San Diego* 704 F.3d 1067, 1082 (9th Cir. 2012).

<sup>161</sup> KP Jois USA Foundation Inc., GUIDESTAR, <http://www.guidestar.org/organizations/45-3182571/kp-jois-usa-foundation.aspx> (last visited Oct. 13, 2013).

<sup>162</sup> Statement of Decision, *supra* note 157, at 7.

<sup>163</sup> *Id.* at 4–10 (describing the yoga program as a part of a comprehensive health and welfare program that included instruction in organic gardening, the culinary arts, and character-building).

had an agenda to advance religion.<sup>164</sup> Plaintiffs cited the following allegedly religious elements: a poster of Ashtanga poses, the phrase, “namaste,” the praying hands position, bowing, the Sun Salutation, the Warrior pose, Sanskrit names of poses, and the Lotus position.<sup>165</sup>

The Sedlocks, together with other parents, complained that the yoga program in the school was religious because Ashtanga yoga is closely associated with Hinduism, Buddhism, and Jainism.<sup>166</sup> The plaintiffs’ expert described Ashtanga yoga’s roots in the classic Hindu religious texts: the *Upanishads*, the *Bhagavad Gita*, and Patanjali’s *Yoga Sutra*.<sup>167</sup> To the plaintiffs, even after the district stripped away the Sanskrit names of the yoga postures, the physical postures themselves remained inherently religious.<sup>168</sup>

The district asserted that the yoga program was not religious.<sup>169</sup> The defendants’ expert did not dispute that yoga is an important feature of some religions.<sup>170</sup> He also pointed out that yoga as practiced in the United States is a “distinctly American cultural phenomenon.”<sup>171</sup> Although defendants’ expert agreed that yoga had ancient roots, he asserted that yoga

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<sup>164</sup> *Id.* at 3–4. EUSD and the Jois Foundation were collaborating with the University of Virginia’s Contemplative Sciences Center to provide research on how to integrate yoga into public schools. *Id.* at 4; *Encinitas Ashtanga Yoga Elementary School Curriculum Research*, CONTEMPLATIVE SCI. CTR., UNIV. OF VA., <http://www.uvacontemplation.org/content/encinitas-ashtanga-yoga-elementary-school-curriculum-research> (last visited Oct. 13, 2013).

<sup>165</sup> Verified Petition for Writ of Mandamus; Complaint for Injunctive and Declaratory Relief at 12–13, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. Feb. 20, 2013) 2013 WL 659082. The Sun Salutation is called Surya Namaskar, which plaintiffs claim worships the Hindu solar deity Surya. *Id.* at 12. The Warrior pose (Virabhadrasana) allegedly represents a Hindu god (Shiva) slicing off someone’s head. *Id.* The lotus flower is a religious symbol in Buddhism, Hinduism, and Jainism. *Id.* at 13.

<sup>166</sup> *Id.*

<sup>167</sup> Declaration of Candy Gunther Brown at 6–7, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. Feb. 20, 2013).

<sup>168</sup> See *Complaint*, *supra* note 165, at 15–17. The complaint quotes Jois as saying, “Don’t talk about the philosophy — 99% practice and 1% philosophy that’s what [Jois] meant. You just keep doing it, . . . then slowly it will start opening up inside of you, . . . [t]o automatically . . . draw you into the spiritual path.” *Id.* at 20.

<sup>169</sup> Statement of Decision, *supra* note 157, at 11.

<sup>170</sup> Declaration of Mark Singleton at 2, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. May 13, 2013).

<sup>171</sup> *Id.* at 4.

today is a global phenomenon, culturally distinct from Indian traditions.<sup>172</sup>

The district also argued that the kind of yoga actually taught at the time of trial — in the spring of 2013 — was not Ashtanga yoga, but “EUSD yoga.”<sup>173</sup> The district conceded that an earlier test program during the 2012–13 year had some references to the cultural roots of yoga and some Sanskrit words.<sup>174</sup> The district asserted, however, that the teachers did not refer to the underlying meaning of the words.<sup>175</sup> Furthermore, starting in January 2013, the yoga program eliminated all Sanskrit words, cultural references, chanting, and humming.<sup>176</sup> The district took the position that as of January 2013, the EUSD yoga program was free of any cultural and religious elements.<sup>177</sup>

## B. IS YOGA RELIGIOUS?

As a threshold question, the court asked if yoga is a religious activity.<sup>178</sup> Interestingly, the court did not apply the *Malnak* test — though the court cited to a number of cases that did use it.<sup>179</sup> The court merely concluded that yoga is religious because of its historic roots in Hinduism and Buddhism.<sup>180</sup> If any conclusion can be drawn from the *Sedlock* court’s sparse analysis, it is that having historic roots in an accepted religion is equivalent to being an activity of an already accepted religion.<sup>181</sup> It is not clear from the case law, however, at what point a historical connection becomes so attenuated

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<sup>172</sup> *Id.*

<sup>173</sup> Statement of Decision, *supra* note 157, at 13. The current version of the EUSD yoga at trial was copyrighted. *Id.* at 11.

<sup>174</sup> Statement of Decision, *supra* note 157, at 13.

<sup>175</sup> Trial Brief In Support of Respondents/Defendants at 2, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. May 10, 2013).

<sup>176</sup> *Id.* at 3. The traditional names of the postures were changed to kid-friendly names such as “Mountain,” “Gorilla,” “Surfer,” “Bamboo,” “Cat,” and “Cow.” *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> See Statement of Decision, *supra* note 157, at 13.

<sup>179</sup> See *id.* at 13–14 (citing *Friedman v. S. Cal. Med. Grp.*, 102 Cal. App. 4th 39 (2d Dist. 2002), *Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir. 1996), *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373 (9th Cir. 1993), and *Malnak*, F.2d 197 (3d Cir. 1979)).

<sup>180</sup> Statement of Decision, *supra* note 157, at 14.

<sup>181</sup> *Id.*

that a set of beliefs defies easy categorization according to prior case law and therefore falls within the ambit of the *Malnak* test.<sup>182</sup>

Although the question appears to be academic — since the issue will normally be disposed of using the *Lemon* test — avoiding a more rigorous analysis of the religiousness of an activity could have a chilling effect on a school district's curriculum choices.<sup>183</sup> A risk-averse school administrator might deem a technically “religious” activity too risky despite the fact that it would easily pass the *Lemon* test.<sup>184</sup> While unsatisfying from a doctrinal standpoint, the *Sedlock* court's conclusory analysis at least harmonizes with the rule that courts ignore a party's subjective categorizations of the challenged activity's religiousness.<sup>185</sup> Some courts simply assume, arguendo, that the activity is religious so that the court can dispose of the case on *Lemon* test grounds.<sup>186</sup> It may be that judges generally prefer applying the *Lemon* test as expeditiously as possible without having to get bogged down in the metaphysical morass of defining religion.<sup>187</sup> In this way, judges address the Establishment Clause violation without running the risk that a higher court will reverse the lower court's decision on Free Exercise grounds.<sup>188</sup>

### C. DOES YOGA PASS THE LEMON TEST?

The *Sedlock* defendants easily met the *Lemon* test's first prong because the plaintiffs conceded that the district's purpose was to promote physical education, health, and wellness.<sup>189</sup> The second prong of the *Lemon* test was the crux of the *Sedlock* case.<sup>190</sup> The *Sedlock* court framed the issue as whether a reasonably informed student in the spring of 2013 would objectively

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<sup>182</sup> *Malnak*, 592 F.2d at 207–10.

<sup>183</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

<sup>184</sup> *See id.*

<sup>185</sup> *Malnak v. Yogi*, 440 F. Supp 1284, 1318 (D.N.J. 1977).

<sup>186</sup> *See cases cited supra* note 114.

<sup>187</sup> *Incorvaia, supra* note 47, at 353. *See Lemon*, 403 U.S. at 612–13.

<sup>188</sup> *Incorvaia, supra* note 47, at 353 (discussing how a court's failure to recognize a set of beliefs as religious could qualify as religious discrimination under the Free Exercise Clause).

<sup>189</sup> Statement of Decision at 15, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. July 1, 2013).

<sup>190</sup> *See id.; Lemon*, 403 U.S. at 612.

perceive the yoga class at EUSD to advance or inhibit religion.<sup>191</sup> The plaintiffs argued that the primary effect of the yoga program was to turn the students toward advanced yoga training and eventually toward conversion to Hinduism.<sup>192</sup> The argument hypothesizes that even if yoga is just stretching and strengthening now, it acts like a “threshold drug.”<sup>193</sup> Under the primary effect test, however, courts only examine those effects that are direct and immediate.<sup>194</sup> The court thus rejected the plaintiffs’ argument because the possible effect was too distant in the future.<sup>195</sup>

The plaintiffs also contended that Hinduism, as opposed to mainstream Western religions, focuses more on practices than beliefs.<sup>196</sup> That is, even when stripped of all religious content, the purely physical “EUSD yoga” promotes Hinduism.<sup>197</sup> The court disagreed, finding EUSD yoga to be a program of just breathing, stretching, and listening to character lessons — all in child-friendly terminology.<sup>198</sup> While the court accepted some quotes of the plaintiffs’ expert, the court found that after a while, her testimony lacked objectivity and credibility.<sup>199</sup> The court concluded that the defendants’ expert was the only person taking the view that the hypothetical student in the EUSD yoga class would think that the school was advancing religion.<sup>200</sup> In the court’s opinion, the defendant’s expert was on a personal mission to eliminate yoga from schools.<sup>201</sup> The court also discounted the declarations of the parents who were against the yoga program.<sup>202</sup> The court believed the defendants and found their testimony

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<sup>191</sup> Statement of Decision, *supra* note 189, at 17.

<sup>192</sup> *Id.* at 21.

<sup>193</sup> *Id.* (quoting Judge John S. Meyer).

<sup>194</sup> *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1382 (9th Cir. 1994).

<sup>195</sup> Statement of Decision, *supra* note 189, at 17.

<sup>196</sup> Declaration of Candy Gunther Brown at 19, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. Feb. 20, 2013).

<sup>197</sup> Verified Petition for Writ of Mandamus; Complaint for Injunctive and Declaratory Relief at 19-20, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. Feb. 20, 2013) 2013 WL 659082; Statement of Decision, *supra* note 189, at 20.

<sup>198</sup> Statement of Decision, *supra* note 189, at 23.

<sup>199</sup> *Id.* at 20.

<sup>200</sup> *Id.* at 23. The court had before it the written curriculum, which also showed no religious component. *Id.* at 22.

<sup>201</sup> *Id.* at 16.

<sup>202</sup> *Id.* at 18–19.

to corroborate the written curriculum.<sup>203</sup> Thus, the defendants met the second *Lemon* test prong.<sup>204</sup>

Lastly, the court concluded that the defendants met the third *Lemon* test prong.<sup>205</sup> The court distinguished EUSD yoga from the Catholic school scenario in *Lemon*.<sup>206</sup> First, EUSD was a public school system as opposed to a private religious school.<sup>207</sup> Second, there were no nearby houses of worship or religious artifacts creating confusion at EUSD.<sup>208</sup> Third, control over the curriculum remained with the district — a public institution — rather than with a religious private school.<sup>209</sup> EUSD hired the instructors and retained control over them through a third-party personnel management firm.<sup>210</sup> The court noted that if any problem arose, the district had the power to deal with it directly, unlike in *Lemon*, where the state would have had to deal with problems through the parochial school and the Catholic Church that supported it.<sup>211</sup> The court also cited *Brown* to support the proposition that a one-time curriculum review by the school administration does not impermissibly entangle the school.<sup>212</sup> Even if there had been some limited entanglement at the outset of *Sedlock*, there had ceased to be entanglement at the time of trial.<sup>213</sup>

Regarding the third prong, the *Sedlock* court struggled with the influence of the Jois Foundation.<sup>214</sup> Evidence indicated that the Jois Foundation had a mission to introduce at least the physical aspects of yoga into schools.<sup>215</sup> Furthermore, there was some evidence that at least one teacher

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<sup>203</sup> *Id.* at 23.

<sup>204</sup> *Id.* at 26.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 26–27.

<sup>207</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971); Statement of Decision at 26, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. July 1, 2013).

<sup>208</sup> See *Lemon*, 403 U.S. at 615; Statement of Decision, *supra* note 207, at 26.

<sup>209</sup> See *Lemon*, 403 U.S. at 615; Statement of Decision, *supra* note 207, at 27.

<sup>210</sup> See *Lemon*, 403 U.S. at 618; Statement of Decision, *supra* note 207, at 5–6.

<sup>211</sup> See *Lemon*, 403 U.S. at 619–21; Statement of Decision, *supra* note 207, at 27.

<sup>212</sup> *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1383–84 (9th Cir. 1994); Statement of Decision, *supra* note 207, at 26.

<sup>213</sup> Statement of Decision, *supra* note 207, at 26.

<sup>214</sup> *Id.* at 27.

<sup>215</sup> *Id.*

worked for the Jois Foundation.<sup>216</sup> The court concluded, however, that there was no excessive entanglement.<sup>217</sup> First, notwithstanding the Grant's one-time mention of "Ashtanga Yoga," the district was teaching "EUSD Yoga" by the time of the lawsuit.<sup>218</sup> Second, the court found that the district witnesses were credible in disclaiming any connection with the Jois Foundation.<sup>219</sup> Third, the Jois Foundation was not part of the curriculum writing process.<sup>220</sup> Thus, the involvement by the Jois Foundation was minimal and did not excessively entangle the school.<sup>221</sup>

In sum, despite the threshold determination that yoga was religious, EUSD yoga passed the *Lemon* test.<sup>222</sup> First, the valid secular purpose was to promote health and wellness.<sup>223</sup> Second, a reasonable, hypothetical child observer would not have thought that the primary effect was to advance religion.<sup>224</sup> Third, there was no excessive entanglement between the EUSD and a religious organization.<sup>225</sup>

As of the time of this writing, the *Sedlock* plaintiffs have filed their appeal.<sup>226</sup> Meanwhile, observers will be watching the Supreme Court of India for its upcoming decision on a case that appears to be *Sedlock v. Baird* writ large.<sup>227</sup> At issue in the Indian case is the constitutionality of a petition ordering compulsory yoga classes nationwide.<sup>228</sup> The arguments for and against follow the same contours of the *Sedlock* case.<sup>229</sup> Those in favor

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 28.

<sup>219</sup> *Id.* at 27–28.

<sup>220</sup> *Id.* at 8.

<sup>221</sup> *Id.* at 28.

<sup>222</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); Statement of Decision, *supra* note 207, at 28.

<sup>223</sup> *Lemon*, 403 U.S. at 612; Statement of Decision at 15, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. July 1, 2013).

<sup>224</sup> *Lemon*, 403 U.S. at 612; Statement of Decision, *supra* note 223, at 26.

<sup>225</sup> *Lemon*, 403 U.S. at 612–13; Statement of Decision, *supra* note 223, at 27–28.

<sup>226</sup> Notice of Appeal at 1, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. Oct. 30, 2013).

<sup>227</sup> Utkarsh Anand, *Supreme Court to Examine if Yoga Can Be Compulsory in Schools*, INDIAN EXPRESS (Oct. 19, 2013), <http://www.indianexpress.com/news/supreme-court-to-examine-if-yoga-can-be-compulsory-in-schools/1184494/0>.

<sup>228</sup> *Id.*

<sup>229</sup> See *id.*

cite the health benefits, while those against cite the religious roots of yoga.<sup>230</sup> News of the India Supreme Court case came several months after the *Sedlock* trial, so it will be interesting to see on appeal to what use, if any, either party puts the eventual India Supreme Court decision.<sup>231</sup>

### III. MEDITATION CLASSES IN PUBLIC SCHOOLS

Like yoga, meditation is making inroads into the public school curriculum.<sup>232</sup> On one hand, some people understand meditation to be merely a secular technique that calms the mind and releases stress.<sup>233</sup> On the other hand, critics say meditation is overtly religious.<sup>234</sup> For example, parents in California, Connecticut, and North Carolina have challenged the presence of TM in the classroom.<sup>235</sup> In April 2013, an Ohio parent-

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<sup>230</sup> *Id.*

<sup>231</sup> See Whitlock, *supra* note 159, at A1 (noting a comment about the pending India Supreme Court decision made by Dean Broyles, the attorney for the *Sedlock* plaintiffs).

<sup>232</sup> See Meiklejohn, *supra* note 2, at 302; Kelly Brewington, *Yoga, Meditation Program Helps City Youths Cope with Stress*, BALTIMORE SUN (Feb. 23, 2011), [http://articles.baltimoresun.com/2011-02-23/health/bs-hs-yoga-city-youth-20110223\\_1\\_yoga-chronic-stress-researchers](http://articles.baltimoresun.com/2011-02-23/health/bs-hs-yoga-city-youth-20110223_1_yoga-chronic-stress-researchers); Nick Street, *Take a Breath*, L.A. TIMES (July 25, 2007), <http://articles.latimes.com/2007/jul/25/opinion/oe-street25> (discussing TM in public and charter schools).

<sup>233</sup> *What Is Mindfulness?*, GREATER GOOD, <http://greatergood.berkeley.edu/topic/mindfulness/definition> (last visited Jan. 2, 2014).

<sup>234</sup> See Carolyn Gregoire, *Warstler Elementary School In Ohio Shuts Down Mindfulness Program Due to Parent Complaints*, HUFFINGTON POST (Apr. 17, 2013, 7:38 PM EDT), [http://www.huffingtonpost.com/2013/04/17/warstler-elementary-school-ohio-mindfulness-program\\_n\\_3101741.html](http://www.huffingtonpost.com/2013/04/17/warstler-elementary-school-ohio-mindfulness-program_n_3101741.html).

<sup>235</sup> Street, *supra* note 232; Gina Catena, *Letter to San Rafael School Board . . . or . . . How TM Lures the Young and Vulnerable*, TM-Free Blog (Jan. 13, 2007, 12:27 AM) <http://tmfree.blogspot.com/2007/01/letter-to-san-rafael-school-boardor-how.html> (protesting TM in Marin County schools); Marcus Wohlsen, *Affluent California High School Becomes the Site of a Flap over Transcendental Meditation*, ASSOCIATED PRESS ARCHIVE, Oct. 19, 2006, (discussing Quiet Time controversy in San Rafael, California). Compare Robert Varley, *Meditation Program Challenged in Branford; Mom Says Plan to Teach TM Puts Religion into Classroom*, NEW HAVEN REG., June 16, 2006, at A1 (discussing perception that TM brings religion into the classroom), and Christina Breen Bolling, *Board Tells Future School: Remove Religion from Lessons or Lose Charter — Transcendental Meditation, Natural Law Fuel Controversy*, THE CHARLOTTE OBSERVER, Apr. 9, 2004, at 1B (threatening to revoke charter school's charter if TM is

teacher organization forced a shutdown of their elementary school's MM program on the basis that MM is Buddhist.<sup>236</sup> Most recently, in August 2013, parents challenged an MM program in the Albuquerque Public Schools.<sup>237</sup> As further evidence that there are many people concerned about meditation in public schools, the Alabama Administrative Code actually contains an outright prohibition on teaching meditation techniques.<sup>238</sup>

Although there will always be close cases, in general, most MM and TM programs should pass constitutional muster.<sup>239</sup> Despite pockets of current controversy and a seeming future headwind, this paper concludes that schools can teach MM and TM in a way that does not violate the Establishment Clause.<sup>240</sup> *Sedlock* provides a modern look at how far a school program could push the boundary before crossing the line into an Establishment Clause violation.<sup>241</sup> Still, innovative meditation programs are at risk due to the combination of aggressive posturing by plaintiffs and a school district's desire to minimize the risk of litigation.<sup>242</sup> The analysis of MM and TM below provides a framework for school districts to consider in setting their curriculum.

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not removed from curriculum), with *Letter to the Editor: Meditation an Opportunity to Have Happy Life*, NEW HAVEN REG., Aug. 4, 2006, A6 ("I understand the misconceptions and fears of some folks who confuse meditation with prayer. Transcendental [M]editation is not prayer. It is not a religion. It is practiced by individuals of all faiths, as well as those who reject religious ideas and beliefs.").

<sup>236</sup> Gregoire, *supra* note 234.

<sup>237</sup> Laura Thoren, *Mother Upset Over School-wide Meditation Program: McKinley Middle School Has Plans to Offer Program, Created by Goldie Hawn*, KOAT 7 ALBUQUERQUE (Aug. 16, 2013, 8:20 AM MDT), <http://www.koat.com/news/new-mexico/albuquerque/mother-upset-over-schoolwide-meditation-program/-/9153728/21491014/-/6om0xbz/-/index.html#ixzz2iIipVFMb>.

<sup>238</sup> ALA. ADMIN. CODE r. 290-040-040-.02 (2013) (explicitly banning the teaching of hypnosis, guided imagery, meditation, TM and yoga).

<sup>239</sup> See discussion *infra* Parts III.A-B.

<sup>240</sup> See *id.*; *supra* notes 232–238 and accompanying text.

<sup>241</sup> Statement of Decision at 27–28, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. July 1, 2013).

<sup>242</sup> See discussion *infra* Parts III.A-B; *supra* notes 232–238 and accompanying text.

## A. WILL MINDFULNESS MEDITATION CLASSES VIOLATE THE ESTABLISHMENT CLAUSE?

### 1. Is MM Religious?

Jon Kabat-Zinn calls MM the “heart” of Buddhist meditation.<sup>243</sup> Mindfulness is the seventh step on the eight-fold path of Buddhism.<sup>244</sup> Buddhists use MM as a tool to achieve liberation from suffering and to become enlightened.<sup>245</sup> Because courts accept Buddhism as a religion,<sup>246</sup> critics could equate the practice of MM to a religious practice such as the recitation of the Lord’s Prayer.<sup>247</sup> Thus, if MM were a Buddhist practice, teaching MM in school would violate the Establishment Clause.<sup>248</sup>

The most vocal resistance to meditation in public schools comes from conservative Christian parents, conservative advocacy groups, and apolitical First Amendment watchdog groups.<sup>249</sup> Evangelical Christians are particularly sensitive about meditation because they believe that techniques developing spiritual power invite demonic possession.<sup>250</sup> Christians do not seek union with God but rather a proper relationship between God, as

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<sup>243</sup> Jon Kabat-Zinn, *Mindfulness-Based Interventions in Context: Past, Present, and Future*, 10 CLINICAL PSYCHOL.: SCI. & PRAC. 144, 145 (2003).

<sup>244</sup> BROWN, *supra* note 154, at 37.

<sup>245</sup> THUBTEN CHODRON, BUDDHISM FOR BEGINNERS 14, 24, 42, 76 (2001).

<sup>246</sup> Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) (recognizing non-theistic religions such as Buddhism, Taoism, Ethical Culture, and Secular Humanism); *Malnak*, 592 F.2d 197, 207–08 (3d Cir. 1979).

<sup>247</sup> See *Grove v. Mead Sch. Dist.* No. 354, 753 F.2d 1528, 1534 (9th Cir. 1985).

<sup>248</sup> See *id.* (invalidating the recitation of the Lord’s Prayer in public school).

<sup>249</sup> News, NAT’L CTR. FOR L. & POL’Y, <http://www.nclplaw.org/news/> (last visited Jan. 2, 2014) (listing NCLP’s recent legal involvements); Key Issues, ALLIANCE DEFENDING FREEDOM, <http://www.alliancedefendingfreedom.org/issues/church> (last visited Jan. 2, 2014) (same); Index of Cults and Religions, WATCHMAN, <http://www.watchman.org/index-of-cults-and-religions/> (last visited Jan. 2, 2014) (discussing cults and religions); Religion in Public Schools and Universities, AMS. UNITED FOR SEPARATION OF CHURCH AND ST., <https://www.au.org/issues/religion-public-schools-and-universities> (last visited Jan. 2, 2014) (listing Americans United’s recent activity with regard to religion and public schools); Archive for the ‘New Age/Occult Practices’ Category, Who is Congressman Tim Ryan, and Why Is He Pushing New Age/Buddhist “Mindfulness” in Public Schools?, CHRISTIANS UNITED AGAINST APOSTASY (last revised Nov. 30, 2013), <http://davemosher.wordpress.com/category/new-ageoccult-practices/>; Catena, *supra* note 235.

<sup>250</sup> BROWN, *supra* note 154, at 70–76.

Creator, and man, as the created.<sup>251</sup> For these adherents, the Buddhist goal of trying to merge with God, therefore, is blasphemous.<sup>252</sup>

On the other hand, those in favor of MM in schools argue that the technique of MM is severable from its religious roots.<sup>253</sup> Like the defendants in *Malnak*, the proponents of MM could assert their honest and subjective belief that MM is not a religious activity.<sup>254</sup> Courts, however, do not give determinative weight to a party's subjective characterization of the challenged activity.<sup>255</sup> The United States Supreme Court has noted that a person's earnest declaration that a belief is not religious is relevant to but not determinative of the question of whether the activity is legally "religious."<sup>256</sup> Thus, on balance, MM is probably religious, and therefore invokes the *Lemon* test.<sup>257</sup>

## 2. Does MM Pass the Lemon Test?

MM meets the first prong, "secular purpose," because the stated goal of boosting performance and health is not a sham.<sup>258</sup> The literature documenting the benefits of meditation is vast.<sup>259</sup> The second prong, "primary effect," is a more difficult case.<sup>260</sup> The main parental complaint about MM

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<sup>251</sup> Reporter's Transcript at 20, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. May 21, 2013) (testimony of Dr. Candy Gunther Brown).

<sup>252</sup> *Id.*

<sup>253</sup> See JON KABAT-ZINN, *supra* note 15, at 21 ("Mindfulness is often described as the heart of Buddhist meditation. Nevertheless, cultivating mindfulness is not a Buddhist activity.").

<sup>254</sup> *Malnak v. Yogi* 440 F. Supp 1284, 1319 (D.N.J. 1977) (calling defendants' characterizations of their own beliefs unreliable).

<sup>255</sup> *Id.*; *Malnak*, 592 F.2d 197, 210 n.45 (3d Cir. 1979) (noting that "the question of the definition of religion for [F]irst [A]mendment purposes is one for the courts, and is not controlled by the subjective perceptions of believers. Supporters of new belief systems may not 'choose' to be non-religious, particularly in the [E]stablishment [C]ause context").

<sup>256</sup> *Welsh v. United States*, 398 U.S. 333, 341 (1970) (noting that although a person's subjective belief is highly relevant to question of religion it is an unreliable guide for courts).

<sup>257</sup> *Malnak*, 592 F.2d at 207–10; *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

<sup>258</sup> See *Lemon*, 403 U.S. at 612; *Edwards v. Aguillard*, 482 U.S. 578, 587–88 (1987).

<sup>259</sup> See *Brochure*, *supra* note 9, at 20–21; *Promising Research on Meditation in Schools*, *supra* note 10.

<sup>260</sup> *Lemon*, 403 U.S. at 612.

is that it looks like a Buddhist practice and therefore has the primary effect of advancing a religion — similar to the complaint in *Sedlock*.<sup>261</sup> A practice's mere consistency with or coincidental resemblance to a religious practice, however, does not have the primary effect of advancing religion.<sup>262</sup> For example, it is no matter that the Ten Commandments' prohibition of theft, adultery, and murder harmonize with state regulation of the same.<sup>263</sup> Thus, concerned parents cannot invalidate MM in schools merely because MM also happens to be a Buddhist practice.<sup>264</sup>

Furthermore, the second prong of the *Lemon* test requires that a hypothetical school-age observer perceive the government activity as actually endorsing religion.<sup>265</sup> *Sedlock* teaches that opponents of MM would have to show an ongoing use of Buddhist phrases, objects, and teachings in the classroom.<sup>266</sup> The *Sedlock* court approved of how the district changed the allegedly religious name of "Lotus position" to "criss-cross applesauce."<sup>267</sup> Thus, proponents of MM would do well to preempt Establishment Clause challenges by keeping the MM program content-free and terminology-neutral.<sup>268</sup>

Even in such a case, however, opponents of MM could still argue — as did the plaintiffs in *Sedlock* with respect to yoga — that the very practice of MM itself advances religion through "camouflage."<sup>269</sup> Under this view, MM would set a child on a path of greater and greater dependency, which would eventually lead to a desire to convert to Buddhism.<sup>270</sup> As *Brown* and *Sedlock* illustrate, however, speculation as to what children might do when they grow up is an effect too far into the future to count as having

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<sup>261</sup> See Statement of Decision at 16–18, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. Feb. 20, 2013); Gregoire, *supra* note 234.

<sup>262</sup> *Alvarado v. City of San Jose*, 94 F.3d 1223, 1232 (9th Cir. 1996).

<sup>263</sup> *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1380–81 (9th Cir. 1994).

<sup>264</sup> See *Alvarado*, 94 F.3d at 1232.

<sup>265</sup> *Brown*, 27 F.3d at 1380–81.

<sup>266</sup> See Statement of Decision, *supra* note 261 at 5–9.

<sup>267</sup> *Id.* at 9.

<sup>268</sup> See *id.* at 28.

<sup>269</sup> *Id.* at 21.

<sup>270</sup> *Id.*

the “primary effect” of advancing religion.<sup>271</sup> Thus, MM would meet the second prong of the *Lemon* test.<sup>272</sup>

Most public school MM programs would also satisfy the third prong of *Lemon*.<sup>273</sup> School districts can proactively avoid a finding of entanglement by using regular classroom teachers instead of religiously affiliated ones, keeping the MM programs on campus, and supervising teachers regularly.<sup>274</sup> Excessive entanglement could arise where an allegedly religious organization had an impermissible level of control over hiring, firing, and curriculum development.<sup>275</sup> In *Sedlock*, for example, EUSD pushed against these limits by agreeing to hire Jois-certified teachers and giving several Jois-related people some access to the curriculum development.<sup>276</sup> EUSD mitigated what could otherwise have been excessive entanglement both by maintaining control of employment decisions and by utilizing an independent curriculum specialist.<sup>277</sup> Thus, most MM programs would likely meet the third prong of the *Lemon* test.<sup>278</sup>

In sum, MM is probably religious, but it will not violate the Establishment Clause where schools take care to avoid using religious phrases, objects, or teaching materials as part of the MM program.<sup>279</sup> Despite MM’s historical roots, the reasonable, hypothetical schoolchild would not understand an MM program to have the primary, immediate, and direct effect of advancing religion.<sup>280</sup> Districts must also remain independent in terms of curriculum development and employment decisions regarding MM program personnel.<sup>281</sup>

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<sup>271</sup> *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1382 (9th Cir. 1994) (dismissing parental claim that neurolinguistic programming would cause schoolchild to seek out occult groups after coming of age); *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL, 2013 WL 6063439, at \*1 (Cal. Super. Ct. C.D. July 1, 2013).

<sup>272</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

<sup>273</sup> *Id.* at 613.

<sup>274</sup> *Id.* at 618 (recognizing that it will always be extremely difficult for religiously affiliated teachers to remain religiously neutral).

<sup>275</sup> Statement of Decision, *supra* note 261 at 5-26-28.

<sup>276</sup> *Id.* at 7.

<sup>277</sup> *Id.* at 8, 27.

<sup>278</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

<sup>279</sup> See Part III.A.1, and *supra* note 266 and accompanying text.

<sup>280</sup> See *supra* Part III.A.2.

<sup>281</sup> See *supra* notes 275–277 and accompanying text (discussing how EUSD avoided excessive entanglement).

## B. WILL TRANSCENDENTAL MEDITATION CLASSES VIOLATE THE ESTABLISHMENT CLAUSE?

### 1. *Is TM in Quiet Time Religious?*

*Malnak I* and *II* examined the religiousness of TM in conjunction with SCI, but no court has decided whether TM, by itself, is a religion.<sup>282</sup> It is, therefore, an open question as to whether TM alone could survive an Establishment Clause challenge.<sup>283</sup> In his *Malnak II* concurrence, Judge Adams alluded to the possibility that TM, by itself, might be able to pass constitutional muster.<sup>284</sup> He noted that the degree to which TM answered matters of “ultimate concern” — the first prong of the *Malnak* test — might vary from course to course.<sup>285</sup>

In some ways, TM in the public school setting today is much different from the TM of thirty-five years ago.<sup>286</sup> Importantly, TM is no longer packaged with SCI.<sup>287</sup> TM is packaged in a program called Quiet Time.<sup>288</sup> To avoid confusion with the *Malnak*-era version of TM, the author will refer to TM — as taught in Quiet Time — as “TM in Quiet Time.”<sup>289</sup> Quiet Time is a fifteen-minute period of unpressured and peaceful rest at the beginning and end of each school day.<sup>290</sup> The purpose of Quiet Time is to

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<sup>282</sup> *Malnak*, 592 F.2d 197, 213, 213 n.54 (3d Cir. 1979).

<sup>283</sup> *Id.* at 213 n.54.

<sup>284</sup> *Id.* at 213 (noting that “[a]lthough [TM] by itself might be defended . . . as primarily a relaxation or concentration technique with no ‘ultimate’ significance, the . . . course at issue here was not a course in TM alone, but a course in [SCI].”).

<sup>285</sup> *Id.* at 213 n.54.

<sup>286</sup> Compare *Malnak v. Yogi*, 440 F. Supp. 1284, 1288–1312 (D.N.J. 1977) (describing TM in depth), *with Brochure*, *supra* note 9, at 7, and *QUIET TIME PRIMER*, EDUTOPIA 1–2 [hereinafter *Primer*], available at <http://www.edutopia.org/pdfs/stw/edutopia-stw-reducingstudentstress-visvalley-primer.pdf>.

<sup>287</sup> See generally *Brochure*, *supra* note 9, at 2–7 (detailing the teaching of TM through the Quiet Time program).

<sup>288</sup> *Id.*

<sup>289</sup> The author’s reference to “TM in Quiet Time” is not to be confused with “TM/Quiet Time,” the name of an earlier version of Quiet Time. See *Featured Past Events*, DAVID LYNCH FOUND., <http://www.davidlynchfoundation.org/featured-past-events.html> (last visited Jan. 2, 2014). Since Quiet Time comprises a set of meditation and non-meditation related activities, the use of the term, “TM in Quiet Time” refers specifically TM component of Quiet Time.

<sup>290</sup> *Brochure*, *supra* note 9, at 7.

increase health and readiness-to-learn.<sup>291</sup> During Quiet Time, students are free to choose between meditation, sustained silent reading, or free painting or drawing.<sup>292</sup> Students who have learned TM are free to practice the technique during this time.<sup>293</sup> Students who do not wish to learn TM can also practice other less structured forms of meditation such as quiet sitting or mindfulness.<sup>294</sup> During Quiet Time, students are not discouraged from napping or praying.<sup>295</sup>

TM in Quiet Time is not a religion under the *Malnak* test.<sup>296</sup> TM in Quiet Time does not meet the first *Malnak* test factor because Quiet Time does not answer any imponderable questions and does not address matters of ultimate concern.<sup>297</sup> Quiet Time is devoid of any teaching about religion, metaphysics, or transcendent reality.<sup>298</sup> Quiet Time does not teach about “creative intelligence.”<sup>299</sup> The only content in the instructional process, aside from the training in the mechanical meditation technique itself, involves the biology and psychology of stress reduction.<sup>300</sup> In one school, for example, a cardiologist and neurologist taught students how meditation affects the heart and brain.<sup>301</sup> Critics could point to the possibility of students’ Googling TM and making a connection to SCI, which does still exist as a stand-alone course.<sup>302</sup> This argument fails, however, because

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<sup>291</sup> *Primer*, *supra* note 286, at 1.

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

<sup>293</sup> *Brochure*, *supra* note 9, at 7.

<sup>294</sup> Telephone Interview with Laurent Valosek, Exec. Dir., Ctr. for Wellness and Achievement in Educ. (Nov. 6, 2013) (notes on file with author) [hereinafter *Telephone Interview*].

<sup>295</sup> Eve Conant, *Can Meditation Help At-Risk Kids?*, NEWSWEEK (May 29, 2008, 8:00 PM), <http://www.newsweek.com/can-meditation-help-risk-kids-90387>. The Free Exercise Clause protects students’ freedom to pray in school. U.S. CONST. amend I. This paper does not discuss Free Exercise Clause challenges.

<sup>296</sup> *Malnak*, 592 F.2d 197, 207–10 (3d Cir. 1979).

<sup>297</sup> *Id.* at 208.

<sup>298</sup> See generally *Brochure*, *supra* note 9 (not discussing religion); *Primer*, *supra* note 286 (same).

<sup>299</sup> See generally *Brochure*, *supra* note 9 (discussing the scope of Quiet Time); *Primer*, *supra* note 286 (same).

<sup>300</sup> *Telephone Interview*, *supra* note 294.

<sup>301</sup> *Id.*

<sup>302</sup> *The Science of Creative Intelligence Course*, MAHARISHI, <http://www.maharishi.org/sci/sci.html> (last visited Jan. 5, 2014) (calling TM the practical aspect of SCI).

such independent Internet research would only serve to distinguish the practical technique of TM as taught in Quiet Time from the separate metaphysical teaching of SCI.<sup>303</sup>

TM in Quiet Time does not meet the second *Malnak* test factor — comprehensiveness.<sup>304</sup> In TM in Quiet Time, students learn only a mental technique, not an all-inclusive belief system.<sup>305</sup> TM in Quiet Time is an isolated scientific method of reducing stress and increasing relaxation.<sup>306</sup> Although it is true that courts sometimes recognize a science as a religion — as in Scientology — Quiet Time is completely devoid of religious content.<sup>307</sup> Furthermore, even if an isolated teaching gives answers to ultimate questions, the teaching will not be broad enough to rise to the level of being religious.<sup>308</sup>

TM in Quiet Time probably does not meet the third *Malnak* test factor — extrinsic formal signs or symbols.<sup>309</sup> There are no sacred objects, holy books, or formal clergy.<sup>310</sup> After the initial lesson, students meet with certified TM teachers only once or twice a semester for short, follow-up refresher classes.<sup>311</sup> The rest of the time, regular classroom teachers oversee the twice-daily Quiet Time classes.<sup>312</sup> Quiet Time does not use any SCI textbook.<sup>313</sup> And although there are TM centers around the world,<sup>314</sup> Quiet

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<sup>303</sup> See *Malnak*, 440 F. Supp. 1284, 1288–1312 (D.N.J. 1977) (detailing TM in depth); *The Science of Creative Intelligence Course*, *supra* note 302.

<sup>304</sup> *Malnak*, 592 F.2d 197, 208–09 (3d Cir. 1979). See *Brochure*, *supra* note 9, at 3–7 (discussing scope of Quiet Time program).

<sup>305</sup> See generally *Brochure*, *supra* note 9 (discussing the scope of the Quiet Time program).

<sup>306</sup> *Brochure*, *supra* note 9, at 20–25.

<sup>307</sup> *Founding Church of Scientology of Wash.*, D.C. v. United States, 409 F.2d 1146, 1160 (D.C. Cir. 1969); *Brochure*, *supra* note 9 (discussing the scope of Quiet Time); *Primer*, *supra* note 286 (same).

<sup>308</sup> *Malnak*, 592 F.2d at 208–09.

<sup>309</sup> *Id.* at 209–10.

<sup>310</sup> *Id.* at 209; *Brochure*, *supra* note 9; *Primer*, *supra* note 286.

<sup>311</sup> Email from Laurent Valosek, Exec. Dir., Ctr. for Wellness & Achievement in Educ., to author (Dec. 26, 2013, 6:40 PM PST) [hereinafter *Email*].

<sup>312</sup> See *Primer*, *supra* note 286.

<sup>313</sup> *Id.*; *Brochure*, *supra* note 9.

<sup>314</sup> *Alphabetical Listing of Resource Websites Around the World*, GLOBAL COUNTRY OF WORLD PEACE, <http://www.globalcountry.org/wp/full-width/links/> (last visited Jan. 5, 2014).

Time teachers do not discuss them.<sup>315</sup> Furthermore, TM in Quiet Time lacks the rigid requirements of formal religious observances;<sup>316</sup> learning TM as part of Quiet Time is optional.<sup>317</sup> And even if a student does choose to learn TM, practicing the technique in the Quiet Time class period remains voluntary.<sup>318</sup>

It is a closer case as to whether the instruction ceremony in TM in Quiet Time is a formal sign of religion.<sup>319</sup> Critics will point out that the *Malnak II* majority cited the puja as one of the factors determining the religiousness of SCI/TM.<sup>320</sup> The highly influential Judge Adams concurrence, however, left more room for debate as to how much determinative weight to afford the puja.<sup>321</sup> For Adams, the textual analysis of the chant was far less important than was the purpose and context of the chant.<sup>322</sup> As was true in the *Malnak* era, the purpose of the puja in Quiet Time is still to ensure that the teacher imparts the technique correctly, by reminding the teacher to instruct in a precise manner without superimposing any changes to the standard instructional process.<sup>323</sup> In addition, the context of the puja in Quiet Time includes many of the same mitigating features noted by Adams: the puja is performed only once, in Sanskrit, without translation, and without the students' knowledge of the meaning of the words.<sup>324</sup> Also, students no longer bring the white handkerchief, fruit, and flowers to the ceremony — these objects are already present in the room.<sup>325</sup>

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<sup>315</sup> Telephone Interview, *supra* note 294.

<sup>316</sup> *Malnak*, 592 F.2d 197, 209–10 (1979).

<sup>317</sup> Mariko Nobori, *How to Start a Meditation Program in Your School*, EDUTOPIA (Feb. 22, 2012), <http://www.edutopia.org/stw-student-stress-meditation-school-tips>.

<sup>318</sup> See *Primer*, *supra* note 286, at 1.

<sup>319</sup> *Malnak*, 592 F.2d at 209–10.

<sup>320</sup> *Id.* at 199.

<sup>321</sup> See *id.* at 209 n.14 (discussing how the puja's ceremonial aspects are not determinative of the course's religiousness); *Friedman v. S. Cal. Permanente Med. Grp.*, 102 Cal. App. 4th 39, 60–62 (2d Dist. 2002) (collecting cases relying on the *Malnak* test, and noting that the Adams concurrence has been far more influential than the majority opinion in guiding contemporary jurisprudence on the question of religion).

<sup>322</sup> *Malnak*, 592 F.2d at 202 n.7.

<sup>323</sup> Telephone Interview, *supra* note 294.

<sup>324</sup> *Malnak*, 592 F.2d at 203; Telephone Interview, *supra* note 294.

<sup>325</sup> Telephone Interview, *supra* note 294.

Lastly, anecdotal evidence suggests that out of the 5,000 students in Northern California who have learned TM in Quiet Time, no student who has chosen to learn TM has ever asked not to participate in the puja.<sup>326</sup> Given the overall context of the puja within the Quiet Time program, therefore, a contemporary court would probably find that the third *Malnak* prong fails.<sup>327</sup> In sum, TM in Quiet Time is probably not religious.<sup>328</sup>

## 2. Does TM in Quiet Time Pass the Lemon Test?

Even if a court did find TM in Quiet Time to be religious, TM in Quiet Time would still pass the *Lemon* test.<sup>329</sup> TM in Quiet Time meets the first prong of *Lemon* because it has a valid secular purpose.<sup>330</sup> The purpose of Quiet Time is to reduce stress, promote relaxation, improve health, reduce violence, and improve academic performance.<sup>331</sup> Over three hundred published studies show benefits, including recovery from PTSD, prevention of heart attacks, and decreased blood pressure.<sup>332</sup> Critics could argue, as did the plaintiffs in *Sedlock*, that Quiet Time is merely camouflage for a religious mission to embed TM in schools.<sup>333</sup> Considering the well-documented benefits of TM in the peer-reviewed academic literature, however, there is a logical basis to conclude that the stated governmental purpose is not a sham.<sup>334</sup>

TM in Quiet Time meets the second prong of *Lemon* because its principal or primary effect neither advances nor inhibits religion.<sup>335</sup> Because the TM technique as taught in Quiet Time lacks any religious content, a reasonable, hypothetical school-aged child would not think that TM is also

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<sup>326</sup> *Id.*

<sup>327</sup> *Malnak*, 592 F.2d 197, 209 (3d Cir. 1979); *See supra* notes 309–326 and accompanying text (analyzing the TM in Quiet Time under the third prong of the *Malnak* test).

<sup>328</sup> *See supra* Part.III.B.1.

<sup>329</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); *See infra* Part III.B.2.

<sup>330</sup> *Lemon*, 403 U.S. at 612. *See infra* Part III.B.2.

<sup>331</sup> *Brochure*, *supra* note 9, at 3, 5.

<sup>332</sup> *Id.* at 20–25 (collecting 112 research findings).

<sup>333</sup> *See Statement of Decision at 21, Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. July 1, 2013).

<sup>334</sup> *See Edwards v. Aguillard*, 482 U.S. 578, 587–88 (1987) (holding that state legislature's pretext of "academic freedom" was a sham, where the Act prohibited the teaching of evolution in public schools); *Brochure*, *supra* note 9, at 20–25 (collecting research).

<sup>335</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

endorsing SCI.<sup>336</sup> Even if a child searched the websites promoting Quiet Time, they would not find any suggestion of religion.<sup>337</sup> The tm.org website does briefly mention the Vedic origins of meditation, but only in a historical way.<sup>338</sup> At the initial TM introductory lecture, the teacher mentions Maharishi only in passing in order to acknowledge him as the founder of TM.<sup>339</sup> Additionally, the students do not understand the Sanskrit chant.<sup>340</sup>

Considering the overall time spent in Quiet Time throughout the school year, the one-time, three- to four-minute ceremony constitutes a minute part of a student's overall Quiet Time experience.<sup>341</sup> Understood in this light, the puja seems more akin to a one-time cultural enrichment program, such as an American Indian dance presentation that might tangentially present some religious elements.<sup>342</sup> Furthermore, the instructor explicitly informs the student that the purpose of the puja is a giving of thanks to the tradition of teachers and a reminder for the teacher to impart the technique correctly.<sup>343</sup> Thus, the puja is a practical quality control measure that does not have the primary effect of advancing or inhibiting religion.<sup>344</sup>

Equally unavailing is the argument that exposure to TM advances religion because of its future effect.<sup>345</sup> Although it is true that TM is the first

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<sup>336</sup> *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1378–79 (9th Cir. 1994). *See Brochure*, *supra* note 9 (describing the content of Quiet Time).

<sup>337</sup> *See Programs: Quiet Time Program*, CTR. FOR WELLNESS AND ACHIEVEMENT IN EDUC., [http://cwae.org/quiet\\_time\\_program.php](http://cwae.org/quiet_time_program.php) (last visited Jan. 5, 2014) (describing the scope and content of Quiet Time); *Schools*, *supra* note 4 (same).

<sup>338</sup> *What Is TM?: The Technique*, *supra* note 16 (discussing the basis of TM in the ancient Vedic tradition of enlightenment in India).

<sup>339</sup> *Telephone Interview*, *supra* note 294.

<sup>340</sup> *Id.*

<sup>341</sup> *See Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1381 (9th Cir. 1994) (finding that a reasonable child observer would not find that the stories on witchcraft were religious, in part because they constituted a minute part of an otherwise clearly nonreligious set of teaching materials); *Malnak v. Yogi*, 440 F. Supp. 1284, 1305 (D.N.J. 1977).

<sup>342</sup> Barbara A. Hughes, *American Indian Dance: Steps to Cultural Preservation*, 21 HIGH PLAINS APPLIED ANTHROPOLOGIST 176, 176–77 (2001).

<sup>343</sup> *Malnak*, 440 F. Supp. at 1309.

<sup>344</sup> *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971); *Telephone Interview*, *supra* note 294.

<sup>345</sup> *Brown*, 27 F.3d at 1382.

step in advanced SCI courses such as the TM Siddhi program,<sup>346</sup> *Brown v. Woodland Joint Unified School District* teaches that the challenged activity must have a direct or immediate effect of advancing religion.<sup>347</sup> A similar argument failed in *Sedlock*.<sup>348</sup> No evidence suggests that any Quiet Time students have changed their religion as a result of practicing TM.<sup>349</sup> Over the last seven years, approximately 5,000 students learned TM in Northern California.<sup>350</sup> Anecdotal evidence suggests that Quiet Time actually strengthens these students' commitments to their existing faiths.<sup>351</sup> Some student meditators say they have a more profound appreciation of their own religious heritage due to the physical and psychological benefits of practicing TM.<sup>352</sup>

Critics also argue that TM advances religion because the TM mantras themselves allegedly derive from Hindu and Tantric Buddhist "bija" mantras.<sup>353</sup> However, academic authorities differ on whether the TM mantras refer to Hindu gods.<sup>354</sup> TM proponents uniformly maintain that the mantras have no meaning.<sup>355</sup> Notably, neither *Malnak I* nor *Malnak II* determined

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<sup>346</sup> *The TM-Sidhi Program*, PERMANENT PEACE, <http://www.permanentpeace.org/technology/sidhi.html> (last visited Jan. 7, 2014) (stating that the practitioners can continue to advanced programs after starting with TM).

<sup>347</sup> 27 F.3d at 1382.

<sup>348</sup> Statement of Decision at 27, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. July 1, 2013).

<sup>349</sup> Email, *supra* note 311.

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> *TranceNet: What's Your Mantra Mean?: Or When Is a Meaningless Sound Not Meaningless? When It's a Tantric Name of a Hindu God*, MINET, <http://minet.org/www.trancenet.net/secrets/mantras.shtml> (last visited Jan. 5, 2014).

<sup>354</sup> CAROL A. WILSON, HEALING POWER BEYOND MEDICINE 178 (2011) (noting that some advanced *bija* mantras used in TM invoke Hindu deities); Note, *Transcendental Meditation and The Meaning of Religion Under the Establishment Clause*, 62 MINN. L. REV. 887, 918–19, n.122 (1978) (noting that Hindu and Buddhist mantras customarily have meaning). *But see* SIR JOHN WOODROFFE, THE GARLAND OF LETTERS 261 (1998) (stating that *bija* mantras have no meaning).

<sup>355</sup> Aff. of Charles Berlitz at 2–3, *Malnak v. Yogi*, No. 76–341 (D.N.J. Oct. 20, 1977) (finding no religious meanings in the TM mantras); Aff. of K.L. Seshagiri Rao at 2–3, *Malnak v. Yogi*, No. 76–341 (D.N.J. Oct. 20, 1977) (stating that TM mantras are not the names of Hindu gods); Email from William Goldstein, Dean of Global Dev. & Gen. Counsel, Maharishi Univ. of Mgmt., to author (Oct. 10, 2013, 9:46 AM PST) (stating

that the mantra was religious.<sup>356</sup> In both opinions, the court merely referred to the mantra as a “sound aid.”<sup>357</sup> Even if a mantra did have religious significance, the Adams concurrence suggests that no one consideration is dispositive of the third factor.<sup>358</sup> Furthermore, some recent Pledge of Allegiance cases suggest that the religiousness of a phrase has less force where the school activity is a non-religious exercise.<sup>359</sup> Thus, even if the mantra were religious, the overall non-religiousness of Quiet Time mitigates any advancement of religion.<sup>360</sup>

TM in Quiet Time does not foster an excessive government entanglement with religion.<sup>361</sup> As with MM, Quiet Time is curriculum-based and therefore easy to monitor.<sup>362</sup> District administrators can supervise Quiet Time directly without leaving the school grounds.<sup>363</sup> Furthermore, the Quiet Time teachers are regular classroom teachers, as opposed to the overtly religious Catholic school nuns in *Lemon*.<sup>364</sup> And any entanglement on the part of the school district with regard to the intermittent training provided by outside TM teachers would be minimal or non-existent.<sup>365</sup> Certified TM

that TM students are told that the mantras have no meaning) (on file with author); Evan Finkelstein, *On TM Mantras: The Mantras Used in TM Are Some of the Most Fundamental Vibrations of Natural Law*, TRUTH ABOUT TM (last visited Jan. 13, 2014), <http://www.truthabouttm.org/truth/IndividualEffects/IsTMaReligion/TMMantras/index.cfm> (stating that TM mantras have no meaning).

<sup>356</sup> See *Malnak v. Yogi*, 440 F. Supp 1284, 1289 n.3 (D.N.J. 1977); *Malnak*, 592 F.2d 197, 198 (3d Cir. 1979).

<sup>357</sup> *Malnak*, 440 F. Supp at 1289 n.3; *Malnak*, 592 F.2d at 198.

<sup>358</sup> See *Malnak*, 592 F.2d at 203 n.14.

<sup>359</sup> See *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1037 (9th Cir. 2010) (holding that the phrase “under God” in the Pledge of Allegiance did not violate the Establishment Clause); *Freedom from Relig. Found. v. Hanover Sch. Dist.*, 626 F.3d 1, 13 (1st Cir. 2010), *cert. denied*, 131 S.Ct. 2992 (2011) (finding that couching of religious phrase, “under God,” in the non-religious text of the Pledge of Allegiance, while not dispositive, is significant in mitigating an Establishment Clause violation).

<sup>360</sup> See *Newdow*, *supra* note 359, at 1037.

<sup>361</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

<sup>362</sup> See *Primer*, *supra* note 286, at 1-2 (detailing classroom implementation of Quiet Time); *supra* text and accompanying notes 274-277.

<sup>363</sup> See *Primer*, *supra* note 286, at 1.

<sup>364</sup> *Id.*; *Lemon v. Kurtzman*, 403 U.S. 602, 615-16 (1971).

<sup>365</sup> See *Lemon*, 403 U.S. at 615-16; *Primer*, *supra* note 286, at 1. Although not dispositive of the legal issue, it is telling that the United States government finds no excessive entanglement in sponsoring TM studies for cardiovascular disease and post-traumatic

instructors, though often present in the school during the day, have contact with students on an individual basis just once or twice a semester.<sup>366</sup> Thus, TM in Quiet Time would meet the third prong of *Lemon*.<sup>367</sup>

In sum, TM in Quiet Time probably does not violate the Establishment Clause.<sup>368</sup> If a court found that TM in Quiet Time was not religious, that would be the end of the matter.<sup>369</sup> If a court found that the program was religious, TM in Quiet Time would probably pass the *Lemon* test.<sup>370</sup> The valid secular purpose is to create relaxation, boost performance, and decrease violence.<sup>371</sup> Given the purpose and context of TM in Quiet Time, a reasonable, hypothetical schoolchild would not understand TM in Quiet Time to have the primary, immediate, and direct effect of advancing religion.<sup>372</sup> Quiet Time presents TM as a standalone, scientifically proven technique to increase health and well-being.<sup>373</sup> Lastly, like in MM, there would be no excessive entanglement as long as the school took care to maintain its independence in monitoring the teachers and in developing the curriculum.<sup>374</sup> At first glance, *Malnak v. Yogi* seems to cast a long shadow over any implementation of TM in schools.<sup>375</sup> The above analysis illustrates, however, that

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stress disorder (PTSD). For example, the National Institutes of Health has provided \$26 million in grants for TM cardiovascular health studies. *TM Research: NIH-funded Research on Transcendental Meditation*, DAVID LYNCH FOUND., <http://www.davidlynch-foundation.org/national-institutes-of-health.html> (last visited Jan. 5, 2014). Similarly, the Department of Defense recently awarded a multi-million dollar grant for TM training and research for veterans with PTSD. *Operation Warrior Wellness: Building Resilience and Healing the : Hidden Wounds of War*, DAVID LYNCH FOUND., <http://www.davidlynch-foundation.org/military.html> (last visited Jan. 5, 2014).

<sup>366</sup> Telephone Interview, *supra* note 294.

<sup>367</sup> See *Lemon*, 403 U.S. at 613.

<sup>368</sup> See Part III.A.1, B.2.

<sup>369</sup> See cases cited *supra* note 114.

<sup>370</sup> See *Lemon*, 403 U.S. at 615–23; Part III.A.1, B.2.

<sup>371</sup> See *supra* notes 330–334 and accompanying text (discussing the secular benefits of Quiet Time).

<sup>372</sup> *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1378–79 (9th Cir. 1994). See *supra* notes 335–340 and accompanying text (analyzing Quiet Time under the second prong of the *Lemon* test).

<sup>373</sup> Brochure, *supra* note 9, at 20–25.

<sup>374</sup> See *supra* notes 361–367 and accompanying text (applying the excessive entanglement prong of the *Lemon* test to Quiet Time).

<sup>375</sup> 592 F.2d 197, 199 (3d Cir. 1979).

TM in Quiet Time presents a fact pattern much different from that of the *Malnak*-era SCI/TM.<sup>376</sup>

#### IV. CONCLUSION

There will always be activities in the ever-subtle twilight between church and state. Especially in the sensitive area of public education, courts must tread lightly, carefully, and correctly when addressing constitutional issues. The purpose of this paper is to bring into sharper focus both the definition of religion and the requirements for an Establishment Clause violation with respect to meditation classes. Despite the firm legal footing for yoga and meditation in public schools, some school districts may shy away from implementing such programs in order to avoid the distraction and expense of defending legal challenges. This uncertainty may have a chilling effect on experimentation with novel health and wellness programs. Even beyond what happens in the *Sedlock* case on appeal, the question of the constitutionality of meditation classes in public schools will still remain unanswered.<sup>377</sup> Whether a school meditation program currently exists or is in the planning phase, it is the intent of this paper to provide a possible framework for how schools can offer meditation programs within the bounds of the law.

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<sup>376</sup> *Malnak*, 440 F. Supp 1284, 1288–1312 (D.N.J. 1977); *Malnak*, 592 F.2d at 199–200. See Part III.B.2.

<sup>377</sup> Notice of Appeal at 1, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. Oct. 30, 2013).



# CALIFORNIA'S ANTI-REVENGE PORN LEGISLATION:

*Good Intentions, Unconstitutional Result*

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## INTRODUCTION

“In a perfect world there would be no bullying and there would be no people like me and there would be no sites like mine . . . [b]ut we don’t live in a perfect world.”

— Revenge porn website owner, Hunter Moore<sup>1</sup>

“Revenge porn”<sup>2</sup> is a practice in which vengeful ex-lovers post photos shared in confidence during their relationships with the public via the Internet.<sup>3</sup> Websites such as Moore’s are dedicated solely to hosting this type of content and have multiplied over the past few years.<sup>4</sup> They provide platforms for users to reveal photos as well as other personal information about their former partners to the public.<sup>5</sup> In fact, users often include with the photos information such as the subject’s full name, city and state, and links to their social media profiles, ensuring the photos appear high in Google search results.<sup>6</sup> Some go so far as to include contact information of subjects’ family members or coworkers.<sup>7</sup>

Holly Jacobs<sup>8</sup> experience demonstrates the devastating effects revenge porn postings have on one’s life, both personally and profes-

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<sup>1</sup> Jessica Roy, *The Battle Over Revenge Porn: Can Hunter Moore, the Web’s Vilest Entrepreneur, Be Stopped?*, BETABEAT (Dec. 4, 2012, 7:46 PM), <http://betabeat.com/2012/12/the-battle-over-revenge-porn-can-hunter-moore-the-webs-vilest-entrepreneur-be-stopped/>.

<sup>2</sup> “Revenge porn” may also be referred to as “cyber revenge,” “cyberrape,” or “involuntary pornography.” See, e.g., *id.*; Heather Kelly, *New California ‘revenge porn’ law may miss some victims*, CNN (Oct. 3, 2013, 6:32 AM), <http://www.cnn.com/2013/10/03/tech/web/revenge-porn-law-california/>; Lorelei Laird, *Victims are taking on ‘revenge porn’ websites for posting photos they didn’t consent to*, ABA JOURNAL (Nov. 1, 2013 4:30 AM), [http://www.abajournal.com/magazine/article/victims\\_are\\_taking\\_on\\_revenge\\_porn\\_websites\\_for\\_posting\\_photos\\_they\\_didnt\\_c/?utm\\_source=maestro&utm\\_medium=email&utm\\_campaign=tech\\_monthly/](http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c/?utm_source=maestro&utm_medium=email&utm_campaign=tech_monthly/).

<sup>3</sup> Laird, *supra* note 2.

<sup>4</sup> *Id.*

<sup>5</sup> Roy, *supra* note 1; *id.*

<sup>6</sup> Laird, *supra* note 2.

<sup>7</sup> *Id.*

<sup>8</sup> Holly Jacobs was previously Holli Thometz and has also used the pseudonym “Sarah.” See Holly Jacobs, *A Message From Our Founder, Dr. Holly Jacobs*, END REVENGE PORN (Sept. 8, 2013), <http://www.endrevengeporn.org/?p=422/>; Roy, *supra* note 1; Jessica Roy, *A Victim Speaks: Standing Up to a Revenge Porn Tormentor*, BETABEAT

sionally.<sup>9</sup> Jacobs shared nude photos with her then-boyfriend during a long-distance portion of their relationship.<sup>10</sup> After they broke up, he posted the photos on hundreds of revenge porn websites and emailed them to all of her coworkers.<sup>11</sup> He also included personal information about Jacobs including her full name, email address, where she worked, and information about the Ph.D. program she was enrolled in.<sup>12</sup> She was horrified.<sup>13</sup> For months, she received harassing emails from people who had seen her photos online.<sup>14</sup> She began to worry she would be physically stalked.<sup>15</sup> In response, she left her job, changed her name, and began carrying a stun gun with her.<sup>16</sup>

She looked to the law for relief. She hired a lawyer, begged three different police stations to file charges against her ex-boyfriend, went to the FBI, and hired an Internet specialist to take the material down.<sup>17</sup> Unable to fund a civil suit, she filed several Digital Millennium Copyright Act takedown requests claiming copyright infringement.<sup>18</sup> However, these attempts proved fruitless.<sup>19</sup> To shed light on her plight and the plights of others similarly situated, Jacobs founded EndRevengePorn.org to support

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(May 1, 2013, 1:04 PM), <http://betabeat.com/2013/05/revenge-porn-holli-thometz-criminal-case/>.

<sup>9</sup> Roy, *supra* note 1. Professor of law Eric Goldman has described the effects of these types of postings as “life-altering” because “there are a lot of people who will feel like someone who is depicted naked or is recorded having sex . . . has done something wrong.” See *Revenge Porn*, YOUR WEEKLY CONSTITUTIONAL (Nov. 22, 2013) [http://ywc.podomatic.com/entry/2013-11-22T13\\_24\\_26-08\\_00](http://ywc.podomatic.com/entry/2013-11-22T13_24_26-08_00) [hereinafter *Podcast*]. Victims report being fired from their jobs or expelled from their schools, being shunned by friends, receiving sexual propositions by strangers who have seen their photos online, being subjected to physical stalking and harassment, changing their names, and some victims have even committed suicide. *Id.*

<sup>10</sup> Roy, *supra* note 1.

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

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

<sup>13</sup> Roy, *supra* note 1.

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

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*; Roy, *supra* notes 8–10.

<sup>17</sup> Jacobs, *supra* note 8.

<sup>18</sup> Roy, *supra* note 1.

<sup>19</sup> *Id.*; Jacobs, *supra* note 8.

the End Revenge Porn campaign organized by the Cyber Civil Rights Initiative (CCRI).<sup>20</sup>

While Moore may be correct that the world — let alone the United States legal system — is not perfect, must it be that victims and potential victims of revenge porn enjoy little to no legal redress? Many state and federal lawmakers do not believe so.<sup>21</sup> For example, California recognized the gravity of the problem and became the second state after New Jersey to pass legislation targeting the activity when it passed California Penal Code section 647(4) in October 2013.<sup>22</sup> Moreover, legislatures in several states are currently considering laws to combat revenge porn and United States senators have contacted CCRI regarding possible federal legislation.<sup>23</sup>

However, lawmakers interested in combatting revenge porn must tread lightly, as regulations on speech evoke First Amendment freedom of speech concerns.<sup>24</sup> California's legislation has come under fire for possibly regulating constitutionally protected speech and missing many of its

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<sup>20</sup> End Revenge Porn, <http://www.endrevengeporn.org> (last visited October 30, 2013) (follow "About" hyperlink; then follow "Who We Are" hyperlink).

<sup>21</sup> See *infra* note 23. In Florida, an anti-revenge porn bill was approved unanimously by both the Criminal Justice Committee and the Senate Judiciary Committee, but ultimately died in the appropriations process. Kristina Ramer, *California becomes second state to ban revenge porn, but still legal in Florida*, THE INDEPENDENT FLORIDA ALLIGATOR (Oct. 7, 2013, 1:43 AM) [http://www.alligator.org/news/local/article\\_7560a468-2f13-11e3-ac8a-001a4bcf887a.html](http://www.alligator.org/news/local/article_7560a468-2f13-11e3-ac8a-001a4bcf887a.html). State Senator David Simmons believes Florida may still pass such a law. Kelly, *supra* note 2. First Amendment concerns played a part in the ultimate death of Florida's revenge porn law. *Id.*

<sup>22</sup> See Kelly, *supra* note 2. New Jersey's law was not passed in response to revenge porn, but in part criminalizes such activity. *Podcast*, *supra* note 9; see also N.J. Stat. § 2C:14-9 (West 2012).

<sup>23</sup> The Senate Judiciary Committee of Pennsylvania voted unanimously on a bill proposed by Pennsylvania Senator Judy Schwank that would outlaw revenge porn postings. Associated Press, *Pennsylvania lawmakers advance bill to punish 'revenge porn'*, Fox News (January 15, 2014) <http://www.foxnews.com/politics/2014/01/15/pennsylvania-lawmakers-advance-bill-to-punish-revenge-porn/>. The legislatures of Maryland, Wisconsin, New York, and Texas, are also currently considering similar legislation. Tal Kopan, *States criminalize 'revenge porn'*, POLITICO (Oct. 30, 2013, 11:10 AM) <http://www.politico.com/story/2013/10/states-criminalize-revenge-porn-99082.html>. Further, lawmakers in Delaware, Kansas and Alabama have contacted CCRI regarding co-drafting legislation for their states. *Id.*

<sup>24</sup> "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

targeted victims.<sup>25</sup> Lee Rowland, a staff attorney with the American Civil Liberties Union (“ACLU”), stated that overly broad bills could bar normal Internet activities or speech that is worth protecting and that “trying to find a cure by creating a new criminal law that threatens free speech could be worse than the disease.”<sup>26</sup> She also opined, “without much evidence that such criminal bills actually protect victims, it’s unclear whether it’s worth wading into the tricky constitutional waters.”<sup>27</sup>

This paper discusses the First Amendment implications of California’s recent legislation targeting revenge porn, California Penal Code section 647. Although California’s law is a step in the right direction, the law likely fails both practically and constitutionally in several ways. As a content-based regulation on constitutionally protected speech, the law faces exacting constitutional scrutiny.<sup>28</sup> Its narrow construction fails to protect a large portion of its targeted victims, possibly rendering it underinclusive and not narrowly tailored to prevent the harm it aims to prevent. Further, it may be overinclusive for vagueness.

Part I of this paper demonstrates the importance of passing constitutionally-sound legislation targeting revenge porn by demonstrating its harms and highlighting the inadequacy of existing laws in redressing and preventing the practice. Part II discusses relevant First Amendment jurisprudence. Part III takes a closer look at California’s anti-revenge porn legislation and the legislative purpose behind it. Part IV analyzes the constitutionality of California’s legislation under First Amendment jurisprudence and concludes that California’s legislation is likely unconstitutional under the First Amendment. Finally, Part V proposes alternate ways to prevent revenge porn and provide redress to victims within constitutional bounds.

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<sup>25</sup> See, e.g., Cathy Reisenwitz, *Revenge Porn Is Awful, But The Law Against It Is Worse*, TALKING POINTS MEMO (Oct. 16, 2013 9:35 AM) <http://talkingpointsmemo.com/cafe/revenge-porn-is-awful-but-the-law-against-it-is-worse/>; Kopan, *supra* note 23; Jessica Roy, *California’s New Anti-Revenge Porn Bill Won’t Protect Most Victims*, TIME (Oct. 3, 2013) <http://nation.time.com/2013/10/03/californias-new-anti-revenge-porn-bill-wont-protect-most-victims/>.

<sup>26</sup> Kopan, *supra* note 23.

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

<sup>28</sup> See *infra* Parts A, IV.A.

## I. WHY LEGISLATIVE ACTION TARGETING REVENGE PORN IS NECESSARY

Constitutionally-sound legislation is necessary to target revenge porn because of the destructive effects of the practice and the inadequacy of current laws to address the issue.<sup>29</sup> This section highlights the limited effect of existing civil and criminal laws on curtailing the rising pandemic in revenge porn postings.<sup>30</sup> It further details the practice's pervasive and harmful effects, which warrant the creation of more effective legislation.

### A. THE INADEQUACY OF EXISTING LAWS

The existing legal avenues for both preventing and redressing revenge porn are scant and unsatisfactory.<sup>31</sup> No federal statute explicitly prohibits the non-consensual disclosure of sexually graphic images and only two states, California and New Jersey, have state criminal laws prohibiting such conduct.<sup>32</sup> Civil suits under existing torts such as intentional infliction of emotional distress or publication of private facts are problematic for victims.<sup>33</sup> For example, plaintiffs may not be able to find attorneys willing to take on their cases because the defendant often does not have any material assets to make the suit worthwhile.<sup>34</sup> Also, litigating the suit would bring further publicity to the media the victim wants to get rid of.<sup>35</sup>

Further, civil suits against website owners or Internet service providers may prove futile because the federal Communications Decency Act (CDA), grants immunity to Internet service providers (ISP) for content posted by

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<sup>29</sup> See *supra* note 9 and accompanying text.

<sup>30</sup> See *Podcast*, *supra* note 9 (referring to the trend as a pandemic).

<sup>31</sup> Ariel Ronneburger, Comment, *Sex, Privacy, And Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 21 SYRACUSE SCI. & TECH. L. REP. 1, 11 (2009).

<sup>32</sup> Mary Anne Franks, Combating Non-Consensual Pornography: A Working Paper (Dec. 5, 2013) (unpublished working paper) (*available at* [<sup>33</sup> See \*Podcast\*, \*supra\* note 9.](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336537</a>); <i>see also</i> Cal. Penal Code § 647 (West 2013); N.J. Stat. § 2C:14-9 (West 2012).</p></div><div data-bbox=)

<sup>34</sup> See *Podcast*, *supra* note 9.

<sup>35</sup> See *Podcast*, *supra* note 9. Also, “once [revenge porn] pictures are out there, it’s really difficult to get them taken down even if [a plaintiff] win[s] on a civil suit.” *Id.*

third-party users.<sup>36</sup> The CDA states, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>37</sup> Accordingly, section 230 likely bars suits by revenge porn victims against website owners for content uploaded by third-party users, unless the court deems them Internet content providers (ICPs).<sup>38</sup> Courts have construed section 230 immunity quite liberally in the past.<sup>39</sup> For example, in *Carafano v. Metrosplash.com, Inc.*, Christianne Carafano sued Metrosplash.com for an allegedly defamatory and fake profile a third party user posted on the defendant’s site, Matchmaker.com.<sup>40</sup> The site provided content in drop-down menus for users to choose from in creating their profiles.<sup>41</sup> Still, the Ninth Circuit held that Metrosplash.com was immune under section 230 because it constituted an Internet service provider.<sup>42</sup> However, courts are

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<sup>36</sup> Ronneburger, *supra* note 31, at 3; see also Communications Decency Act, 47 U.S.C. § 230 (1998). Internet service providers (ISPs) “provide[] or enable[] computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” Communications Decency Act, 47 U.S.C. § 230(f) (1998). Internet content provider (ICP) “means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” *Id.*

<sup>37</sup> Communications Decency Act, 47 U.S.C. § 230 (1998).

<sup>38</sup> Ronneburger, *supra* note 31, at 3. The CDA distinguishes between ISPs and ICPs, generally granting complete immunity to ISPs, but not to ICPs. See Ashley Ingber, Comment, *Cyber Crime Control: Will Websites Ever Be Held Accountable For The Legal Activities They Profit From?*, 18 CARDOZO J.L. & GENDER 423, 429–34 (2012). Congress’ purpose in making this distinction was “not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.” *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003). Congress recognized that imposing such liability would force ISPs to police a staggering amount of online communication, thereby leaving them no choice but to restrict the amount and type of posts allowed. *Id.* at 1124.

<sup>39</sup> See Ingber, *supra* note 38, at 434.

<sup>40</sup> 339 F.3d 1119, 1122 (9th Cir. 2003).

<sup>41</sup> *Id.* at 1121.

<sup>42</sup> *Id.* at 1120, 1125. The court stated that even if it were to find Matchmaker.com an Internet content provider, § 230 “would still bar Carafano’s claims unless Matchmaker created or developed the particular information at issue.” *Id.* at 1125 (emphasis added); see also Barnes v. Yahoo! Inc., No. Civ. 05-926-AA, 2005 WL 3005602, at \*1 (D. Or. Nov. 8, 2005) (holding Yahoo! fell “under the broad immunity provided Internet servers by § 230.”) (emphasis added).

gradually moving toward a narrower interpretation of section 230 immunity, which “indicates that courts may be willing, or even intending, to find that Section 230 does not provide protections to ISPs or ICPs in the realm of criminal suits.”<sup>43</sup> However, only two states criminalize revenge porn thus far.<sup>44</sup> Accordingly, it is unclear whether a court would grant immunity to a revenge porn site such as Moore’s, and it is necessary for states to enact constitutionally sound criminal legislation to redress the problem of revenge porn.<sup>45</sup>

Copyright law may be a better avenue, but is likewise inadequate.<sup>46</sup> The CDA does not immunize website owners from copyright claims.<sup>47</sup> Furthermore, it is inexpensive for victims to notify website owners of their copyright infringement.<sup>48</sup> However, it is not guaranteed the website owners will remove the content; “website operators overseas or those who believe they’re judgment-proof can and do ignore the notices.”<sup>49</sup> It is likewise uncertain whether someone has saved the photos and will repost them on the same site or elsewhere.<sup>50</sup> Moreover, only copyright owners — those who took the photos or videos themselves — may file claims for copyright infringement against websites hosting the copyrighted

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<sup>43</sup> See Ingber, *supra* note 38, at 434.

<sup>44</sup> Franks, *supra* note 32.

<sup>45</sup> See also Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003). It is possible a court could construe a revenge porn website to be an ICP where it actively seeks out and promotes the posting of revenge porn. See *Podcast*, *supra* note 9. However, courts are not in agreement as to how to differentiate between ISPs and ICPs. Compare F.T.C. v. Accusearch Inc., 570 F.3d 1187, 1199 (10th Cir. 2009) (finding Accusearch an ICP because it “encourage[d] development of what is offensive about the content” by soliciting requests for legally confidential information and publishing it) with Chicago Lawyers’ Committee for Civil Rights Under Law v. Craigslist, Inc., 519 F.3d 666, 671–72 (7th Cir. 2008) (holding Craigslist not an ICP because it does not induce users to post specific content or types of content).

<sup>46</sup> See *Podcast*, *supra* note 9.

<sup>47</sup> Franks, *supra* note 32.

<sup>48</sup> Laird, *supra* note 2.

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

<sup>50</sup> See *Podcast*, *supra* note 9. Professor Goldman has stated that “once content is released to the internet it’s almost impossible to put that digital data back into the bottle . . . . In theory [victims] could go and try and stamp out each and every instance on the internet, but that’s not very feasible.” *Id.*; see also Laird, *supra* note 2.

content.<sup>51</sup> Those who did not create the contested media do not have copyright claims.<sup>52</sup>

Further, current criminal laws are insufficient to address revenge porn.<sup>53</sup> State and federal laws regulating child pornography, stalking, harassment, voyeurism, and computer hacking are limited.<sup>54</sup> State anti-voyeurism laws and the federal Video Voyeurism Prevention Act of 2004 are inadequate because they only protect those whose images were taken without their consent or knowledge.<sup>55</sup> Likewise, federal and state child pornography laws only regulate the age of those depicted in pornographic media, and not whether they consented to the distribution of the images.<sup>56</sup> Laws targeting stalking and harassment only apply if the prosecutor can show that the posting of revenge porn is part of a larger pattern of conduct intended to distress or harm the victim, which may not apply in many revenge porn cases.<sup>57</sup> For example, many revenge porn site operators claim intent only to “obtain notoriety, fulfill some sexual desire, or increase traffic for their websites.”<sup>58</sup> Further, some posters are only motivated by financial gain or bragging rights.<sup>59</sup> Thus, the prosecutor may have a hard time proving the intent-to-harm element in prosecutions of such defendants.

Even where a state criminal law does address an individual’s predicament, police are reluctant to investigate or file charges.<sup>60</sup> Attorney Erica Johnstone has represented clients in revenge porn cases, and she states that police are accustomed to typical crime scenes and may not think to apply pertinent laws on stalking, voyeurism, or hacking to online revenge porn cases.<sup>61</sup> It is “common for police to say no law was broken unless the

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<sup>51</sup> Laird, *supra* note 2.

<sup>52</sup> Franks, *supra* note 32. According to a recent study by CCRI, up to 80 percent of revenge porn victims were victimized using photos they took themselves; the remaining 20 percent of victims are unprotected under copyright law. *Id.*

<sup>53</sup> *Id.*

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

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

<sup>56</sup> Laird, *supra* note 2.

<sup>57</sup> Franks, *supra* note 32.

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

<sup>59</sup> See Kelly, *supra* note 21.

<sup>60</sup> Laird, *supra* note 2.

<sup>61</sup> *Id.*

picture is child porn.”<sup>62</sup> Jody Westby, a consultant on online privacy and security, says that law enforcement officers are not aware of how existing criminal laws apply to revenge porn cases and are “loath to get involved in domestic problems.”<sup>63</sup>

## B. THE HARM

Online dissemination of sexually explicit photos without the depicted person’s consent causes tremendous harm to that person. As illustrated by Jacobs’ story, publication of these types of photos negatively affects many aspects of one’s life.<sup>64</sup> Many others have been the subject of revenge porn postings.<sup>65</sup> Mary Anne Franks, board member of CCRI and University of Miami associate law professor, has stated that revenge porn victims are coming out of the woodwork to tell their stories or seek help, especially since Jacobs braved the public eye to tell her story.<sup>66</sup>

According to Franks, these new accounts demonstrate that revenge porn is of serious concern, both in terms of the magnitude of the problem and the degree of harm caused to victims.<sup>67</sup> Once photos have been disseminated via the Internet, women suffer stalking and harassment, they often must leave their jobs, are expelled from their schools, have problems in their relationships, and change their names.<sup>68</sup> In some cases, victims have committed suicide.<sup>69</sup>

The potential for future victims is high as well. It is estimated that one third of young adults have sent or posted nude or semi-nude photos

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<sup>62</sup> *Id.* In fact, police are not always keen on taking up child pornography cases either. *Id.* Las Vegas attorney Marc Randazza’s underage client “couldn’t get the police or FBI interested in her case.” *Id.*

<sup>63</sup> *Id.* Westby states she had to convince police to take up a case in which her client was being cyberstalked. *Id.*

<sup>64</sup> See *supra* Introduction.

<sup>65</sup> Cases of revenge porn are “becoming increasingly common.” See *Podcast*, *supra* note 9.

<sup>66</sup> Kopan, *supra* note 23.

<sup>67</sup> *Id.*

<sup>68</sup> “[S]ome . . . victims have had to change their names because, as you can imagine, when you put a person’s name into a search engine, if the first 10, 20, 30 hits are going to be these pornographic websites, it can become very difficult to retain any kind of credibility over [one’s] own name.” See *Podcast*, *supra* note 9.

<sup>69</sup> Kopan, *supra* note 23; see also *Podcast*, *supra* note 9.

of themselves.<sup>70</sup> The vast majority of those who have sent or posted these types of photos have done so to their boyfriends or girlfriends.<sup>71</sup> To deter future posts, constitutionally-sound legislation that directly addresses revenge porn is necessary, because current laws have not prevented revenge porn from becoming “pandemic.”<sup>72</sup>

## II. CALIFORNIA’S ANTI-REVENGE PORN LEGISLATION

California’s anti-revenge porn legislation went into effect on October 1, 2013.<sup>73</sup> The legislation is an amendment to the California Penal Code section 647 prohibiting disorderly conduct.<sup>74</sup> The amendment states that any person who commits any of the following is guilty of disorderly conduct, a misdemeanor:

(4)(A) Any person who photographs or records by any means the image of the intimate body part or parts of another identifiable person, under circumstances where the parties agree or understand that the image shall remain private, and the person subsequently distributes the image taken, with the intent to cause serious emotional distress, and the depicted person suffers serious emotional distress. (B) As used in this paragraph, intimate body part means any portion of the genitals, and in the case of a female, also includes any portion of the breasts below the top of the areola, that is either uncovered or visible through less than fully opaque clothing.<sup>75</sup>

The law makes the above conduct punishable by up to six months in county jail and/or a fine of up to \$1,000.<sup>76</sup> Canella states that there is a need for this law because “[c]urrent law is silent as to the illegality of this

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<sup>70</sup> *Sex and Tech: Results from a Survey of Teens and Young Adults*, THE NATIONAL CAMPAIGN, [http://www.thenationalcampaign.org/sextech/PDF/SexTech\\_Summary.pdf](http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf) [hereinafter *Sex and Tech*] (last visited Dec. 29, 2013).

<sup>71</sup> *Id.*

<sup>72</sup> See *Podcast*, *supra* note 9.

<sup>73</sup> Cal. Penal Code § 647 (West 2013). California state senator Anthony Canella proposed the bill on June 3, 2013 with an urgency clause. S. B. 255, Reg. Sess. (Cal. 2013).

<sup>74</sup> Cal. Penal Code § 647 (West 2013).

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

<sup>76</sup> S. B. 255, Reg. Sess. (Cal. 2013).

disturbing practice.”<sup>77</sup> As the justification for the bill, Canella states that “[v]ictims of this cruel act are often so humiliated that they pose a threat to harming themselves, as evidenced by numerous examples of cyber revenge victims who have taken their own lives.”<sup>78</sup> According to the bill’s legislative history, one specific incident prompted the bill.<sup>79</sup> The incident involved a fifteen-year-old named Audrie in Saratoga, California:

Audrie became very intoxicated to the point of unconsciousness at a party. Three boys — Audrie’s high school classmates — took off some or much of her clothing, sexually assaulted her, wrote crude and demeaning phrases on her body and took at least one cell-phone photo of an intimate part of her body. She awoke in the morning to find her shorts pulled down and the crude drawings or words on her body. When the photo was shown to other students at school, Audrie became very distraught. About a week later, Audrie hung herself.<sup>80</sup>

Media reports indicate that the photos were widely distributed at school and uploaded to social media.<sup>81</sup> The government has filed sexual battery and distribution of child pornography charges against her perpetrators.<sup>82</sup>

Several entities expressed their support for the bill, including the California Partnership to End Domestic Violence, the California Sheriffs’ Association, Crime Victims Action Alliance, and Crime Victims United of California.<sup>83</sup> On the other hand, the ACLU opposed the bill, stating, “the posting of otherwise lawful speech or images even if offensive or emotionally distressing is constitutionally protected.”<sup>84</sup> Despite ACLU’s

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

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

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* The legislative history gives other examples of incidents of revenge porn in the United States and California. *Id.* The proposal also mentions the highly publicized 2012 rape case from Steubenville, Ohio and a case in Tulare County where a man named Michael Rosa posted false ads online containing nude photos of his ex-wife. *Id.*

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

<sup>84</sup> *Id.* The ACLU states that, in order to criminalize speech, the prohibited speech “must constitute a true threat or violate another otherwise lawful criminal law” and

opposition, the bill was signed into law.<sup>85</sup> It has not been challenged on constitutional grounds as of yet.

### III. FIRST AMENDMENT JURISPRUDENCE

Legislators must walk on eggshells when drafting legislation regulating speech.<sup>86</sup> The First Amendment protects the right to freely disseminate and receive ideas and unequivocally prohibits Congress from making laws “abridging the freedom of speech.”<sup>87</sup> The judiciary has long considered the right to free speech essential to a democracy.<sup>88</sup> As Justice Thurgood Marshall stated, “[the] right to receive information and ideas, regardless of their social worth, is fundamental to our free society.”<sup>89</sup> This Section introduces First Amendment jurisprudence relevant to the constitutional implications of California Penal Code section 647(4). It discusses the standards of review courts use in analyzing the constitutionality of statutes that regulate speech, such as section 647(4), and the high burden proponents of legislation carry when courts subject their laws to strict scrutiny.<sup>90</sup>

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that California’s bill does not meet this standard. *Id.* (citing *United States v. Cassidy*, 814 F. Supp. 2d 574 (D. Md. 2011)).

<sup>85</sup> See Cal. Penal Code § 647 (West 2013).

<sup>86</sup> U.S. Const. amend. I.

<sup>87</sup> *Id.* Pursuant to the Fourteenth Amendment, First Amendment freedom of expression is guaranteed by the states as well. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 663 (1964) (stating enforcement of an unconstitutional state law constitutes state action). Accordingly, state laws may be invalidated for unconstitutionally infringing on freedom of speech. *Id.*

<sup>88</sup> *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). While the First Amendment only explicitly protects “speech,” the Supreme Court has “long recognized that its protection does not end at the spoken or written word.” *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Conduct may be considered protected speech where there exists an “intent to convey a particularized message” and “the likelihood [is] great that the message [will] be understood by those who view[] it.” *See id.* (quoting *Spence v. Washington*, 418 U.S. 405, 410–411 (1974)). Photography, film, and audio recording may be constitutionally protected expression in some circumstances. *Cf. Glik v. Cunniffe*, 655 F. 3d 78, 82 (1st Cir. 2011) (finding videotaping in public to be protected speech); *Anderson v. City of Hermosa Beach*, 621 F. 3d 1051, 1061–62 (9th Cir. 2010) (stating compositions of “words, realistic or abstract images, symbols, or a combination of these . . . are forms of pure expression”).

<sup>89</sup> *Stanley*, 394 U.S. at 564.

<sup>90</sup> See *infra* Part III.A.

It also introduces the doctrines of low-level speech,<sup>91</sup> secondary effects,<sup>92</sup> obscenity,<sup>93</sup> indecency,<sup>94</sup> and online speech.<sup>95</sup> Within these categories, the law is uncertain. Internet and indecency jurisprudence is particularly uncertain, making it difficult to predict how the Supreme Court will rule on the constitutionality of a statute regulating indecent expression and online communication.<sup>96</sup>

#### A. JUDICIAL STANDARDS OF REVIEW OF REGULATIONS ON SPEECH

At the heart of the First Amendment is the idea that the government shall not proscribe speech “simply because society finds the idea itself offensive or disagreeable.”<sup>97</sup> As a baseline rule, the government may not regulate speech based on “its message, its ideas, its subject matter, or its content.”<sup>98</sup> In other words, the government may not censor expression of any thought and “the essence of this forbidden censorship is content control.”<sup>99</sup> Consequently, regulations that proscribe speech based on its content are subject to heightened judicial examination compared with those that do not.<sup>100</sup> Content-based restrictions are presumed invalid.<sup>101</sup> Content-based statutes that go one step further and discriminate based on particular views commit “viewpoint

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<sup>91</sup> See *infra* Part III.B.

<sup>92</sup> See *infra* Part III.C.

<sup>93</sup> See *infra* Part III.D.

<sup>94</sup> See *infra* Part III.D.

<sup>95</sup> See *infra* Part III.E.

<sup>96</sup> See *infra* Parts III.D and III.E.

<sup>97</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

<sup>98</sup> *See Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 94 (1972).

<sup>99</sup> *Id.* at 95–96.

<sup>100</sup> Kevin Francis O’Neill, *A First Amendment Compass: Navigating The Speech Clause With A Five-Step Analytical Framework*, 29 Sw. U. L. REV. 223, 226–27 (2000). Regulations restricting speech based on its content are generally referred to as “content-based” and such statutes are subject to what courts and legal scholars have coined “strict scrutiny.” *Id.*

<sup>101</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). As the Supreme Court has emphasized repeatedly, content-based regulations on speech are contrary to “the principle that debate on public issues should be uninhibited, robust, and wide-open.” *Sullivan*, 376 U.S. at 270.

discrimination.”<sup>102</sup> The Supreme Court considers viewpoint discrimination to be even more blatantly violative of the First Amendment because it “raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.”<sup>103</sup> On the other hand, the government may regulate the time, place, and manner of speech more freely; such laws are considered “content-neutral.”<sup>104</sup> Courts examine content-neutral statutes less rigorously under what is often referred to as “intermediate scrutiny.”<sup>105</sup>

### *1. Determining the Applicable Level of Scrutiny*

To determine what level of scrutiny to apply, courts must first determine whether a statute is content-based or content-neutral.<sup>106</sup> Content neutrality depends on “whether the government has adopted [the] regulation of speech because of disagreement with the message it conveys.”<sup>107</sup> The main inquiry is into the government’s purpose or intent in passing the legislation.<sup>108</sup> A speech regulation is content-neutral so long as it is “*justified* without reference to the content of the regulated speech”<sup>109</sup> and “even if it has an incidental effect on some speakers or messages but not others.”<sup>110</sup>

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<sup>102</sup> DAVID L. HUDSON, JR., *LEGAL ALMANAC: THE FIRST AMENDMENT: FREEDOM OF SPEECH* § 2:2 (2012); *see also* R.A.V., 505 U.S. at 387–91.

<sup>103</sup> *See* R.A.V., 505 U.S. at 387–91 (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)). In *R.A.V.*, the Supreme Court struck down a city ordinance that criminalized “fighting words” that insult, or provoke violence, ‘on the basis of race, color, creed, religion or gender.’ *Id.* at 391. The Court stated that St. Paul could not prohibit speakers from speaking on “disfavored subjects” nor “license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.” *Id.* at 391–92. It held that this amounted to unconstitutional viewpoint discrimination. *Id.*

<sup>104</sup> *See e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994); *Ward v. Rock Against Racism*, 491 U.S. 781, 789 (1989); *see also* O’Neill, *supra* note 100, at 227.

<sup>105</sup> O’Neill, *supra* note 100, at 227. There is less of a presumption of invalidity with regard to these types of statutes because they merely regulate the when, where, and how of expression rather than the subject matter of speech. *HUDSON*, *supra* note 102, § 2:3. However, because content neutral statutes are nevertheless restrictions on speech, courts must still analyze their constitutionality, albeit using a milder test. *Id.*

<sup>106</sup> *HUDSON*, *supra* note 102, § 2:3.

<sup>107</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

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

<sup>109</sup> *Id.* (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

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

On the other hand, a content-based regulation “discriminates between lawful and unlawful conduct based upon the content of the [speaker’s] communication.”<sup>111</sup> For example, the Supreme Court in *United States v. Playboy Entertainment Group, Inc.* held a law to be content-based where it only regulated sexually explicit speech.<sup>112</sup> The justification for the law was the subject matter’s effect on young viewers.<sup>113</sup> The Court concluded that the law was content-based because its justification “focus[ed] *only* on the content of the speech and the direct impact that speech has on its listeners.”<sup>114</sup>

## *2. Strict Scrutiny vs. Intermediate Scrutiny*

Once the court determines whether the statute is content-based or content-neutral, it must apply the corresponding level of constitutional scrutiny.<sup>115</sup> Courts frequently invalidate content-based statutes upon strict judicial examination.<sup>116</sup> To survive strict scrutiny, a regulation must be (1) necessary to serve a compelling state interest, (2) narrowly drawn to achieve that end, and (3) the least restrictive means of doing so.<sup>117</sup> On the other hand, intermediate scrutiny is “a far cry from strict scrutiny.”<sup>118</sup> To survive intermediate scrutiny, content-neutral regulations must be (1) “justified without reference to the content of the regulated speech,” (2) “narrowly tailored to serve a significant governmental interest,” and (3) “leave open

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<sup>111</sup> *Carey v. Brown*, 447 U.S. 455, 460 (1980); *see also* *Consolidated Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 536 (1980).

<sup>112</sup> *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 811 (2000) (analyzing a regulation applying to “sexually explicit adult programming or other programming that is indecent”); *see also* *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 410 (1993). In *Cincinnati v. Discovery Network, Inc.*, the Supreme Court analyzed the constitutionality of a city ordinance banning news racks containing “commercial handbills.” *See* 507 U.S. at 410. The Court held the ordinance was content-based because it was not justifiable as a time, place, or manner restriction without reference to the content — the commercial nature — of the material on the news racks. *Id.* at 428–31.

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

<sup>114</sup> *Id.*

<sup>115</sup> *HUDSON*, *supra* note 102, § 2:2.

<sup>116</sup> “Strict scrutiny leaves few survivors.” *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 455 (2002) (Souter, J., dissenting).

<sup>117</sup> *See e.g.*, *Burson v. Freeman*, 504 U.S. 191, 197 (1992); *Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989).

<sup>118</sup> *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 434 (1993).

ample alternative channels for communication of the information.”<sup>119</sup> Notably, content-neutral regulations need not be justified by a compelling government interest, as content-based statutes must, but rather a significant government interest. Further, content-neutral time, place, and manner restrictions need not be the least restrictive or least intrusive means of achieving the government’s purpose.<sup>120</sup>

## B. UNPROTECTED AND “LOW-LEVEL” SPEECH

While heightened judicial scrutiny — both strict and intermediate — of speech regulations serves to protect First Amendment interests, not all speech is equally deserving of protection.<sup>121</sup> Accordingly, the judicial standards of review described in Part II.A do not apply in all First Amendment cases.<sup>122</sup> On one end, political speech and speech on matters of public concern garner the highest protection.<sup>123</sup> On the other end, some categories of speech are considered “low-level” or “low-value” speech deserving less protection, and some categories are entirely outside of constitutional protection due to their harm or lack of social value.<sup>124</sup> The following are low-value, unprotected

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<sup>119</sup> Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994); Clark v. Cnty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

<sup>120</sup> Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989). The Supreme Court has stated, “the requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’” *Id.* (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

<sup>121</sup> Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 S.M.U. L. Rev. 297, 298 (1995). “Some speech might not sufficiently further the values and purposes of the First Amendment to warrant such extraordinary immunity from regulation,” i.e., application of strict scrutiny. Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273, 283 (2009).

<sup>122</sup> Shaman, *supra* note 121, at 298.

<sup>123</sup> *Id.* at 302; *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985) (“It is speech on ‘matters of public concern’ that is ‘at the heart of the First Amendment’s protection.’”) (quoting First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978)).

<sup>124</sup> Shaman, *supra* note 121, at 298–99, 331. In *Chaplinsky v. New Hampshire*, the Supreme Court first acknowledged the idea that some speech is less deserving of protection and stated, “there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” 315 U.S. 568, 571–72. It stated that these categories “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that

categories of speech: incitement to imminent lawless action, fighting words, true threats, obscenity, child pornography, and speech integral to criminal conduct.<sup>125</sup> In these areas, the government has considerable leeway in regulating speech.<sup>126</sup> Some types of speech that are considered low-value, but are not entirely unprotected, are commercial speech, indecent expression, and false statements of fact.<sup>127</sup> The government has more leeway to regulate low-value speech than high-value speech.<sup>128</sup> Where the proscribed speech is of high-value, the Supreme Court requires a sufficiently compelling state interest as justification for its law.<sup>129</sup> The Court “requires much less to sustain the regulation of low-value speech.”<sup>130</sup>

The Supreme Court uses definitional balancing<sup>131</sup> for low-value speech.<sup>132</sup> Definitional balancing “focuses upon a category or class of speech, such as libel, and inquires whether the category of speech causes a sufficiently serious harm to justify restricting the speech.”<sup>133</sup> If the Court is convinced that the speech causes sufficient harm, it will uphold a regulation on such speech.<sup>134</sup> However, the Court has been “quite reluctant to recognize new ‘low value’

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any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Id.*

<sup>125</sup> HUDSON, *supra* note 102, § 2:2; *see also* Stone, *supra* note 121, at 298.

<sup>126</sup> However, the government does not have absolute power to regulate speech within unprotected speech categories. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). In *R.A.V. v. City of St. Paul*, the Supreme Court held that where the government makes content-based distinctions between types of speech *within* an unprotected speech category, the government’s regulation is subject to “greater scrutiny” than strict scrutiny. 505 U.S. at 431.

<sup>127</sup> O’Neill, *supra* note 100, at 252; Stone, *supra* note 121, at 285.

<sup>128</sup> Shaman, *supra* note 121, at 329.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* “The essential difference between the Supreme Court’s treatment of high- and low-value speech concerns what the Court will accept as justification for regulating speech.” *Id.*

<sup>131</sup> *Id.* at 331. Definitional balancing has also been called “categorical balancing.” *Id.*; *see also* Stone, *supra* note 121, at 285.

<sup>132</sup> Stone, *supra* note 121, at 285; *see also* Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 942–43 (1968).

<sup>133</sup> Shaman, *supra* note 121, at 331.

<sup>134</sup> *Id.* However, in established unprotected speech categories, the Supreme Court does not use balancing tests because it has historically considered such categories of little to no value. *Id.* at 331–32.

categories that have not been well established over time.”<sup>135</sup> There has been much debate in the past few years over the value of “violent expression, hate speech,<sup>136</sup> pornography,<sup>137</sup> and non-newsworthy invasions of privacy,” but the Supreme Court has not yet declared these areas unprotected.<sup>138</sup> These types of expression, which may overlap with revenge porn, fall into a regulatory gray area, making it difficult for legislators to predict how courts will view laws that regulate in these areas.

### C. SECONDARY EFFECTS

Under the secondary effects doctrine, where the government justifies a facially content-based law without reference to the communicative impact of the regulated speech, courts will treat the law as content-neutral, and subject it to intermediate scrutiny.<sup>139</sup> The government frequently uses the secondary effects doctrine to defend legislation, arguing that laws “are not aimed at the content of the disfavored expression, but at certain indirect or side effects of the speech that are unrelated to the message of the speech.”<sup>140</sup> The secondary effects doctrine arose out of adult entertainment zoning regulation cases, as city officials sought to regulate the locations of adult businesses, such as clubs with nude dancing, adult movie theaters, and adult bookstores.<sup>141</sup>

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<sup>135</sup> Stone, *supra* note 121, at 284. University of Chicago Law School Professor Geoffrey R. Stone suggests a four-prong definition for the Supreme Court to use in determining whether speech is of low value. *Id.* “Low value speech does not ‘primarily advance political discourse,’ is not defined in terms of ‘disfavored ideas or political viewpoints,’ usually has ‘a strong noncognitive’ aspect, and has ‘long been regulated without undue harm to the overall system of free expression.’” *Id.*

<sup>136</sup> Hate speech is generally defined as “highly offensive speech that vilifies, insults, or stigmatizes an individual on the basis of race, ethnicity, national origin, religion, gender, age, handicap, or sexual orientation.” Shaman, *supra* note 121, at 324.

<sup>137</sup> Webster’s Dictionary defines “pornography” as “writings, pictures, etc. intended primarily to arouse sexual desire.” HUDSON, *supra* note 102, § 4:1.

<sup>138</sup> Stone, *supra* note 121, at 284; Shaman, *supra* note 121, at 319–325 (commentators petition the Supreme Court to deem non-obscene pornography and racist “hate speech” to be low-value, unprotected speech categories).

<sup>139</sup> O’Neill, *supra* note 100, at 245.

<sup>140</sup> David L. Hudson, Jr., *The Secondary Effects Doctrine: “The Evisceration Of First Amendment Freedoms,”* 37 WASHBURN L.J. 55, 60 (1997).

<sup>141</sup> HUDSON, *supra* note 102, § 2:4; Hudson, *supra* note 140, at 61–62.

The doctrine first came about in *Young v. American Mini Theatres, Inc.*<sup>142</sup> There, the Supreme Court upheld Detroit's "Anti-Skid Row Ordinance" which limited the locations for adult businesses.<sup>143</sup> The government justified its law by arguing that a concentration of such businesses in certain areas has negative secondary effects on the surrounding areas, such as decreased property values and increased crime rate.<sup>144</sup> It supported this argument with corroborating opinions of urban planners and real estate experts.<sup>145</sup> The Court accepted the government's secondary effects justification.<sup>146</sup> Justice Stevens reasoned that the interest in protecting this type of speech "is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate."<sup>147</sup> Thus, the Court seems to rest its decision on both the secondary effects doctrine and the idea that adult entertainment is of "lesser" social value.

In *City of Renton v. Playtime Theatres, Inc.*, two adult theaters challenged an ordinance prohibiting adult movie theaters within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school.<sup>148</sup> The government of the city of Renton supported their secondary effects justification with studies from the nearby city of Seattle and other cities, but not from Renton.<sup>149</sup> The Supreme Court relied heavily on *American Mini Theatres* in concluding the ordinance was facially content-discriminatory, but content-neutral in its justification based on the negative secondary effects of

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<sup>142</sup> *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976).

<sup>143</sup> *Hudson, supra* note 140, at 61.

<sup>144</sup> *Am. Mini Theatres*, 427 U.S. at 54.

<sup>145</sup> *Id.* at 55. After *American Mini Theatres*, courts required that the government support their secondary effects arguments with some factual basis. See *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659, 661 (1981) (striking down a law similar to that in *American Mini Theatres* because it was "not based on any studies by social scientists, or on a demonstrated past history of 'adult' theatres causing neighborhood deterioration.").

<sup>146</sup> *Am. Mini Theatres*, 427 U.S. at 71 n.34 (1976) ("The Common Council's determination was that a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime . . . . It is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech.").

<sup>147</sup> *Am. Mini Theatres*, 427 U.S. at 70.

<sup>148</sup> *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 41 (1986).

<sup>149</sup> *Id.* at 44.

adult theaters.<sup>150</sup> The Court upheld the ordinance.<sup>151</sup> While *Renton* arguably expanded the application of the secondary effects doctrine by indicating that governments need not supply supporting data from the locale the law applies to, the majority opinion has received much criticism.<sup>152</sup>

First, the decision was not unanimous.<sup>153</sup> The dissent, written by Justice Brennan and joined by Justice Marshall, argued the ordinance was content-based.<sup>154</sup> Justice Brennan contended the majority mixes up the secondary effects doctrine with the requirement under strict scrutiny that the government have a compelling interest justifying its law.<sup>155</sup> The dissent also pointed out that only *after* the lawsuit was filed challenging the ordinance did the city amend the ordinance to add a provision claiming its purpose was to prevent negative effects.<sup>156</sup> Second, legal scholars also denounced the decision.<sup>157</sup> For example, Professor Laurence Tribe opined that, “[c]arried to its logical conclusion, such a doctrine could gravely erode the first amendment’s protections” and allow government regulation of “most, if not all, speech.”<sup>158</sup> Despite this criticism, courts have continued to apply the secondary effects doctrine in adult business zoning cases, albeit inconsistently.<sup>159</sup>

Further, in *Boos v. Barry*, the Supreme Court opened the door for the expansion of the secondary effects doctrine to cases besides those involving

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<sup>150</sup> *Id.* at 47.

<sup>151</sup> *Id.* at 54.

<sup>152</sup> Hudson, *supra* note 140, at 64–67.

<sup>153</sup> Playtime Theatres, 475 U.S. at 55.

<sup>154</sup> *Id.* at 56.

<sup>155</sup> *Id.* Justice Brennan stated that the idea that the targeted speech has negative secondary effects may be support for a compelling government interest, but it does not turn a content-based law into a content-neutral one. *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Hudson, *supra* note 140, at 65. Marc Rohr called the *Renton* decision “a wholly unprecedented approach to the understanding of content-neutrality.” *Id.* at 66.

<sup>158</sup> *Id.* Tribe is a professor of constitutional law at Harvard Law School. Laurence H. Tribe, HARVARD LAW SCHOOL, <http://www.law.harvard.edu/faculty/directory/10899/Tribe> (last visited January 15, 2014).

<sup>159</sup> Hudson, *supra* note 140, at 67–71. Some courts apply the secondary effects doctrine even where the legislature claims such a purpose after the litigation has commenced or where there is evidence of a content discriminatory purpose. *Id.* Other courts are reluctant to apply the secondary effects doctrine and require the government “show some evidence or probability that adult businesses will create harmful effects.” *Id.*

adult businesses.<sup>160</sup> In *Boos*, the Court invalidated a law banning the “display [of] any sign that tends to bring [a] foreign government into ‘public odium’ or ‘public disrepute’” within 500 feet of that foreign country’s embassy.<sup>161</sup> However, Justice O’Connor opened the door for application of the secondary effects doctrine to political speech by stating, “Respondents and the United States do not point to the ‘secondary effects’ . . . . They do not point to congestion, to interference with ingress or egress, to visual clutter, or to the need to protect the security of embassies.”<sup>162</sup> This suggests that these secondary effects justifications may have been sufficient to uphold a content-based statute regulating political speech.<sup>163</sup> Since *Boos*, courts have applied the secondary effects doctrine in cases of regulation of several different types of speech such as, “indecent speech, commercial speech, and even political speech.”<sup>164</sup> The secondary effects jurisprudence illustrates one route legislators may take in combating revenge porn. *Boos* indicates that courts may accept a secondary effects justification even where the regulated speech is of high value, while *American Mini Theatres* demonstrates that courts may be more likely to accept a secondary effects argument where the regulated speech is of low value. However, the *Renton* decision and the criticism it garnered illustrate the existence of diverging views in this area.

#### D. OBSCENITY, INDECENCY, AND PORNOGRAPHY

“All ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full [First Amendment] protection.”<sup>165</sup> However, this principle is not absolute.<sup>166</sup> As discussed above, the Supreme Court

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<sup>160</sup> *Id.* at 74–76; *see also* *Boos v. Barry*, 485 U.S. 312 (1988).

<sup>161</sup> *Boos*, 485 U.S. at 312.

<sup>162</sup> *Id.* at 321.

<sup>163</sup> *Hudson*, *supra* note 140, at 75–76.

<sup>164</sup> *Id.* at 76–77 (citing *Reno v. ACLU*, 117 S. Ct. 2329, 2346 (1997) (applying the secondary effects doctrine to obscenity); *Maryland II Ent., Inc. v. City of Dallas*, 28 F.3d 492 (5th Cir. 1994) (applying the secondary effects doctrine to commercial speech); *Johnson v. Bax*, 63 F.3d 154 (2d Cir. 1995) (applying the secondary effects doctrine to political speech)).

<sup>165</sup> *Roth v. United States*, 354 U.S. 476, 484 (1957).

<sup>166</sup> *Shaman*, *supra* note 121, at 298.

considers some categories of speech of such low value or high harm as to be considered unprotected, and has upheld regulations on adult entertainment under the secondary effects doctrine.<sup>167</sup> The Supreme Court clearly considers some speech less worthy of protection and more susceptible to regulation than other speech.<sup>168</sup>

Obscenity is one such type. Obscenity has been called one of the most “controversial and confounding areas of First Amendment jurisprudence.”<sup>169</sup> In *Roth v. United States*, the Supreme Court held that “obscenity is not within the area of constitutionally protected speech or press.”<sup>170</sup> The Court stated that “implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.”<sup>171</sup> To determine what constitutes obscene material, the Court laid out the test: “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.”<sup>172</sup> It defined “prurient” interest as “material having a tendency to excite lustful thoughts” and “having morbid or lascivious longings.”<sup>173</sup> It further clarified that “sex and obscenity are not synonymous.”<sup>174</sup>

Post-*Roth*, the Supreme Court continued to struggle to define obscenity.<sup>175</sup> In his concurring opinion in *Jacobellis v. Ohio*, Justice Stewart attempted clarification by stating that “criminal laws in this area are constitutionally limited to hard-core pornography.”<sup>176</sup> Years after the Supreme

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<sup>167</sup> See *supra* Parts III.B and III.C.

<sup>168</sup> Shaman, *supra* note 121, at 298.

<sup>169</sup> HUDSON, *supra* note 102, § 4:2. In *Jacobellis v. Ohio*, the Supreme Court was faced with the task of determining whether a film was obscene. 378 U.S. 184, 186–87 (1964). Justice Stewart stated he felt the Court was “faced with the task of trying to define what may be indefinable. *Id.* at 197 (Stewart, J., concurring).

<sup>170</sup> Roth, 354 U.S. at 485.

<sup>171</sup> *Id.* at 484.

<sup>172</sup> *Id.* at 489.

<sup>173</sup> *Id.* at 488 n.20.

<sup>174</sup> *Id.* at 487.

<sup>175</sup> HUDSON, *supra* note 102, § 4:2.

<sup>176</sup> Jacobellis v. Ohio, 378 U.S. 184, 197 (Stewart, J., concurring). Beyond that, however, Justice Stewart could not further define obscene material, except to state “I know it when I see it.” *Id.*

Court heard *Jacobellis* and *Roth*, it adjusted the obscenity test in *Miller v. California*.<sup>177</sup> The *Miller* test instructs consideration of

- (1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; (3) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.<sup>178</sup>

The Court left it up to the states to regulate obscene speech according to their community standards, but gave the following two examples of “what a state statute could define for regulation”: “(a) [p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated”; and “(b) [p]atently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.”<sup>179</sup> Today, the *Miller* test is still used to determine what is obscene.<sup>180</sup> It is clear today that states may regulate within the unprotected realm of obscenity.<sup>181</sup>

However, there is a plethora of sexual speech that does not fall within the category of obscenity.<sup>182</sup> Pornography is not a legal term.<sup>183</sup> Pornography and sex are not synonymous with obscenity, but overlap with obscenity.<sup>184</sup> Some pornography is legally obscene, but much is protected because it does not meet the *Miller* requirements.<sup>185</sup> States have an interest in regulating “indecent” sexual expression that does not amount to obscenity, but the

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<sup>177</sup> HUDSON, *supra* note 102, § 4:2.

<sup>178</sup> *Id.*; see also *Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>179</sup> *Miller*, 413 U.S. at 25.

<sup>180</sup> HUDSON, *supra* note 102, § 4:2.

<sup>181</sup> Shaman, *supra* note 121, at 306–07; see also HUDSON, *supra* note 102, § 4:2.

<sup>182</sup> HUDSON, *supra* note 102, § 4:5.

<sup>183</sup> *Id.* at § 4:1. However, one type of pornography, child pornography, is an unprotected speech category under the First Amendment. *Id.*

<sup>184</sup> See *id.*; *Roth v. United States*, 354 U.S. 476, 487 (1957).

<sup>185</sup> HUDSON, *supra* note 102, § 4:1. The Supreme Court in *Jacobellis v. Ohio* stated that only hard-core pornography is legally obscene. 378 U.S. 184, 197 (Stewart, J., concurring). Courts struggle to determine the line between protected and unprotected pornography. David L. Hudson, Jr., *Pornography & obscenity*, FIRST AMENDMENT CENTER (Sept. 13, 2002) <http://www.firstamendmentcenter.org/pornography-obscenity>.

Supreme Court has not declared indecent speech an unprotected speech category.<sup>186</sup>

In *FCC v. Pacifica*, the Supreme Court held that the Federal Communications Commission (FCC) could regulate indecent speech on broadcast radio in some situations.<sup>187</sup> In *Pacifica*, the FCC granted a complaint it received against Pacifica, a radio station that had broadcast a comedian's monologue entitled "Filthy Words," which contained repeated curse words, during the day.<sup>188</sup> Pacifica challenged the FCC's order on First Amendment grounds.<sup>189</sup> The Court found the content of the broadcast to be "vulgar, offensive, and shocking" and stated that, while some "patently offensive references to excretory and sexual organs and activities" may be protected, "they surely lie at the periphery of First Amendment concern."<sup>190</sup> However, the Court declined to declare indecency an unprotected category of speech.<sup>191</sup> Rather, it stated that whether indecent expression is protected varies with the context; "[i]t is a characteristic of speech such as this that both its capacity to offend and its 'social value' . . . vary with the circumstances."<sup>192</sup> Later, in *Sable*, the Supreme Court definitively stated that "[s]exual expression which is indecent but not obscene is protected by the First Amendment," but the government may regulate such speech so long as the regulation passes strict scrutiny.<sup>193</sup>

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<sup>186</sup> HUDSON, *supra* note 102, § 4:5.

<sup>187</sup> FCC v. *Pacifica*, 438 U.S. 726 (1978).

<sup>188</sup> *Id.* at 730. The FCC's order stated that *Pacifica* "could have been the subject of administrative sanctions," and that the FCC has the power to regulate the use of "any obscene, indecent, or profane language by means of radio communications." *Id.*

<sup>189</sup> *Id.* at 734.

<sup>190</sup> *Id.* at 743, 747 (internal quotations omitted). The Court compared indecency with the unprotected category of low-value speech, obscenity; it stated, "These words offend for the same reasons that obscenity offends." *Id.* at 746.

<sup>191</sup> *Id.* at 747.

<sup>192</sup> *Id.* at 747. In this case, the Court made clear that the 'circumstances' of this broadcast, i.e., that the monologue was disseminated via broadcast radio during the day when children would be listening, were of tantamount importance. *Id.*

<sup>193</sup> *Sable Commc'n's of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989); *see also* C. Richard Martin, *Censorship in Cyberspace*, 34 Hous. LAW. 45, 47 (1996) ("[T]he government cannot regulate 'indecent' speech unless the restriction promotes a compelling interest, and the government uses the least restrictive means to further that interest.").

Following *Pacifica*, the FCC was reluctant to end licenses with broadcast stations based on indecency complaints, stating its “inten[tion] strictly to observe the narrowness of the *Pacifica* holding.”<sup>194</sup> However, in 2003, the FCC began to “crack down” on licensees.<sup>195</sup> That year, in response to a complaint regarding a singer’s isolated use of the word “fuck” on the Golden Globe awards, the FCC ruled that the word is inherently indecent.<sup>196</sup> In a subsequent order, the FCC also deemed “shit” to be per se indecent.<sup>197</sup> Unlike the “Filthy Words” monologue, these were cases of isolated instances of profanity, so-called “ fleeting expletives.”<sup>198</sup> In its orders, the FCC made clear that it considered fleeting expletives to be indecent, regardless of context or usage.<sup>199</sup> These orders marked a striking change in policy.<sup>200</sup>

Several television networks challenged the FCC’s Golden Globes order.<sup>201</sup> The Supreme Court heard the case twice.<sup>202</sup> In *Fox I*, the Court avoided the First Amendment issue entirely.<sup>203</sup> In *Fox II*, the Court held that the FCC failed to give the television networks adequate notice of their new policy before the broadcasts.<sup>204</sup> The Court again sidestepped the constitutional issue.<sup>205</sup> Accordingly, First Amendment indecency jurisprudence is plagued with uncertainty. It is unclear at which point the Supreme Court would consider speech that crosses the line into indecent expression

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<sup>194</sup> FCC v. Fox Television Stations (*Fox I*), 556 U.S. 502, 507 (2009).

<sup>195</sup> GEORGE B. DELTA & JEFFREY H. MATSUURA, LAW OF THE INTERNET §12.01 (Supp. 2014-1), available at 2013 Westlaw 3924202.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Fox I*, 556 U.S. at 502; see also DELTA & MATSUURA, *supra* note 195, § 12.01.

<sup>199</sup> DELTA & MATSUURA, *supra* note 195, § 12.01.

<sup>200</sup> *Fox I*, 556 U.S. at 502, 508–09; DELTA & MATSUURA, *supra* note 195, § 12.01.

<sup>201</sup> See *Fox I*, 556 U.S. at 502.

<sup>202</sup> See *id.*; FCC v. Fox Television Stations, Inc. (*Fox II*), 132 S. Ct. 2307 (2012).

<sup>203</sup> See *Fox I*, 556 U.S. at 502, 529. *Fox I* consisted entirely of discussion on whether an administrative agency need give an explanation when drastically changing its policy. *Id.* The Court remanded the case to the Second Circuit for consideration of the First Amendment issues. *Id.* On remand, the Second Circuit held the FCC’s policy was unconstitutionally vague and the FCC appealed. *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317 (2d Cir. 2010) (vacated and remanded by *Fox II*, 132 S. Ct. 2307 (2012)).

<sup>204</sup> *Fox II*, 132 S. Ct. at 2320.

<sup>205</sup> *Id.* (“[I]t is unnecessary for the Court to address the constitutionality of the current indecency policy.”).

is “at the periphery of First Amendment concern.”<sup>206</sup> It is thereby unclear the extent to which indecent material may be regulated within the bounds of the Constitution. What we do know, however, is that the Supreme Court has not yet declared indecency to be unworthy of First Amendment protection and *Sable* is still good law.<sup>207</sup>

## E. THE INTERSECTION OF THE FIRST AMENDMENT AND THE INTERNET

The Supreme Court has afforded different types of media varying levels of protection under the First Amendment.<sup>208</sup> The Internet is no different. The nature of the Internet creates unique First Amendment challenges.<sup>209</sup> Its creation sparked debate among legislators, parents, and politicians regarding how to protect children from adult material online.<sup>210</sup> In 1996 Congress passed the Communications Decency Act (CDA), which in part, sought to address these issues.<sup>211</sup> In particular, two provisions sparked controversy.<sup>212</sup> One provision criminalized the online transmission of “obscene” or “indecent” material to a person the sender knows to be under eighteen years of age.<sup>213</sup> The prohibition of indecent communication sparked criticism because the Supreme Court had distinguished indecency

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<sup>206</sup> FCC v. Pacifica, 438 U.S. 726, 743, 747 (1978) (internal quotations omitted). The spectrum of uncertainty ranges from Carlin’s clearly indecent monologue to fleeting expletives in arguably innocuous contexts.

<sup>207</sup> See *Sable Commc’ns of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

<sup>208</sup> See, e.g., *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) (“Each medium of expression . . . may present its own problems.”); *Sable Commc’ns of California, Inc. v. FCC*, 492 U.S. 115 (1989) (discussing a regulation on telephonic communications); *FCC v. Pacifica*, 438 U.S. 726 (1978) (considering a regulation on broadcast media).

<sup>209</sup> Kim L. Rappaport, Comment, *In The Wake Of Reno v. ACLU: The Continued Struggle In Western Constitutional Democracies With Internet Censorship And Freedom Of Speech Online*, 13 AM. U. INT’L L. REV. 765, 773 (1998). “[The Internet] allows any of the literally tens of millions of people with access to the Internet to exchange information . . . almost instantaneously . . . either to specific individuals, to a broader group of people interested in a particular subject, or to the world as a whole.” *ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996).

<sup>210</sup> See Martin, *supra* note 193, at 47; see also Rappaport, *supra* note 209, at 766.

<sup>211</sup> Rappaport, *supra* note 209, at 766.

<sup>212</sup> Martin, *supra* note 193, at 47.

<sup>213</sup> Rappaport, *supra* note 209, at 775–76; see also Communications Decency Act, 47 U.S.C. § 223(a) (Supp. II 1994).

from obscenity as a protected category of speech.<sup>214</sup> The other provision criminalized the transmission or display of “patently offensive” material “in a manner available to a person under 18 years of age.”<sup>215</sup>

Although the CDA included affirmative defenses for content providers and ISPs, its opponents requested an injunction on the two provisions on First Amendment grounds in *ACLU v. Reno*.<sup>216</sup> The district court granted the injunction and the government appealed.<sup>217</sup> In *Reno v. ACLU*, the Supreme Court affirmed the district court’s decision.<sup>218</sup> Nearly two decades prior, the Supreme Court stated that it grants broadcast media the most limited First Amendment protection of all expressive media because it is a “uniquely pervasive presence in the lives of all Americans” and “uniquely accessible to children.”<sup>219</sup>

In *Reno*, the Court differentiated broadcast media from the Internet; it stated that unlike the Internet, broadcast media has a “history of extensive Government regulation,” a frequency-scarcity element, and is uniquely “invasive.”<sup>220</sup> The Court emphasized that the Internet is not as invasive as radio or television and that “odds are slim that a user would come across a sexually explicit sight by accident.”<sup>221</sup> As for the regulation itself, the Court found the CDA to be a content-based regulation, applied strict scrutiny,

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<sup>214</sup> See *supra* Part III.D; see also Martin, *supra* note 193, at 47.

<sup>215</sup> Rappaport, *supra* note 209, at 777; see also Communications Decency Act, 47 U.S.C. § 223(d) (Supp. II 1994).

<sup>216</sup> *Id.* at 777–78.

<sup>217</sup> *ACLU v. Reno*, 929 F. Supp. 824, 851–83 (E.D. Pa. 1996).

<sup>218</sup> *Reno v. ACLU*, 521 U.S. 844, 844 (1997).

<sup>219</sup> *FCC v. Pacifica*, 438 U.S. 726, 748 (1978). In other words, the government has more freedom to regulate broadcast media than other types of media. *Id.*

<sup>220</sup> *Reno*, 521 U.S. at 867. Spectrum scarcity refers to the idea that available broadcast frequencies are finite. *FRC v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933). It allowed Congress to delegate power to the FCC to regulate licensing of frequencies. *Id.* The Supreme Court has cited spectrum scarcity as one of the reasons broadcast media may be regulated more strictly than other types of media. See, e.g., *Turner Broad. System, Inc. v. FCC*, 512 U.S. 622, 622 (1994); *NBC v. United States*, 319 U.S. 190, 213 (1943); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969) (stating the broadcast medium is “of considerable and growing importance whose scarcity impelled its regulation by an agency authorized by Congress.”).

<sup>221</sup> *Reno*, 521 U.S. at 869 (internal quotations omitted).

and held it unconstitutionally vague and overbroad.<sup>222</sup> The Court invalidated the provisions despite its recognition that it had “repeatedly recognized the governmental interest in protecting children from harmful materials.”<sup>223</sup> This decision demonstrates the constitutional hurdles legislators face in attempting to regulate online communications. The Court explicitly granted the Internet the utmost First Amendment protection, even where it is pitted against an interest the Supreme Court has previously found compelling.<sup>224</sup>

The inception of the Internet has also created a difficulty in the realm of obscenity jurisprudence. In *Miller*, the Court stated that courts and juries must apply “contemporary community standards” in deciding what “appeals to the prurient interest.”<sup>225</sup> However, as the district court found in *ACLU v. Reno*, the Internet is a “global medium of communications that links people, institutions, corporations, and governments *around the world*.”<sup>226</sup> The Internet knows no geographic boundaries. The community standards measure as applied to Internet communications has thus received harsh criticism.<sup>227</sup> Content creators risk being penalized for content

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<sup>222</sup> *Id.* at 868, 871, 878. The Court found the CDA to be vague because one of the provisions uses “indecent” to describe the prohibited expression, while the other defines the prohibited expression as material that “in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.” *See id.* at 871; *see also* Communications Decency Act, 47 U.S.C. § 223(a), (d) (Supp. II 1994). With two differing descriptions and absent a definition of “indecency,” it was unclear what speech was prohibited. *Reno*, 521 U.S. at 873. Moreover, the second provision uses some of the language from the *Miller* test for obscenity, but omits important narrowing aspects, as well as the limiting social value prong, rendering it overbroad. *Id.*

<sup>223</sup> *See Reno*, 521 U.S. 875 (“[T]he Government may not ‘reduc[e] the adult population . . . to . . . only what is fit for children.’”) (quoting *Denver Area Ed. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 759 (1996)).

<sup>224</sup> *See, e.g.*, *Sable Commc’ns of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors.”); *see also* *FCC v. Pacifica*, 438 U.S. 726, 749–750 (1978) (upholding a regulation justified in part by an interest in protecting children from indecent programming); *see also* *Ginsberg v. New York*, 390 U.S. 629, 640 (1968) (“The State also has an independent interest in the well-being of its youth.”).

<sup>225</sup> *Miller v. California*, 413 U.S. 15, 32 (1973).

<sup>226</sup> *ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996) (emphasis added).

<sup>227</sup> *See, e.g.*, Noah Hertz-Bunzl, Note, *A Nation of One? Community Standards in the Internet Era*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 145 (2011); Matthew

that is constitutionally protected in one community, but considered obscene in a less liberal community.<sup>228</sup>

In *Ashcroft v. ACLU*, the Supreme Court addressed whether the Child Online Protection Act's (COPA) reliance on community standards to identify material harmful to minors renders it overbroad under the First Amendment.<sup>229</sup> The Supreme Court, in a plurality opinion, held that "any variance caused by the statute's reliance on community standards is not substantial enough to violate the First Amendment."<sup>230</sup> It upheld the statute as constitutional.<sup>231</sup> Notably, only three justices stated they believed the community standards measure is constitutional in online obscenity cases.<sup>232</sup> The other four justices questioned the constitutionality of local community standards as applied to Internet communications, and two explicitly supported a move to a national standard.<sup>233</sup> In the realm of Internet communication, First Amendment jurisprudence is still developing. *Ashcroft* indicates that the Supreme Court may prefer objective national standards over subjective standards that vary with geographic location when it comes to Internet regulations.

#### IV. THE CONSTITUTIONALITY OF CALIFORNIA PENAL CODE SECTION 647(4)

California Penal Code section 647(4) raises several First Amendment issues. First, the law is likely a content-based regulation warranting the application of strict scrutiny.<sup>234</sup> Second, the secondary effects doctrine likely does not apply, as the California Legislature intended to prevent the

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Dawson, Comment, *The Intractable Obscenity Problem 2.0: The Emerging Circuit Split Over the Constitutionality of "Local Community Standards" Online*, 60 CATH. U. L. REV. 719 (2011).

<sup>228</sup> Dawson, *supra* note 227, at 721–22.

<sup>229</sup> *Ashcroft v. ACLU*, 535 U.S. 564, 585 (2002).

<sup>230</sup> *Id.* at 584–85.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 583.

<sup>233</sup> *Id.* at 587, 589–90. Justice O'Connor stated a national standard is necessary in cases of online speech and Justice Breyer stated, "A nationally uniform adult-based standard . . . significantly alleviates any special need for First Amendment protection." *Id.*

<sup>234</sup> See *infra* Part IV.A.

direct effect the speech has on its listeners, as opposed to any indirect effects.<sup>235</sup> Third, much of the targeted speech undoubtedly falls outside of the unprotected category of obscenity.<sup>236</sup> Lastly, revenge porn may fall within the low-value speech category of indecency, but indecency jurisprudence is not well defined and indecent speech is not unprotected.<sup>237</sup> Section 647(4) is likely unconstitutional as written, but California and other states can and should work toward passing constitutional laws to deter the destructive trend of posting revenge porn. Part V discusses possible alterations to California's law that could strengthen it against attacks on its constitutionality and render it more effective in combating revenge porn.<sup>238</sup>

#### A. APPLYING STRICT SCRUTINY

Strict scrutiny is the applicable standard of review because section 647(4) is a content-based statute. Section 647(4) is not a time, place, or manner restriction on speech because it is not “*justified* without reference to the content of the regulated speech.”<sup>239</sup> It prohibits the dissemination of media based on the content of the images or videos.<sup>240</sup> In other words, in order for one to determine whether an individual who has posted an image online has violated section 647(4), one must know the content of the image posted. As in *United States v. Playboy Entertainment*

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<sup>235</sup> See *infra* Part III.B; see also Boos v. Barry, 485 U.S. 312, 321 (1988).

<sup>236</sup> See *infra* Part III.C.

<sup>237</sup> *Id.*

<sup>238</sup> No one has attacked the constitutionality of California's law yet, but it may not be long. California Attorney General Kamala Harris is prosecuting an alleged revenge porn website operator and extortionist as of December 10, 2013. Fran Berkman, *Alleged Operator of Revenge Porn Site Pleads Not Guilty in California*, MASHABLE (Jan. 17, 2014) <http://mashable.com/2014/01/17/revenge-porn-not-guilty/>. Kevin Christopher Bollaert operated two websites, ugotposted.com, which hosted revenge porn, and changemyreputation.com, which charged money to remove the content from ugotposted.com. *Id.* However, Attorney General Harris did not charge Bollaert under the new revenge porn legislation. *Id.* The case indicates that California prosecutors are serious about prosecuting these types of cases and it is only a matter of time before someone is charged under the new law, giving defendants the opportunity to attack its constitutionality.

<sup>239</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cnty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

<sup>240</sup> See *supra* Part III.A.i. Section 647(4) regulates images “of the intimate body part or parts of another identifiable person.” Cal. Penal Code § 647 (West 2013).

*Group, Inc.*, where the Supreme Court held a law applying only to sexually explicit speech to be content-based,<sup>241</sup> section 647(4) only applies to images depicting intimate body parts.<sup>242</sup> Content neutrality further depends on whether the government has passed the legislation because of its “disagreement with the message it conveys.”<sup>243</sup> The government in this case passed section 647(4) because it considers the prohibited speech “disturbing.”<sup>244</sup> California’s intent and the law’s construction render it content-based.

As a content-based statute, section 647(4) faces a constitutional uphill battle. Content-based statutes must survive strict scrutiny, a test that “leaves few survivors.”<sup>245</sup> To survive strict scrutiny, the law must be necessary to serve a compelling state interest, narrowly drawn, and the least restrictive means of achieving the interest.<sup>246</sup> According to the bill’s legislative history, California’s interest is in preventing its citizens from the humiliation, emotional distress, and other repercussions caused by the dissemination of revenge porn.<sup>247</sup> In his proposal, Canella cites the “numerous examples of cyber revenge victims who have taken their own lives.”<sup>248</sup> Thus, it is likely that a court would find California has at least a substantial interest in criminalizing the cause of these suicides.<sup>249</sup>

However, the Supreme Court has invalidated content-based statutes for violating the First Amendment even in cases where government interests

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<sup>241</sup> See *supra* notes 112–14 and accompanying text.

<sup>242</sup> See Cal. Penal Code § 647 (West 2013).

<sup>243</sup> Rock Against Racism, 491 U.S. at 791.

<sup>244</sup> S. B. 255, Reg. Sess. (Cal. 2013); see also *supra* Part II.

<sup>245</sup> City of Los Angeles v. Alameda Books, 535 U.S. 425, 455 (2002) (Souter, J., dissenting).

<sup>246</sup> See *supra* Part III.A.

<sup>247</sup> S. B. 255, Reg. Sess. (Cal. 2013); see also *supra* Part II.

<sup>248</sup> S. B. 255, Reg. Sess. (Cal. 2013); see also *supra* Part II.

<sup>249</sup> The legislative history indicates California’s interest is partially in the well-being of its children. See *supra* Part II. The Supreme Court may be more likely to find “compelling” an interest in children than an interest in only adults. See, e.g., *Sable Commc’ns of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors.”); but see *Reno v. ACLU*, 521 U.S. 844, 875 (1997) (rejecting an interest in protecting children from offensive material online to justify a content-based regulation).

seem to be of the highest order.<sup>250</sup> For example, in *The Florida Star v. B.J.F.*, the Supreme Court invalidated a Florida statute that made it “unlawful to print, publish, or broadcast . . . in any instrument of mass communication the name of the victim of a sexual offense.”<sup>251</sup> The government cited as its interests the privacy of victims of sexual offenses, their physical safety against retaliation by their assailants, and its interest in encouraging victims of sexual offenses to report the crimes without fearing exposure.<sup>252</sup> Despite the convincing nature of the government’s interests, the Court struck down the statute under strict scrutiny.<sup>253</sup> *Florida Star* demonstrates the importance of narrow tailoring in regulations on speech.<sup>254</sup>

Here, section 647(4) runs into similar problems. Assuming the government has a compelling interest, California’s anti-revenge porn legislation may not be narrowly tailored nor the least restrictive means of achieving its interest. One aspect of the law that has produced criticism is its failure to cover photos taken by the victims themselves, so-called “self-shots.”<sup>255</sup> According to a recent study by CCRI, up to 80 percent of revenge porn victims were victimized using photos they took themselves.<sup>256</sup>

Absent justification for such an exclusion, section 647(4)’s exclusion of self-shots is constitutionally problematic for two reasons. First, one could infer from the exclusion impermissible viewpoint discrimination on the government’s part. Viewpoint discrimination is considered even more constitutionally untenable than content discrimination.<sup>257</sup> The government has not supplied any reason to distinguish between images that are taken by an individual’s partner versus those taken by the individual, and there is no obvious justification. The harm caused by the online dissemination of intimate images of an individual presumably does not depend

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<sup>250</sup> See e.g., *Sable*, 492 U.S. at 126; *Reno*, 521 U.S. at 875.

<sup>251</sup> *The Florida Star v. B.J.F.*, 491 U.S. 524, 524 (1989) (quotations omitted).

<sup>252</sup> *Id.* at 537.

<sup>253</sup> *Id.* at 538–41. It held that the statute was not narrowly tailored nor the least restrictive means. *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Franks*, *supra* note 32. California’s law only applies to “[a]ny person who photographs or records by any means the image of the intimate body part or parts of another identifiable person.” Cal. Penal Code § 647 (West 2013) (emphasis added).

<sup>256</sup> *Id.*

<sup>257</sup> See *supra* notes 102–03 and accompanying text.

on the photographer; regardless of the photographer, the victim's photos have been publicized without their consent. The exclusion may amount to viewpoint discrimination because it indicates a government belief that those who took the photos of themselves are less deserving of protection than those who did not. Franks, in discussing California's exclusion of self-shots stated, "I think we are really looking at a 'blame the victim' mentality here," meaning a government mentality that those who take photos of themselves are "asking for it."<sup>258</sup>

A tenuous justification for California's exclusion may be that the government felt that self-shots are sufficiently covered by copyright law.<sup>259</sup> However, the fact that another law may apply to some conduct does not mean that legislators are precluded from addressing overlapping conduct in another statute. It is unlikely that this was the government's logic because the statute does not likewise exclude minors even though child pornography laws apply to the dissemination of their photos.<sup>260</sup> Thus, the government's exclusion is suspect.

Second, the exclusion of self-shots indicates the law is not narrowly drawn to achieve its stated end. Under the "narrow tailoring" prong of strict scrutiny, courts may invalidate statutes for being underinclusive, overinclusive, or both.<sup>261</sup> Here, the exclusion of self-shots renders the statute underinclusive. There is no apparent justification for such a distinction. If the government's purpose in passing the statute is to protect individuals from the harm caused by having photos of intimate areas of their bodies splashed across the Internet, then the statute effectively misses a large portion of its targeted victims. As in Holly Jacobs' case and as the CCRI study indicates, the vast majority of revenge porn victims took the photos themselves.<sup>262</sup> Where a content-based statute misses its target, First Amendment

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<sup>258</sup> See Kelly, *supra* note 2.

<sup>259</sup> See *supra* notes 46–52 and accompanying text.

<sup>260</sup> See *supra* notes 53–56 and accompanying text.

<sup>261</sup> See, e.g., *The Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2658 (2011). An underinclusive statute regulates less speech than necessary to achieve the government's purpose in enacting the statute. *Id.* An overinclusive or overbroad statute prohibits more speech than necessary to meet the government's stated end. See *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227–29 (1987).

<sup>262</sup> See *supra* notes 8–20, 257 and accompanying text.

jurisprudence tells us the government's true purpose becomes particularly suspect and the statute is more likely than not unconstitutional.<sup>263</sup>

Moreover, section 647(4) may be underinclusive for another reason. The law requires proof of the poster's intent to cause the depicted person serious emotional distress.<sup>264</sup> There is indication that some revenge porn disseminators post the material solely for financial gain or for bragging rights.<sup>265</sup> In such cases, California would be hard-pressed to prove intent to harm the victim, rendering the law inadequate, similar to laws targeting stalking and harassment.<sup>266</sup> Regardless of the poster's intent, the harm to the victim is arguably the same. The victim did not consent to publication of the photo, yet their ex disseminated it to the public. Thus, section 647(4) may not address some types of the harmful conduct it aims to prevent.

Lastly, the statute may be effectively overinclusive due to vagueness.<sup>267</sup> One aspect of the statute in particular raises vagueness issues. As Franks has stated, the requirement of “circumstances where the parties agree or understand that the image shall remain private” uses a subjective rather than objective standard and “[s]uch standards are inherently ambiguous and less likely to withstand constitutional scrutiny.”<sup>268</sup> Where a statute is vague, it deters more speech than is necessary because people do not understand what expression the law prohibits and are overly deterred from speaking.<sup>269</sup> Consequently, section 647(4) is not likely to withstand strict scrutiny because it is not narrowly tailored nor the least restrictive means to achieving the government's goal.<sup>270</sup>

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<sup>263</sup> See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387–91 (1992).

<sup>264</sup> Cal. Penal Code § 647 (West 2013) (requiring the poster have “the intent to cause serious emotional distress” to the person depicted).

<sup>265</sup> See, e.g., Franks, *supra* note 32; Ronneburger, *supra* note 31, at 29 (“The blog ‘Ex Girlfriend Pictures’ allows users to submit photos of ex-girlfriends for ‘revenge or bragging rights.’”); see also *supra* Part I.A.

<sup>266</sup> See *supra* notes 57–59 and accompanying text.

<sup>267</sup> See *supra* note 222 and accompanying text.

<sup>268</sup> Cal. Penal Code § 647 (West 2013); Franks, *supra* note 32.

<sup>269</sup> See, e.g., *Reno v. ACLU*, 521 U.S. 844, 871 (1997) (stating that, where a statute lacks definitions of key terms, the statute leads to uncertainty and has an “obvious chilling effect on free speech”).

<sup>270</sup> See *id.* at 873.

## B. SECONDARY EFFECTS

Courts may deem a content-based statute content-neutral for constitutional purposes where the government's purpose is not based on the direct impact of the targeted speech on its listeners, but on some secondary effects of the speech.<sup>271</sup> The secondary effects doctrine is unlikely to apply to section 647(4). The Legislature has stated its purpose as preventing the humiliation of victims of the prohibited speech.<sup>272</sup> The government's target is to prevent the harmful, direct communicative impact of the speech on its listeners. Furthermore, the secondary effects doctrine has typically been applied in zoning regulation cases involving adult businesses.

However, *Boos* opened the door for expansion of the doctrine to cases involving different types of speech.<sup>273</sup> Furthermore, some courts have applied the doctrine even where the legislature claims such a purpose after the litigation has commenced or where there is evidence of a content discriminatory purpose.<sup>274</sup> Accordingly, although the government has not cited a secondary effects justification yet, it is not out of the realm of possibility that a court would accept one. One possible secondary effect is the promotion of extortion. In some instances, when victims of revenge porn have requested website operators to take down their photos, the owners have agreed, but only for a fee.<sup>275</sup> One website "claims to hold an 'independent' partnership with another site that charges a \$250 fee for the removal of photos."<sup>276</sup> The proliferation of revenge porn creates an avenue not only for humiliation of its subjects, but also for their extortion. The government may have a legitimate argument for secondary effects, but it is by no means

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<sup>271</sup> See *supra* Part III.C.

<sup>272</sup> As in *ACLU v. Reno*, a court would likely find that California's interest is in the "primary effects of 'indecent' and 'patently offensive' speech, rather than any "secondary" effect of such speech." 521 U.S. at 868.

<sup>273</sup> *Boos v. Barry*, 485 U.S. 312, 321 (1988); see also *supra* notes 160–64 and accompanying text.

<sup>274</sup> *Hudson*, *supra* note 140, at 76–77 (citing *Phillips v. Borough of Keyport*, 107 F.3d 164, 168–69 (3d Cir. 1997)).

<sup>275</sup> See *Laird*, *supra* note 2.

<sup>276</sup> Jessica Roy, *Victims of Revenge Porn Speak Out Against Craig Brittain, Founder of Is Anybody Down*, BETABEAT (Feb. 4, 2013 2:40 PM), <http://betabeat.com/2013/02/victims-of-revenge-porn-speak-out-against-craig-brittain-and-is-anybody-down/#ixzz2ljSYqAxA>.

certain a court would be persuaded by it.<sup>277</sup> And even if a court did buy such an argument, the statute would still be subject to intermediate scrutiny, which requires narrow tailoring.<sup>278</sup> As discussed above, the statute likely fails this prong and thus, likely fails intermediate scrutiny as well.<sup>279</sup>

### C. OBSCENITY, INDECENCY, AND PORNOGRAPHY

The Supreme Court would likely consider speech that constitutes “revenge porn” to be low-value, indecent expression.<sup>280</sup> But, indecency is not a currently established unprotected category of speech.<sup>281</sup> Revenge porn is of low social value because it is not likely that its protection is essential to a free marketplace of ideas.<sup>282</sup> However, a baseline rule of First Amendment jurisprudence is that the government may not prohibit speech based on its offensiveness to society. While obscenity has been deemed to be so worthless as to fall outside of First Amendment protection, indecency is still considered protected expression. Here, because pornography is not synonymous with obscenity, the government may not regulate revenge porn without limit and will face several problems in attempting to regulate it as either obscene or indecent.<sup>283</sup>

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<sup>277</sup> Even were a court to apply the secondary effects doctrine, it would still subject the statute to intermediate scrutiny, which requires a significant government interest. See Part III.A. A court may not find as significant an interest in preventing extortion than an interest in protecting against the repercussions of revenge porn as discussed *supra* in Part I.B.

<sup>278</sup> See *supra* Part IV.A.

<sup>279</sup> *Id.*

<sup>280</sup> See *supra* notes 190–192 and accompanying text.

<sup>281</sup> See FCC v. Pacifica, 438 U.S. 726, 747 (1978).

<sup>282</sup> Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, Wakeforest L. Rev. (forthcoming 2014). “The publication of revenge porn does not produce better democratic citizens . . . It does not promote civic character or educate us about cultural, religious, or political issues.” *Id.* However, the argument can and has been made that sexual material may convey information or have artistic value. See Shaman, *supra* note 121, at 305–06. Moreover, Eric Goldman has argued that there may be social value in the dissemination of indecent photos that are of public concern. See *infra* notes 289–91 and accompanying text. However, the existence of a narrow exception for material of public concern or of high artistic value would safeguard against such concerns. *Id.*

<sup>283</sup> See *supra* Part III.D.

First, revenge porn media does not necessarily fall within obscenity.<sup>284</sup> To constitute obscenity, an image would have to “appeal to the prurient interest,” be “patently offensive,” and depict “sexual conduct.”<sup>285</sup> As California’s legislation does not require the image depict “sexual conduct,” but rather only “intimate body parts,” much of what the law covers would fall outside of obscenity jurisprudence.<sup>286</sup>

Second, because indecency is a protected speech category, laws regulating such speech are subject to the traditional standards of review. It is safe to say that nearly all, if not all, material falling within California’s statute is indecent.<sup>287</sup> However, such material and the mode of expressing it inherently conveys an idea — specifically, that of revenge. The First Amendment stands to prohibit the government from prohibiting speech based on its disagreeability.<sup>288</sup> Michael Perry has stated, “That the ideas conveyed by obscene materials may be hateful does not make them any less ideational,” and that “even reprehensible ideas such as Nazi ideology are nonetheless ideas.”<sup>289</sup> Accordingly, it is likely that a court would apply the strict scrutiny analysis detailed in Part IV.A and conclude that section 647(4) is likely unconstitutional.

Furthermore, indecency jurisprudence revolves primarily around when the government may regulate speech to shield minors from viewing offensive content online. California’s justification for its revenge porn legislation does not purport to protect children from encountering offensive content online.<sup>290</sup> It is unclear what amount of regulation of indecent

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<sup>284</sup> See *Roth v. United States*, 354 U.S. 476, 487 (1957).

<sup>285</sup> *Miller v. California*, 413 U.S. 15, 25 (1973).

<sup>286</sup> See Cal. Penal Code § 647 (West 2013).

<sup>287</sup> To fall under section 647(4), media must depict “any portion of the genitals, and in the case of a female, also includes any portion of the breasts below the top of the areola, that is either uncovered or visible through less than fully opaque clothing.” Cal. Penal Code § 647 (West 2013).

<sup>288</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

<sup>289</sup> Shaman, *supra* note 121, at 305.

<sup>290</sup> See *supra* Part II. The legislative history cites the case of Audrie, a fifteen-year-old whose nude photos were posted without her consent online. *Id.* The law does not aim to protect children from viewing offensive content online, but rather aims to protect both children and adults from having their depictions posted online without their consent. *Id.*

online communication courts will tolerate as constitutional.<sup>291</sup> However, these cases also indicate that, as a low-value speech category, indecent speech may be regulated to some extent. For example, if the Supreme Court had felt strongly about the FCC's harsh definition of and policy on indecency, it presumably would not have sidestepped the constitutional issues in *Fox Television II*.<sup>292</sup> Accordingly, the only certainty is that California may regulate indecent material without violating the First Amendment, so long as its regulation passes the applicable standard of review.

## V. LOOKING FORWARD: RECONCILING COMPETING GOALS TO ACHIEVE CONSTITUTIONALLY-SOUND LEGISLATION

The problem of revenge porn proves to be a constitutionally tricky one. California's legislation is a step in the right direction, but needs modification to be effective and withstand constitutional scrutiny. Other states should learn from section 647(4)'s shortcomings in drafting their own anti-revenge porn legislation. As a start, in order to narrowly tailor legislation to achieve California's purpose, legislators ought to include self-shots.<sup>293</sup> Many past victims took the photos themselves and the exclusion of such victims renders the law inadequate.<sup>294</sup>

Second, legislators should consider including an exception that excludes material with serious literary, artistic, political, or scientific value, as does the *Miller* test.<sup>295</sup> Franks cites as a constitutional weakness of the California law its lack of "clear exceptions for commercial images, reporting, investigation, and prosecution of unlawful conduct, or images relating to the public interest."<sup>296</sup> Exceptions such as these would keep the law from chilling constitutionally valuable speech. Professor of law Eric Goldman

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<sup>291</sup> See *supra* notes 205–07 and accompanying text.

<sup>292</sup> *Id.* However, it is important to note that the FCC acts in a special capacity. See *supra* note 220. Congress delegated power to the FCC to regulate broadcast media, authorization that states do not enjoy. *Id.*

<sup>293</sup> *Podcast*, *supra* note 9.

<sup>294</sup> See *supra* note 256 and accompanying text; see also *supra* Part IV.A.

<sup>295</sup> See *supra* note 178 and accompanying text.

<sup>296</sup> Franks, *supra* note 32.

gave the example of Anthony Weiner's infamous nude self-shots.<sup>297</sup> As a person of legitimate public interest, Anthony Weiner's actions are of public concern.<sup>298</sup> Goldman stated that a recipient of such photos "might want to divulge [them] to prove his or her story as part of their ability to engage in this important social discourse."<sup>299</sup> An exception for media of public concern would allow people to participate in such dialogue. Further, the exception for serious literary, artistic, political, or scientific value should be an objective, national standard because in *Ashcroft v. ACLU* some Supreme Court justices have voiced their beliefs that subjective standards that vary with geographic location are unconstitutional as applied to the Internet.<sup>300</sup>

Third, anti-revenge porn statutes should be entirely based on objective standards, rather than subjective.<sup>301</sup> For example, Franks has suggested that a statute could prohibit dissemination of photos where the subject has a "reasonable expectation of privacy or confidentiality" in the photo.<sup>302</sup> Section 647(4)'s requirement of "circumstances where the parties agree or understand that the image shall remain private" is a subjective standard.<sup>303</sup>

Fourth, criminal laws targeting revenge porn are preferable to civil laws.<sup>304</sup> Civil litigation is expensive and further publicizes the embarrassing material.<sup>305</sup> Further, courts are tending to interpret section 230 immunity more narrowly and decline to grant immunity to sites that induce users to engage in criminal activity.<sup>306</sup> Where a state criminalizes revenge porn, victims may also have a remedy under the CDA.<sup>307</sup>

Lastly, the New Jersey statute serves as a more comprehensive and constitutionally sound statute. The pertinent part of the statute states:

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<sup>297</sup> *Podcast*, *supra* note 9.

<sup>298</sup> *See id.*

<sup>299</sup> *Id.* In such a case, Goldman states that the recipient "has no credibility in the media" and "the proof is in the photos." *Id.*

<sup>300</sup> *See* 535 U.S. 564, 589–90 (2002); *see also supra* notes 229–33 and accompanying text.

<sup>301</sup> *See supra* note 268 and accompanying text.

<sup>302</sup> Franks, *supra* note 32; *see also id.*

<sup>303</sup> *See supra* note 268 and accompanying text.

<sup>304</sup> *See supra* notes 33–43 and accompanying text.

<sup>305</sup> *Id.*

<sup>306</sup> *See supra* notes 43–45 and accompanying text.

<sup>307</sup> *Id.*

An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he discloses any photograph, film, videotape, recording or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure.<sup>308</sup>

New Jersey's law is commendable because it does not exclude self-shots and it deems revenge porn an invasion of privacy.<sup>309</sup> The statute has proved successful in prosecuting revenge porn cases already and has not yet been challenged on constitutional grounds.<sup>310</sup> Further, Franks believes that "California's categorization of revenge porn as a misdemeanor sends a weak message to would-be perpetrators and will be a less effective deterrent than a law like New Jersey's."<sup>311</sup> New Jersey's law makes it a third-degree crime and carries a prison sentence of three to five years.<sup>312</sup> California's law threatens only a six-month jail sentence.<sup>313</sup>

Looking forward, California, as well as other states contemplating passing anti-revenge porn legislation should study First Amendment jurisprudence carefully to determine how to achieve constitutionally-sound legislation. The problem of revenge porn is real, and victims and potential victims deserve legal redress, which they lack in the vast majority of jurisdictions today.

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<sup>308</sup> Franks, *supra* note 32; see also N.J. Stat. § 2C:14-9 (West 2012).

<sup>309</sup> *Podcast*, *supra* note 9.

<sup>310</sup> *Id.*

<sup>311</sup> Keats & Franks, *supra* note 282.

<sup>312</sup> N.J. Stat. § 2C:14-9 (West 2012).

<sup>313</sup> S. B. 255, Reg. Sess. (Cal. 2013).

# VIRTUAL CLONING: TRANSFORMATION OR IMITATION?

*Reforming the Saderup Court's Transformative  
Use Test for Rights of Publicity*

SHANNON FLYNN SMITH\*

## INTRODUCTION

Tupac Shakur, dead nearly sixteen years, rose up slowly from beneath the stage at the 2012 Coachella Valley Music & Arts Festival in Indio, California to rouse the crowd and perform his songs *2 of Amerikaz Most Wanted* and *Hail Mary* alongside rap artists Snoop Dogg and Dr. Dre.<sup>1</sup> Celine Dion and Elvis Presley belted *If I Can Dream* together in a duet on the hit performance show *American Idol* in 2007,<sup>2</sup> thirty years after Presley's

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<sup>1</sup> Claire Suddath, *How Tupac Became a Hologram (Is Elvis Next?)*, BUSINESSWEEK (Apr. 16, 2012), <http://www.businessweek.com/articles/2012-04-16/how-tupac-became-a-hologram-plus-is-elvis-next>; *Tupac Hologram Snoop Dogg and Dr. Dre Perform Coachella Live 2012*, YOUTUBE (Apr. 17, 2012), <http://www.youtube.com/watch?v=TGbrFmPBV0Y> [hereinafter *Tupac Live Hologram*].

<sup>2</sup> *American Idol Elvis & Celine Dion "If I Can Dream,"* YOUTUBE (Jan. 8, 2010), <http://www.youtube.com/watch?v=p1HtPG6eM1o>.

death.<sup>3</sup> In 2011, Mariah Carey performed live across five European countries — Germany, Croatia, Macedonia, Montenegro, and Poland — simultaneously.<sup>4</sup> Pop artist Beyoncé performed at the Billboard Music awards in 2011; in fact several of her did: Beyoncé performed, at one point, with over forty replicas of herself.<sup>5</sup> Hologram technology made all of these, and many similar performances, possible and has since transformed the entertainment industry.

The excitement of this new technology has not come without concern, however, and the legal issues it raises are many: right of publicity infringement, copyright infringement, and trademark infringement, to name a few.<sup>6</sup> Not all celebrities, or their families, are thrilled with the technology. Some estates, like Marilyn Monroe's, have sought to stop digital re-creators from creating holograms of their deceased celebrities under these different legal theories.<sup>7</sup> Tupac Shakur's mother consented to the use of her son's likeness in the Coachella concert, but even when a license is granted, re-creators may exceed the scope of that license, raising right-of-publicity issues.<sup>8</sup>

One main concern this hologram, or virtual cloning, technology presents is right-of-publicity infringement. Rights of publicity, as creatures of state law, provide a cause of action to celebrities (and sometimes their

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<sup>3</sup> Molly Ivins, *Elvis Presley Dies; Rock Singer Was 42*, N.Y. TIMES, Aug. 16, 1977, at A1, available at <https://www.nytimes.com/learning/general/onthisday/big/0816.html>.

<sup>4</sup> *Mariah Carey Hologram Performs Simultaneously in Five Cities for Deutsche Telekom Campaign*, THE DRUM (Nov. 18, 2011, 12:14 PM), <http://www.thedrum.com/news/2011/11/18/mariah-carey-hologram-performs-simultaneously-five-cities-deutsche-telekom-campaign> [hereinafter *Mariah Carey Hologram*].

<sup>5</sup> *Tupac's Coachella Performance and More Hologram Wins and Fails* (VIDEO), THE DAILY BEAST (Apr. 8, 2012), <http://www.thedailybeast.com/articles/2012/04/18/tupac-s-coachella-performance-and-more-hologram-wins-fails-video.html>.

<sup>6</sup> See generally Joseph J. Beard, *Clones, Bones and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead and the Imaginary*, 16 BERKELEY TECH. L.J. 1165 (2001) (describing virtual cloning techniques and dangers).

<sup>7</sup> Eriq Gardner, *Marilyn Monroe Estate Threatens Legal Action over Hologram (Exclusive)*, HOLLYWOOD REP. (June 11, 2012, 12:40 PM), <http://www.hollywoodreporter.com/thr-esq/marilyn-monroe-estate-hologram-legal-334817> (displaying a cease-and-desist letter from Monroe's estate to Digicon requesting Digicon stop a concert featuring Monroe's hologram).

<sup>8</sup> *See No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397, 411 (Cal. Ct. App. 2011) (providing an example of a right-of-publicity claim for exceeding the scope of a license to use a likeness).

estates)<sup>9</sup> when the celebrities' likenesses are used without permission.<sup>10</sup> Where the celebrity is alive and able to consent to the performance, as with Mariah Carey's concert, these issues can easily be resolved through licensing.<sup>11</sup> Where a celebrity has not consented and is either alive or was domiciled at death in a state that recognizes postmortem rights of publicity, the celebrity or estate may bring a right-of-publicity infringement claim. A First Amendment defense may still defeat that claim, however, depending on the facts of the case and the jurisdiction.

States have an amalgam of different protections for rights of publicity, and as such, several different First Amendment defense tests have developed across jurisdictions to protect legitimate uses of a celebrity's likeness.<sup>12</sup> California, the hotbed of celebrities and celebrity right-of-publicity claims, has adopted the transformative use test to determine whether the use of a likeness is protected by the First Amendment or whether a celebrity's rights of publicity will prevail. This new virtual cloning technology and its recent right-of-publicity challenges will pose new questions when balancing First Amendment interests under the transformative use test, particularly because California and others who have adopted the test have provided several different iterations of what may constitute a transformative use, and those iterations may lead to conflicting results. As such, courts should abandon these several iterations and instead adopt a single iteration of the transformative use test to better direct courts and parties alike.

This article focuses on the transformative use test applied by California and other United States courts when analyzing the First Amendment defense to right-of-publicity infringement claims in the context of newly developing virtual-cloning technology.<sup>13</sup> Part I examines this virtual-cloning

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<sup>9</sup> See J. THOMAS McCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 9:18 (2013) (stating that twenty states have recognized postmortem rights of publicity, six by common law and fourteen by statute).

<sup>10</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (2012).

<sup>11</sup> See *Mariah Carey Hologram*, *supra* note 4.

<sup>12</sup> See generally Andreas N. Andrews, Note, *Stop Copying Me: Rethinking Rights of Publicity Verses the First Amendment*, 32 TEMP. J. SCI. TECH. & ENVTL. L. 127 (2013).

<sup>13</sup> This work is intended to extend the discussion from my previous work, which considered the implications of virtual cloning and postmortem right-of-publicity choice-of-law complications that arise under current state right-of-publicity laws. See Shannon Flynn Smith, *If It Looks like Tupac, Walks like Tupac, and Raps like Tupac, It's*

technology and the Tupac Shakur concert. Part II sets out the current state of First Amendment defenses by examining the Supreme Court precedent on the issue and the cases where courts have applied the transformative use test. Part III then applies the transformative use test to the Tupac Shakur virtual clone concert to demonstrate that the different iterations of the transformative use test can lead to conflicting results using the same set of facts. Part IV concludes, based on this analysis using the Tupac virtual clone, that because the current iterations of the transformative use test are unclear and lead to contradictory results, courts should adopt the Mere Celebrity Likeness Test as the single iteration of the transformative use test.

## I. VIRTUAL CLONING TECHNOLOGY & THE TUPAC SHAKUR VIRTUAL CLONE CONCERT

The Tupac Shakur virtual clone that performed at the Coachella music festival and other virtual clones like it present a unique question in applying First Amendment defenses to this new technology. At the concert, the Tupac Shakur virtual clone performed the song *Hail Mary* for a live audience, but Tupac had never actually performed this song live during his life; re-creators enabled the virtual clone to sing this song in front of an audience for the very first time.<sup>14</sup> The re-creators' performance enabled the Tupac virtual clone to dance and rap alongside two other rappers, Dr. Dre and Snoop Dogg.<sup>15</sup> The re-creators also added language never before spoken by the living Tupac Shakur: "What the fuck is up, Coachella!"<sup>16</sup> The Coachella music festival in fact did not even exist until three years after Tupac's death.<sup>17</sup> Finally, the re-creators took out the first lines of the

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*Probably Tupac: Virtual Cloning and Postmortem Right-of-Publicity Implications*, 2013 MICH. ST. L. REV. 1719.

<sup>14</sup> Ewan Palmer, *Tupac Shakur Hologram 'Performs' at Coachella 2012* [Video], INTERNATIONAL BUSINESS TIMES (Apr. 16, 2012, 11:32 AM), <http://www.ibtimes.co.uk/tupac-shakur-2pac-performs-coachella-hologram-dr-328517>.

<sup>15</sup> *Id.*

<sup>16</sup> Jason Lipshutz, *Opinion: The Problem with the Tupac Hologram*, BILLBOARD (Apr. 16, 2012, 7:25 PM), <http://www.billboard.com/articles/columns/the-juice/494288/opinion-the-problem-with-the-tupac-hologram>.

<sup>17</sup> Suddath, *supra* note 1.

recorded *Hail Mary* song, “Killuminati all through your body, the blow’s like a twelve gauge shotty.”<sup>18</sup>

Other than these small changes, the virtual clone was so nearly identical to the deceased Tupac that some fans did not realize that the virtual clone was not the real Tupac. One fan at the concert was quoted as saying, “‘Wow, it was a hologram? . . . It was ridiculously realistic. Unbelievable.’”<sup>19</sup> After all, the clone danced like Tupac; rapped like Tupac; dressed like Tupac, wearing no shirt, baggy pants sagging below the waist, Timberland boots, and even Tupac’s characteristic gold-chain necklace; and donned the same “Thug Life” tattoo across its chest as the deceased Tupac sported.<sup>20</sup> As such, the re-creators added their own touches by creating a completely new visual performance — *Hail Mary* — but the idea of the performance was to make the clone resemble the true Tupac to the fullest extent possible.<sup>21</sup>

The Tupac virtual clone, while appearing to be a three-dimensional replica of the artist, was actually a flat optical illusion created by reflecting the image off of an angled piece of glass outside of the view of the audience;<sup>22</sup> this distinction, however, would not likely change any First Amendment

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<sup>18</sup> Compare *Tupac Live Hologram*, *supra* note 1, with TUPAC SHAKUR, *Hail Mary, on THE DON KILLUMINATI: THE 7 DAY THEORY* (Koch Records 1996).

<sup>19</sup> Jacob E. Osterhout, *It’s Tupac, Live 3-D Hologram Resurrects Rapper for Performance at Festival*, N.Y. DAILY NEWS, Apr. 17, 2012, at 38. Another fan later said, “‘The hologram was so real that I kept looking over at Snoop to catch his reaction at having his buddy back on stage with him after all of this time . . . He seemed happy.’” *Id.*

<sup>20</sup> Cyrus Farivar, *Tupac “Hologram” Merely Pretty Cool Optical Illusion*, ARSTECHNICA (Apr. 16, 2012, 9:45 PM), <http://arstechnica.com/science/2012/04/tupac-hologram-merely-pretty-cool-optical-illusion/>; Osterhout, *supra* note 19, at 38.

<sup>21</sup> Anthony McCartney, *Holograms Present Celebs with New Afterlife Issues*, MPRNEWS (Aug. 21, 2012), <http://minnesota.publicradio.org/display/web/2012/08/21/arts/holograms-present-celebs-with-new-afterlife-issues/> (quoting a Tupac re-creator as saying, “I also hope that the people who do follow us do it with the same care and the same sense of dedication because I would hate to see a bad version of Marilyn Monroe, a bad version of Elvis up there”).

<sup>22</sup> Hayley Tsukayama, *How the Tupac ‘Hologram’ Works*, WASH. POST (Apr. 18, 2012), [http://www.washingtonpost.com/business/technology/how-the-tupac-hologram-works/2012/04/18/gIQAIzVYQT\\_story.html](http://www.washingtonpost.com/business/technology/how-the-tupac-hologram-works/2012/04/18/gIQAIzVYQT_story.html). For a diagram of the technology used to project this hologram, see Reggie Ugwu, *Everything You Ever Wanted to Know About the Tupac Hologram*, COMPLEX (Apr. 18, 2012, 5:53 PM), <http://www.complex.com/tech/2012/04/everything-you-ever-wanted-to-know-about-the-tupac-hologram>.

defense's success.<sup>23</sup> Whether the digital re-creation is used on-screen in a movie or off-screen in a virtual clone concert like Tupac's, two approaches are typically used to create virtual clones: the direct approach and the indirect approach.<sup>24</sup> Under one version of the direct approach, called motion capture, the re-creator uses an actor or the artist himself by attaching sensors to the artist and then recording the light refractions in front of a blue or green screen.<sup>25</sup> The re-creator can then manipulate this "human blueprint" in a computer program to do anything the re-creator would like.<sup>26</sup>

Under the indirect approach, the artist is not present. In the indirect-approach method, re-creators use film, photos, and other media of the artist taken during the artist's life and then incorporate the person's image, voice, and even mannerisms from this material to create a completely new digital version of the artist.<sup>27</sup> The re-creators of the Tupac virtual clone would not reveal their exact strategy for creating the clone, but as Tupac was not available, some version of the indirect approach was used.<sup>28</sup> One method re-creators use in the indirect approach, called photogrammetry, is to feed images of the artist into computer software that establishes a three-dimensional coordinate point of the artist's face in a given photo and then repeats this process to establish all of the points of the face to create the clone.<sup>29</sup>

Re-creators also use voice techniques to add new language to a performance. Digital voice compilation software allows a re-creator to input the voice of an artist from soundtracks, movies, and other audio recordings

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<sup>23</sup> Cf. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 811 (Cal. 2001) (stating that regardless of the skill employed to create the depiction of an artist, the work may still lack transformative elements).

<sup>24</sup> Beard, *supra* note 8, at 1172.

<sup>25</sup> *Id.* at 1172–73.

<sup>26</sup> Joel Anderson, Comment, *What's Wrong with This Picture? Dead or Alive: Protecting Actors in the Age of Virtual Reanimation*, 25 LOY. L.A. ENT. L. REV. 155, 171 (2005) (quoting Kenneth Turan, *A Bumpy, Noisy Ride: Robert Zemeckis' Visually Striking 'Polar Express' Pumps up a Classic Children's Book*, L.A. TIMES, Nov. 10, 2004, at E1).

<sup>27</sup> Beard, *supra* note 6, at 1188–89. This method is called photogrammetry. *Id.* at 1188. Other possible indirect-approach methods include creating a bust from a life mask, creating a bust by referencing photos, or scanning a look-alike. *Id.* at 1186.

<sup>28</sup> See Suddath, *supra* note 1.

<sup>29</sup> Joseph J. Beard, *Casting Call at Forest Lawn: The Digital Resurrection of Deceased Entertainers — A 21st Century Challenge for Intellectual Property Law*, 8 HIGH TECH. L.J. 101, 111–12 (1993).

that can then be broken down into its base components and reconstructed.<sup>30</sup> This will then allow the re-creator to make a virtual clone speak new words never spoken in life. Re-creators may also simply use impersonators as an alternative where this voice technology is not available or is too expensive.<sup>31</sup> This nearly exact replication of a dead individual raises the question of whether the estate would have to consent to this re-creation or whether by creating a completely new product using the indirect approach — the virtual clone — the re-creators would have a successful First Amendment defense to any possible right-of-publicity infringement claim.

## II. RIGHTS OF PUBLICITY & THE FIRST AMENDMENT

Rights of privacy predated, and ultimately led to the establishment of, rights of publicity but were not a consideration for the courts until nearly 1900.<sup>32</sup> It was not until the 1960s that rights of privacy began to develop as a concept of torts. In a law review article, Dean William Prosser identified four specific causes of action encompassing the rights of privacy: (1) intrusion,<sup>33</sup> (2) disclosure,<sup>34</sup> (3) false light,<sup>35</sup> and (4) appropriation.<sup>36</sup> The fourth tort, invasion of privacy by appropriation, then led to the courts' recognizing a commercial property right in one's likeness — rights of publicity.<sup>37</sup> Since this development of rights of publicity, individual states have

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<sup>30</sup> Beard, *supra* note 6, at 1192.

<sup>31</sup> Anderson, *supra* note 26, at 172–73.

<sup>32</sup> Justice Louis Brandeis and Samuel Warren were two of the earliest scholars and jurists to consider rights of privacy, and they voiced their concerns in an 1890 Harvard Law Review article, *The Right to Privacy*. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195–96 (1890), available at [http://www.californialawreview.org/assets/pdfs/misc/prosser\\_privacy.pdf](http://www.californialawreview.org/assets/pdfs/misc/prosser_privacy.pdf).

<sup>33</sup> William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) (“[i]ntrusion upon plaintiff's seclusion or seclusion or solitude, or into his private affairs”).

<sup>34</sup> *Id.* (“[p]ublic disclosure of embarrassing private facts about the plaintiff”).

<sup>35</sup> *Id.* (“[p]ublicity which places the plaintiff in a false light in the public eye”).

<sup>36</sup> *Id.* (“[a]ppropriation, for the defendant's advantage, of the plaintiff's name or likeness”).

<sup>37</sup> See *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (coining the phrase “right of publicity” to describe these property-like rights in one's own likeness).

addressed this tort in very different ways. Most states, however, require the following *prima facie* elements for a right-of-publicity infringement action: “(1) defendant, *without permission*, has used some *aspect of identity or persona* in such a way that plaintiff is *identifiable* from the defendant’s use; and (2) defendant’s use is likely to *cause damage to the commercial value* of that persona.”<sup>38</sup>

Other than these *prima facie* elements, however, states’ right-of-publicity protections vary greatly. For example, Indiana, the state known for providing the most protection for rights of publicity,<sup>39</sup> protects an artist’s “name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, [and] mannerisms” but makes exemptions for literary works, television programs, works of art, and anything that has “political or newsworthy value.”<sup>40</sup> It further protects these rights for one hundred years after the death of the artist.<sup>41</sup> New York, on the other hand, does not recognize postmortem rights of publicity at all,<sup>42</sup> and its protection extends only to “the name, portrait or picture of any living person.”<sup>43</sup> Therefore, the celebrity may only bring a cause of action for right-of-publicity infringement for the unconsented use of these narrow aspects of a persona, and an estate has no claim after the celebrity’s death.

California, the state examined in this article to determine the legitimacy of a First Amendment defense in the Tupac virtual clone concert,<sup>44</sup>

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<sup>38</sup> Thomas Phillip Boggess V, *Cause of Action for an Infringement of the Right of Publicity*, in 31 CAUSES OF ACTION § 5 (Clark Kimball & Mark Pickering eds., 2d ed. 2013) (emphasis added) (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (2012)).

<sup>39</sup> See 1 MCCARTHY, *supra* note 9, § 6:59.

<sup>40</sup> IND. CODE § 32-36-1-1 (2013).

<sup>41</sup> *Id.* § 32-36-1-8.

<sup>42</sup> Without postmortem rights protection, the likeness of the celebrity becomes a part of the public domain upon the celebrity’s death, and anyone may use it. See ‘Rights of Publicity’ Extended Beyond the Grave, NPR (Sept. 4, 2012, 1:00 PM), <http://www.npr.org/2012/09/04/160551338/rights-of-publicity-extended-beyond-the-grave>.

<sup>43</sup> N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2013).

<sup>44</sup> California law would be applicable to this use of Tupac’s likeness had Tupac’s mother not consented to the performance or had the use of the likeness exceeded the scope of the license. See Jana M. Moser, *Tupac Lives! What Hologram Authors Should Know About Intellectual Property Law*, Bus. L. TODAY, Sept. 2012, at 3, available at <http://apps.americanbar.org/buslaw/blt/content/2012/09/all.pdf> (stating that Tupac’s mother, who holds Tupac’s postmortem rights of publicity, granted permission to Dr. Dre to use

provides right-of-publicity protection both statutorily and by common law.<sup>45</sup> California provides statutory protection for a deceased celebrity's "name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services"<sup>46</sup> for seventy years following the artist's death.<sup>47</sup> That same statute also delineates that the following will not be considered a product, article of merchandise, good, or service for application of the statute: "a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement . . . for any of these works . . . if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work."<sup>48</sup> This legislative remedy is meant to "complement, not supplant"

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the likeness in the clone); *see, e.g.*, *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397, 411 (Cal. Ct. App. 2011) (providing an example of a right-of-publicity claim for exceeding the scope of a license to use a likeness). Under the domicile-at-death rule, the law of the artist's domicile at death governs questions of the availability of postmortem right-of-publicity protections. 2 McCARTHY, *supra* note 9, § 11:15. Therefore, California law, including the transformative use test adopted in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001), would be applicable to any case brought regarding this hologram concert because California was Tupac's domicile at death, Jon Pareles, *Tupac Shakur, 25, Rap Performer Who Personified Violence, Dies*, N.Y. TIMES, Sept. 14, 1996, at 1.

<sup>45</sup> *Kirby v. Sega of Am., Inc.*, 60 Cal. Rptr. 3d 607, 612 (Cal. Ct. App. 2006).

<sup>46</sup> CAL. CIV. CODE § 3344.1(a)(1) (West 2013). It is arguable that the Coachella concert used Tupac Shakur's likeness in a service, as the concert was not a tangible good. Further, any copies of the concert that the re-creators sold would arguably fall within this statute as goods using Tupac's likeness. Beard, *supra* note 29, at 159 (asserting that the showing of a film or theatrical exhibition may not fall within the goods category but that the sale of the film on a videotape would be considered the sale of a good). If the concert did fall within the statute on the first instance, a court would still need to consider whether it falls within a statutory exception.

<sup>47</sup> § 3344.1(g).

<sup>48</sup> *Id.* § 3344.1(a)(2). This statutory exception, meant to protect works where an artist's life is depicted, such as books or movies about the artist, may also apply to the Tupac virtual clone. *See Beard, supra* note 29, at 161. A re-creator of the Tupac virtual clone may assert that this concert falls within the "audiovisual work . . . if it is fictional or nonfictional entertainment" category of protection and as such is a statutory exception to any right-of-publicity claim Tupac's rights-holder could bring. *Id.* at 164. This statutory defense is outside the scope of this article, however.

common law rights of publicity, in which the plaintiff must prove that there was unauthorized use of the plaintiff's likeness that results in injury, regardless of whether the purpose is commercial.<sup>49</sup>

#### A. SUPREME COURT PRECEDENT: *ZACCHINI V. SCRIPPS-HOWARD BROADCASTING CO.*

Due in part to the distinct nature of these state laws,<sup>50</sup> the United States Supreme Court has only addressed state rights of publicity once.<sup>51</sup> In *Zacchini v. Scripps-Howard Broadcasting Co.*, the Supreme Court heard a case arising from the Ohio statutory right of publicity.<sup>52</sup> In *Zacchini*, plaintiff Hugo Zacchini brought suit after a local news station rebroadcast Zacchini's fifteen-second human cannonball routine in its entirety.<sup>53</sup> Zacchini asserted that this violated his Ohio rights of publicity because the television station rebroadcast the entire act and did not compensate him.<sup>54</sup> The television station asserted a First Amendment defense, and the Ohio Supreme Court found for the television station in holding that the station was protected by the First Amendment and could broadcast matters of public interest.<sup>55</sup> The U.S. Supreme Court granted certiorari and considered the issue of whether the First and Fourteenth Amendments could shield the television station from damages arising from a state right-of-publicity infringement claim when the performance had been rebroadcast in its entirety.<sup>56</sup>

In balancing the state interests in compensating publicity rights holders and providing public access to information, the Court found that

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<sup>49</sup> *Kirby*, 60 Cal. Rptr. 3d at 612.

<sup>50</sup> *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 566 (1977) (stating that if the judgment rested on independent state grounds, certiorari should be denied).

<sup>51</sup> MCCARTHY, *supra* note 9, §1:33.

<sup>52</sup> 433 U.S. at 565.

<sup>53</sup> *Id.* at 563–64.

<sup>54</sup> *Id.* at 564.

<sup>55</sup> The Ohio Supreme Court, in its syllabus wrote:

“A TV station has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual.”

*Id.* at 566 (quoting 47 Ohio St. 2d 224 (1976)).

<sup>56</sup> *Id.* at 565.

“[w]herever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer’s entire act without his consent.”<sup>57</sup> The Court reasoned that broadcasting the act in its entirety threatened the economic value of Zacchini’s performance, which lay in his right to control the publicity of the act.<sup>58</sup>

The Court stated that “unlike the unauthorized use of another’s name for purposes of trade or the incidental use of a name or picture by the press, [this] goes to the heart of petitioner’s ability to earn a living as an entertainer.”<sup>59</sup> Recognizing that this may be the strongest case for a right-of-publicity claim, the Court decided that this was “not the appropriation of an entertainer’s reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place.”<sup>60</sup> The Court found important that Zacchini was seeking compensation rather than an injunction, and it held that the First Amendment did not require that the press have the right to rebroadcast Zacchini’s performance where Ohio chose to enact right of publicity legislation.<sup>61</sup>

## B. THE TRANSFORMATIVE USE TEST

Without more guidance on the appropriate balance between rights of publicity and the First Amendment, states have struggled to hone First Amendment tests to determine when there is “a privilege to report matters of legitimate public interest even though such reports might intrude” on other rights, such as rights of publicity.<sup>62</sup> For example, to weigh these interests, courts have created several different tests. Courts have used a “Predominant Purpose Test” and asked whether the predominant purpose of the use or portrayal is to serve a social function valued by free speech or

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<sup>57</sup> *Id.* at 574–75.

<sup>58</sup> *Id.* at 575.

<sup>59</sup> *Id.* at 576.

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

<sup>61</sup> *Id.* at 578.

<sup>62</sup> *Id.* at 567 (internal quotation marks omitted).

to commercially exploit the likeness in the same way the celebrity would.<sup>63</sup> The Second Circuit established the *Rogers Test*, which asks whether the challenged work is wholly unrelated to the underlying work and whether the plaintiff's name is used for its advertisement and commercial value.<sup>64</sup> California has also used a "Public Interest Test" of sorts to ask whether the events are ones of public interest that the public has a right to know and the press has a right to tell.<sup>65</sup> The California Supreme Court considered these tests and others in *Comedy III Productions, Inc. v. Gary Saderup, Inc.* and instead adopted the transformative use test.<sup>66</sup>

### *1. The Origin of the Transformative Use Test: Copyright & Fair Use Analyses*

Taking from established copyright fair use analyses, the California Supreme Court was the first to import the copyright transformative use concept to weigh the First Amendment in right-of-publicity cases in.<sup>67</sup> Under copyright law, traditional fair use factors include: "(1) the purpose and

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<sup>63</sup> Andrews, *supra* note 12, at 133; see *Presley's Estate v. Russen*, 513 F. Supp. 1339, 1356 (D.N.J. 1981). The court in this case held that THE BIG EL SHOW could not sustain its First Amendment defense against right-of-publicity infringement claims by the Elvis Presley estate because the predominant purpose behind the imitation show was for the defendant's own economic interest, and it did not have significant social value as a mere imitation without more. *Id.* at 1359.

<sup>64</sup> See *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989). In this case, the Second Circuit found for the defendant, MGM, who had produced the film "Fred and Ginger," which imitated Fred Astaire and Ginger Rogers's cabaret performances. *Id.* at 1004–05. The court found that the film's title both related to the product, the movie, and was not an advertisement in disguise. *Id.*

<sup>65</sup> Andrews, *supra* note 12, at 134; see *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 793 (1995). In this case, the California Court of Appeal for the Sixth District held that a news story relating to past Superbowls and NFL player Joe Montana was a matter of public interest and protected by the First Amendment. *Id.* at 797.

<sup>66</sup> *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 806–09 (Cal. 2001).

<sup>67</sup> Matthew D. Bunker, *Free Speech Meets the Publicity Tort: Transformative Use Analysis in Right of Publicity Law*, 13 COMM. L. & POL'Y 301, 305 (2008). A second defense recognized in California is the public interest defense. *Arenas v. Shed Media U.S. Inc.*, 881 F. Supp. 2d 1181, 1190 (C.D. Cal. 2011). Under the public interest defense, "no cause of action will lie for the publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it." *Id.* at 1191. This defense is beyond the scope of this article, however, because the concert was created by re-creators and would not otherwise be newsworthy, as it would not exist.

character of the use . . . ; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for the copyrighted work.”<sup>68</sup>

In 1994, in *Campbell v. Acuff-Rose Music, Inc.*, the United States Supreme Court endorsed the idea of asking whether a use was transformative in considering the purpose and character of the use prong of the fair use test.<sup>69</sup> In *Campbell*, the Court considered whether the rap group 2 Live Crew’s song “Pretty Woman” could survive a copyright infringement claim brought by Ray Orbison, who wrote the original song “Oh, Pretty Woman,” by asserting a fair use defense.<sup>70</sup> To determine whether 2 Live Crew’s song constituted a fair use of Orbison’s song, the United States Supreme Court adopted the transformative use test, stating that it is a proper inquiry in a copyright fair use analysis to ask “whether the new work merely ‘supersede[s] the objects’ of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’”<sup>71</sup>

The Court further stated that finding transformation was sufficient but not necessary to determine whether a new work could be considered a fair use.<sup>72</sup> The Court reasoned that the goals of copyright — to “promote the Progress of Science and useful Arts”<sup>73</sup> — are furthered when transformative works are created; as such, the transformative use inquiry was appropriate to protect those original works that deserved protection when the second work in question did not add its own expression.<sup>74</sup> Further

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<sup>68</sup> 17 U.S.C. § 107 (2006).

<sup>69</sup> 510 U.S. 569, 578 (1994) (“The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely ‘supersede[s] the objects’ of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’” (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (internal citations omitted))).

<sup>70</sup> *Id.* at 571–72.

<sup>71</sup> *Id.* at 579 (internal citations omitted).

<sup>72</sup> *Id.*

<sup>73</sup> U.S. CONST. art I, § 8, cl. 8.

<sup>74</sup> *Campbell*, 510 U.S. at 579.

justifying the transformative use test, the Court reasoned that the more transformative a secondary work was, “the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”<sup>75</sup> The Court stated that 2 Live Crew’s song was a parody and “has an obvious claim to transformative value”<sup>76</sup> deserving of fair use protection under the four-prong fair use test.<sup>77</sup>

## *2. Applying the Transformative Use Test to Rights of Publicity*

In drawing upon this Supreme Court precedent in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, the California Supreme Court also adopted the transformative use test as the applicable First Amendment defense test to be applied in right-of-publicity claims.<sup>78</sup> In *Saderup*, plaintiff Comedy III Productions owned the rights to the images of the Three Stooges.<sup>79</sup> The defendant, Gary Saderup, made charcoal-type drawings that he then silkscreened onto various products and sold.<sup>80</sup> Saderup made a charcoal drawing of the Three Stooges and then sold this likeness on shirts without obtaining permission from Comedy III Productions.<sup>81</sup> Saderup made approximately \$75,000 in profits from these shirts.<sup>82</sup> When Comedy III Productions brought suit against Saderup for violating California’s postmortem-right-of-publicity statute, the district court enjoined Saderup from violating the statute by using the likeness of the Three Stooges.<sup>83</sup> On appeal, Saderup claimed that his conduct was protected by the First Amendment, and the California appellate court struck the injunction but affirmed the judgment of damages and attorneys’ fees.<sup>84</sup>

The California Supreme Court, hearing the case on appeal, adopted the transformative use test to determine the essential balance between

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<sup>75</sup> *Id.* at 578.

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

<sup>77</sup> *Id.* at 594.

<sup>78</sup> *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001) (quoting *Campbell*, 510 U.S. at 579).

<sup>79</sup> *Id.* at 800.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 800–01.

<sup>82</sup> *Id.* at 801.

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

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

publicity rights and the First Amendment.<sup>85</sup> The Court recognized that rights of publicity and the First Amendment are in tension and that rights of publicity have the potential to frustrate the purposes of the First Amendment.<sup>86</sup> As such, the Court concluded that the “inquiry into whether a work is ‘transformative’ appears to us to be necessarily at the heart of any judicial attempt to square the right of publicity with the First Amendment.”<sup>87</sup> The Court recognized that the two also shared common goals: both rights of publicity and the First Amendment seek to encourage “free expression and creativity.”<sup>88</sup> Where a likeness is used without significant transformative elements, the Court stated that “protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist.”<sup>89</sup> Similar to the transformative use justification in *Campbell*, the *Saderup* Court also suggested that where a work contains significant transformative elements, it is more deserving of First Amendment protection and is also not as likely to interfere with the original artist’s economic interest in his or her likeness.<sup>90</sup> As such, when a secondary work is transformative, First Amendment interests should prevail.<sup>91</sup>

In adopting the transformative use test though, the Court explicitly rejected applying the entire copyright fair use test to right-of-publicity claims.<sup>92</sup> The Court was willing to adopt the first prong of the copyright fair use test — the purpose and character of the work — but was unwilling to apply the entire test because at least two prongs — the nature of the copyrighted work and the amount and substantiality of the portion used — were particularly designed to apply to “the partial copying of works of authorship ‘fixed in [a] tangible medium of expression.’”<sup>93</sup>

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<sup>85</sup> *Id.* at 808.

<sup>86</sup> *Id.* at 803.

<sup>87</sup> *Id.* at 808.

<sup>88</sup> *Id.* (“Both the First Amendment and copyright law have a common goal of encouragement of free expression and creativity, the former by protecting such expression from government interference, the latter by protecting the creative fruits of intellectual and artistic labor.”).

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

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

<sup>91</sup> *Id.* at 809.

<sup>92</sup> *Id.* at 807–08.

<sup>93</sup> *Id.* (quoting 17 U.S.C. § 102) (“[I]t is difficult to understand why these factors would be especially useful for determining whether the depiction of a celebrity likeness

Then looking to Saderup's work, the Court recognized that the portraits were expressive works, for the purpose of entertaining, and done for financial gain, but this did not void the constitutional protection they should receive.<sup>94</sup> The Court found that the appropriate inquiry was whether the work in question "adds something new, with a further purpose or different character, altering the first new expression, meaning, or message," quoting the U.S. Supreme Court in *Campbell*.<sup>95</sup> The Court did not stop at this New Meaning Test,<sup>96</sup> however, and instead provided several other iterations of what else may constitute a transformative use. The Court expressed that where a work is transformative and "adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation" (the Mere Celebrity Likeness Test), it should be protected under the First Amendment.<sup>97</sup>

The Court continued on, also iterating the Raw Materials Test: "Another way of stating the inquiry is whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question."<sup>98</sup> The Court also phrased the test in a fourth way to ask "[w]hether a product containing a celebrity likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness," with expression meaning something other than the celebrity's likeness — the Defendant's Own Expression Test.<sup>99</sup> Addressing what may constitute a transformative use, the Court listed parody, factual reporting, "heavy-handed lampooning," and social criticism.<sup>100</sup> The Court further

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is protected by the First Amendment.").

<sup>94</sup> *Id.* at 802, 804.

<sup>95</sup> *Id.* at 808 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994)).

<sup>96</sup> The names for these three tests were not used by the Court but have been added by the author to demonstrate the different questions truly involved in the *Saderup* transformative use test.

<sup>97</sup> *Saderup*, 21 P.3d at 799. The court reasons that this type of depiction is also not likely to interfere with the economic interests that the artist has in his or her own likeness, as it will have its own value and not act as a good substitute for the original likeness itself. *Id.* at 808.

<sup>98</sup> *Id.* at 809.

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

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

reasoned that literal depictions may be protected in some circumstances,<sup>101</sup> but where a work is simply a literal depiction of the celebrity (lacking other expressive elements), the interests of rights of publicity prevail over First Amendment interests.<sup>102</sup>

In answering all of these questions (or tests), the Court found that Saderup's portraits had no such transformative elements.<sup>103</sup> Even if it took great skill to draw the portraits, the Court stated, the use of a likeness is still subject to challenge if the imitative elements of the portraits predominated and the economic value of the portraits derived mainly from the fame of the celebrity.<sup>104</sup> In this case, despite the fact that Rush used his artistic talents to create the charcoal drawings, the Court found no significant transformation and found that Saderup's skill was subordinated to his purpose to capitalize on the Three Stooges' fame through literal depictions.<sup>105</sup> Saderup's portraits using the Three Stooges' likenesses could not sustain a First Amendment defense claim.<sup>106</sup>

### *3. The Development of the Right-of-Publicity Transformative Use Test*

Since the adoption of the transformative use test by the California Supreme Court in *Saderup*, California courts and federal circuit courts alike have asked whether the likeness of a celebrity was transformed to balance celebrities' and artists' interests.

#### *a. ETW Corp. v. Jireh Publishing, Inc.*

The Sixth Circuit in *ETW Corp. v. Jireh Publishing, Inc.*, in one of the highest profile right-of-publicity cases to use the transformative use test,<sup>107</sup>

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<sup>101</sup> See *id.* at 811. The Court discusses Andy Warhol's reproduction of celebrity portraits and demonstrates that by manipulating the likeness, Warhol conveys a message that "went beyond the commercial exploitation of celebrity images and became a form of ironic social comment on the dehumanization of celebrity itself" and which may be deserving of First Amendment protection. *Id.*

<sup>102</sup> *Id.* at 808.

<sup>103</sup> *Id.* at 811.

<sup>104</sup> *Id.* at 810. The Court held that even though these were reproductions of the likeness, this does not remove the significant creative elements that entitled the portraits to protection under the First Amendment as expressive works of art. *Id.*

<sup>105</sup> *Id.* at 811.

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

<sup>107</sup> Bunker, *supra* note 67, at 315.

settled the issue of whether a painter's use of Tiger Woods's likeness was protected under the First Amendment.<sup>108</sup> In *ETW*, painter Rick Rush created a work of art depicting Tiger Woods famously winning the 1997 Masters Tournament in Augusta, Georgia.<sup>109</sup> Rush created the painting, *The Masters of Augusta*, depicting Woods completing a swing and lining up to observe a putt with one of his caddies on either side of him.<sup>110</sup> In a blue sky-like background, Rush painted the Augusta National Clubhouse; the Masters leaderboard; and past famous golfers Arnold Palmer, Sam Snead, Ben Hogan, Walter Hagen, Bobby Jones, and Jack Nicklaus.<sup>111</sup>

*ETW*, the exclusive holder of Woods's rights of publicity, brought suit claiming, among other claims, an infringement on Woods's rights of publicity under Ohio common law.<sup>112</sup> Ultimately, in a short transformative use analysis, the court set out tests similar to those of *Saderup*, asking whether Rush had added a significant creative component.<sup>113</sup> The court also focused on the economic impact that the work would have on Woods's own economic interests in his likeness.<sup>114</sup> Ultimately, the court concluded that Rush's work was a transformative use that consisted of more than the mere use of Woods's likeness.<sup>115</sup> The court found the added elements of the clubhouse, leaderboard, caddies, and legendary golfers significant and creative, stating that they "in themselves are sufficient to bring Rush's work within the protection of the First Amendment" by adding the message that Woods would one day become one of these golf greats.<sup>116</sup> The court also

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<sup>108</sup> 332 F.3d 915, 919 (6th Cir. 2003).

<sup>109</sup> *Id.* at 918.

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

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

<sup>112</sup> *Id.* at 918–19.

<sup>113</sup> *Id.* at 938.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 936.

<sup>116</sup> *Id.* The court in its analysis considered other right-of-publicity cases decided on First Amendment grounds: *White v. Samsung Electronics America, Inc.*, where the Ninth Circuit found that a robot wearing a gown and wig intended to look like Vanna White did not qualify under a parody defense against White's right-of-publicity claims, *id.* at 932 (citing 989 F.2d 1512 (9th Cir. 1993)); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, where the Tenth Circuit found that trading cards with humorous commentary about baseball players constituted a parody and added a creative component to make an entirely new product, *id.* at 932–33 (citing 95 F.3d 959 (10th Cir. 1996));

found persuasive that the painting included a collage of images to describe a historic sporting event.<sup>117</sup> Finally the court found that Rush's painting was not capitalizing solely on Wood's literal depiction and would not interfere with Woods's ability to profit from the use of his likeness.<sup>118</sup> Therefore, Rush's First Amendment interests outweighed any right-of-publicity interest that Woods maintained.

#### b. *Winter v. DC Comics*

Another instance where the California Supreme Court found a clear transformative use was the case of *Winter v. DC Comics*. In *Winter*, the defendant created a series of comics that featured singers Edgar and Johnny Winter as half-worm, half-human characters.<sup>119</sup> The Winter brothers' likenesses appeared in a volume titled *Autumns of our Discontent*, and the half-worm characters were aptly named Edgar and Johnny Autumn.<sup>120</sup> In determining whether DC Comics' use of the Winters's likeness infringed the Winters's rights of publicity, the Court used the transformative use test to balance DC Comics' First Amendment rights.<sup>121</sup> In setting out the test, the Court reaffirmed the use of *Saderup*'s Raw Materials Test and Defendant's Own Expression Test.<sup>122</sup> The California Supreme Court went further than in *Saderup* though, expressing that even if the market and economic value of a work derive from the celebrity's fame, the secondary work may still be transformative.<sup>123</sup> The Court then iterated that a "work is protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame."<sup>124</sup>

The Court also stated that rights of publicity may not be used to censor portrayals of the celebrity that the celebrity dislikes, but rather are intended

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*Hoffmann v. Capital Cities/ABC, Inc.*, where the Ninth Circuit found that an altered image of Dustin Hoffman wearing a spring 1997 line of women's clothing was not commercial speech and was entitled to full First Amendment protection, *id.* at 933–34 (citing 255 F.3d 1180 (9th Cir. 2001)); and *Saderup*, *id.* at 934–36 (citing 21 P.3d 797 (Cal. 2001)).

<sup>117</sup> *ETW*, F.3d at 938.

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

<sup>119</sup> *Winter v. DC Comics*, 69 P.3d 473, 476 (Cal. 2003).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 477.

<sup>122</sup> *Id.* at 477–78.

<sup>123</sup> *Id.* at 478.

<sup>124</sup> *Id.* at 478–79.

to prevent the misappropriation of a likeness for economic value.<sup>125</sup> As such, the Court found that “this case is not difficult” and that the comic books did not contain literal depictions of the Winters brothers, but rather they added significant expressive content.<sup>126</sup> The Court concluded that the plaintiffs were “merely part of the raw materials from which the comic books were synthesized.”<sup>127</sup> As such, the Court found the incorporation of these likenesses into the comic books to be one of the clearest examples of a transformative use and protected the use of the likenesses under the First Amendment.

### c. *The Use of Athletes’ Likenesses in Video Games*

Another common area where right-of-publicity infringement claims have arisen has been the use of celebrity likenesses in video games, in which sports video game creators’ First Amendment defenses have largely been unsuccessful.<sup>128</sup> Recently, in *Hart v. Electronic Arts, Inc.*, the Third Circuit found for Rutgers University football quarterback Ryan Hart where the video game creator, Electronic Arts, Inc., incorporated Hart’s likeness into its *NCAA Football 2004*, *2005*, and *2006* games.<sup>129</sup> The video game incorporated aspects of Hart’s identity to make up the Rutgers quarterback in its game.<sup>130</sup> The quarterbacks both played for Rutgers; wore number thirteen; were 6'2" tall and 197 pounds; came from the same hometown, team, and class year; and looked alike.<sup>131</sup> Any game user could alter the digital avatar resembling Hart to change statistics like height, weight, and throwing distance, but could not change the hometown and class year.<sup>132</sup>

In applying the transformative use test to determine the validity of Electronic Arts’ First Amendment defense, the Third Circuit listed both

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<sup>125</sup> *Id.* at 478.

<sup>126</sup> *Id.* at 479.

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

<sup>128</sup> In *In re NCAA Student-Athlete Name & Likeness Litigation*, 724 F.3d 1268 (9th Cir. 2013), the Ninth Circuit heard a class-action claim by student athletes against video game developer Electronic Arts. The court found that the First Amendment did not protect the use of college athletes’ likenesses in football video games against the athletes’ right-of-publicity infringement claims because the use was not transformative where the athletes’ likenesses were used to play football in the game as they did in life. *Id.*

<sup>129</sup> 717 F.3d 141,170 (3d Cir. 2013).

<sup>130</sup> *Id.* at 146.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

the Raw Materials Test and the Defendant's Own Expression Test as the appropriate inquiries.<sup>133</sup> The Court then found that the digital avatar closely resembled Hart and that the context of the video game was not transformative: "The digital Ryan Hart does what the actual Ryan Hart did while at Rutgers: he plays college football . . ."<sup>134</sup> The Court further found that the video game player's ability to change the avatar was not sufficient to constitute a transformative use and rather fell into the "'mere trivial' variation"<sup>135</sup> category, in which rights of publicity surmount First Amendment protections.<sup>136</sup> Other creative elements of the game that did not affect Hart's digital avatar were not applicable to the question of whether Hart's likeness had been transformed,<sup>137</sup> and the Court found this use violated Hart's rights of publicity.<sup>138</sup>

#### *d. The Use of Musicians' Likenesses in Video Games*

College athletes have not been the only ones seeking to recover from the video game industry for the use of their likenesses to sell video games. Musicians have also brought right-of-publicity infringement claims against video game creators for including their likenesses and music in video games.

##### *i. Kirby v. Sega of America*

In *Kirby v. Sega of America*, for example, '90s singer Keirin Kirby brought suit against video game distributor Sega for allegedly incorporating her likeness into the video game *Space Channel 5*.<sup>139</sup> Kirby alleged that the main character of *Space Channel 5*, Ulala, was a depiction of Kirby.<sup>140</sup> Kirby claimed that she had a specific "funky diva-like" character and that she typically wore "platform shoes, knee-socks, brightly colored form-fitting clothes and unitards, short pleated or cheerleader-type skirts, bare

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<sup>133</sup> *Id.* at 160.

<sup>134</sup> *Id.* at 166.

<sup>135</sup> *Id.* at 168 (quoting *Winter v. DC Comics*, 69 P.3d 473, 478 (Cal. 2003)).

<sup>136</sup> *Id.* at 167.

<sup>137</sup> *Id.* at 169 ("Decisions applying the Transformative Use Test invariably look to how the *celebrity's identity* is used in or is altered by other aspects of a work.").

<sup>138</sup> *Id.* at 170.

<sup>139</sup> 60 Cal. Rptr. 3d 607, 609 (Cal. Ct. App. 2006).

<sup>140</sup> *Id.*

midriffs, . . . a blue backpack, and red/pink hair.”<sup>141</sup> She also claimed that her signature lyrical expression was “ooh la la,” phonetically similar to the name of the Ulala character.<sup>142</sup> Sega released *Space Channel 5* in 1999, and the game featured Ulala as a news reporter working in outer space in the twenty-fifth century.<sup>143</sup> In the game, Ulala primarily wore an orange outfit with a bare midriff, a miniskirt, elbow-length gloves, platform boots, hot pink hair, and a blue jetpack.<sup>144</sup> Considering the similarities and differences between Ulala and Kirby, the California Court of Appeals for the Second District found that there was a factual issue as to whether Sega infringed, but the court ultimately concluded that any use of Kirby’s likeness was protected by the First Amendment.<sup>145</sup>

The court applied the transformative use test to the game and listed the Raw Materials Test, the Defendant’s Own Expression Test, and the New Meaning Test as applicable inquiries.<sup>146</sup> The court reasoned that Ulala was more than a literal depiction in part because of differences in physical appearance but also because of the context in which Ulala appeared, as a futuristic space reporter, not a 1990s singer.<sup>147</sup> The fact that Ulala and Kirby also did not have similar dance moves demonstrated that Ulala was transformative and as such protected under the First Amendment. Finally, the court rejected Kirby’s argument that Ulala and the game must have some type of social commentary or meaning, stating, “Whether the Ulala character conveys any expressive meaning is irrelevant to a First Amendment defense. All that is necessary is that respondents’ work add ‘something new . . . altering the first with new expression, meaning, or message.’”<sup>148</sup> The court found that Ulala was not simply “an imitative character contrived of ‘minor digital enhancements or manipulations,’ and as such was protected by the First Amendment against Kirby’s claims.<sup>149</sup>

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 610.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 616.

<sup>146</sup> *Id.* at 615.

<sup>147</sup> *Id.* at 616.

<sup>148</sup> *Id.* at 617 (quoting *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001)).

<sup>149</sup> *Id.* at 616.

*ii. No Doubt v. Activision Publishing, Inc.*

In another case involving musicians' likenesses appearing in a video game, however, the California Court of Appeal for the Second District applied the transformative use test and found that the First Amendment did not supersede the band No Doubt's rights of publicity.<sup>150</sup> In *No Doubt v. Activision Publishing, Inc.*, the band No Doubt had contracted with Activision to appear in Activision's game *Band Hero*, which allowed players to perform various popular songs in a rock band with other digital members of the band.<sup>151</sup> Players would choose an avatar character and then play with either digital versions of real-life rock stars or other fictional avatars.<sup>152</sup> No Doubt agreed to appear in the video game and granted Activision a nonexclusive license to use their likenesses in the game, subject to the band's prior approval.<sup>153</sup>

To facilitate the game creation, No Doubt participated in a motion-capture photography<sup>154</sup> session to make the digital representations closely look like the real band members.<sup>155</sup> No Doubt later became aware that an unlocking feature of the game (when the player reached a certain level) would allow the player to choose No Doubt avatars to perform other songs in the game that "No Doubt maintains it never would have performed."<sup>156</sup> Players could also manipulate the No Doubt band member Gwen Stefani to sing in a male voice and male band members to sing in female voices or manipulate band members to perform solo without the rest of the band.<sup>157</sup> No Doubt demanded that Activision stop these additional functions, but Activision refused.<sup>158</sup> No Doubt then brought suit alleging that Activision had violated the band's rights of publicity by exceeding the scope of its

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<sup>150</sup> *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397, 411 (Cal. Ct. App. 2011).

<sup>151</sup> *Id.* at 401.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 401–02.

<sup>154</sup> See *supra* note 25 and accompanying text.

<sup>155</sup> *No Doubt*, 122 Cal. Rptr. 3d at 402.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* Activision admitted that because No Doubt had not performed these new songs during its motion capture photography session, Activision had simply used impersonators to create the likenesses that would perform songs other than those licensed by No Doubt.

license, which indicated that the likenesses would only appear performing No Doubt songs.<sup>159</sup> Activision asserted that even if it did exceed the scope of its license, the First Amendment provided a complete defense to the complaint.<sup>160</sup>

In applying the transformative use test, the court listed all four of the *Saderup* test iterations: the New Meaning, Defendant's Own Expression, Mere Celebrity Likeness, and Raw Materials tests.<sup>161</sup> The court then considered that the digital representations were nearly an exact replication because of the motion-capture photography.<sup>162</sup> It then looked to the context of the likenesses within the game.<sup>163</sup> The court found compelling that “no matter what else occurs in the game during the depiction of the No Doubt avatars, the avatars perform rock songs, the same activity by which the band achieved and maintains its fame. Moreover, the avatars perform those songs as literal recreations of the band members.”<sup>164</sup> The court recognized that the band members could be manipulated to play in different venues, including outer space, but found that these other creative elements did not transform the avatars into doing anything other than what the band members would normally do — play songs.<sup>165</sup> The fact that Activision used the depictions to increase interest in its game by enticing the band’s fan base to purchase the game also ultimately led the court to conclude that the use of the band’s likenesses was not transformative.<sup>166</sup>

### III. THE TRANSFORMATIVE USE TEST & THE TUPAC VIRTUAL CLONE: TRANSFORMATION OR INFRINGEMENT?

To determine whether the Tupac virtual clone could be protected under the First Amendment, the virtual clone must first be protected speech. The United States Supreme Court has stated that video games can constitute

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 406.

<sup>161</sup> *Id.* at 407.

<sup>162</sup> *Id.* at 409.

<sup>163</sup> *Id.* at 410.

<sup>164</sup> *Id.* at 410–11.

<sup>165</sup> *Id.* at 411.

<sup>166</sup> *Id.*

protected speech,<sup>167</sup> a proposition that lower courts have followed when weighing right-of-publicity interests against First Amendment interests.<sup>168</sup> The video game *Band Hero*, which the court found was protected speech,<sup>169</sup> closely resembles the Tupac concert. For example, *Band Hero* used motion-capture technology to incorporate the likeness of the band No Doubt into a video game to perform its own songs.<sup>170</sup> To achieve the Tupac performance, re-creators used an indirect approach to virtual cloning that allowed a two-dimensional Tupac to appear rapping in a live concert.<sup>171</sup> Because similar virtual cloning technology was used to create both the band and Tupac, and both were created to perform their own music for an audience, this virtual performance is likely also protected speech. Because of this, the re-creators may attempt to claim a First Amendment defense to any common law right-of-publicity claim.<sup>172</sup>

#### A. ARGUMENTS AGAINST TUPAC'S VIRTUAL CLONE AS A TRANSFORMATIVE USE UNDER SADERUP'S TEST ITERATIONS

It is not the case that the First Amendment “automatically trumps” rights of publicity,<sup>173</sup> and to balance these interests, the *Saderup* transformative use test requires that the work in question (1) “adds something new, with a further purpose or different character, altering the first with *new expression, meaning, or message*”,<sup>174</sup> (2) “adds significant creative elements so as

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<sup>167</sup> See *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (analyzing a restriction on video games under a strict scrutiny standard because it “impose[d] a restriction on the content of protected speech”).

<sup>168</sup> See *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 618 (Cal. Ct. App. 2006) (“Because Kirby's claims are subject to a First Amendment defense, and the video game is protected speech, Kirby's state common law and statutory claims fail.”).

<sup>169</sup> See *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397, 405 (Cal. Ct. App. 2011).

<sup>170</sup> *Id.* at 402.

<sup>171</sup> See *supra* notes 22–31 and accompany text (describing the possible creation technique that re-creators used to create the concert performance).

<sup>172</sup> To sustain a common law right of publicity, the plaintiff must prove that there was unauthorized use of the plaintiff's likeness that results in injury, regardless of whether the purpose is commercial. *Kirby*, 50 Cal. Rptr. 3d at 612.

<sup>173</sup> *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 806 (Cal. 2001).

<sup>174</sup> *Id.* at 808 (emphasis added).

to be transformed into something more than a *mere celebrity likeness* or imitation;<sup>175</sup> (3) “is so transformed that it has become primarily the *defendant’s own expression* rather than the celebrity’s likeness,” with expression meaning something other than the celebrity’s likeness;<sup>176</sup> or (4) uses the celebrity likeness as one of the ‘*raw materials*’ from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question.”<sup>177</sup> In considering whether a likeness has been transformed, the court first considers the likeness itself and then the context in which the likeness appears<sup>178</sup> to determine whether the new work is transformative.

### 1. Likeness Similarities

The Tupac virtual clone, like the No Doubt motion-capture use, was intended to resemble the deceased Tupac as closely as possible. Using either a direct or an indirect approach to virtual cloning in and of itself demonstrates that the re-creators are attempting to replicate the likeness. The Tupac virtual clone donned Tupac’s tattoos, gold-chain necklace, Timberland boots, and even sagging baggy pants exactly the way the true Tupac had in life.<sup>179</sup> Arguably, under the Mere Celebrity Likeness Test, by making the virtual clone physically identical to the true Tupac, the re-creators did not add “significant creative elements” to transform the Tupac virtual clone “into something more than a mere celebrity . . . imitation.”<sup>180</sup> Rather, replicating the likeness down to the tattoos on Tupac’s chest was “painstakingly designed to mimic [his] likeness,” exactly like the No Doubt video game avatars that did not meet the court’s requirements for transformative use.<sup>181</sup>

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<sup>175</sup> *Id.* at 799 (emphasis added).

<sup>176</sup> *Id.* at 809 (emphasis added).

<sup>177</sup> *Id.* (emphasis added).

<sup>178</sup> See *No Doubt v. Activision Publ’g, Inc.*, 122 Cal. Rptr. 3d 397, 409–10 (Cal. Ct. App. 2011).

<sup>179</sup> *Coachella’s ‘Astonishing’ Tupac Shakur Hologram: How They Did It*, THE WEEK (Apr. 17, 2012), <http://theweek.com/article/index/226859/coachellas-astonishing-tupac-shakur-hologram-how-they-did-it> (“No detail was glossed over, with the late rapper’s signature tattoos, jewelry, and body movements all incorporated into the hologram.”).

<sup>180</sup> *Saderup*, 21 P.3d at 799.

<sup>181</sup> *No Doubt*, 122 Cal. Rptr. 3d at 409.

The fact that the likeness was a literal depiction of the former Tupac Shakur weighs against a finding of transformative use where the virtual clone is more or less a “fungible” image of Tupac Shakur, which he and his estate have the right to monopolize.<sup>182</sup> Further, the songs performed also incorporated Tupac Shakur’s voice exactly as he had sung those songs when he was alive.<sup>183</sup> As such, it was not just Tupac’s physical identity that the re-creators took, but rather it was his physical identity, paired with his own voice, making the virtual clone simply a full-blown substitute for, or imitation of, the former Tupac Shakur. Rather than using Tupac’s likeness as a raw material to create a new work, the new work itself was just a carbon copy of which the imitation of Tupac is “the very sum and substance.”<sup>184</sup> Therefore, this exact replication would weigh against transformation under both the Raw Materials and Mere Celebrity Likeness tests.

The virtual clone likely took much skill and significant resources to create.<sup>185</sup> Using the indirect approach, the re-creators needed to incorporate many different performances, photos, etc. to be able to create the virtual clone with sufficient detail. The software is also likely very complex and not operable by a lay user, as evidenced by the fact that Dr. Dre teamed up with two different audio-visual companies to create the virtual clone.<sup>186</sup> The complexity and skill required, however, do not transform the virtual clone performance itself into something new or something other than a mere imitation of Tupac’s likeness. The Court in *Saderup* recognized that while Saderup’s charcoal drawings took the skill of an artist to create, this alone did not make the depiction of the Three Stooges transformative because the “marketability and economic value . . . derived primarily from the fame of the celebrity depicted” rather than the “creativity, skill, and reputation” of the re-creator — thus failing the Defendant’s Own Expression Test.<sup>187</sup>

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<sup>182</sup> *Id.* at 407.

<sup>183</sup> Compare *Tupac Live Hologram*, *supra* note 1, with *2-Pac-Hail Mary (Official Music Video)* (1996), YouTube (Nov. 8, 2010), <https://www.youtube.com/watch?v=3SQVBsJG9Rs>.

<sup>184</sup> *Winter v. DC Comics*, 69 P.3d 473, 477 (Cal. 2003).

<sup>185</sup> The re-creators stated that the Tupac hologram cost between \$100,000 and \$400,000. Gil Kaufman, *Exclusive: Tupac Coachella Hologram Source Explains How Rapper Resurrected*, MTV.com (Apr. 16, 2012, 12:49 PM), <http://www.mtv.com/news/articles/1683173/tupac-hologram-coachella.jhtml>.

<sup>186</sup> *Id.*

<sup>187</sup> *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 810 (Cal. 2001).

The media aftermath of the concert demonstrates that the focus of the audience was on seeing Tupac perform again, not on the mastery of AV Concepts and Digital Domain. The fans and media were ecstatic to see Tupac resurrected and performing next to his friends again, not to see the AV Concept's *version* of Tupac.<sup>188</sup> This was not a case of Andy Warhol re-creating Marilyn Monroe's face to make it Andy Warhol's version of Marilyn Monroe; rather it was simply AV Concepts creating a replica of Tupac to be Tupac.<sup>189</sup> As such, there are strong arguments that the virtual clone would not pass the Defendant's Own Expression Test, further weighing against a finding of transformative use.

## 2. *Likeness Differences Insignificant*

The re-creators did change elements of the performance, namely creating a live performance for the song *Hail Mary*, which Tupac had never actually performed for a live audience; adding new language into Tupac's vernacular, "Coachella"; and opening and closing the performance with awe-inspiring visual effects, raising Tupac from beneath the ground and then vanishing him into a cloud of gold specks.<sup>190</sup> Transformative use precedent is not clear, however, on whether these minor changes constitute transformative use where the overall effect is still to physically replicate the virtual clone Tupac to perform as Tupac performed in life. The ability to change quarterback Ryan Hart's avatar to reflect different bodily physique and skill was insufficient to make Hart's likeness in the football video game transformative.<sup>191</sup> Arguably, this precedent could apply to any minor changes (intended or unintended) made to Tupac's physical appearance and would weigh toward a finding that the virtual clone is not a transformative use under the Mere Celebrity Likeness Test.

In *No Doubt*, the court also considered the fact that the game player could manipulate the band's voices and make men sound like women and

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<sup>188</sup> See Osterhout, *supra* note 19, at 38 (quoting a concert-goer as saying, "The hologram was so real that I kept looking over at Snoop to catch his reaction at having his buddy back on stage with him after all of this time . . . [h]e seemed happy").

<sup>189</sup> See *Saderup*, 21 P.3d at 811 (describing a celebrity depiction that would be deserving of First Amendment defense protection under the transformative use test).

<sup>190</sup> Suddath, *supra* note 1.

<sup>191</sup> Hart v. Electronic Arts, Inc., 717 F.3d 141, 168 (3d Cir. 2013).

vice versa.<sup>192</sup> The court's finding that this element did not transform the likeness into something new is also telling for the Tupac performance where only one truly new word was added to Tupac's vernacular. As such, this minor addition may be rather insignificant when considering whether the virtual clone as a whole deserves First Amendment protections over Tupac's rights of publicity. In *No Doubt*, the avatars could perform with or without the band, and the avatars sang new songs by other artists that the band had not sung before.<sup>193</sup> Tupac similarly performed with other rappers during the concert, Dr. Dre and Snoop Dogg. The fact that the *No Doubt* court put little weight behind the argument that the separation of the band was transformative could also indicate that simply including new rappers into the virtual clone performance will not constitute a transformative use, particularly where the artist had in fact performed with those rappers in life.<sup>194</sup>

Finally, the fact that the Tupac virtual clone performed a song that Tupac had not performed in life is arguably also not transformative. The *No Doubt* avatars were forced to sing the songs of other artists in *Band Hero*, and the court found that this made the video game no more transformative.<sup>195</sup> As such, forcing Tupac's virtual clone to sing a Tupac song, albeit not one performed in life, is arguably directly in line with this *No Doubt* precedent and will not transform this use of Tupac's likeness under the Defendant's Own Expression or Raw Materials tests also employed in *No Doubt*.<sup>196</sup> Therefore, these minor changes to the Tupac virtual clone are similar to that which Activision undertook in *No Doubt* and which the court found unconvincing and un-transformative.<sup>197</sup> Considering the similarity of the likeness alone however cannot dictate whether a use is transformative.<sup>198</sup>

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<sup>192</sup> *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397, 402, 406 (Cal. Ct. App. 2011).

<sup>193</sup> *Id.*

<sup>194</sup> See *2Pac-2 of Amerikaz Most Wanted*, YOUTUBE (Feb. 12, 2006), <https://www.youtube.com/watch?v=Qb4V4jfHOO8&feature=kp> (showing a music video of Tupac performing with rapper Snoop Dogg); *2Pac-California Love*, YOUTUBE (Feb. 12, 2006), <https://www.youtube.com/watch?v=FWOsbgP5Ox4&feature=kp> (showing a music video of Tupac performing with rapper Dr. Dre).

<sup>195</sup> *No Doubt*, 122 Cal. Rptr. 3d at 407.

<sup>196</sup> *Id.* at 410.

<sup>197</sup> *Id.* at 411.

<sup>198</sup> *Id.* at 415; *Hart v. Electronic Arts, Inc.*, 717 F.3d 141, 166 (3d Cir. 2013).

### 3. Context

Courts have also looked to the context in which the celebrity's likeness appears to determine whether the re-creator added significant creative elements, thus making it transformative and worthy of protection.<sup>199</sup> The Tupac virtual clone performed two Tupac songs alongside Dr. Dre and Snoop Dogg, two performers that he had performed with during life.<sup>200</sup> Because the only songs the trio sang were songs that Tupac had written and sung during his life, arguably the message of both songs in the context of a new concert was the same message conveyed when Tupac was alive, rather than any new message that the re-creators were attempting to impart. The estate could then assert that the performance should fail the New Meaning Test for transformativeness.

Further, courts have been reluctant to provide protection to re-creations that depict the celebrity doing exactly "the same activity by which the [celebrity] achieved and maintains [his or her] fame."<sup>201</sup> Rapping made Tupac famous and continued to make him famous throughout both his life and his death.<sup>202</sup> In the virtual clone concert, re-creators capitalized on what made Tupac famous — his rap lyrics and style. The Tupac virtual clone even performed Tupac's own songs, which contributed to his fame. This use of Tupac's likeness to perform the same activity that made him famous is much like the use of Zacchini's entire cannonball act, which was also how Zacchini achieved his reputation.<sup>203</sup> It may similarly be what the United States Supreme Court termed one of the "strongest case[s] for a 'right of publicity' involving, not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place."<sup>204</sup> Ryan Hart played college football for Rutgers. Ryan Hart's avatar played college football for Rutgers. No Doubt

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<sup>199</sup> See *No Doubt*, 122 Cal. Rptr. 3d at 409–10.

<sup>200</sup> See *supra* note 194.

<sup>201</sup> *No Doubt*, 122 Cal. Rptr. 3d at 411.

<sup>202</sup> Derek Iwamoto, *Tupac Shakur: Understanding the Identity Formation of Hyper-Masculinity of a Popular Hip-Hop Artist*, THE BLACK SCHOLAR, Summer 2003, at 44, available at <http://www.jstor.org/stable/41069025?seq=2>. ("In the mid-1990s [Tupac] was one of the most popular rap stars. Even today he is considered a legend in the hip-hop world, and has sold over 22 million records, posthumously.").

<sup>203</sup> *Zacchini v. Scripps–Howard Broad. Co.*, 433 U.S. 562, 576 (1977).

<sup>204</sup> *Id.*

performed songs. No Doubt's avatars in the *Band Hero* video game performed songs. No matter what else changed on the football field or in the concert arena in these video games, the celebrities were depicted doing the exact activities that made them famous.<sup>205</sup> And as such, these depictions were arguably not transformative under any of the *Saderup* tests.<sup>206</sup>

The added creative elements of the concert, such as Tupac's entrance and exit and the fact that Tupac performed as one part of an entire music festival, are also arguably insufficient to make the use transformative. The court in *Hart* rejected an argument that the other elements of the video game (not affecting Hart's likeness) elevated the entire game as a transformative use.<sup>207</sup> Instead, the court stated that the transformative use test looks only at the way in which the celebrity's identity is used or changed, not other extraneous creative parts of the game (or concert in this case).<sup>208</sup> Therefore, other elements of the concert outside of the Tupac performance do not bear on the transformative use inquiry.<sup>209</sup> These other elements may be relevant though when considering whether the performance interferes with the Tupac estate's economic interest in his likeness.

#### 4. Possible Interference with Economic Interest

In considering whether a use is transformative, courts have also taken into account the extent to which the new use of the artist's likeness will affect the economic interest of the artist, asserting that the more transformative the work, the less it will interfere with the celebrity's economic interest.<sup>210</sup> The Coachella concert organizers sold tickets to the show, as any concert

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<sup>205</sup> *Hart v. Electronic Arts, Inc.*, 717 F.3d 141, 166 (3d Cir. 2013); *No Doubt*, 122 Cal. Rptr. 3d at 411 (“Moreover, Activision’s use of life-like depictions of No Doubt performing songs is motivated by the commercial interest in using the band’s fame to market *Band Hero*, because it encourages the band’s sizeable fan base to purchase the game so as to perform as, or alongside, the members of No Doubt.”).

<sup>206</sup> *Hart*, 717 F.3d at 166; *No Doubt*, 122 Cal. Rptr. 3d at 411.

<sup>207</sup> *Hart*, 717 F.3d at 166.

<sup>208</sup> *Id.* 169.

<sup>209</sup> *Id.*

<sup>210</sup> See *Zacchini v. Scripps–Howard Broad. Co.*, 433 U.S. 562, 575 (1977); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001) (“On the other hand, when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity.”).

presenter would. These ticket sales alone are not likely detracting from any economic interest Tupac's estate has unless the estate itself would like to capitalize on a Tupac virtual clone performance of its own. If this were the case, the Coachella concert would be in direct competition with the estate's economic interest in the use of the likeness.

Following the concert though, Tupac Shakur's *Greatest Hits* album returned to the Billboard top 200 for the first time since 2000, falling into spot 129, with 4,000 copies sold.<sup>211</sup> The concert thus boosted record sales more than a 570% increase from the previous week.<sup>212</sup> This alone would not likely interfere with the estate's economic interest but would rather do the opposite and enhance the estate's economic interest in Tupac's music. However, if the fans turned to purchasing recorded versions of the concert to view the performance rather than buying "The Don Killuminati: The 7 Day Theory" album that simply contains the song *Hail Mary*, this could interfere with the estate's interest in Tupac's likeness. This is still a very narrow substitute, however, and the likelihood is greater that the estate's economic interest would be enhanced following the concert rather than impeded based on the post-concert record sales.

These elements, the identical depiction of Tupac doing exactly what Tupac did to obtain and maintain his fame, tend to weigh against a finding that Dr. Dre and his audio-visual counterparts added "significant creative elements so as to . . . transform[] [the Tupac virtual clone] into something more than a mere celebrity likeness or imitation."<sup>213</sup> Rather this concert, meant to astonish fans by resurrecting an iconic deceased rapper using an indirect virtual cloning approach, is likely more akin to "when an artist's skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame" that then subordinates a re-creator's First Amendment defenses to the celebrity's rights of publicity under the Mere Celebrity Likeness Test.<sup>214</sup> Where there is arguably no or little economic interference, however, critics

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<sup>211</sup> Keith Caulfield, *Tupac's Virtual Coachella Appearance Spurs Huge Sales Bump*, BILLBOARD (Apr. 26, 2012, 9:30 PM), <http://www.billboard.com/news/tupac-s-virtual-coachella-appearance-spurs-1006896752.story>.

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

<sup>213</sup> *Saderup*, 21 P.3d at 799.

<sup>214</sup> *Id.* at 810.

of rights of publicity are not without hope, as this lack of interference would tend to show transformation. Several other elements of the concert also weigh toward a finding of transformative use.

## B. ARGUMENTS FOR TRANSFORMATIVE USE OF TUPAC'S LIKENESS USING SADERUP'S TEST ITERATIONS

Tupac's re-creators would undoubtedly assert that they created something of their own that contributes more to Tupac's performance and his legacy than any "trivial variation" could.<sup>215</sup> The re-creators added aspects both to the likeness and to the context of the performance that arguably add a new message, that of the re-creator rather than Tupac himself, thus passing the New Meaning, Defendant's Own Expression, and Raw Materials tests.

### *1. Likeness & Context Additions Under the Defendant's Own Expression & Raw Materials Tests*

While the virtual clone is a literal depiction meant to look like the deceased Tupac Shakur, courts applying the transformative use test have not damned artistic expressions merely for being a literal reproduction. The courts in *No Doubt* and *Saderup* both recognized that the First Amendment can protect literal reproductions where there are added elements making the depiction recognizable as the work of the artist rather than the celebrity.<sup>216</sup> While not as distinct as Andy Warhol's famous additions to Marilyn Monroe's likeness, the re-creators reproduced Tupac but did so by creating an entirely new performance to accompany the song *Hail Mary*. The re-creators had to either find old dance moves in past performances or create the new dance moves digitally themselves because Tupac had not ever actually shown the world how he would dance to and perform this song live. The re-creators thus added their own creative elements to the performance. Even the music video for the song *Hail Mary* does not show Tupac dancing, so the virtual clone's moves, while undoubtedly Tupac-esque, are something that the re-creators memorialized and constructed to fit the lyrics and rhythm of the

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<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 811; *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397, 402, 408 (Cal. Ct. App. 2011).

song themselves.<sup>217</sup> In adding words that Tupac had never spoken and deleting the beginning portion of the recorded song *Hail Mary* from the live performance, the re-creators arguably also made artistic changes to the performance to make the performance as a whole more coherent and forceful, thus likely passing the Defendant's Own Expression Test.

These changes to a literal reproduction to represent real-life events with artistic additions are similar to the changes that transformed Tiger Woods's likeness in *ETW*. In *ETW*, Rick Rush created a painting of Tiger Woods, intended to look like Tiger Woods, and depicting Woods as he appeared in real life — winning the Masters Tournament.<sup>218</sup> These facts made Rush's work no less transformative or deserving of First Amendment protection. Rush added elements to a historical event by including Woods's caddies, the Master's Leader Board, and famous golf greats in the background looking down on Woods.<sup>219</sup> The Tupac re-creators added rap greats Dr. Dre and Snoop Dogg to the concert and included both a mesmerizing resurrection from below the ground to open the performance and a shocking burst of light to represent Tupac's exit from the stage — but not the music industry. Under this theory, taking the exact replication of Tupac's likeness was just one of the raw materials used to create this larger performance that then added significant creative elements, thus passing the Raw Materials Test.

While this performance was not a historic event, like the youngest golfer ever to win the Masters,<sup>220</sup> these added elements are arguably deserving of First Amendment protection where the re-creators transformed Tupac's live performances into a new performance all their own. AV Concepts also created other virtual clone performances for artists like Madonna, the Gorillaz, Celine Dion, and the Black Eyed Peas,<sup>221</sup> so AV could assert that, like Rush, it is creating literal reproductions with added elements that make the performances "recognizably [AV's] own" expression.<sup>222</sup>

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<sup>217</sup> See 2-Pac-*Hail Mary* (Official Music Video) (1996), *supra* note 183.

<sup>218</sup> *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 918 (6th Cir. 2003).

<sup>219</sup> *Id.* at 936.

<sup>220</sup> *Id.* at 918.

<sup>221</sup> Tom Eames, *Tupac Shakur Hologram Took Several Months, Says Creator*, DIGITAL SPY (Apr. 16, 2012, 5:02PM), <http://www.digitalspy.com/music/news/a376774/tupac-shakur-hologram-took-several-months-says-creator.html#~oAGyIsmbhbVPuz>.

<sup>222</sup> *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 810 (Cal. 2001).

## 2. The Re-Creators' Added Message: The New Meaning Test

The re-creators, in re-creating and resurrecting a performer who died too young and whom the public has idolized to the extent of questioning his death,<sup>223</sup> arguably “added something new, with a further purpose or different character, altering the first [Tupac] with new expression, meaning, or message.”<sup>224</sup> This concert may well have added new meaning to the Tupac performances than existed before. In life, his performances carried the message that thug life was difficult and that racial oppression was occurring right in front of society’s face, but nothing was changing.<sup>225</sup> In death, however, the re-creators created the virtual clone from the memories and vision of Dr. Dre<sup>226</sup> with the purpose of adding new meaning to the *posthumous* Tupac’s performance — the world has not forgotten you. This concert arguably elevated Tupac to an iconic status as a rapper that, even in death, the world will not let die.<sup>227</sup> The concert could have been making a comment that unlike Tupac himself, Tupac’s music will live on forever.

However, while this new message is persuasive to a finding that the use was transformative, whether or not the concert actually made this comment about Tupac is not required under the transformative use test.<sup>228</sup> All that the re-creators needed to do is add new meaning that the likeness did not otherwise provide,<sup>229</sup> which the resurrection, new performance,

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<sup>223</sup> Chris Whitworth, *Tupac Shakur: Top 5 Conspiracy Theories*, 3 News (June 17, 2011, 3:00 PM), <http://www.3news.co.nz/Tupac-Shakur-Top-5-conspiracy-theories/tabid/418/articleID/215479/Default.aspx> (listing Tupac’s posthumous albums and lyrics pointing to his death as reasons supporting conspiracy theories that Tupac Shakur is still alive).

<sup>224</sup> Saderup, 21 P.3d at 808.

<sup>225</sup> Iwamoto, *supra* note 202, at 44.

<sup>226</sup> “[Q]uite honestly, it was Dre and Snoop who had to guide us. He is their friend and they know him,” said the chief creator at Digital Domain. Suddath, *supra* note 1; see also Nadeska Alexis, *Dr. Dre Hopes Jimi Hendrix, Marvin Gaye Follow ‘Pac as Holograms*, MTV.COM (Apr. 19, 2012, 12:36 PM), <http://www.mtv.com/news/articles/1683463/tupac-hologram-dr-dre.jhtml> (stating that the creation of the hologram was Dr. Dre’s idea, and his vision was what was used to bring Tupac back).

<sup>227</sup> Re-creator Dylan Brown, a filmmaker who worked on the Tupac virtual clone, stated, “even if you die we’ll bring you back.” McCartney, *supra* note 21.

<sup>228</sup> See *Kirby v. Sega of Am., Inc.*, 60 Cal. Rptr. 3d 607, 617 (Cal. Ct. App. 2006) (“The law does not require Ulala to ‘say something — whether factual or critical or comedic’ about Kirby the public figure in order to receive First Amendment protection. This argument has been soundly rejected by the Supreme Court.”).

<sup>229</sup> *Id.*

and vanishing may indeed all do. The slow resurrection from beneath the stage adds meaning to the likeness — Tupac's music and messages cannot be killed. Singing the song *Hail Mary*, of all the songs in Tupac's discography,<sup>230</sup> also added meaning to the concert because the song includes lyrics like “[w]hen they turn out the lights, I'll be down in the dark [t]huggin eternal through my heart,” and “[d]ealing with fate, hoping God don't close the gate.”<sup>231</sup> This song and its title — the name of a Catholic prayer calling for the intercession of the Virgin Mary<sup>232</sup> — further exemplify the “eternal” nature of Tupac's music, and the virtual clone's performance to this song that had never been performed further conveys the message that, to the audience and friends, Tupac will never truly die. This new message, that of an eternal Tupac Shakur, is new meaning that Tupac's likeness did not maintain during Tupac's life, and as such, the use of the likeness passes the transformative use test under the New Meaning and Raw Materials subtests and is deserving of First Amendment protection.

#### IV. THE MANY TESTS OF *SADERUP*

Because the *Saderup* test iterations seemingly lead to contrary results in situations like the Tupac virtual clone concert, one may question whether the transformative use test is really the most appropriate inquiry when balancing right-of-publicity and First Amendment interests. The California Supreme Court in *Saderup*, however, took the approach most directly imparted by the United States Supreme Court in adopting the transformative use test, rather than the tests adopted by other circuits and jurisdictions.<sup>233</sup> The U.S. Supreme Court in *Zacchini* stated that Ohio's goals in providing right-of-publicity protection were “closely analogous” to the goals of both copyright and patent protection by “focusing on the right

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<sup>230</sup> See *2Pac Discography*, MTV, <http://www.mtv.com/artists/2pac/discography/> (last visited Mar. 26, 2014) (listing fourteen Tupac albums released).

<sup>231</sup> *Hail Mary*, AZ LYRICS, <http://www.azlyrics.com/lyrics/2pac/hailmary.html> (last visited Mar. 26, 2014).

<sup>232</sup> *Hail Mary*, MERRIAM WEBSTER, <http://www.merriam-webster.com/dictionary/hail%20mary> (last visited Mar. 26, 2014).

<sup>233</sup> See *supra* notes 62–66 and accompanying text (outlining the First Amendment tests applied in right-of-publicity infringement cases).

of the individual to reap the reward for his endeavors”<sup>234</sup> and providing an economic incentive to create.<sup>235</sup> The Court again compared rights of publicity and copyrights in declaring that the Constitution would no more prevent a state from requiring the news station to compensate Zacchini than it would allow a defendant to broadcast a copyrighted dramatic work without compensating the copyright holder.<sup>236</sup>

Because the U.S. Supreme Court had already recognized the connection between copyrights and rights of publicity in a case balancing First Amendment protections against rights of publicity, the California Supreme Court’s decision to take a similar approach — using an aspect of the established copyright fair use test based on these common goals — is warranted under stare decisis principles.<sup>237</sup> Further, because *Zacchini* is the only U.S. Supreme Court case to address rights of publicity generally, much less rights of publicity as weighed against the First Amendment, adopting a similar copyright transformative use test would be most consistent with the only binding precedent of all of the possible right-of-publicity tests employed.

In adopting the transformative use test over other possible First Amendment defense tests, the Third Circuit in *Hart* rejected the *Rogers* test<sup>238</sup> because it did not maintain a single focus on whether the work in question sufficiently transformed the celebrity’s likeness in simply requiring that the new work be unrelated and not use the celebrity’s name for its commercial value.<sup>239</sup> The court said that this inquiry overlooked the possibility that misappropriation can occur in the celebrity’s market as well.<sup>240</sup>

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<sup>234</sup> *Zacchini v. Scripps–Howard Broad. Co.*, 433 U.S. 562, 573 (1977).

<sup>235</sup> *Id.* at 576.

<sup>236</sup> *Id.* at 575.

<sup>237</sup> See *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001) (“The right of publicity, at least theoretically, shares this goal with copyright law. . . . When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist.”).

<sup>238</sup> The *Rogers Test* asks whether the challenged work is wholly unrelated to the underlying work and whether the plaintiffs name is used for its advertisement and commercial value. See *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989).

<sup>239</sup> *Hart v. Electronic Arts, Inc.*, 717 F.3d 141,163 (3d Cir. 2013).

<sup>240</sup> *Id.*

The court also rejected the Predominant Purpose Test,<sup>241</sup> stating that the court's inquiry should not start and stop with commercial purpose or value but that it must look at whether the work is the creator's own expression.<sup>242</sup> This analysis, coupled with the U.S. Supreme Court dicta in *Zacchini*, further demonstrates that the transformative use test is the most appropriate test for balancing rights of publicity against the First Amendment.

The *Saderup* Court in presenting several different iterations of the transformative use test, however, derailed the analysis slightly by not adopting a single iteration of the test to narrow the scope of the inquiry to strictly consider the use of the celebrity's likeness. The California Supreme Court should address these four iterations of the transformative use test that it laid out in *Saderup* and instead adopt just one, the Mere Celebrity Likeness Test. This more narrow iteration of the test can provide predictability without losing the spirit of the larger goals found in both copyright and rights of publicity.

As the Tupac virtual clone shows, the transformative use test itself now has subparts, each of which can weigh toward contrary results using the same set of facts. The Tupac re-creators, even though creating a literal reproduction, added new elements to the performance — new language, dance moves, and interactions — and may well have added new meaning to the performance in addition to any meaning that the *Hail Mary* and *2 of Amerikaz Most Wanted* songs or performances held before. The re-creators made artistic changes and inserted the message that "Tupac's music will live forever" into the minds of fans and the media. This additional meaning or message would weigh in favor of the defendant re-creators under the *Saderup* transformative use New Meaning Test. The fact that the re-creators had similarly created other concert performances using virtual cloning technology, in addition to the added message in the Tupac concert, also tends to show that the virtual clone was really the re-creators' own expression. This would again weigh in favor of the re-creators' First Amendment interests under the *Saderup* Defendant's Own Expression Test.

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<sup>241</sup> The Predominant Purpose Test asks whether the predominant purpose of the use or portrayal is to serve a social function valued by free speech or to commercially exploit the likeness in the same way the celebrity would. See *Presley's Estate v. Russen*, 513 F. Supp. 1339, 1356 (D.N.J. 1981).

<sup>242</sup> *Hart*, 717 F.3d 163 & n.29.

On the other hand, the re-creators made an exact replica of Tupac Shakur and profited from the activity that made and kept him famous, rapping, which courts have weighed heavily against a finding of transformative use.<sup>243</sup> Therefore, this would also weigh heavily against a finding that the re-creators' use of both Tupac's likeness and his voice would be a transformative use under the *Saderup* Mere Celebrity Likeness and Raw Materials tests. It is also unclear how the Court should weigh the possible interference with the artist's economic interest under the transformative use test and its current subtests adopted in *Saderup*,<sup>244</sup> reaffirmed in *Winter*,<sup>245</sup> and subsequently used by the Third, Sixth, and Ninth Circuits.<sup>246</sup> Under the current set of tests, cases similar to this one involving virtual-cloning technology will present new issues for the Court, which will have a difficult time parsing the convoluted test-setting precedent and the strong case law on each side of the debate.

To avoid this outcome, first the California Supreme Court should clarify the New Meaning Test in terms of right-of-publicity issues and reject the blanket New Meaning Test used in *Campbell* — a copyright test.<sup>247</sup> Merely taking the test in its entirety confuses the issue in right-of-publicity claims; that is, whether the likeness has been transformed into something more. The depictions themselves must “contain[] significant expressive content beyond the [celebrity’s] likeness.”<sup>248</sup> Simply asking whether “a work . . . adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message” misses the mark and is too broad.<sup>249</sup> While copyright and rights of publicity have similar goals in respect to applying the First Amendment,<sup>250</sup> they are still two different areas of law comparing two different things.

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<sup>243</sup> See *supra* notes 204–205 and accompanying text.

<sup>244</sup> See *supra* notes 95–99 and accompanying text.

<sup>245</sup> See *Winter v. DC Comics*, 69 P.3d 473, 477–78 (Cal. 2003).

<sup>246</sup> See *Hart*, 717 F.3d at 160; *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003); *In re NCAA Student-Athlete Name & Likeness Litigation*, 724 F.3d 1268, 1275–76 (9th Cir. 2013).

<sup>247</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>248</sup> *Kirby v. Sega of Am.*, 60 Cal. Rptr. 3d 607, 615 (Cal. Ct. App. 2006).

<sup>249</sup> *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001).

<sup>250</sup> See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573, 575–76 (1977).

In copyright infringement claims, the United States Supreme Court has said that a transformative use is sufficient but not necessary to find a fair use.<sup>251</sup> In right-of-publicity analyses using the transformative use test, however, a finding of transformativeness is imperative to the decision of whether the use of the likeness is legitimate because it is the only question at issue. Therefore, employing the exact same iteration of the New Meaning Test to rights of publicity and copyright infringement is inappropriate because of these distinct legal standards. Copyright transformative use compares two works to determine whether the second is deserving of First Amendment protection because it is itself a new creation with added creative elements.<sup>252</sup> Right-of-publicity First Amendment analyses, however, compare a secondary work not with an original work, but with an actual likeness (a property right the celebrity has a right to compensation for).<sup>253</sup> While both are similar negative rights, comparing a human being and a work is a different analysis than comparing a work against another work. As such, even when employing a similar test derived from copyright law — the New Meaning Test — the question when dealing with rights of publicity must be posed in terms of the likeness that triggers the cause of action — did the new likeness add expressive content to *the old likeness?*<sup>254</sup>

The *Saderup* Court rejected importing the entire copyright fair use analysis because in its entirety it would be inapplicable to right-of-publicity questions.<sup>255</sup> However, in continuing to use the copyright New Meaning Test as an iteration of what constitutes a right-of-publicity transformative use, the Court is implicitly introducing the broad copyright transformative use test rather than focusing on whether the work has been transformed to do something more than just exploit the likeness for its monetary gain. As such, this broad definition of the test should be abandoned for a more focused inquiry.

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<sup>251</sup> *Campbell*, 510 U.S. at 579.

<sup>252</sup> *Id.*

<sup>253</sup> *Winter v. DC Comics*, 69 P.3d 473, 478 (Cal. 2003) (“What the right of publicity holder possesses is not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity’s fame . . . ”).

<sup>254</sup> *Hart v. Electronic Arts, Inc.*, 717 F.3d 141,169 (3d Cir. 2013) (“Decisions applying the Transformative Use Test invariably look to how the *celebrity’s identity* is used in or is altered by other aspects of a work. Wholly unrelated elements do not bear on this inquiry.”).

<sup>255</sup> *Saderup*, 21 P.3d at 807–08.

Because of this breadth of the transformative use test and the possibility of confusing the real issue — appropriation of one's likeness — the Court should clarify and narrow the transformative use by adopting the Mere Celebrity Likeness Test as the single iteration for the transformative use test in right-of-publicity cases. The Court should instead simply ask “whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.”<sup>256</sup> This maintains the spirit of both the *Campbell* and *Saderup* rules, including the New Meaning, Defendant’s Own Expression, and Raw Materials tests, but narrows the scope of the inquiry to focus specifically on whether the celebrity or the defendant should profit from the use of the likeness.

The Mere Celebrity Likeness Test language is also clearer and arguably more predictable than the very similar Raw Materials Test that similarly asks “whether the celebrity likeness is one of the ‘raw materials’ from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question.”<sup>257</sup> By asking whether significant creative elements have been added, the Court is similarly asking whether there is a larger work encompassing that likeness. By also asking whether the work has been made into something more than an imitation of the likeness, the Court is similarly determining whether the likeness is actually serving as the “sum and substance” of the new work. If the work is imitative and does not have significant creative elements, the Court can conclude, as it would under the Raw Materials Test, that the likeness is not a raw material synthesized into a larger work but rather that the imitation serves as the sum and substance of the new work. This single iteration would not change the conclusion under the Raw Materials test but would offer clarity to future courts in providing only one test iteration for the court to follow rather than unnecessarily employing several similar tests.

Further, if the defendant has transformed the likeness so that the work has become the defendant’s own expression (of something other than the celebrity’s likeness), the Mere Celebrity Likeness Test acknowledges this contribution as well but without requiring that the Court point to exactly what that expression is. So long as the work adds creative elements to be

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<sup>256</sup> *Id.* at 799.

<sup>257</sup> *Id.* at 809.

something more than a mere celebrity likeness or imitation, the Court need not find anything else, and the First Amendment interests prevail. By maintaining this one consistent iteration of the transformative use test, rather than four, the Court can give better direction both to re-creators who want to fairly use a likeness and to the courts that will hear the cases, which now have strong precedent on both sides of the issue.

## CONCLUSION

Virtual-cloning technology has advanced to the point where live concerts featuring both the living and the dead are possible. Rights of publicity, meant to protect an artist's economic interest in his or her likeness, conflict with First Amendment free expression principles, and courts have struggled to balance the two. The transformative use test has emerged as one of the predominant tests to determine whether the use of a celebrity's likeness is legitimate, but courts have come to different conclusions depending on the facts of each case due to the four different *Saderup* iterations of the right-of-publicity transformative use test. The Tupac virtual clone concert, which incorporated Tupac's exact physical appearance and voice, also depicted Tupac doing what made him famous in life: rapping. While the Tupac re-creators also added new elements to this performance — a stunning entrance, exit, and entirely new live performance never before done by Tupac — this may be insufficient to transform the performance into anything more than a mere imitation of the artist to profit from the likeness itself.

Precedent on transformative use is available and currently strengthens both sides of the debate based on the four different subtests created in *Saderup*. Because these four different test iterations can lead to contrary results based on the same set of facts, the California Supreme Court, as the pioneer of the right-of-publicity transformative use test, and other courts using the transformative use test should adopt the Mere Celebrity Likeness Test as the sole iteration of the transformative use test in right-of-publicity First Amendment defense claims. This will maintain the spirit of the original iterations but also provide for more consistency and predictability for cases, including virtual-cloning cases, still to come.



# STUDENT SYMPOSIUM



*Introduction:*

# THE CALIFORNIA SUPREME COURT AND JUDICIAL LAWMAKING —

*The Jurisprudence of the California Supreme Court*

EDMUND URGIN\*

This student symposium focuses on lawmaking by the California Supreme Court. One way to place these articles in context is to ask a fundamental question: Do judges make law? Are they lawmakers? Chief Justice Roberts in his confirmation hearings famously suggested they are not when he compared judges to umpires who call balls and strikes — but do not “legislate” the rules of baseball.<sup>1</sup>

A similar view was prevalent when Roger Traynor was appointed to the California Supreme Court in 1940. At that time legal formalism — the view that judges apply but do not make law, and that policy has no role in judicial decision making — was the norm in judicial decisions and mainstream legal thought.<sup>2</sup> Leaving aside whether this is an accurate description

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<sup>1</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. On the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

<sup>2</sup> In 1939, the year before Traynor was appointed to the bench, for example, Warren Seavey, the leading torts scholar at Harvard Law School and Reporter for the *Restatement of Torts*, wrote approvingly of judges who recognized that their task was

of the historic (or current) role of courts in America (it is not), it was a view that Traynor challenged soon after taking the bench.

In the field of torts, formalism was linked to what might be called traditional tort theory and “the fundamental proposition . . . which link[ed] liability to fault.”<sup>3</sup> In his famous 1944 concurring opinion in *Escola v. Coca Cola Bottling Co.*,<sup>4</sup> however, Traynor called on his Court not only to make new law, but to do so by adopting a strict liability rule in products liability cases — and to do this based on a policy that had recently been disdainfully dismissed by a leading torts scholar as “sentimental justice” unfit for a court of law.<sup>5</sup> Traynor wrote in *Escola* that a strict liability rule was justified in products cases in part because “the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.”<sup>6</sup>

Nor did Traynor confine his view of judicial lawmaking to common law subjects such as torts. In 1948, for example, Traynor’s opinion for the court in *Perez v. Sharp*<sup>7</sup> held California’s anti-miscegenation statute unconstitutional (thus preceding the United States Supreme Court’s similar holding by twenty years).<sup>8</sup> By 1956, Traynor wrote, it was

widely, if not universally, accepted that there is no rational basis in any law for race discrimination, that it is an insidiously evil thing that deprives the community of the best of all its people as it deprives individuals and groups to give of their best.<sup>9</sup>

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to articulate “principles deduced from the cases[,] . . . to see the plan and pattern underlying the law and to make clear the paths which had been obscured by the undergrowth of illogical reasoning.” See Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 375, 39 COLUM. L. REV. 20, 23, 48 YALE L.J. 390, 393 (1939) [hereinafter cited to HARV. L. REV.]. In Seavey’s view a judge’s “opinions of policy” had no place in this process. See *id.* at 373.

<sup>3</sup> Ezra Ripley Thayer, *Liability Without Fault*, 29 HARV. L. REV. 801, 815 (1916); see also Seavey, *supra* note 2, at 375 (noting the policy of no liability for non-negligent conduct).

<sup>4</sup> 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

<sup>5</sup> Seavey, *supra* note 2 at 373.

<sup>6</sup> *Escola*, 150 P.2d at 441.

<sup>7</sup> 198 P.2d 17 (Cal. 1948).

<sup>8</sup> See *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>9</sup> Roger J. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L. FORUM 230, 237.

Judge Richard Posner has written of norms that exist within the community of judges. Most judges, in his view, “derive considerable intrinsic satisfaction from their work and want to be able to regard themselves and be regarded by others as good judges.”<sup>10</sup> And to be regarded “as a good judge requires conformity to the accepted norms of judging.”<sup>11</sup>

In judging, as in art, however, “norms are contestable,”<sup>12</sup> and “[r]apid norm shifts are possible . . . , because the products of these activities cannot be evaluated objectively.”<sup>13</sup> In law it is the innovative judges who “challenge the accepted standards of their art, . . . [and these] innovators have the greater influence on the evolution of their field.”<sup>14</sup> Posner cites Holmes, Brandeis, Cardozo, and Hand as “examples of judges who succeeded by their example in altering the norms of opinion writing.”<sup>15</sup> Justice Traynor could be added to this list. By his example and through his extrajudicial writings, Traynor also altered the norms of opinion writing and judicial decision making.

In a series of articles beginning in 1956, Traynor articulated the jurisprudential perspective that would guide his Court over the next decades. Stated simply, Traynor’s view was that courts are lawmakers and policy does — and should — shape their lawmaking. Thus, Traynor wrote, “Courts have a creative job to do when they find that a rule has lost touch with reality and should be abandoned or reformulated to meet new conditions and new moral values.”<sup>16</sup> If this perspective sounds familiar it is because of its similarity to Judge Richard Posner’s legal pragmatism.<sup>17</sup>

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<sup>10</sup> RICHARD A. POSNER, HOW JUDGES THINK 62 (2008).

<sup>11</sup> *Id.* at 61.

<sup>12</sup> *Id.* at 63.

<sup>13</sup> *Id.* at 64.

<sup>14</sup> *Id.* at 12–13.

<sup>15</sup> *Id.* at 63.

<sup>16</sup> Traynor, *supra* note 9, at 232. This comes with the qualification that in constitutional matters judges should generally — but not always — defer to legislative judgments. *Id.* at 241.

<sup>17</sup> Judges, Posner writes, “are rulemakers as well as rule appliers.” In a particular case, “[a]n appellate judge has to decide . . . whether to apply an old rule unmodified, modify and apply the old rule, or create and apply a new one.” RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 248–59 (1999). In this process the goal is to “mak[e] the choice that will produce the best results.” *Id.* at 249.

This jurisprudential perspective also has a distinguished pedigree. As I have recently explained, early incarnations of this view can be found in the works of four giants in American law: Justice Oliver Wendell Holmes, Judge — later Justice — Benjamin Cardozo, and the Legal Realists Leon Green and Karl Llewellyn.<sup>18</sup>

Following Traynor's lead, the California Supreme Court became the most innovative<sup>19</sup> and influential<sup>20</sup> state supreme court in the nation — and continues to be so to this day. Four examples illustrate "Traynor-style" lawmaking by the California Supreme Court. The first, *Greenmen v. Yuba Power Products, Inc.*, is a 1963 decision in which Traynor, in an opinion for a unanimous Court, wrote his *Escola* strict liability proposal and policies into California Law.<sup>21</sup> Based on these policies, the California Supreme Court, with little hesitation, then quickly extended strict liability beyond manufacturers to include retailers,<sup>22</sup> wholesalers,<sup>23</sup> and lessors.<sup>24</sup> These rulings, which courts across the nation quickly followed, represented, according to Prosser, "the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts."<sup>25</sup>

The second and third examples also involve common law subjects — the tort doctrines of contributory (and comparative) negligence and assumption of risk. Each involves lawmaking that occurred after Traynor's

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<sup>18</sup> See Edmund Ursin, *Holmes, Cardozo, and the Legal Realists: Early Incarnations of Legal Pragmatism and Enterprise Liability*, 50 SAN DIEGO L. REV. 537 (2013). See also Edmund Ursin, *How Great Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial lawmaking*, 57 BUFF. L. REV. 1267 (2009).

<sup>19</sup> See GRANT GILMORE, THE DEATH OF CONTRACT 91 (1974).

<sup>20</sup> Measured by decisions that have been "followed," as that term is employed by Shepard's Citations Service, "over the course of several decades, the California Supreme Court has been the most followed state high court, and that trend continues." Jake Dear & Edward W. Jessen, "*Followed Rates*" and the Leading State Cases, 1940–2005, 41 U.C. DAVIS L. REV. 683, 683, 710 (2007). Five of the six *most* followed of the "most followed" decisions are tort decisions rendered since 1960. See *id.* at 708–09.

<sup>21</sup> See 377 P.2d 897, 900–01 (Cal. 1963).

<sup>22</sup> See *Vandermark v. Ford Motor Co.*, 391 P. 2d 168, 171–72 (Cal. 1964).

<sup>23</sup> See *Canifax v. Hercules Powder Co.*, 46 Cal. Rptr. 552, 557 (Ct. App. 1965).

<sup>24</sup> See *Price v. Shell Oil Co.*, 466 P. 2d 722, 723, 726–27 (Cal. 1970).

<sup>25</sup> WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 97, at 654 (4th ed. 1971).

retirement, in one case by the still-liberal California Supreme Court, in the other by a Court dominated by conservative justices.

The contributory negligence rule, which as late as the 1960s was the law in most states, deprived an injured plaintiff of recovery from a negligent defendant if the plaintiff also had been negligent. The harsh effect of this rule had long been apparent.<sup>26</sup> It throws the entire loss on an injured party, even though he was only slightly negligent, and relieves a negligent defendant of liability however much he may have contributed to the injury. In contrast, a rule of comparative negligence apportions damages according to the relative negligence of the two parties.

Nevertheless, courts had consistently refused to adopt the comparative negligence principle, despite the fact that few disinterested observers had defended contributory negligence on the merits. Why did courts refuse to institute this change? The answer is that the judiciary viewed this reform as beyond their competence, as inappropriate to their institutional role. In *Maki v. Frelk*,<sup>27</sup> decided in 1968, for example, the Illinois Supreme Court explained “that such a far-reaching change, if desirable, should be made by the legislature rather than by the court.”<sup>28</sup>

In 1975, five years after Traynor’s retirement, however, the California Supreme Court in *Li v. Yellow Cab Co. of California* abolished the doctrine of contributory negligence and adopted a system of pure comparative negligence.<sup>29</sup> After *Li*, plaintiff negligence no longer completely bars recovery in negligence suits; rather, damages are only “diminished in proportion to the amount of negligence attributable to the person recovering.”<sup>30</sup>

*Li* also had a second ruling, this one involving the doctrine of assumption of risk. Under this doctrine a person who voluntarily encountered a specific known and appreciated risk (whether reasonably or unreasonably)

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<sup>26</sup> See, e.g., 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS 1193–1209, 1236–41 (1956).

<sup>27</sup> 239 N.E. 2d 445 (Ill. 1968).

<sup>28</sup> *Id.* at 447.

<sup>29</sup> 532 P.2d 1226 (Cal. 1975). See Edmund Ursin, *Judicial Creativity and Tort Law*, 49 GEO. WASH. L. REV. 229, 253–59 (1981).

<sup>30</sup> *Li*, 532 P.2d at 1243.

could not recover when injured by a negligent defendant. *Li* held that the defense of assumption of risk was merged into the general scheme of assessment of liability in proportion to fault in instances in which the plaintiff unreasonably encountered a specific known risk created by a defendant's negligence.<sup>31</sup> Thus it appeared, oddly enough, that a non-negligent plaintiff might still be totally barred from recovery.

In its 1992 *Knight v. Jewett* decision,<sup>32</sup> however, the now-conservative Court, in a plurality opinion by then Justice Ronald George, rewrote the law, effectively abolishing the traditional defense of assumption of risk.<sup>33</sup> At the same time, however, the Court also created a policy-based new doctrine favorable to defendants who are participants in active sports. As now Chief Justice George later explained in an opinion for the majority of the Court, to "impose liability on a coparticipant for 'normal energetic conduct' while playing — even careless conduct — could chill vigorous participation in the sport" and could "alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity."<sup>34</sup> As "a matter of policy, it would not be appropriate to recognize a duty of care when to do so would require that an integral part of the sport be abandoned, or would discourage vigorous participation in sporting events."<sup>35</sup> Accordingly, the Court created a limited-duty rule: "[C]oparticipants breach a duty of care to each other only if they 'intentionally injure[] another player or engage[] in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.'"<sup>36</sup>

For our fourth example we return to constitutional law and another opinion by Chief Justice George for the majority of the Court. In the widely known *In re Marriage Cases*, the Court held that California's

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<sup>31</sup> *Id.* at 1240.

<sup>32</sup> 834 P. 2d 696 (Cal. 1992). The views expressed in George's plurality *Knight* opinion were subsequently embraced by a majority of the Court. See *Kahn v. East Side Union High School District*, 75 P. 3d 30, 38 (Cal. 2003) (George, C.J.).

<sup>33</sup> *Knight*, 834 P. 2d at 714 (Kennard, J., dissenting). To maintain continuity with its *Li* decision, however, the *Knight* Court retained the terminology of assumption of risk. See Edmund Ursin & John N. Carter, *Clarifying Duty: California's No-Duty for Sports Regime*, 45 SAN DIEGO L. REV. 383 (2008).

<sup>34</sup> *Kahn*, 75 P.3d at 38.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 38–39 (quoting *Knight*, 834 P.2d at 711).

limitation of marriage to a union of a man and a woman violated the equal protection provision of the California Constitution.<sup>37</sup> Like Traynor's *Perez* decision, *In re Marriage Cases* was decided by a Court that split 4–3. Firmly grounding his opinion in *Perez*, George wrote, “The decision in *Perez*, although rendered by a deeply divided court, is a judicial opinion whose legitimacy and constitutional soundness are by now universally recognized.”<sup>38</sup> Only time will tell if *In re Marriage Cases* will be similarly regarded, but the spate of federal district court and courts of appeals decisions<sup>39</sup> overturning bans on same-sex marriage — including California’s Proposition 8 which had (temporarily as it turns out) reinstated a ban on same-sex marriage<sup>40</sup> — suggests that it might well be seen as equally prescient.

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<sup>37</sup> 183 P.3d 384 (Cal. 2008). The Court also — and importantly — held that the strict standard of judicial review was applicable because

(1) the statutes in question properly must be understood as classifying or discriminating on the basis of sexual orientation, a characteristic that we conclude represents — like gender, race, and religion — a constitutionally suspect basis upon which to impose differential treatment, and (2) the differential treatment at issue impinges upon a same-sex couple’s fundamental interest in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple. *Id.* at 401.

Based on this, the Court wrote that to uphold the differential treatment of opposite-sex and same-sex unions, the state had to establish “(1) that the state interest intended to be served by the differential treatment not only is a constitutionally legitimate interest, but is a *compelling* state interest, and (2) that the differential treatment not only is reasonably related to but is *necessary* to serve that compelling state interest.” *Id.* Applying this standard, the Court

conclude[d] that the purpose underlying differential treatment of opposite-sex and same-sex couples embodied in California’s current marriage statutes — the interest in retaining the traditional and well-established definition of marriage — cannot properly be viewed as a *compelling* state interest for purposes of the equal protection clause, or as *necessary* to serve such an interest. *Id.*

<sup>38</sup> *Id.* at 399.

<sup>39</sup> See, e.g., *Baskin v. Bogan*, Nos. 14-2386 to 14-2388, and *Wolf v. Walker*, No. 2526 (7th Cir. September 4, 2014) (Posner, J.) (holding Indiana and Wisconsin bans on same-sex marriage unconstitutional).

<sup>40</sup> After the California Supreme Court held that California’s limitation of marriage to a union of a man and a woman violated the Equal Protection Clause of the California Constitution, California voters approved Proposition 8, a ballot initiative

So for the past seven decades the California Supreme Court — whatever its ideological makeup — has been a lawmaking Court with policy at the heart of its lawmaking. It has embraced the lawmaking role that Traynor articulated in a series of articles in the 1950s and 1960s when he wrote that “judicial responsibility connotes . . . the recurring formulation of new roles to supplement or displace the old [and the] choice of one policy over another.”<sup>41</sup> Guided by this jurisprudential view, the Court became the most influential state supreme court in the nation.

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The three articles in this symposium focus on different aspects of the court’s lawmaking. In the first article, Evan Youngstrom notes that for several decades the California Supreme Court has been the most influential state supreme court in the nation and asks why the Court has been so influential. He concludes that this influence can be attributed to the Court’s rejection of legal formalism and its embrace of a policy-based lawmaking role. Then, after discussing examples of the Court’s innovative decisions, he explains why this type of judicial lawmaking is appropriate for a state supreme court.

Next, Aaron Schu asks whether Traynor should be considered to be an “activist” judge. He notes the definition of an activist judge offered by Ben

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amending the California Constitution to define marriage as a union between a man and a woman. *See* Strauss v. Horton, 207 P.3d 48 (Cal. 2009) (upholding Proposition 8). Same-sex couples then successfully challenged in Federal District Court the constitutionality of Proposition 8 under the Due Process and Equal Protection Clauses of the Federal Constitution. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal 2010).

California officials had refused to defend the law, but the initiative’s official proponents were allowed to intervene to do so. On appeal, the Ninth Circuit affirmed the District Court’s decision. *See* Perry v. Brown, 671 F.2d 1052, 1095 (9th Cir. 2012). In *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), the United States Supreme Court held that the initiative’s proponents lacked standing, vacated the judgment of the Ninth Circuit, and remanded the case with instructions to dismiss the appeal. The District Court’s 2010 holding went into effect in June 2013 when the District Court’s previous stay was lifted.

<sup>41</sup> R.J. Traynor, *The Courts: Interweavers in the Reformation of Law*, 32 SASK. L. REV. 201, 213 (1967).

Field, author of a book on Traynor,<sup>42</sup> as one who “explicitly departs from legal precedent in favor of his or her sense of justice or social values.”<sup>43</sup> This would include a judge’s decisions involving common law subjects or statutory interpretation; and, indeed, two of Field’s principal chapters focus on just such Traynor opinions. In contrast, Judge Richard Posner defines an activist judge as one who “enlarg[es] judicial power at the expense of the power of other branches of government,”<sup>44</sup> as in holding legislative or executive action unconstitutional. Decisions in private law subjects, under this definition, would not be activist even if they departed from precedent. In examining Traynor’s opinions Schu concludes that, under Posner’s definition, Traynor, like Holmes, should be classified as a “mixed” activist/restrained judge, activist in some constitutional areas, but generally restrained.

Then, in the third article Marissa Marxen examines Chief Justice Traynor’s approach to statutory interpretation. She begins by explaining different theoretical approaches put forth by academics and others, including “intentionalism,” “purposivism,” “textualism,” and “dynamic interpretation.” In light of these approaches, she examines notable Traynor opinions involving statutory interpretation. She concludes that Traynor employed a blend of purposivism and dynamic interpretation in these cases.

The articles in this symposium present three perspectives on the judicial lawmaking of the California Supreme Court, with two of them focusing specifically on the work of Chief Justice Roger Traynor, one of the great judges in American history.<sup>45</sup> Judge Posner has written that he is “struck by how unrealistic are the conceptions of the judge held by most people,

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<sup>42</sup> See BEN FIELD, ACTIVISM IN PURSUIT OF THE PUBLIC INTEREST: THE JURISPRUDENCE OF CHIEF JUSTICE ROGER J. TRAYNOR (2003).

<sup>43</sup> Aaron J. Schu, *Justice Traynor’s “Activist” Jurisprudence: Field and Posner Revisited*, 9 CAL. LEGAL HIST. 423, 427 (2014), (citing FIELD, *supra* note 42, at 121).

<sup>44</sup> *Id.* at 431 (citing RICHARD A. POSNER, HOW JUDGES THINK 287 (2008)).

<sup>45</sup> See Henry J. Friendly, Tribute, *Ablest Judge of His Generation*, 71 CAL. L. REV. 1039, 1039 (1986). In addition to Traynor, Friendly at various times identified only Holmes, Brandeis, Cardozo, Hand, Harlan Fisk Stone, Frankfurter, Robert Jackson, Hugo Black, and Traynor as great. Traynor “was the only contemporary on Friendly’s list.” DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA 122 (2012).

including practical lawyers and eminent law professors who have never been judges — and even some judges.”<sup>46</sup> If the articles in this symposium have shed some light on judges and judicial lawmaking and suggested new areas for research,<sup>47</sup> they have done a valuable service.

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## EDITOR'S NOTE:

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

Professor Edmund Ursin, who offers a course each year in Judicial Lawmaking at the University of San Diego School of Law, graciously agreed to propose to his Spring 2014 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 Ursin, I have selected the three that appear on the following pages as a student symposium on the California Supreme Court and judicial lawmaking.

— SELMA MOIDEL SMITH

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<sup>46</sup> POSNER, *supra* note 10, at 2.

<sup>47</sup> For example, in addition to the Traynor decisions involving statutory interpretation presented by Marxen, other Traynor decisions illustrate further aspects of Traynor’s creative use of statutes. See, e.g., Clinkscales v. Carver, 136 P.2d 777, 778 (Cal. 1943) (violation of criminal statute “does not create civil liability . . . The significance of the statute in a civil suit for negligence lies in its formulation of a standard of conduct that the court [chooses to] adopt[] in the determination of such liability.”).

# JUDICIAL LAWMAKING, PUBLIC POLICY, AND THE CALIFORNIA SUPREME COURT

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## I. INTRODUCTION

A recent study showed the California Supreme Court is the most followed state court in the nation.<sup>1</sup> Between 1940 and 2005, other state supreme courts followed the California Supreme Court 1,260 times,<sup>2</sup> which is twenty-five percent more than any other state high court.<sup>3</sup> Therefore, the California Supreme Court is a unique provider of persuasive authority to the rest of the country. But, why is the California Supreme Court so influential?

The California Supreme Court is the most influential state court for two connected reasons. First, the Court embraces judicial lawmaking and rejects formalism. Formalists contend courts should not make law, use policy, exercise discretion, or explore extrinsic sources when deciding cases.<sup>4</sup> Starting in the Traynor era, the California Supreme Court redefined its role as a legitimate and influential lawmaking institution<sup>5</sup> that actively makes law, uses policy, exercises discretion, and explores extrinsic sources.

Second, the Court modernizes California's law to reflect the public's perception of sound policy. When the California Supreme Court faces a hard case, the Court identifies trends in public policy, and then uses its lawmaking power to align the law with that policy. In other words, the Court follows William Hurst's model of judicial lawmaking because the Court expresses the times and foretells the generation to come.<sup>6</sup>

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<sup>1</sup> See Jake Dear & Edward Jessen, "Followed Rates" and Leading State Cases, 1940–2005, 41 U.C. DAVIS L. REV. 683, 694 (2007).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* (explaining that the Washington Supreme Court was the second most followed state supreme court with 942; thus, the California Supreme Court is followed twenty-five percent more than any other state supreme court).

<sup>4</sup> RICHARD POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 7–8 (1999) (explaining the formalist view that courts "do not legislate, do not exercise discretion other than in ministerial matters (such as scheduling), have no truck with policy, and do not look outside conventional legal texts — mainly statutes, constitutional provisions, and precedents (authoritative judicial decisions) — for guidance in deciding new cases.").

<sup>5</sup> Edmund Ursin, *How Great Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial Lawmaking*, 57 BUFF. L. REV. 1267, 1276 (2009).

<sup>6</sup> LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 157 (1957) (explaining that "great jurists like Shaw, who vitalize and revitalize the law so that it may fulfill its function, can channel and legitimatize social change in as

As Richard Wasserstrom emphasizes, “a desirable legal system is one that succeeds in giving maximum effect to the needs, desires, interests, and aspirations of the members of society.”<sup>7</sup> Thus, a democratic lawmaking institution, which reflects contemporary public policy trends, will be the most endearing and influential. This paper argues the California Supreme Court’s interpretation of its role within government, as a lawmaking institution that reflects contemporary public policy, makes it the most influential state court. Therefore, other courts should consider adopting a similar model to facilitate the evolution of the law to reflect public policy trends.

#### A. FOUNDATION: COURTS MAKE LAW

Although judicial lawmaking is not expressly set forth in the Constitution, courts inherently make law.<sup>8</sup> In the United States, Chief Justice John Marshall fortified the judicial branch as a lawmaking institution when he established judicial review in *Marbury v. Madison*.<sup>9</sup> Judicial review combined with precedent and *stare decisis* gives the judicial branch immense lawmaking powers.<sup>10</sup> Since *Marbury*, courts have exercised their lawmaking powers to help shape America’s substantive law: constitutional and common.<sup>11</sup>

Simply put, “when courts decide cases, their decisions make law because they become precedent.”<sup>12</sup> Many famous judges expressly recognized the judiciary’s lawmaking power. For example, Justice Oliver Wendell Holmes stated, “I recognize without hesitation that judges do and must legislate.”<sup>13</sup> More recently, Justice Antonin Scalia said, “Judges in a real sense ‘make’ law.”<sup>14</sup>

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reasoned a way possible. William Hurst remarked that great judges have the ability to express the times or foretell the generation to come.”).

<sup>7</sup> RICHARD WASSERSTROM, THE JUDICIAL DECISION 10 (1961).

<sup>8</sup> Adam N. Steinman, *A Constitution For Judicial Lawmaking*, 65 U. PITTS. L. REV. 545, 548 (2004).

<sup>9</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (concluding that “it is emphatically the province and duty of the judicial department to say what the law is.”).

<sup>10</sup> H.L.A. HART, THE CONCEPT OF LAW 121–35 (1961) (explaining that in a *stare decisis* system, courts perform a rule-producing function, in which public policy may be taken into account).

<sup>11</sup> Sol Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. REV. 1, 3 (1990).

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

<sup>13</sup> S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

<sup>14</sup> James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring).

Courts make laws in three ways.<sup>15</sup> First, courts adjudicate cases so that the final judgment “is a legal decree” for the litigating parties.<sup>16</sup> Also, courts make law by “promulgating rules,” such as practice and procedure instructions for the courtroom.<sup>17</sup> But the most influential form of judicial lawmaking is when appellate courts legislate because they create precedent for future cases.”<sup>18</sup> As Judge Richard Posner concludes, an appellate judge’s job is to “apply an old rule unmodified, modify then apply the old rule, or make and apply a new rule.”<sup>19</sup>

Although courts still create and modify laws in the common law, legislatures displaced courts as the major lawmakers in the United States.<sup>20</sup> But ironically, the increased rate of new legislation also increased judicial lawmaking.<sup>21</sup> Legislatures cannot create codes to cover every social situation<sup>22</sup> because “legislatures are neither omnipresent nor omniscient.”<sup>23</sup> “Society changes at a rapid rate, and legislatures frequently do not manufacture enough law necessary to cover new disputes created by new social relationships.”<sup>24</sup> Thus, courts fill these ever-present gaps at an escalating rate.<sup>25</sup>

Finally, as Judge Posner points out, active judicial lawmaking is not based on liberal or conservative politics.<sup>26</sup> Both conservative and liberal courts make law regardless of their political tilt. Thus, judicial lawmaking is “independent of the policies that other governmental institutions happen to be following.”<sup>27</sup> The “right” outcome “depends on the particular historical situation, in which the judge finds himself.”<sup>28</sup>

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<sup>15</sup> Steinman, *supra* note 8, at 552.

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

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

<sup>18</sup> *Id.*

<sup>19</sup> POSNER, *supra* note 4, at 248–49.

<sup>20</sup> John Poulos, *The Judicial Philosophy of Roger Traynor*, 46 HASTINGS L.J. 1643, 1701 (1995).

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

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

<sup>23</sup> Roger J. Traynor, *Comment on Courts and Lawmaking*, LEGAL INSTITUTIONS TODAY AND TOMORROW 52 (Monrad G. Paulsen ed., 1959).

<sup>24</sup> Poulos, *supra* note 20, at 1701.

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

<sup>26</sup> Richard Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1, 12 (1983).

<sup>27</sup> *Id.* at 14.

<sup>28</sup> *Id.* (explaining that if Chief Justice Marshall had used judicial restraint in *Marybury*, it would have been a disaster).

## II. SHOULD COURTS ACTIVELY MAKE LAW?

Critics attack judicial lawmaking from both sides.<sup>29</sup> Some believe courts should not tread on the legislature's territory.<sup>30</sup> Others fault courts for reluctance to declare new law.<sup>31</sup> The historical debate as to whether courts should actively engage in lawmaking will not end soon. But the tide shifted toward the approval of an active lawmaking judiciary. The acceptance of the California Supreme Court's judicial lawmaking model is hard evidence that the tides have turned. Essentially, Traynor shaped the California Supreme Court's judicial lawmaking model. Thus, Traynor was correct because he advocated for a broad construction of the judiciary's lawmaking authority.

### A. JUSTICE TRAYNOR BELIEVED COURTS SHOULD ACTIVELY MAKE LAW

Justice Traynor believed courts should make law when old doctrines become unsound due to society's fluctuating expectations. Traynor's view of judicial lawmaking "emphasized the practical necessity of judicial innovation to meet constantly changing social conditions and values."<sup>32</sup> In Traynor's view, a court's role is to "search for solutions, hammer out new rules that respect values, which survived the tests of reason and experience, and anticipate what contemporary values will meet those tests."<sup>33</sup> Traynor did not believe judicial creativity was the enemy; he believed a lack of judicial creativity was.<sup>34</sup>

Generally, Traynor opposed formalism because formalists "either denied courts are lawmakers, or citing *stare decisis*, argued they should not be."<sup>35</sup> Basically, Traynor would disagree with the position taken by Chief Justice John Roberts in his confirmation hearing, in which Roberts said that courts should be simply "umpires calling balls and strikes."<sup>36</sup>

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<sup>29</sup> Wachtler, *supra* note 11, at 1.

<sup>30</sup> *Id.*

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

<sup>32</sup> Ursin, *supra* note 5, at 1308.

<sup>33</sup> *Id.* at 1309 (quoting Justice Traynor).

<sup>34</sup> *Id.*

<sup>35</sup> Roger J. Traynor, *Badlands in an Appellate Judge's Realm of Reason*, 7 UTAH L. REV. 157, 165 (1960).

<sup>36</sup> Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 55

“Traynor recognized significant differences between hard cases involving [constitutional] law and hard cases involving common law.”<sup>37</sup> However, he was also concerned with a major likeness: a judge is faced in both realms with the same dilemma of contemplating competing policies.<sup>38</sup> So in either realm, judges must “arrive at a value judgment as to what the law ought to be and spell out why.”<sup>39</sup> But, Traynor noted courts should generally defer to “legislative judgments in constitutional adjudication.”<sup>40</sup>

### *1. Justice Traynor’s Limits on Judicial Lawmaking*

Justice Traynor believed courts are restrained when they make law. Traynor believed “the primary obligation of a judge is to keep the law’s evolution on a rational course. Reason, not the rulebook, is the soul of the law.”<sup>41</sup> Traynor also said, “Unlike the legislator, the judge takes precedent as his starting-point, so he is constrained to arrive at a decision in the context of ancestral judicial experience.”<sup>42</sup> Essentially, a “court is not at liberty to seek hidden meanings not suggested by statutes, [precedents], or extrinsic aids.”<sup>43</sup> Further, Traynor acknowledged a judge’s explanation for evolving the law must “persuade his colleagues, make sense to the bar, pass muster with scholars, and allay suspicion of any man in the street.”<sup>44</sup> Thus, a judge’s lawmaking power is limited procedurally and substantively to reach a socially acceptable decision.

In common law, Traynor was less concerned with courts engaging in large-scale lawmaking because the “legislature can always step in to un-write the common law that the judge [wrote].”<sup>45</sup> Traynor believed courts

(2005) (statement of John G. Roberts, Jr.).

<sup>37</sup> Ursin, *supra* note 5, at 1310.

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

<sup>39</sup> Roger J. Traynor, *La Rude Vita, La Dolce Giustizia; or Hard Cases Can Make Good Law*, 29 U. CHI. L. REV. 223, 234 (1962).

<sup>40</sup> Ursin, *supra* note 5, at 1270.

<sup>41</sup> Roger J. Traynor, *Limits on Judicial Creativity*, 63 IOWA L. REV. 1, 7 (1977).

<sup>42</sup> Roger J. Traynor, *The Courts: Interweavers in the Reformation of Law*, 32 SASK. L. REV. 201, 203 (1967).

<sup>43</sup> Roger J. Traynor, *No Magic Words Could Do It Justice*, 49 CAL. L. REV. 615, 618 (1961).

<sup>44</sup> *Id.* at 621.

<sup>45</sup> Ursin, *supra* note 5, at 1355.

should “play an active role in bringing the common law into conformity with [contemporary] social realities and values.”<sup>46</sup>

However, in constitutional law, Traynor used a combination of creativity and caution. In the constitutional realm, courts can limit the legislature’s power.<sup>47</sup> In other words, the court tells the legislature it cannot do something, and except by constitutional amendment, only the court can change its constitutional rulings. So, Traynor advised courts to defer to the legislature, but they should not let tradition thwart constitutional scrutiny.<sup>48</sup>

Traynor used a pragmatic analysis to determine if courts should avoid deference to the legislature. Traynor’s analysis included four factors; (1) the issue’s urgency, (2) competing interests (*i.e.* costs and benefits to society), (3) if the legislature will cure the problem, and (4) if the Court can issue justice within the time prescribed.<sup>49</sup> On balance, if these factors weigh against deference, then the court should act.

When this slim exception applies, Traynor believed courts have a responsibility to safeguard “civil liberties, which are the sum and substance of citizenship.”<sup>50</sup> Traynor grounded his position on limited constitutional lawmaking by demonstrating “social changes [consistently] bring about the rise, fall, and modification of constitutional doctrines.”<sup>51</sup> In essence, Traynor believed courts should defer to the legislature, unless modern public policy directly conflicts with constitutional doctrines.

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<sup>46</sup> *Id.* at 1295.

<sup>47</sup> *Id.* at 1292.

<sup>48</sup> *Id.* at 1314.

<sup>49</sup> Traynor, *supra* note 41, at 13 (“If on rare occasion [a judge] contemplates a decision of constitutional tenor, intended to prompt legislators to take action, he must first analyze exhaustively the claimed urgency of such action, particularly in the context of possibly equally strong competing claims, no one of which might be fulfilled without cost to the others. If this hurdle is cleared, he must still analyze whether legislators would otherwise remain delinquent toward the federal or a state constitution, despite the pleas of their constituents. The second hurdle cleared, he must finally analyze whether his own decision is one that the legislature can implement with justice to all and within the time prescribed.”).

<sup>50</sup> Ursin, *supra* note 5, at 1313.

<sup>51</sup> Roger J. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L.F. 230, 237 (1956).

## B. JUSTICE TRAYNOR BELIEVED COURTS SHOULD REFLECT MODERN PUBLIC POLICY TRENDS WHEN THEY MAKE LAW

Under the “consent of the governed” theory of government, laws’ premises come from the ground up, not from the top down.<sup>52</sup> In other words, laws are created by interpreting the will of the people and exist to serve the people.<sup>53</sup> Holmes articulated and Traynor followed the premise that law embodies the preference of the “people in a given time and place.”<sup>54</sup>

Traynor believed courts should factor modern public policy trends into the court’s decision-making process. He explained that judges always choose “one policy over another”<sup>55</sup> when making a decision. Essentially, Traynor believed a judge’s job is to displace old polices with new ones.<sup>56</sup>

Traynor noted, “Courts have a creative job to do when they find that a rule has lost its touch with reality. The rule should be abandoned or reformulated to meet new conditions and moral values.”<sup>57</sup> “The task [of interpreting public policy trends] is not easy,” but judges should do their best.<sup>58</sup> This public policy concept guided the Traynor-era California Supreme Court and its descendants to modernize innumerable laws to reflect Californians’ perception of sound policy.

## III. THE CALIFORNIA SUPREME COURT EMBRACES JUDICIAL LAWMAKING

The California Supreme Court embraces its lawmaking function to supplement the Legislature and facilitate the law’s evolution. “During Justice

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<sup>52</sup> Alexander Tsaxis, *Self-Government and The Declaration of Independence*, 97 CORNELL L. REV. 693, 696 (2012).

<sup>53</sup> JOHN LOCKE, TWO TREATISES ON GOVERNMENT 104 (Peter Laslett ed., Cambridge Univ. Press 1988) (“Reason being plain on our side, that men are naturally free, and the examples of history shewing, that the governments of the world, that were begun in peace, had their beginning laid on that foundation, and were made by the consent of the people; there can be little room for doubt, either where the right is, or what has been the opinion, or practice of mankind, about the first erecting of governments.”).

<sup>54</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

<sup>55</sup> Traynor, *supra* note 42, at 213.

<sup>56</sup> Ursin, *supra* note 5, at 1276.

<sup>57</sup> Traynor, *supra* note 51, at 232.

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

Traynor's tenure, California witnessed a transformation of the judicial role."<sup>59</sup> California's liberal social policies coupled with political and economic development forced the California Supreme Court to expand its role to supplement the Legislature.<sup>60</sup>

This renaissance came about because Traynor and the California Supreme Court embraced judicial lawmaking and rejected formalism.<sup>61</sup> Since 1940, numerous California Supreme Court decisions exemplify the Court's willingness to supplement the Legislature. But, please note this paper does not discuss a vast number of very influential cases.<sup>62</sup> All of the Court's

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<sup>59</sup> Craig Green, *An Intellectual History of Judicial Lawmaking*, 58 EMORY L.J. 1196, 1247 (2009).

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

<sup>61</sup> Ursin, *supra* note 5, at 1276–77.

<sup>62</sup> Here are some examples of California Supreme Court decisions which span generations and are widely influential: *Summers v. Tice*, 33 Cal.2d 80 (1948) (shifting the burden to the defense to disprove causation when it was clear one of two defendants must have caused the plaintiff's injury, but it was unclear which one); *Lucas v. Hamm*, 56 Cal.2d 583 (1961) (allowing beneficiaries of wills to pursue a professional negligence action despite a lack of privity); *Seely v. White Motor Co.*, 63 Cal.2d 9 (1965) (holding strict liability does not extend to recovery for purely economic loss); *Gray v. Zurich Insurance Co.*, 65 Cal.2d 263 (1966) (requiring the insurer to defend an action in which the interests of insurer and insured are so opposed as to nullify the insurer's fulfillment of its duty of defense and of the protection of its own interests); *Dillion v. Legg*, 68 Cal.2d 728 (1968) (expanding the tort of negligent infliction of emotional distress (NIED) beyond its traditional form, which was limited to plaintiffs standing in the same "zone of danger" as a relative who was killed); *Gruenberg v. Aetna Insurance Co.*, 9 Cal.3d 566 (1973) (recognizing the tort of insurance bad faith); *Tarasoff v. Regents of the University of California*, 17 Cal.3d 425 (1976) (holding that mental health professionals have a duty to protect individuals who are being threatened with bodily harm by a patient); *Ray v. Alad Corp.*, 19 Cal.3d 22 (1977) (creating an additional exception to the traditional successor liability framework (product-line exception), which imposes liability on an asset purchaser for the seller's defective products if the purchaser continues to manufacture the seller's product line following the transaction); *Barker v. Lull Engineering Co.*, 20 Cal.3d 413 (1978) (describing two ways in which a product can be defective); *People v. Wheeler*, 22 Cal.3d 258 (1978) (prohibiting use of peremptory challenges to exclude prospective jurors on the basis of race); *Sindell v. Abbott Laboratories*, 26 Cal.3d 588 (1980) (creating the doctrine of market share liability); *Foley v. Interactive Data Corp.*, 47 Cal.3d 654 (1988) (holding that the covenant of good faith and fair dealing applies to employment contracts and that breach of the covenant may give rise to contract, but not tort, damages); *Thing v. La Chusa*, 48 Cal.3d 644 (1989) (withdrawing from the expansive form of NIED set forth in *Dillon* and imposing a rigid bright-line test for recovery in bystander NIED cases); *In re Alvarez*, 2 Cal.4th 924 (1992) (explaining the

decisions include a similar factor that transcends decades and justices: lawmaking, which reflects contemporary public policy trends.<sup>63</sup>

The Court implemented the procedure that “cases must be decided in the long run” so that they are harmonious with the “moral sense of the community.”<sup>64</sup> Regardless of whether the injustice is in the constitutional or common law realm, the Court is willing to make law when it no longer aligns with modern public policy trends. As the Court saw it, “judicial doctrines are on trial as well as the litigants, and only doctrines that meet the test of experience survive.”<sup>65</sup>

#### A. THE CALIFORNIA SUPREME COURT AND THE CALIFORNIA STATE LEGISLATURE CO-EXIST AS LAWSMAKING INSTITUTIONS

Justice Traynor viewed the California Supreme Court and California State Legislature as “co-workers,” not competitors.<sup>66</sup> Sometimes the Court is forced to engage in judicial lawmaking because of legislative inaction.<sup>67</sup>

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appropriate remedy for ineffective counsel that resulted in a defendant’s decision to reject an offered plea bargain); *People v. Leahy*, 8 Cal.4th 587 (1994) (imposing limitations on the use of a certain type of field sobriety test); *Waller v. Truck Insurance Exchange*, 11 Cal.4th 1 (1995) (finding no duty to defend allegations of incidental emotional distress damages caused by the insured’s non-covered economic or business torts); *Temple Community Hospital v. Superior Court*, Cal.4th 464 (1999) (declining to recognize a new proposed common law tort of intentional third-party spoliation of evidence).

<sup>63</sup> Dear, *supra* note 1, at 702–03.

<sup>64</sup> Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907) (explaining that statutory interpretation is purely judicial in character and that the interpretation should reflect the community standards).

<sup>65</sup> Walter Schaefer, *Chief Justice Traynor and the Judicial Process*, 53 CAL. L. REV. 11, 18 (1965).

<sup>66</sup> Traynor, *supra* note 43, at 616 (“The judiciary must continue as a co-worker with the legislature in the development of the law.”).

<sup>67</sup> The California State Legislature cannot act to align the law with modern public policy trends when it is stalemated by party polarization. Recently, the United States has experienced significant party polarization, which is not present in the general population. PIETRO NIVOLA & DAVID BRADY, RED AND BLUE NATION?: CHARACTERISTICS AND CAUSES OF AMERICA’S POLARIZED POLITICS 1 (Brookings Institution Press, vol. 2, 2006). Although the Democrats have a supermajority in the California State Legislature, the Legislature still becomes stalemated by party polarization. See John Diaz, *How California tamed its once-dysfunctional Legislature*, SFGATE (Feb. 21, 2014), <http://www.sfgate.com/default/article/How-California-tamed-its-once-dysfunctional-5256895.php>

The Court supplements the Legislature when there is “legislative indifference, legislative sensitivity to political issues, or legislative adherence to singular agendas.”<sup>68</sup>

The justiciability doctrine combined with checks and balances allows the California Supreme Court and the California State Legislature to coexist as lawmaking institutions.<sup>69</sup> As Edward White explains, the justiciability doctrine is “the primary force harmonizing judicial lawmaking with the doctrine of separation of powers. Properly understood and applied, justiciability principles serve as the foundation for legitimate judicial lawmaking.”<sup>70</sup>

Further, the checks and balance system restricts the Court from usurping too much lawmaking power. Essentially, the Court and the Legislature have a symbiotic relationship, each drawing on the actions of the other. The Legislature passed statutes “whose applicability to specific situations was uncertain, the Court undertook the applications, and the Legislature revised that decision if they found a specific application offensive.”<sup>71</sup>

#### IV. THE CALIFORNIA SUPREME COURT REFLECTS THE PUBLIC’S PERCEPTION OF SOUND POLICY WHEN IT MAKES LAW

The use of public policy in judicial decision-making<sup>72</sup> ignited the flame which made the California Supreme Court the most influential state court. Early in the Traynor era, many frowned upon using public policy in judicial decision-making<sup>73</sup> because most judges embraced formalism. But, “during the 1960s and 1970s, the California Supreme Court was a frequent legislator, comfortable with basing its lawmaking on policies, which was abhorrent to

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(explaining that recent terms of the California State Legislature have seen party polarization, which caused dysfunction).

<sup>68</sup> Traynor, *supra* note 43, at 618.

<sup>69</sup> *Id.*

<sup>70</sup> EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 255 (1976).

<sup>71</sup> *Id.*

<sup>72</sup> Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 U.P.A. J. CONST. L. 455, 456 (2010).

<sup>73</sup> Ursin, *supra* note 5, at 1273.

formalists.”<sup>74</sup> Subsequent generations of the California Supreme Court followed Traynor’s lawmaking model.<sup>75</sup> Therefore, the Court’s model persists because it passed the tests of experience, but the Court’s model didn’t just survive, it flourished.

The Court uses public policy in its analysis “not because it is particularly desirable, but because there is often no feasible alternative.”<sup>76</sup> “Modern times demand judicial creativity, and advances in the social sciences assist the judge in this task.”<sup>77</sup>

Additionally, the Court considers competing political interests when determining modern public policy trends because the justices are subject to retention elections. Former California Supreme Court Justice Otto Kaus stated, “There is no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he has to make them near election time. That would be like ignoring a crocodile in your bathtub.”<sup>78</sup>

However, the “mass public is generally uninterested in politics, especially supreme court decision making. Consequently, there are a limited number of high-salience issues in which the justices have strong incentive to take into account voter backlash.”<sup>79</sup> But California Supreme Court justices understand their role within government, so they will not issue a decision that significantly diverges from contemporary public policy.<sup>80</sup> The

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<sup>74</sup> *Id.* at 1338.

<sup>75</sup> See *Knight v. Jewett*, 3 Cal.4th 296 (1992) (using policy to limit liability for participants in sporting events); Dear, *supra* note 1, at 703 (explaining that the data suggests the current generation of the California Supreme Court will continue to influence other courts because they follow the Traynor-era judicial lawmaking model).

<sup>76</sup> Henry Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 22 (1978).

<sup>77</sup> Richard Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 540 (2012) (quoting Ben Field who spoke about Traynor’s writings and decisions).

<sup>78</sup> Otto Kaus often stated that ignoring the political consequences of visible decisions is like ignoring a crocodile in your bathtub. Paul Reiderer, *The Politics of Judging*, 73 A.B.A.J. 52, 58 (1997).

<sup>79</sup> Devins, *supra* note 72, at 473.

<sup>80</sup> LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 157–59 (1998) (explaining that justices “operate within the greater social and political context of the society as a whole, so the justices must attend to those informal rules that reflect dominant societal beliefs about the rule of law in general, and the role of the Supreme Court in particular — the norms of legitimacy”); Barry Friedman, *Mediated Popular*

justices know the electorate<sup>81</sup> and the Legislature<sup>82</sup> can and will override a decision if it steps outside Californians' public policy limits.

### A. CALIFORNIANS' LIBERAL AND PROGRESSIVE PUBLIC POLICY TENDENCIES

Justice Holmes articulated the maxim that laws are best created by reflecting the public's perception of sound policy. In industrial accident cases, Holmes recognized that juries often found for injured plaintiffs, despite the judges' instructions which dramatically favored industrial defendants.<sup>83</sup> Holmes foresaw a shift in tort law because he understood "the life of the law has not been logic: it has been experience."<sup>84</sup> Essentially, Holmes believed that public policy dictates what the law should be. Thus, a governing institution that reflects contemporary public policy trends will create laws the people want.

California is a populous state with dynamic and diverse social, cultural, and economic conditions. The diverse nature of California produces "a wealth of litigation capable of yielding leading decisions."<sup>85</sup> Thus, the California Supreme Court "addresses difficult cases of broad application," and it faces novel cases that arise from new social conditions.<sup>86</sup> Therefore, when the Court addresses these questions, it must look at a variety of competing policy issues.

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*Constitutionalism*, 101 MICH. L. REV. 2596, 2606–07 (2003) (asserting that judicial decision making is often consistent with popular opinion).

<sup>81</sup> The electorate will retaliate against a California Supreme Court decision in two ways. First, the electorate can remove a justice through the retention election. Second, the electorate can amend California's Constitution through a referendum to alter the Court's decisions.

<sup>82</sup> Because the Democrats hold a supermajority, the California State Legislature can quickly overturn a peculiar California Supreme Court decision that does not align with Californians' expectations.

<sup>83</sup> Holmes, *supra* note 54, at 463.

<sup>84</sup> OLIVER WENDELL HOLMES, THE COMMON LAW 4 (1881) ("The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.").

<sup>85</sup> Dear, *supra* note 1, at 703.

<sup>86</sup> Dear, *supra* note 1, at 707.

Inevitably, the Court reflects Californians' political orientation. The majority of Californians are liberals and progressives, which is illustrated by Californians' recent voting trends. California's 113th congressional delegation is regarded as one of the most liberal. "Six of the House's fifteen most liberal members, based on their voting records, come from California. Conversely, none of the fifteen most conservative members of Congress come from California."<sup>87</sup> Further, Californians' liberal propensity can be seen in the California State Legislature, where at present the Democrats hold a supermajority.<sup>88</sup> Indeed many exceptions apply to Californians' liberal propensity, but as a general notion, most Californians are liberals and progressives. So, the Court is generally bonded to a liberal or progressive public policy position on high-salience issues.

However, this liberal and progressive propensity also helped the California Supreme Court become the most influential. Gregory Caldeira explained that the most prestigious and influential high courts throughout history are characterized as "politically liberal."<sup>89</sup>

## B. THE CALIFORNIA SUPREME COURT USES MODERN PUBLIC POLICY TRENDS TO UPDATE THE COMMON LAW

The California Supreme Court foreshadowed large doctrinal shifts for the nation in the common law. The Court's opinions demonstrate that it modernized the law to align with emerging trends in public policy. Specifically, the California Supreme Court identified and updated outdated policies in products liability, landowner duties, and negligence law. These cases "dispel the myth" that the Court could not make "fundamental changes to tort law."<sup>90</sup>

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<sup>87</sup> Dan Walters, *Californians Dominate "Most Liberal" Rankings in Congress*, THE SACRAMENTO BEE (Feb. 6, 2014), <http://blogs.sacbee.com/capitolalert/latest/2014/02/californians-dominate-most-liberal-rankings-in-congress.html>.

<sup>88</sup> Diaz, *supra* note 67.

<sup>89</sup> Gregory A. Caldeira, *On the Reputation of State Supreme Courts*, 5 POL. BEHAV. 83, 101 (1983) (asserting that the most "innovative and prestigious state supreme courts" are those that have "handed down numerous progressive decisions" characterized by "political liberalism" and "judicial activism").

<sup>90</sup> EDMUND URGIN & VIRGINIA NOLAN, UNDERSTANDING ENTERPRISE LIABILITY: RETHINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY 175 (1995).

### 1. Products Liability

Traynor built the foundation for California's eventual shift to strict products liability with his 1944 concurring opinion in *Escola v. Coca-Cola Bottling Co.* In *Escola*, the Court held the defendant was liable for an exploding soda bottle which injured a waitress.<sup>91</sup> In the concurring opinion, Traynor reasonably deduced the forward-looking position that manufacturers should be strictly liable for defective products.<sup>92</sup> Strict liability should be adopted because plaintiffs are not in a position to refute the defense of due-care.<sup>93</sup> Thus, the risk of loss should be distributed as a cost of doing business.<sup>94</sup>

Traynor supported the proposed change in the law by citing public policy,<sup>95</sup> and he overtly argued that the law should reflect public policy.<sup>96</sup> He said, "If public policy demands a manufacturer be responsible, then there is no reason not to fix responsibility openly."<sup>97</sup> Traynor's concurrence rippled through the legal system because it argued that laws should reflect contemporary public policy trends.<sup>98</sup>

Eighteen years after *Escola*, the California Supreme Court officially aligned the law with public policy in *Greenman v. Yuba Power Products, Inc.*<sup>99</sup> The opportunity for the Court to act came from a case where a defective power tool seriously injured the plaintiff. *Greenman* was the "first unequivocal court decision adopting both the rule and the theory of strict liability for products."<sup>100</sup> Traynor unceremoniously cited his concurrence in *Escola* to support the holding in *Greenman* because the shift in public policy was now very clear.<sup>101</sup>

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<sup>91</sup> *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 461 (1944).

<sup>92</sup> *Id.* at 462.

<sup>93</sup> *Id.* at 463.

<sup>94</sup> *Id.* at 462.

<sup>95</sup> *Id.* ("Public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot.").

<sup>96</sup> *Id.* at 463.

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

<sup>98</sup> John Wade, *Chief Justice Traynor and Strict Tort Liability for Products*, 2 HOFSTRA L. REV. 455, 456 (1974).

<sup>99</sup> See *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57 (1963).

<sup>100</sup> Wade, *supra* note 98, at 459.

<sup>101</sup> *Greenman*, 59 Cal.2d at 63.

Traynor's *Escola* concurrence and *Greenman* logically extended strict liability from food cases to all products.<sup>102</sup> At the time, William Prosser believed the California Supreme Court's position on strict products liability was too radical and disruptive.<sup>103</sup> But Prosser was incorrect because *Greenman* "produced a rapid revolution" of products liability reform.<sup>104</sup> Now, *Greenman* is the cornerstone of American law for defective products.<sup>105</sup> As Judge Henry Friendly noted, the California Supreme Court influenced the nation's products liability laws because it made laws which reflected modern public policy trends.<sup>106</sup>

## 2. Landowners' Duty of Due Care

In its 1968 opinion *Rowland v. Christian*, the California Supreme Court eliminated the archaic landowner rules in favor of a general duty of due care for all visitors to land.<sup>107</sup> The Court discarded the categories of trespasser, licensee, and invitee, which determined the level of due care owed by a landowner.

The Court could have justly resolved *Rowland* without making new law, but the Court used the opportunity to "discard inflexible and confusing rules" that no longer reflected modern public policy.<sup>108</sup> The Court explained that modern public policy considerations dictated that the rule should change. "Public policy changed from concern for the rights of the individual landowner to a greater concern for public safety."<sup>109</sup>

*Rowland* rippled through the American legal system because "innumerable judicial descendants adopted *Rowland*."<sup>110</sup> *Rowland*'s impact is

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<sup>102</sup> This is a prime example of Traynor's "creative judicial elaboration." See *Traynor, supra* note 23 at 52.

<sup>103</sup> Ursin, *supra* note 5, at 1304.

<sup>104</sup> Wade, *supra* note 98, at 459.

<sup>105</sup> Wade, *supra* note 98, at 459.

<sup>106</sup> Friendly, *supra* note 76, at 27 n.26 (noting the California Supreme Court, i.e. Justice Traynor, "sounded the bell" for products liability reform by using public policy).

<sup>107</sup> *Rowland v. Christian*, 69 Cal. 2d 108, 120 (1968) (creating a unitary standard for landowners' duty of due care).

<sup>108</sup> Gary T. Shara, Comment, *California Applies Negligence Principles in Determining Liability of a Land Occupier*, 9 SANTA CLARA LAWYER 179, 188 (1969).

<sup>109</sup> Douglas Bergere, *Negligence — Duty of Due Care-Invitee/Licensee/Trespasser Distinction Abolished — Rowland v. Christian*, 10 WM. & MARY L. REV. 495, 497 (1968).

<sup>110</sup> Juarez v. Boy Scouts of America, Inc., 81 Cal. App. 4th 377, 401 (2000) ("Since its publication in 1968, the seminal case of *Rowland v. Christian*, has stood as the gold

evident because it started a national trend towards the adoption of a unitary standard.<sup>111</sup> Also, modern California courts treat *Rowland* as the “gold standard” for determining the existence of a legal duty of care.<sup>112</sup>

Moreover, the Restatement (Third) of Torts adopted the *Rowland* standard.<sup>113</sup> The Restatement’s adoption of *Rowland* is significant because the purpose of the Restatement is to inform judges and lawyers about general principles of the common law. The Restatement implicitly proposes that courts should adopt *Rowland*’s substantive holding: landowners owe a general duty of due care for all visitors to land.<sup>114</sup> But more controversially, by adopting *Rowland*, the Restatement implicitly approves of active judicial lawmaking. This implicit approval by the American Law Institute further demonstrates that the California Supreme Court’s judicial lawmaking model is influential, reasonable, and widely accepted.

### 3. Comparative Negligence

In *Li v. Yellow Cab*, the California Supreme Court adopted comparative negligence and rejected contributory negligence.<sup>115</sup> Again in 1975, the Court used its lawmaking power to promote modern public policy. The

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standard against which the imposition of common law tort liability in California is weighed by the courts in this state. Since *Rowland* was decided, its innumerable judicial descendants have adopted the *Rowland* court’s multi-factor duty assessment in determining whether a particular defendant owed a tort duty to a given plaintiff. These factors include: (1) the foreseeability of harm to the injured party; (2) the degree of certainty that the injured party suffered harm; (3) the closeness of the connection between the defendant’s conduct and the injury suffered; (4) the moral blame attached to the defendant’s conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant; and (7) the consequences to the community of imposing a duty to exercise care, with resulting potential liability.”).

<sup>111</sup> Michael D. Green, *Introduction: The Third Restatement of Torts in a Crystal Ball*, 37 W.M. MITCHELL L. REV. 993, 1002 n.30 (2011); See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 cmt. reporters’ note (stating that, of forty-eight states that can be classified, twenty-four had adopted a unitary duty for invitees and licensees).

<sup>112</sup> *Juarez*, 81 Cal. App. 4th at 401.

<sup>113</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 (2012).

<sup>114</sup> *Id.*

<sup>115</sup> *Li v. Yellow Cab Co.*, 13 Cal.3d 804, 805 (1975).

Court concluded “logic, practical experience, and fundamental justice” justified a doctrinal shift.<sup>116</sup>

The Court specifically noted that juries often did not follow the contributory negligence doctrine. “Every trial lawyer is well aware that juries often do in fact allow recovery in cases of contributory negligence, and the compromise in the jury room results in some diminution of damages because of the plaintiff’s fault.”<sup>117</sup> Therefore, the doctrinal shift to comparative negligence aligned the law with what the people practiced and wanted, *i.e.* public policy.

However, many debated this doctrinal shift. The most compelling argument against judicial adoption of comparative negligence is that the change should be left to the Legislature.<sup>118</sup> Before *Li*, the California Civil Code contained a statute that arguably codified the contributory negligence defense.<sup>119</sup> Some argued that the code restricted the Court from eliminating contributory negligence.<sup>120</sup>

However, the Court dispensed with the myth that they could not adopt comparative negligence. The Court explained that the judiciary created the contributory negligence defense, so courts have the power to change it.<sup>121</sup> The Court also determined that the Legislature did not intend to preclude judicial action to remove contributory negligence.<sup>122</sup> The Court relied on outside studies<sup>123</sup> and the code itself<sup>124</sup> to justify its action. Further, the

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 811.

<sup>118</sup> Victor E Schwartz, *Judicial Adoption of Comparative Negligence — The Supreme Court of California Takes A Historic Stand*, 51 IND. L.J. 281 (1976); *Li*, 13 Cal.3d at 813.

<sup>119</sup> *Li*, 13 Cal.3d at 816 (explaining that Section 1714 of the Civil Code does not preclude the Court from removing contributory negligence because the Legislature did not intend to exclude judicial action).

<sup>120</sup> Izhak England, *Li v. Yellow Cab. Co. — A Belated and Inglorious Centennial of the California Civil Code*, 65 CAL. L. REV. 4, 7 (1977) (“Two conflicting interpretations of the pertinent language of section 1714 were advanced. The first argued that section 1714 had codified the doctrine of contributory negligence, thus rendering the ‘all-or-nothing’ rule invulnerable to attack in the courts except on constitutional grounds.”).

<sup>121</sup> *Li*, 13 Cal.3d at 813.

<sup>122</sup> *Id.* at 816.

<sup>123</sup> *Id.* at 814–15.

<sup>124</sup> England, *supra* note 120, at 7 (“[The Court] interpreted the language of section 1714 as establishing in specific terms a rule of comparative negligence. The use of the compound conjunction ‘except so far as’ indicated a legislative intent to adopt a system

California Supreme Court demonstrated to other state courts that they could also judicially adopt comparative negligence.

*Li* is significant because it gave other courts persuasive precedent to change the law. The Illinois Supreme Court demonstrated a comedic reversal when they struggled with the adoption of comparative negligence. In 1968 the Illinois Supreme Court refused to adopt comparative negligence in *Maki v. Frelk* because “such a far-reaching change should be made by the legislature rather than by the court.”<sup>125</sup> Thirteen years later, in *Alvis v. Ribar*, the Illinois Supreme Court reversed its position and adopted comparative negligence.<sup>126</sup> The *Alvis* Court cited *Li* along with several other cases to justify that judicial action is appropriate because the courts created the contributory negligence doctrine,<sup>127</sup> and the legislature did not act.<sup>128</sup>

### C. THE CALIFORNIA SUPREME COURT USES MODERN PUBLIC POLICY TO UPDATE CONSTITUTIONAL DOCTRINES

In constitutional law, the California Supreme Court fortified equality as a fundamental right for Californians, influenced the United States Supreme Court, and laid the foundation for protecting gay marriage. Although the Court generally defers to the Legislature on constitutional issues,<sup>129</sup> the Court uses its lawmaking power to modernize constitutional doctrines when they directly conflict with contemporary public policies.

In 1948, Traynor authored the *Perez v. Sharp* opinion, which struck down a ban on interracial marriage.<sup>130</sup> *Perez* was significant because it was the first case of the twentieth century to invalidate an anti-miscegenation law.<sup>131</sup> The Court anticipated the imminent civil rights movement when it emphasized that a civilization based on equality is repulsed by

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other than one where contributory fault on the part of the plaintiff would operate to bar recovery.”).

<sup>125</sup> *Maki v. Frelk*, 40 Ill.2d 193, 196 (1968).

<sup>126</sup> *Alvis v. Ribar*, 85 Ill.2d 1, 28 (1981).

<sup>127</sup> *Alvis*, 85 Ill. 2d at 21.

<sup>128</sup> *Id.* at 22; *Maki*, 40, Ill.2d at 203.

<sup>129</sup> Ursin, *supra* note 5, at 1314.

<sup>130</sup> *Perez v. Sharp*, 32 Cal.2d 711 (1948).

<sup>131</sup> RANDALL KENNEDY, INTERRACIAL INTIMACIES 259–66 (2003).

racism.<sup>132</sup> To justify the holding, the Court cited several social science studies<sup>133</sup> and policy reasons,<sup>134</sup> which emphasized the illogical foundation of racism.<sup>135</sup> Specifically, during oral argument, Traynor directly attacked the ‘white superiority doctrine’ when he said, “Anthropologists say there is no such thing as race.”<sup>136</sup>

Nineteen years after *Perez*, the United States Supreme Court followed the California Supreme Court’s lead and banned anti-miscegenation laws for the nation in *Loving v. Virginia*.<sup>137</sup> However, Chief Justice Warren’s approach was very different than Traynor’s.<sup>138</sup> Warren “devoted very little attention to social scientific evidence; instead he focused on normative matters of racial equality and personal choice.”<sup>139</sup> However, “the similarities in the way Warren and Traynor discuss race and marriage are especially noteworthy and should not be overlooked.”<sup>140</sup> Both decisions reveal “a commitment to racial equality and a commitment to marital autonomy.”<sup>141</sup> Also, Traynor<sup>142</sup> and Warren both relied on the Due Process Clause and Equal Protection Clause to invalidate the ban on interracial marriages.<sup>143</sup> Thus, the opinions differ on the surface, but both are based on the same public policy of social equality.

“*Perez* highlights the Court’s early efforts to grapple with notions of colorblindness, which are now enshrined in equal protection law.”<sup>144</sup> Although many Californians did not approve of interracial marriage

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<sup>132</sup> *Perez*, 32 Cal.2d at 715 (“Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.”).

<sup>133</sup> *Id.* at 756–60.

<sup>134</sup> *Id.* at 737–38.

<sup>135</sup> R.A. LENHARDT, THE STORY OF *PEREZ V. SHARP*: FORGOTTEN LESSONS ON RACE, LAW, AND MARRIAGE 366 (2011).

<sup>136</sup> Transcript of Oral Argument at 3–4, *Perez*, 198 P.2d 17 (No. L.A. 20305).

<sup>137</sup> LENHARDT, *supra* note 135, at 365–366. See also *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967).

<sup>138</sup> LENHARDT, *supra* note 135, at 366.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Perez*, 32 Cal.2d. at 714.

<sup>143</sup> *Loving*, 388 U.S. at 2.

<sup>144</sup> LENHARDT, *supra* note 140, at 345.

in 1948,<sup>145</sup> the Court correctly identified the emerging social equality trend in public policy<sup>146</sup> because “today, *Perez* is recognized as clearly correct.”<sup>147</sup>

Further, *Perez* created the foundation that allowed the Court to protect gay rights six decades later. In *Perez*, Traynor expressed that the right to choose one’s partner is fundamental and vital to the Constitution. In 2008, the Court used Traynor’s words to constitutionally protect gay rights in *In Re Marriage*.<sup>148</sup>

The *In Re Marriage* cases demonstrated a more recent example of the Court aligning the law with emerging public policy trends in constitutional law. Historically, Americans ostracized the gay culture. However, by the early 1990s Americans started to shift their attitudes.<sup>149</sup> By 2006, fifty-five percent of Americans accepted gay culture,<sup>150</sup> and by 2008, a majority of Californians accepted gay marriage.<sup>151</sup> Once the “acceptance” was apparent, the California Supreme Court aligned the law with this emerging public policy trend. In 2008, the Court held that forming a family relationship is a fundamental constitutional right for *all* Californians.<sup>152</sup>

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<sup>145</sup> R. A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Anti-miscegenation Law, and the Fight for Same-Sex Marriage*, 96 CAL. L. REV. 839, 848 (2008).

<sup>146</sup> After *Perez*, Traynor noted, “It is now widely, if not universally, accepted that there is no rational basis in any law for race discrimination.” Traynor, *supra* note 51, at 237.

<sup>147</sup> Plaintiff-Appellants’ Brief at 48, Hernandez v. Robles, No. 103434/04, 7 N.Y. 3d 338 (N.Y. 2006).

<sup>148</sup> *In re Marriage Cases*, 43 Cal.4th 757, 781 (2008).

<sup>149</sup> Marilyn Elias, *Gay teens coming out earlier to peers and family*, USA TODAY (Feb. 2, 2007), [http://usatoday30.usatoday.com/news/nation/2007-02-07-gay-teens-cover\\_x.htm](http://usatoday30.usatoday.com/news/nation/2007-02-07-gay-teens-cover_x.htm) (explaining graphically by region that Americans’ perception of gay culture shifted and that now a majority of Americans support gay culture).

<sup>150</sup> *Id.*

<sup>151</sup> John Wildermuth, *The California Majority Supports Gay Marriage*, SFGATE (May 28, 2008), <http://www.sfgate.com/news/article/CALIFORNIA-MAJORITY-BACKS-GAY-MARRIAGE-3211777.php> (explaining Californians’ public opinion of gay marriage shifted in a dramatic fashion, and now a majority of Californians openly support gay marriage, according to a Field Poll).

<sup>152</sup> *In re Marriage Cases*, 43 Cal.4th at 782 (2008) (“The substance and significance of the fundamental constitutional right to form a family relationship, the California Constitution properly must be interpreted to guarantee this basic civil right to all Californians, whether gay or heterosexual, and to same-sex couples as well as to opposite-sex couples.”).

Proposition 8 was the conservative reaction to the shift in public policy toward acceptance of gay marriage.<sup>153</sup> In a highly contested election, California voters narrowly passed Proposition 8, a constitutional amendment aimed at stopping gay marriage.<sup>154</sup> In its 2009 opinion *Strauss v. Horton*, the Court deferred to the electorate and upheld Proposition 8.<sup>155</sup> However, the Court narrowly construed the amendment to a hollow definition of the term “marriage,” and the Court upheld the basic civil right to form a family relationship.<sup>156</sup>

In *Strauss v. Horton*, the Court continued its tradition of upholding voter-approved constitutional amendments. But the Court did not give conservatives the ultimate victory when it upheld Proposition 8 because the Court narrowly construed the definition of “marriage.” Essentially, the Court only facially changed the law because it upheld substantive gay rights, so the Court gave the ultimate victory to Proposition 8 opponents. Thus, the Court followed its precedent and the policy of social equality when it upheld Proposition 8. The Court used a flurry of litigation around gay marriage to align the law with the policy of social equality.

Although California was not the first state to legalize gay marriage, the Court leveraged California’s influence to further gay rights. Now, the dominos are falling.<sup>157</sup> Traditionally conservative courts in Iowa and Utah now expressly recognize gay rights. In *Kitchen v. Herbert*, the federal district court in Utah recounted the history of same-sex marriage by citing California’s same-sex marriage litigation history.<sup>158</sup> This in-depth reference

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<sup>153</sup> See Lois A. Weithorn, *Can a Subsequent Change in Law Void a Marriage that Was Valid at Its Inception? Considering the Legal Effect of Proposition 8 on California’s Existing Same-Sex Marriages*, 60 HASTINGS L.J. 1063, 1064 (2009).

<sup>154</sup> Derrick Bell, *The Referendum: Democracy’s Barrier to Racial Equality*, 54 WASH. L. REV. 1, 18–20 (1978) (“Supporters of minority rights must be concerned with the initiative process because that process often serves those opposed to reform. Tumultuous media campaigns are not conducive to careful thinking and voting.”).

<sup>155</sup> See *Strauss v. Horton*, 46 Cal.4th 364 (2009).

<sup>156</sup> *Id.* at 388 (emphasizing “only among the various constitutional protections recognized in the *Marriage Cases* as available to same-sex couples, it is only the designation of marriage that has been removed by this initiative measure”).

<sup>157</sup> Richard Wolf, *Same-Sex Marriage On Winning Streak Toward High Court*, USA Today, (Feb. 15, 2014), <http://www.usatoday.com/story/news/nation/2014/02/14/supreme-court-gay-lesbian-marriage-virginia/5485119/>.

<sup>158</sup> See *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1198 (D. Utah 2013).

demonstrated that the California Supreme Court influenced the decision to strike down a ban on same-sex marriage. In *Varnum v. Brien*, the Iowa Supreme Court cited *In Re Marriage* multiple times to demonstrate that other courts legalized gay marriage because public policy has shifted.<sup>159</sup>

## V. COUNTERS TO CRITICS OF THE CALIFORNIA SUPREME COURT'S JUDICIAL LAWMAKING MODEL

Historically, critics of judicial lawmaking cite accountability, reliability, and competence as the main reasons courts should not tread on the legislature's territory.<sup>160</sup> However, these arguments hold less weight with the California Supreme Court. The accountability factor weighs less because California's justices are held accountable through the appointment process and retention elections. The reliance critique weighs less because the Court creatively includes the "reliability" factor into its opinions' application. The competence factor weighs less because the justices study independently, consider *amicus* and Brandeis briefs, and use extrinsic sources supplied by vigorous advocates.

### A. CALIFORNIA SUPREME COURT JUSTICES ARE ACCOUNTABLE TO THE PEOPLE, SO THE COURT CAN LEGISLATE WITHOUT VIOLATING DEMOCRATIC PRINCIPLES

The premise behind democracy is that public decisions should reflect the will of the people.<sup>161</sup> Therefore, government officials making decisions need to be accountable to the people. California uses a merit-based appointment process and retention election system to ensure that the justices are held accountable because they make laws that impact Californians' everyday lives.

In California, Supreme Court justices must be an attorney or judge for ten years prior to their appointment.<sup>162</sup> First, the governor nominates the

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<sup>159</sup> See *Varnum v. Brien*, 763 N.W.2d 862, 882–94 (Iowa 2009).

<sup>160</sup> Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 403 (1908).

<sup>161</sup> Eric Maskin & Jean Tirole, *The Politician and the Judge: Accountability in Government*, AM. ECON. REV., Sep. 2004, at 1.

<sup>162</sup> Cal. Const. art. VI, § 8.

justices, and then they must be confirmed by the Commission on Judicial Appointments, which consists of the chief justice, the attorney general, and a presiding justice of the courts of appeal.<sup>163</sup> After appointment, the justice is subjected to a retention vote in the first general election and every twelve years thereafter.<sup>164</sup> The California judicial selection and retention election system is known as the “California Plan.”<sup>165</sup>

The California Plan is a merit-based judicial selection and retention system.<sup>166</sup> Generally, merit plans reduce political influence, thus resulting in better justices.<sup>167</sup> Undoubtedly, political pressures affect the judicial selection process in some way because of recent political polarization.<sup>168</sup> However, a justice must impress the governor and the selection committee to reach the bench, so a justice is unlikely to embody a polarized viewpoint. Further, the people hold a revolving veto power over a sitting justice, so the justice is unlikely to develop a polarized viewpoint. Additionally, the retention rate for California justices is very high,<sup>169</sup> so justices are unlikely to be swept away by polarized political waves in the electorate.

A counter to judicial accountability (*i.e.* judicial retention elections) is that it strips judges of some of their independence. However, Supreme

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<sup>163</sup> *Id.*

<sup>164</sup> Cal. Const. art. VI, § 16.

<sup>165</sup> Peter D. Webster, *Selection and Retention of Judges: Is There One “Best” Method?*, 23 FLA. ST. U. L. REV. 1, 30 (1995).

<sup>166</sup> *Id.* at 31.

<sup>167</sup> *Id.*

<sup>168</sup> Polarized political parties no longer represent the moderate American electorate. Wealth disparity, immigration, and other forces in modern American politics cause extreme party polarization:

In the choreography of American politics inequality feeds directly into political polarization, and polarization in turn creates policies that increase inequality. Some direct causes of polarization can be ruled out rather quickly. The consequences of “one person, one vote” decisions and redistricting can be ruled out because the Senate and the House are polarized. The shift to a Republican South can be ruled out because the North is also polarized. Primary elections can be ruled out because polarization actually decreased after primaries became widespread.

NOLAN McCARTY ET AL., *POLARIZED AMERICA* 1 (2d ed. 2006).

<sup>169</sup> Gerald Uelman, *California Judicial Retention Elections*, 28 SANTA CLARA L. REV. 333, 335 (1988) (explaining that only fourteen California Supreme Court justices have been removed from office since 1855).

Court Justice Sandra Day O'Connor, a vocal critic of judicial elections,<sup>170</sup> concedes that judicial accountability advances the rule of law and furthers judicial integrity.<sup>171</sup>

Times have changed since Hamilton penned *Federalist Paper No. 78*, when the judiciary was the weakest branch of government.<sup>172</sup> Indeed, the Founding Fathers implemented judicial independence in the federal model to insulate the judiciary, but the people want judicial accountability because courts do make law, not just “call balls and strikes.” This is evident because a supermajority of states implemented judicial elections. Currently, thirty-eight states have some type of judicial election for the state’s high court.<sup>173</sup>

Another counter to judicial accountability is that it invites politics into judicial decision-making. Justice O’Connor said, “Judicial elections powered by money and special interests create the impression, rightly or wrongly, that judges are accountable to money and special interests, not the law.”<sup>174</sup> However, money that supports political agendas is constitutionally protected,<sup>175</sup> so these influences are inevitable. But Californians hold a veto over Supreme Court justices, like they do with legislators, so people can remove a justice.

Additionally, California Supreme Court justices do not need to constantly campaign because they have twelve-year terms. Essentially, the justices do not need to start campaigning on their first day in office, like

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<sup>170</sup> Annemarie Mannion, *Retired Justice Warns Against Politicians In Robes*, CHICAGO TRIBUNE, (May 30, 2013), [http://articles.chicagotribune.com/2013-05-30/news-chi-retired-justice-warns-against-politicians-in-robes-20130530\\_1\\_o-connor-bias-judges](http://articles.chicagotribune.com/2013-05-30/news-chi-retired-justice-warns-against-politicians-in-robes-20130530_1_o-connor-bias-judges) (explaining that Justice Sandra Day O’Connor has been a vocal critic of judicial elections).

<sup>171</sup> Sandra Day O’Connor, *Judicial Accountability Must Safeguard, Not Threaten, Judicial Independence: An Introduction*, 86 DENV. U. L. REV. 1, 4 (2008).

<sup>172</sup> Alexander Hamilton, *The Federalist No. 78*, (Clinton Rossiter ed., 1961) (examining the role of the judiciary as a limited functioning branch of government).

<sup>173</sup> American Bar Association, Fact Sheet On Judicial Selection Methods In States, [http://www.americanbar.org/content/dam/aba/migrated/leadership/fact\\_sheet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf) (last visited May 16, 2014).

<sup>174</sup> Bill Rankin, *Ex-justice Says Contested Elections Threaten Fair Judiciary*, THE ATLANTA JOURNAL-CONSTITUTION, (Aug. 12, 2013), <http://www.ajc.com/news/news/local/ex-justice-says-contested-elections-threaten-fair-/nZMSC/>.

<sup>175</sup> See *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (announcing that financial speech deserves the highest constitutional protections).

most legislators do.<sup>176</sup> The long terms allow the justices to be independent because they can exercise wide discretion during their decade-long tenure. Therefore, time, instead of campaign commercials, vindicates or condemns the justices' policies and judgments.

### *1. Californians Hold the California Supreme Court Justices Accountable When a Justice's Policies Directly Conflict with Californians' Public Policy*

In the 1986 general election, Californians sent a message to the justices that the Court must reflect public policy. Californians looked at the justices' "subjective value judgments"<sup>177</sup> (*i.e.* policies), when they decided to oust Chief Justice Bird and others because they were "soft on crime."<sup>178</sup> Californians rejected Bird mainly because she reversed every one of the death penalty cases that came across her desk.<sup>179</sup> Californians handily removed Bird with a 66 percent "no" vote.<sup>180</sup> Thus, the justices understand their decisions need to be socially acceptable to Californians; otherwise they may be removed from office.

## B. THE CALIFORNIA SUPREME COURT FACTORS RELIANCE INTO ITS OPINIONS

A major critique of active judicial lawmaking is a lack of stability in the law, *i.e.* reliance. The critics argue that people cannot rely on precedent because the Court may change the law at any moment. To reduce reliance issues, the California Supreme Court factors reliance into its opinions and creatively chooses the fairest course for the parties and society.

Essentially, reliance is a double-edged sword. Traynor noted that a dilemma arises when people substantially relied on precedent the Court now finds

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<sup>176</sup> Legislators are constantly campaigning, instead of focusing on legislative matters because they must start campaigning on their first day in office so they can be re-elected. See Ryan Grim, *Call Time For Congress Shows How Fundraising Dominates Bleak Work Life*, HUFFINGTON POST, (Jan. 8, 2013), [http://www.huffingtonpost.com/2013/01/08/call-time-congressional-fundraising\\_n\\_2427291.html](http://www.huffingtonpost.com/2013/01/08/call-time-congressional-fundraising_n_2427291.html).

<sup>177</sup> Michael Dann & Randall Hansen, *Judicial Retention Elections*, 34 Loy. L.A. L. REV. 1429, 1433 (2001).

<sup>178</sup> *Id.* at 1432.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

unsound.<sup>181</sup> The Court may retroactively apply the new law.<sup>182</sup> This causes hardship on the party who relied, but a substantial benefit to the other who benefits from the new law.<sup>183</sup> Or, the Court may apply the old law, and prospectively apply the new law.<sup>184</sup> This protects the party who relied, but hurts the other because he is subjected to an unsound law.<sup>185</sup> Traynor said the Court should balance “whether or not the hardship of defeating reliance of one party will outweigh the hardship of subjecting the other to a precedent unfit to survive.”<sup>186</sup> “Barring exceptional situations, where the entrenched precedent has engendered so much reliance that its liquidation would do more harm than good, a court should be free to overrule such a precedent.”<sup>187</sup>

To dull the double-edged sword of reliance, Traynor advocated that the Court should “retreat or advance the law with minimum shock to its evolutionary course and with a minimum shock to those who relied upon judicial decisions.”<sup>188</sup> In other words, the Court should “interweave the new with the old to make a seamless whole.”<sup>189</sup>

To confront large doctrinal shifts (*i.e.* when reliance is a major issue), the California Supreme Court weighs competing reliance interests and creatively chooses the fairest course for society and the litigants. In *Li*, for example, the California Supreme Court held that the doctrinal shift to comparative negligence is “given a limited retrospective application.”<sup>190</sup> The Court applied comparative negligence to all future cases and retrials, but the Court did not apply comparative negligence to cases already in trial.<sup>191</sup> After balancing the litigants’ reliance interests, the Court concluded, “This is a case where the litigant before the court should be given the benefit of the new rule.”<sup>192</sup>

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<sup>181</sup> Traynor, *supra* note 35, at 167.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 168.

<sup>187</sup> Traynor, *supra* note 23, at 66.

<sup>188</sup> Poulos, *supra* note 20, at 1705.

<sup>189</sup> *Id.*

<sup>190</sup> *Li*, 13 Cal.3d at 808.

<sup>191</sup> *Id.* at 829 (explaining the retroactive and prospective application of the new contributory negligence doctrine).

<sup>192</sup> *Id.*

### C. THE CALIFORNIA SUPREME COURT IS A COMPETENT LAWSMAKING INSTITUTION

Unlike the legislature, “justices may not commission scientific studies, convene groups of experts, or issue notice-and-comment procedures.”<sup>193</sup> However, this “legislative subpoena power” is unnecessary for the California Supreme Court to obtain adequate information to correctly adjudicate cases before it. Traynor noted, “Only a small fraction of cases are of a complexity that calls for inquiry beyond the facts and available precedents.”<sup>194</sup> However, when justices need more information, they study independently, solicit Brandeis and *amicus* briefs, and use information supplied by the vigorous advocates. Thus, like the Legislature, the Court is competent when it makes new laws.

When justices need more information, they study outside materials to supplement their decision.<sup>195</sup> Today, the Internet gives justices infinite information at their fingertips. If the justices need “legislative facts,” then the justices can quickly research existing studies, assess competing interests, and examine legislative records: all with a click of the mouse. Or even easier, the justices can order their clerks to comb the Internet for the required information.

Also, interested parties can file Brandeis and *amicus* briefs with the Court to support their positions. Thus, the Court is aware of scientific and outside perspectives on the issues. Brandeis briefs bring to the Court a compilation of scientific information and social science. *Amicus* briefs allow interested parties to make their position known. Also, the *amicus* brief acts as a notice-and-comment procedure because interested parties are put on notice when the case is on appeal, and then the interested parties can comment on the case through the *amicus* brief. Traynor argued that Brandeis and *amicus* briefs should be used more often.<sup>196</sup> Since his time, the use of these briefs skyrocketed in the California Supreme Court and others.<sup>197</sup>

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<sup>193</sup> Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2540 (2010).

<sup>194</sup> Traynor, *supra* note 43, at 627.

<sup>195</sup> Dear, *supra* note 1, at 705 (explaining that the California Supreme Court’s culture from the 1940s until today supports independent study, which is apparent in the opinions).

<sup>196</sup> Traynor, *supra* note 43, at 627.

<sup>197</sup> *The Rise of Amicus Briefs*, APPELLATE PRACTICE COMMITTEE NEWSLETTER (International Association of Defense Counsel) March 2010.

Further, vigorous advocates bring case-specific experts, studies, and knowledge to the Court. Essentially, these advocates come to trial prepared to educate the Court on the issues at hand. Recently, advocates use experts and studies more often in litigation,<sup>198</sup> so the Court is supplied with ample information from the parties. The Court can consider the experts' opinions and contrast them with independent research.

The argument against courts' using every available resource is that judges will be overwhelmed with conflicting information to consider. However, Traynor articulated the counter to this. He explained that judges can "detect latent quackery in science or medicine, edit the swarm spore of the social scientists, and add grains of salt to the fortune-telling statistics of the economists."<sup>199</sup>

## VI. CONCLUSION

The California Supreme Court is the most followed state court because it embraces its lawmaking powers and uses public policy in its decision-making process. Great courts, like great judges, are known for their active role in lawmaking, not for idle adherence to precedent.<sup>200</sup> The California Supreme Court is a "great court" because its significant influence proves its lawmaking model is successful. The data indicates the California Supreme Court will continue to influence other courts for the foreseeable future,<sup>201</sup> so the Court's lawmaking model will continue to gain traction. Therefore, other courts should consider embracing a similar model to facilitate the evolution of the law to continually align with public policy.



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<sup>198</sup> Faust F. Rossi, *Modern Evidence and the Expert Witness*, 12 LITIG. 18 (1985) (asserting that inflation in the use of experts is the result of (1) the growth of complex litigation, (2) the explosion of technology and science, (3) the increasing creativity of advocates, and (4) liberality of the rules of evidence).

<sup>199</sup> Traynor, *supra* note 43, at 627.

<sup>200</sup> See generally Ursin, *supra* note 5.

<sup>201</sup> Dear, *supra* note 1, at 702–03.

# JUSTICE TRAYNOR'S "ACTIVIST" JURISPRUDENCE:

*Field and Posner Revisited*

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## I. INTRODUCTION

Justice Roger J. Traynor's reputation as a great judge is widely known.<sup>1</sup> Commentators and jurists alike, from Chief Justice Warren Burger and Judge Henry Friendly<sup>2</sup> to Professors Robert Keeton and G. Edward White, have recognized him as such.<sup>3</sup> Yet commentators have long labeled Traynor an activist,<sup>4</sup> a term that has developed a negative connotation<sup>5</sup> and one that Traynor once referred to as "befuddled" and "misbegotten."<sup>6</sup> Among them is Ben Field.<sup>7</sup> And although others share Field's conception of an activist judge,<sup>8</sup> by no means do commentators universally accept it,<sup>9</sup> most notably, Judge Richard Posner, whose definition of activism focuses only on a judge's constitutional jurisprudence.<sup>10</sup> In light of this disparity, this paper

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<sup>1</sup> See, e.g., THE TRAYNOR READER: NOUS VERRONS: A COLLECTION OF ESSAYS BY THE HONORABLE ROGER J. TRAYNOR, at ix (San Francisco: The Hastings Law Journal, 1987); Robert E. Keeton, *In Tribute to Roger Traynor*, 2 HOFSTRA L. REV. 452, 452 (1974); Walter V. Schaefer, *Chief Justice Traynor and the Judicial Process*, 53 CALIF. L. REV. 11, 24 (1965); Edmund Ursin, *How Great Judges Think*, 57 BUFF. L. REV. 1267, 1271 (2009).

<sup>2</sup> See Warren E. Burger, *In Memoriam — Roger John Traynor, A Tribute*, 71 CALIF. L. REV. 1037 (1983); Henry J. Friendly, *In Memoriam — Roger John Traynor, Ablest Judge of His Generation*, 71 CALIF. L. REV. 1039 (1983).

<sup>3</sup> See Keeton, *supra* note 1, at 452; G. Edward White, *Tribute, Roger Traynor*, 60 VA. L. REV. 1381, 1383 (1983).

<sup>4</sup> See, e.g., Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195, 1248 n.229 (2009).

<sup>5</sup> See Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 533 (2012) [hereinafter Posner, *The Rise and Fall*] ("Judicial activism' survives as a vague, all-purpose pejorative."); see also Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 50 INDIANA L.J. 1, 14 (1983) [hereinafter Posner, *The Meaning of Judicial Self-Restraint*] ("Although activism is respectable enough among academics today, it still is not sufficiently respectable among the general public for judges to dare to admit that they are activists . . .").

<sup>6</sup> Roger J. Traynor, *The Limits of Judicial Creativity*, 63 IOWA L. REV. 1, 2, 5, 7 (1977).

<sup>7</sup> BEN FIELD, ACTIVISM IN PURSUIT OF THE PUBLIC INTEREST: THE JURISPRUDENCE OF CHIEF JUSTICE ROGER J. TRAYNOR 121 (2003).

<sup>8</sup> See, e.g., Harry N. Scheiber, *A Jurisprudence of "Pragmatic Altruism": Jon van Dyke's Legacy to Legal Scholars*, 35 U. HAW. L. REV. 385, 394 (2013).

<sup>9</sup> See Keenan D. Kmiec, Comment, *The Origin and Current Meaning of "Judicial Activism,"* 92 CALIF. L. REV. 1441, 1463–76 (2004) (classifying several different definitions of judicial activism).

<sup>10</sup> Posner, *The Meaning of Judicial Self-Restraint*, *supra* note 5, at 14; Posner, *The Rise and Fall*, *supra* note 5, at 521. As one commentator has noted, Judge Posner's definitions

first addresses whether Field's conclusion that Traynor was an activist judge remains true under Posner's definition. This paper determines that it does not. Further, because Field examined only one of Traynor's constitutional opinions, this paper delves deeper into Traynor's constitutional jurisprudence to determine whether an activist classification in Posner's terms is nevertheless appropriate. Determining that it is not, this paper turns to a discussion of the appropriate classification of Traynor's constitutional jurisprudence, concluding, based on a comparison with Justice Oliver Wendell Holmes, that Traynor belongs on Posner's list of "mixed" activist/restrained jurists.

In addressing these questions, this paper proceeds as follows: After this introduction, Part II outlines Field's definition of judicial activism and details his conclusions on Traynor. Part III turns to Posner's seminal works on judicial lawmaking, first by reviewing Posner's definition of *Judicial Activism* before turning to his definition of judicial restraint and concluding with an overview of his activist/restrained spectrum.

Part IV begins the analysis portion of this paper by revisiting Field's classification of Traynor and concluding that, based on Posner's definition of judicial activism, Field's conclusion is unsupported. Part IV then turns to Traynor's constitutional jurisprudence, examining Traynor's notable opinions and classifying each in Posner's terms. After establishing that Traynor's constitutional jurisprudence has both restrained and activist characteristics, this paper inquires as to how Posner would classify Traynor's constitutional approach, ultimately concluding by comparison to Holmes that Traynor's constitutional jurisprudence should be characterized as "mixed" activist/restrained. Part V concludes.

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of judicial activism are slightly different. See Aziz Z. Huq, *When Was Judicial Self-Restraint?*, 100 CALIF. L. REV. 579, 580 n.2 (2012). Specifically, in his book *How Judges Think*, Posner defines "the activist/restraint spectrum according to whether a decision 'expands the Court's authority relative to that of the other branches of government.'" *Id.* (quoting RICHARD A. POSNER, *HOW JUDGES THINK* 287 (2008)). For the purposes of this paper, the author utilizes activism in the sense that "courts declare 'legislative or executive action unconstitutional.'" *Id.* at 581 (quoting Posner, *The Rise and Fall, supra* note 5, at 521); *infra* Part III.

## II. BEN FIELD'S "JUDICIAL ACTIVISM": TRAYNOR AS AN ACTIVIST JUDGE

### A. BEN FIELD'S CONCEPTION OF JUDICIAL ACTIVISM

For Ben Field, an activist decision is one that "explicitly departs from legal precedent in favor of [a judge's] sense of justice or social values."<sup>11</sup> As one commentator notes:

What "activist" means to Field is that a judge assesses the public policy behind a law and is unafraid to update, overrule, or modify if that law leads to outdated, unjust, and ineffectual results. Law is not fixed like commandments in stone tablets, but is to be viewed realistically and applied pragmatically in service to the times of the people who must live by it.<sup>12</sup>

The quintessential example, according to Field, is Justice Harlan Stone's famous footnote in *United States v. Carolene Products Co.*, which "expand[ed]" the rights enumerated in the Bill of Rights and "held that they applied to the states, reversing longstanding precedent."<sup>13</sup>

Applying this definition to Justice Traynor, Field found that Traynor's use of "policy innovations" and "efforts at reform" made him an activist jurist.<sup>14</sup> Specifically, it was "Traynor's concern for society's weak and his willingness to depart from legal convention on their behalf."<sup>15</sup> Field offers Traynor's opinions *Perez v. Sharp*,<sup>16</sup> *De Burgh v. De Burgh*,<sup>17</sup> and *People v. Cahan*,<sup>18</sup> as well as Traynor's famous products liability opinions in *Escola*

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<sup>11</sup> FIELD, *supra* note 6, at 121.

<sup>12</sup> Allen G. Minker, *Activism in Pursuit of the Public Interest: The Jurisprudence of Chief Justice Roger J. Traynor*, THE FREE LIBRARY, <http://www.thefreelibrary.com/Activism+in+Pursuit+of+the+Public+Interest%3A+The+Jurisprudence+of...-a0160714435> (last visited May 16, 2014) (reviewing FIELD, *supra* note 6).

<sup>13</sup> FIELD, *supra* note 6, at xvi.

<sup>14</sup> *Id.* at xv, xvi.

<sup>15</sup> *Id.* at xvii.

<sup>16</sup> 198 P.2d 17 (Cal. 1948).

<sup>17</sup> 250 P.2d 598 (Cal. 1952).

<sup>18</sup> 282 P.2d 905 (Cal. 1955).

v. Coca-Cola Bottling Co.<sup>19</sup> and *Greenman v. Yuba Power Products, Inc.*,<sup>20</sup> as evidence of Traynor's "activist" jurisprudence.<sup>21</sup>

## B. BEN FIELD ON JUSTICE TRAYNOR'S "ACTIVIST" JURISPRUDENCE

Ben Field's first example of Justice Traynor's activist jurisprudence is perhaps one of Traynor's most notable constitutional opinions.<sup>22</sup> In *Perez v. Sharp*, the California Supreme Court, led by Traynor, abolished California's anti-miscegenation law, which had prevented the issuance of marriage licenses "authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race."<sup>23</sup> According to Field, Traynor's break from precedent made *Perez* an activist opinion: "Traynor's opinion in *Perez* undeniably broke from precedent, and Traynor made no effort to disguise the novelty of his decision."<sup>24</sup> Instead, Traynor overturned the statute based on his belief that it "lacked a 'legitimate legislative objective' because its assumptions about race had been refuted by contemporary science and social science."<sup>25</sup>

Field turns next to Traynor's opinion in *De Burgh v. De Burgh*, where the California Supreme Court "did away with one of the major bulwarks of the at-fault [divorce] system: the defense of recrimination."<sup>26</sup> Specifically, Traynor, writing for the Court, "discarded the common law rule treating recrimination as an automatic bar to divorce,"<sup>27</sup> placing it instead "in the discretion of the trial court . . . whenever each party could show some fault

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<sup>19</sup> 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

<sup>20</sup> 377 P.2d 897 (Cal. 1963).

<sup>21</sup> See FIELD, *supra* note 7, 19–95.

<sup>22</sup> Field also briefly examines several other Traynor opinions, including *People v. Oyama*, 173 P.2d 794, 804 (Cal. 1946) (Traynor, J., concurring), *rev'd, Oyama v. California*, 332 U.S. 633 (1948), *Takahashi v. Fish & Game Commission*, 185 P.2d 805 (Cal. 1947) (Traynor, J., concurring in dissent), *rev'd*, 334 U.S. 410 (1948), and *Mulkey v. Reitman*, 413 P.2d 825 (Cal. 1966) (Traynor, J., concurring in judgment), among others. As Field did not utilize these opinions in his primary analysis, this paper does not discuss them here, although it discusses *Takahashi* in subsequent Parts. See *infra* Part IV.

<sup>23</sup> FIELD, *supra* note 7, at 22 (quoting *Perez*, 198 P.2d at 18).

<sup>24</sup> *Id.* at 34.

<sup>25</sup> *Id.* at 39–40.

<sup>26</sup> Catherine Davidson, *All the Other Daisys: Roger Traynor, Recrimination, and the Demise of At-Fault Divorce*, 7 CAL. LEGAL HIST. 381, 384 (2012).

<sup>27</sup> *Id.* at 389.

in the other.”<sup>28</sup> According to Field, the decision “could have been resolved easily by precedent, if the precedent had not conflicted with the justices’ values and perception of social realities”;<sup>29</sup> specifically, “Traynor’s conception of the public interest in the family contained the seed of the change.”<sup>30</sup> For Field, then, Traynor’s opinion in *De Burgh*, like *Perez*, was an activist one.

Next, Field examines Traynor’s opinion in *People v. Cahan*, where the California Supreme Court adopted the exclusionary rule for evidence obtained in illegal police searches.<sup>31</sup> According to Field, “Traynor’s opinion in *People v. Cahan* . . . was unusual both because it marked a departure from precedent and because Traynor himself authored the precedent it overruled.”<sup>32</sup> For Field, “*Cahan* and the search and seizure decisions that followed it demonstrated Traynor’s concern over the practical effect of sophisticated police tactics on the privacy rights of individuals.”<sup>33</sup> “Traynor explained that his decision in *Cahan* was the means to achieve the policy objective of deterring illegal police searches,” rather than the U.S. Supreme Court’s determination that the exclusionary rule was an important part of the Fourth and Fourteenth Amendments.<sup>34</sup> Thus,

*Cahan* . . . exemplified Traynor’s conception of judicial creativity. Like the Pragmatist philosophers, Traynor believed that judgment was the process of bringing experience to bear on the facts. His experience on the bench impelled him to overrule his own decision, *Gonzales*, when he realized it had failed to deter illegal searches, and he crafted new rules to serve that function. *Cahan* and its progeny functioned as a coherent system of rules instituted because of the need for a practical, *policy-oriented* approach to the problem of illegal police searches. Traynor called on judges to assert judicial contract over law enforcement measures. He believed the health of the law required that law enforcement yield to judicial authority. . . . Traynor gave clear *policy reasons*, based on observation of

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<sup>28</sup> *Id.* at 390.

<sup>29</sup> FIELD, *supra* note 7, at 45 (citing *De Burgh v. De Burgh*, 250 P.2d 598 (Cal. 1952)).

<sup>30</sup> *Id.* at 68.

<sup>31</sup> See 282 P.2d 905 (Cal. 1955).

<sup>32</sup> FIELD, *supra* note 7, at 69 (citing *Cahan*, 282 P.2d 905).

<sup>33</sup> *Id.* at 81.

<sup>34</sup> *Id.* at 85 (quoting *Mapp v. Ohio*, 367 U.S. 643, 657 (1961)).

police practices, *for the departure from precedent*. His innovations in search and seizure law reflected his civil libertarian sympathies . . . . *Cahan* and its progeny incorporated into law these changing value judgments on police tactics.<sup>35</sup>

Lastly, Field analyzes two of Traynor's most well-known opinions, both in the area of products liability.<sup>36</sup> "In his 1944 concurrence in *Escola v. Coca-Cola Bottling Co.* Traynor set forth his theory that manufacturers should be held strictly liable for injuries caused by design or manufacturing defects."<sup>37</sup> In 1963, "all of Traynor's colleagues joined his opinion in *Greenman v. Yuba Power Products, Inc.*, making the California Supreme Court the first court to adopt a rule of strict products liability."<sup>38</sup> For Field, the *Greenman* opinion was a "landmark in the massive shift in judicial thinking toward strict liability,"<sup>39</sup> and it was this shift that made the *Escola* and *Greenman* opinions activist, as "[s]trict liability broke with legal convention" and "signaled a 'quiet revolution' in the law."<sup>40</sup>

As a review of these opinions shows, Field believes that Traynor "was an activist judge in that he departed from precedent in favor of his conception of the public interest."<sup>41</sup> In these "landmark" decisions, Traynor "diverged from legal convention not only in their result, but in their method," explicitly utilizing public policy in making his determinations.<sup>42</sup> Further, it was Traynor's use of "untraditional sources, such as academic writings and policy-oriented studies" and belief that "modern times demanded judicial creativity and that modern advances in the social sciences would assist the judge in this task" that made Traynor's decisions "activist" for Field.<sup>43</sup>

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<sup>35</sup> *Id.* at 93 (emphasis added).

<sup>36</sup> *Id.* at 116 (noting that "state courts outside of California cited the [*Greenman*] decision in 280 opinions" and that "after 1963, state courts outside of California cited [the *Escola* concurrence] approvingly 60 times").

<sup>37</sup> *Id.* at 95.

<sup>38</sup> *Id.* (footnote omitted).

<sup>39</sup> *Id.* at 116.

<sup>40</sup> *Id.* at 119 (quoting James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability*, 37 UCLA L. REV. 479, 483 (1990)).

<sup>41</sup> *Id.* at 121.

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

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

### III. JUDGE POSNER ON JUDICIAL ACTIVISM

#### A. JUDGE POSNER'S DEFINITION OF AN ACTIVIST JUDGE

Having established Ben Field's conception of activism and reviewed his analysis of Justice Traynor's seminal opinions, this Part examines Judge Posner's definition of the term. In Posner's view, "the major concern over activism . . . centers on the fact that in holding a statute unconstitutional, a court is *cutting back on the power of the legislature*."<sup>44</sup> Thus, for Posner, "unless [the court] is acting contrary to the will of the other branches of government it is not being activist."<sup>45</sup> Posner has further refined his conception of activism. In *How Judges Think*, he distinguished between two senses of the term, noting that "[i]n one sense . . . it means enlarging judicial power at the expense of the power of the other branches of government (both federal and state)."<sup>46</sup> In a different sense, judicial activism "refers to the legalist's conceit that his technique for deciding cases minimizes judicial power by transferring much of that power back, as it were, to elected officials . . . from whom the judges are thought to have wrested it by loose construction."<sup>47</sup> For clarity purposes, this paper focuses solely on Posner's broader definition of activism, that is, when a court holds a statute unconstitutional, thereby "cutting back on the power of the legislature."<sup>48</sup>

To illustrate Posner's judicial activism further, consider his definition of judicial restraint, which he considers the opposite.<sup>49</sup> As Posner writes, "constitutional restraint," also referred to as "'separation of powers' judicial

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<sup>44</sup> Posner, *The Meaning of Judicial Self-Restraint*, *supra* note 5, at 14 (emphasis added).

<sup>45</sup> *Id.* at 14.

<sup>46</sup> POSNER, *supra* note 10, at 287 (citing RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 318 (1996)).

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

<sup>48</sup> Posner, *The Meaning of Judicial Self-Restraint*, *supra* note 5, at 14. Based on this definition, this paper excludes from its analysis in Part IV Traynor's opinions in voter-approved legislation, including *Mulkey v. Reitman*, 413 P.2d 825 (Cal. 1966) (Traynor, J., concurring in judgment).

<sup>49</sup> "Judicial modesty or self-restraint," Posner writes, is "understood as the rejection of judicial activism in the sense of judicial aggrandizement at the expense of the other branches of government." POSNER, *supra* note 10, at 287–88.

self-restraint,’ or . . . ‘structural restraint,’ ”<sup>50</sup> occurs where “judges are *highly* reluctant to declare legislative or executive action unconstitutional.”<sup>51</sup> This conception translates to “the judge’s setting as an important goal of his decisionmaking the cutting back of the power of his court system in relation to — as a check on — other government institutions.”<sup>52</sup> Thus, a restrained judge, “if he is a federal judge . . . will want his court to pay greater *deference* to decisions of Congress, of the federal administrative agencies, of the executive branch, and of all branches and levels of state government.”<sup>53</sup>

As an example of restraint, Posner provides the hypothetical decision overruling *Marbury v. Madison*,<sup>54</sup> which “would be self-restrained . . . because it would reduce the power of the federal courts vis-à-vis other organs of the government.”<sup>55</sup> Similarly, Posner explains that *Erie Railroad Co. v. Tompkins*<sup>56</sup> “is a self-restrained decision . . . because it reduced the power of the federal courts vis-à-vis the state courts,” and conversely, *Mapp v. Ohio*<sup>57</sup> “is activist because it had the opposite effect.”<sup>58</sup>

Importantly, in contrast to Field’s conception of *judicial activism*, Posner’s activism has nothing to do with a judge’s common law opinions. Posner does not consider these decisions activist, as legislatures can always overturn a common law decision by passing a statute, and thus the court is not usurping power from the legislature.<sup>59</sup> Professor Edmund Ursin illustrates this

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<sup>50</sup> *Id.* at 11. For clarity purposes, like Posner, the remainder of this paper refers to restraint or judicial restraint as encompassing the several forms of the terms. *See id.* at 12.

<sup>51</sup> Posner, *The Rise and Fall*, *supra* note 5, at 521.

<sup>52</sup> Posner, *The Meaning of Judicial Self-Restraint*, *supra* note 5, at 11–12.

<sup>53</sup> *Id.* at 12 (emphasis added). By deference, Posner does not mean a “modest, deferential, [or] timid judge” with a “lack of self-esteem or self-confidence and . . . [an] above-average reverence of precedent.” *Id.* at 18. Rather, in Posner’s sense of the word, deference is the belief that “the courts ought to be deferring to the other branches of government.” *Id.* at 18.

<sup>54</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>55</sup> Posner, *The Meaning of Judicial Self-Restraint*, *supra* note 5, at 13.

<sup>56</sup> 304 U.S. 64 (1938).

<sup>57</sup> 367 U.S. 643 (1961).

<sup>58</sup> Posner, *The Meaning of Judicial Self-Restraint*, *supra* note 5, at 13–14 (footnotes omitted).

<sup>59</sup> See RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 247 (1999) (noting, in the context of oil and gas law, that the “legislature can always step in and prescribe an economically sound scheme of property rights”); *see also* Posner, *The Meaning of Judicial Self-Restraint*, *supra* note 5, at 18 (noting that “considerations

point by comparing Traynor's *Escola* concurrence with the U.S. Supreme Court's controversial decision in *Lochner v. New York*<sup>60</sup>: "Unlike Traynor's *Escola* proposal, *Lochner* and its progeny were constitutional decisions in which the court limited the power of the legislature."<sup>61</sup> Ursin continues, "A court engaging in . . . large scale lawmaking would not have been usurping legislative authority because the legislature can always step in to unwrite the common law that judges write."<sup>62</sup>

### B. JUDGE POSNER'S ACTIVIST/RESTRAINED SPECTRUM AND "MIXED" JURISTS

In addition to these general conceptions of activist and restrained judges, Judge Posner provides a basic spectrum of judicial decisionmaking that "runs from activist to restrained."<sup>63</sup> On one hand is the judicial activist, or "aggressive judge," who "expands the Court's authority relative to that of the other branches of government."<sup>64</sup> On the other is the "modest [or restrained] jurist," who "tells the Court to think very hard before undertaking to nullify the actions of the other branch of government."<sup>65</sup> Thus, as Posner writes, one can "identify Rehnquist, Frankfurter, Burger, and Scalia as the most restrained Justices" and "Douglas, Brennan, Black, and Marshall as the most activist."<sup>66</sup>

Although these classifications represent the ends of Posner's spectrum, in some jurists, "restrained and activist strains are mixed," as on occasion, such jurists "plow new constitutional ground."<sup>67</sup> Among Posner's "mixed" activist/restrained jurists are "John Marshall, Holmes, Brandeis, Cardozo, Robert Jackson, and Henry Friendly."<sup>68</sup> Holmes, for example, was

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of judicial self-restraint" are "irrelevant" in areas of "private judge-made law as distinct from public law," with Holmes's tort decisions as an example).

<sup>60</sup> 198 U.S. 45 (1905).

<sup>61</sup> Ursin, *supra* note 1, at 1292 (footnotes omitted).

<sup>62</sup> *Id.* at 1355; see also Virginia E. Nolan & Edmund Ursin, *An Enterprise (No-Fault) Liability Suitable for Judicial Adoption — With a "Draft Judicial Opinion,"* 41 SAN DIEGO L. REV. 1211, 1214 (2004) ("[S]cholars [in the 1950s] generalized their *Lochner*-inspired concerns over judicial activism (in constitutional law) to include the common law.").

<sup>63</sup> Posner, *The Rise and Fall*, *supra* note 5, at 551.

<sup>64</sup> POSNER, *supra* note 10, at 286.

<sup>65</sup> *Id.* at 286, 287.

<sup>66</sup> Posner, *The Rise and Fall*, *supra* note 5, at 554–58.

<sup>67</sup> *Id.* at 554–58.

<sup>68</sup> *Id.* at 555.

not exclusively deferential to the legislature; rather, he overruled as unconstitutional certain statutes that made him “puke.”<sup>69</sup> As Posner writes, “Holmes’s opinions on the Supreme Judicial Court of Massachusetts upholding the rights of unions, and his later, more famous opinions for the United States Supreme Court dissenting from decisions that invalidated social welfare legislation on ‘liberty of contract’ grounds are generally thought to be the apogee of judicial self-restraint.”<sup>70</sup> Holmes, however, was “far from uniformly restrained in constitutional cases — think of his free speech and habeas corpus opinions, and his dissent in the wiretapping case (*Olmstead*). Although they are not closely reasoned opinions, they are sharp reactions to government actions that he found abhorrent.”<sup>71</sup>

Justices Brandeis and Frankfurter also fall into Posner’s “mixed” activist/restrained grouping. Brandeis “embraced . . . (constitutional) restraint, adopting, advocating, and amplifying doctrines . . . that eliminate[d] or at least postpone[d] occasions on which a federal court deems itself authorized to declare a legislative or executive measure unconstitutional.”<sup>72</sup> However, “[n]o more than Holmes was Brandeis uniformly restrained,” as he “participated in decisions that invalidated New Deal legislation.”<sup>73</sup> Similarly, although Frankfurter advocated restraint “with a noisy passion,” he “displayed no restraint when it came to the Fourth Amendment and the Equal Protection Clause; he was passionate in support of declaring public school segregation unconstitutional.”<sup>74</sup>

#### IV. BEN FIELD AND JUDGE POSNER REVISITED: JUSTICE TRAYNOR AS AN ACTIVIST JUDGE?

##### A. REVISITING BEN FIELD: JUSTICE TRAYNOR’S “ACTIVIST” JURISPRUDENCE

Ben Field and Judge Posner have incompatible conceptions of judicial activism. On one hand, Field focuses on breaks from precedent and the use

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<sup>69</sup> Posner, *supra* note 10, at 288.

<sup>70</sup> Posner, *The Rise and Fall*, *supra* note 5, at 526 (footnotes omitted).

<sup>71</sup> *Id.* at 526–27.

<sup>72</sup> *Id.* at 527.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 530–31.

of policy in judicial decisionmaking without regard for any common law and constitutional law distinctions. On the other, Posner, whose definition encompasses only constitutional decisions, focuses on whether the decision takes power away from another branch of government. These divergent conceptions raise the first general question this paper seeks to answer: Whether Field's classification of Traynor as an activist judge remains true under Posner's definition. As the following discussion demonstrates, of the five opinions Field examined, only *Perez* falls within Posner's definition of activism.

As noted, Traynor's majority opinion in *Perez* examined the constitutionality of California's anti-miscegenation law. Ultimately, the California Supreme Court, led by Traynor, struck down that statute, holding that it "denied freedom of association to every member of the population"<sup>75</sup> and declaring that a state's "forbidding interracial marriage was unconstitutional."<sup>76</sup> In Posner's terms, such an invalidation clearly falls within the "activist" category, as it cuts "back on the power of the legislature."<sup>77</sup> Thus, Field's activist classification of this opinion is accurate.

Traynor's *De Burgh* opinion, however, was not activist in Posner's sense, as it addressed the judge-made rule regarding fault-based divorces in California and the judicial interpretation of the related California divorce statutes.<sup>78</sup> More specifically, prior judicial interpretations of California's divorce statutes required "a person seeking a divorce . . . to establish one of the specified grounds for divorce, such as adultery."<sup>79</sup> And "divorce statutes had been interpreted to require the trial court to deny the divorce if recrimination, such as the party seeking a divorce on the grounds of adultery also having committed adultery, was proven."<sup>80</sup> In *De Burgh*, Traynor held that the "trial courts had discretion to grant or deny a divorce" as the public interest required.<sup>81</sup> As a statutory interpretation case dealing with

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<sup>75</sup> James R. McCall, *Thoughts About Roger Traynor and Learned Hand — A Qualifying Response to Professor Konefsky*, 65 U. CIN. L. REV. 1243, 1251 n.40 (1997).

<sup>76</sup> Donald R. Wright, *The Role of the Judiciary: From Marbury to Anderson*, 60 CALIF. L. REV. 1262, 1270 (1972).

<sup>77</sup> Posner, *The Meaning of Judicial Self-Restraint*, *supra* note 5, at 14.

<sup>78</sup> See Ursin, *supra* note 1, at 1310; Davidson, *supra* note 28, at 383.

<sup>79</sup> Ursin, *supra* note 1, at 1310.

<sup>80</sup> *Id.* (citing *De Burgh*, 250 P.2d at 599–600); see also Davidson, *supra* note 28, at 383 (noting that California's "divorce system [was] generally statutory").

<sup>81</sup> *Id.* at 1311 (citing *De Burgh*, 250 P.2d at 603–07).

judge-made rules, then, Traynor's *De Burgh* opinion was not activist in Posner's terms. Thus, Field's classification of this opinion is inaccurate.

The *Cahan* opinion tracks *De Burgh* in that it should not be classified as activist; the *Cahan* decision dealt with a judge-made rule of evidence. As Justice Walter Schaefer notes, in *Cahan* "[Traynor] concluded' . . . writing for the majority, 'that evidence obtained in violation of the constitutional guarantees is inadmissible.'"<sup>82</sup> Field himself cites the decision as creating "a judicial rule of evidence barring the admission at trial in California courts of evidence obtained in an illegal police search."<sup>83</sup> Although it most certainly took away power from law enforcement, the decision was based on a rule of evidence, not an unconstitutional statute, and thus does not qualify as activist in Posner's terms. Therefore, like *De Burgh*, Field's characterization of *Cahan* as an activist opinion is unsupported.

Lastly, Traynor's opinions in *Escola* and *Greenman* do not support Field's activist classification. Rather, they fall outside the scope of Posner's definition, as both are common law decisions dealing with strict products liability; the California legislature could have overruled Traynor's strict products liability rules. Thus, neither decision is activist in Posner's terms.

To review, of the opinions Field cites as evidence of Traynor's activist jurisprudence, only the *Perez* opinion clearly supports his conclusion. The *De Burgh*, *Cahan*, *Escola*, and *Greenman* opinions, however, are not supportive. Based on these opinions, then, it cannot be said that Traynor was an activist judge in Posner's terms; Field's classification is at best inconclusive.

## B. JUSTICE TRAYNOR REVISITED: TRAYNOR'S CONSTITUTIONAL JURISPRUDENCE

Having established that Field's supporting case law is inconclusive, this paper turns to Justice Traynor's most notable constitutional opinions to determine whether he should be classified as an activist judge in Judge Posner's terms.<sup>84</sup> As the following discussion shows, Traynor's constitutional

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<sup>82</sup> Schaefer, *supra* note 1, at 13 (quoting *Cahan*, 282 P.2d at 911–12).

<sup>83</sup> Ben Field, *The Jurisprudence of Innovation: Justice Roger Traynor and the Reordering of Search and Seizure Rules in California*, 1 CAL. SUP. CT. HIST. SOC'Y Y.B. 67, 68 (1994).

<sup>84</sup> Traynor penned over 900 opinions in his thirty years on the California Supreme Court. See Wright, *supra* note 76, at 1262. As Schaefer notes, "[a]ll that an outside

jurisprudence reveals a generally restrained approach, but his racial discrimination and free speech opinions show strains of judicial activism.

Before delving into Traynor's constitutional jurisprudence, a review of his general position on constitutional decisionmaking provides important context to the discussion. Traynor once wrote that "a state judge is . . . bound to be aware of the signs that we may cross new frontiers in constitutional law"<sup>85</sup> and that "the growth of the law, far from being unduly accelerated by judicial boldness, is unduly hampered by a *judicial lethargy* that masks itself as judicial dignity with the tacit approval of an equally lethargic bar."<sup>86</sup> Without further inquiry, these assertions seem to urge courts to take an activist jurisprudential view: crossing new frontiers — or overturning statutes — when necessary and calling for "judicial boldness."

Traynor, however, also "warned judges against usurping the legislative function," writing that

[s]tudents of constitutional law will find valid grounds for difference as to how readily a court should arrive at a constitutional rule that nudges a legislature into social reform along one expansive front or another. Nevertheless there remains widespread agreement that the *court itself cannot be the engine of social reform*. The very responsibilities of a judge as an arbiter disqualify him as a crusader.<sup>87</sup>

This reflects Posner's view of a restrained jurist. Compare it to his definition of judicial restraint in *The Rise and Fall of Judicial Self-Restraint*: "judges are highly reluctant to declare legislative or executive action unconstitutional — deference is at its zenith when action is challenged as unconstitutional."<sup>88</sup> Further, as Ursin writes, for "Traynor . . . there was no inconsistency in calling for deference to the legislature in constitutional

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generalist can do is offer some rather random but hopefully relevant, observations about some aspects of [a judge's] work," and in reviewing Traynor's constitutional jurisprudence, that is all this paper seeks to do. See Schaefer, *supra* note 1, at 11.

<sup>85</sup> Roger J. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L.F. 230, 237.

<sup>86</sup> Roger J. Traynor, *Comment on Courts and Lawmaking*, in *LEGAL INSTITUTIONS TODAY AND TOMORROW*, 58, 52 (Monrad G. Paulsen ed., 1959) (emphasis added).

<sup>87</sup> Lynn D. Wardle, *The Gap Between Law and Moral Order: An Examination of the Legitimacy of the Supreme Court Abortion Decisions*, 1980 BYU L. REV. 811, 818 (quoting Traynor, *supra* note 6, at 5) (emphasis added).

<sup>88</sup> Posner, *The Rise and Fall*, *supra* note 5, at 521.

decision making while insisting on a creative role for courts when it came to the common law.”<sup>89</sup> Ultimately for Traynor, “however sensitive judges become to the need for law reform they must necessarily keep their dispassionate distance from that ball of fire that is the living law. The United States Supreme Court had ‘stated that it is not for them to pass judgment on the wisdom of legislation,’ and the California Supreme Court had ‘accepted that thesis.’”<sup>90</sup>

### *1. Justice Traynor’s Restrained Jurisprudence*

Turning to Justice Traynor’s constitutional jurisprudence, his opinions largely echo this sense of deference. Perhaps most indicative is Traynor’s opinion in *People v. Sidener*,<sup>91</sup> where, writing for the court, he upheld a statute that punished recidivists more severely than first-time offenders.<sup>92</sup> Exhibiting Posner’s sense of judicial restraint, Traynor wrote that “[i]t is not [the judiciary’s] concern whether the Legislature has adopted what we might think to be the wisest and most suitable means of accomplishing its objects.”<sup>93</sup> This deference to the California Legislature clearly does not fall within Posner’s conception of activist jurisprudence.

Traynor’s opinion in *Gospel Army v. City of Los Angeles*<sup>94</sup> also evidences a restrained jurisprudential approach. In that case, Traynor, writing for the Court, upheld Los Angeles ordinances that regulated “transactions in secondhand goods and solicitations for charitable purposes.”<sup>95</sup> Disregarding Gospel Army’s argument that the ordinances “abridged its religious liberty,”<sup>96</sup> Traynor found the ordinances not violative of the First

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<sup>89</sup> Ursin, *supra* note 1, at 1292.

<sup>90</sup> *Id.* at 1312 (quoting Traynor, *supra* note 24, at 237) (footnotes omitted) (internal quotation marks omitted).

<sup>91</sup> 375 P.2d 641 (Cal. 1962), *overruled in part*, *People v. Tenorio*, 473 P.2d 993 (Cal. 1970).

<sup>92</sup> The statute itself provided that “a recidivism charge, which would increase a defendant’s criminal penalties, could only be dismissed when the district attorney moved to dismiss it.” John E. Noyes, *Justice Roger Traynor Professorship Acceptance*, 39 CAL. W. INT’L L.J. 384, 386 (2009).

<sup>93</sup> *Sidener*, 375 P.2d at 653 (quoting State v. Industrial Accident Comm’n, 310 P.2d 7 (Cal. 1957)) (internal quotation marks omitted).

<sup>94</sup> 163 P.2d 704 (Cal. 1945).

<sup>95</sup> *Id.* at 706.

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

Amendment.<sup>97</sup> Thus, like *Sidener*, Traynor's *Gospel Army* should be classified as restrained in Posner's terms, not activist.

Similarly, Traynor's social welfare opinions evidence Posner-style restraint. First, in one of his earliest opinions, *Alameda County v. Janssen*,<sup>98</sup> Traynor examined the constitutionality of California's Welfare and Institutions Code, which authorized "releases of liens held against real estate belonging to the needy aged."<sup>99</sup> Traynor upheld the legislation, deeming it "clearly justified in its belief that the release of liens held against the property of indigent recipients of aid is for the general public welfare."<sup>100</sup>

Traynor's last opinion,<sup>101</sup> his dissent in *Goytia v. Workmen's Compensation Appeals Board*,<sup>102</sup> also shows a restrained approach to constitutional decisionmaking. The majority in *Goytia* reviewed a decision of the Workmen's Compensation Appeals Board that reduced a permanent disability award, which it eventually annulled,<sup>103</sup> holding that "potential future earnings should have been considered in determining earning capacity."<sup>104</sup> Traynor, however, "would have the court defer to the branch of the government charged with administering a social program."<sup>105</sup> As Elizabeth Roth notes, "[u]nderlying his opinion is the view that the court's supervisory powers have been overexercised."<sup>106</sup> Taken together, neither *Janssen* nor *Goytia* qualify as activist under Posner's definition.

Moreover, although, as discussed below, Traynor's free speech opinions generally represent an activist approach, several exude judicial restraint in Posner's sense — in particular, Traynor's opinion in *In re Bell*,<sup>107</sup> which held as valid in part and invalid in part a county's anti-picketing ordinance,

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<sup>97</sup> *Id.* at 711–13.

<sup>98</sup> 106 P.2d 11 (Cal. 1940).

<sup>99</sup> Elizabeth Roth, *The Two Voices of Roger Traynor*, 27 AM. J. LEGAL HIST. 269, 274–75 (1983) (citing *Janssen*, 106 P.2d at 14).

<sup>100</sup> *Janssen*, 106 P.2d at 15, 16. For a more detailed discussion on the decision, see Roth, *supra* note 99, at 274–76.

<sup>101</sup> Roth, *supra* note 99, at 286.

<sup>102</sup> 464 P.2d 47, 53 (Cal. 1970) (Traynor, C.J., dissenting).

<sup>103</sup> See *id.* at 48 (majority opinion).

<sup>104</sup> Roth, *supra* note 99, at 286.

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

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

<sup>107</sup> 122 P.2d 22, 27–28 (Cal. 1942).

and his opinion in *Payroll Guarantee Association v. Board of Education*,<sup>108</sup> which held valid a California statute that limited school building availability for community activities. Further, one of Traynor's last opinions, *In re Bushman*,<sup>109</sup> upheld the constitutionality of California Penal Code section 415, which made it a misdemeanor to "maliciously and willfully disturb[] the peace or quiet of any . . . person . . . by tumultuous or offensive conduct."<sup>110</sup> Traynor, writing for the Court, found that "[s]ection 415 [was] not unconstitutionally vague and overbroad" and that it "assures that conduct protected by the First Amendment's guarantee of freedom of speech is not made criminal."<sup>111</sup> Taken together, these opinions, in that they upheld or upheld in part various statutes or ordinances, represent Posner's judicial restraint, not his judicial activism.

## 2. Justice Traynor's Activist Jurisprudence

Despite this generally restrained approach, Justice Traynor believed that courts had "an 'active responsibility in the safeguard of those civil liberties that are the sum and substance of citizenship.'"<sup>112</sup> This "active responsibility," perhaps what Judge Friendly calls a "sense for the 'right' result,"<sup>113</sup> surfaced in two major areas of Traynor's constitutional jurisprudence — racial discrimination and free speech — resulting in activist jurisprudence in Posner's view.

It was in the area of racial discrimination where Traynor was perhaps the most activist. In particular, Traynor felt "changes in public opinion on race discrimination have compelled reinterpretation of the fourteenth amendment, itself a product of violent social change."<sup>114</sup> By the 1950s, Traynor opined that it was "widely, if not universally, accepted that there is no rational basis in any law for race discrimination, that it is an *insidiously evil thing* that deprives the community of the best of all its people as it deprives individuals and groups to give of their best."<sup>115</sup> As noted, Traynor's

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<sup>108</sup> 163 P.2d 433, 434–36 (Cal. 1945).

<sup>109</sup> 463 P.2d 727 (Cal. 1970).

<sup>110</sup> *Id.* at 729 n.1.

<sup>111</sup> *Id.* at 730–31.

<sup>112</sup> Traynor, *supra* note 85, at 241.

<sup>113</sup> Friendly, *supra* note 2, at 1040.

<sup>114</sup> Traynor, *supra* note 85, at 239.

<sup>115</sup> *Id.* at 237 (emphasis added).

opinion in *Perez*, which overturned California's anti-miscegenation law, can be characterized as activist in Posner's terms.

Several of Traynor's opinions on California's Alien Land Act can also be classified in this way. Justice Jesse Carter's *Takahashi v. Fish and Game Commission*<sup>116</sup> dissent, which Traynor joined, noted that "highly persuasive arguments may be made that the law . . . is aimed solely at Japanese in an obvious discrimination against a particular race," and would have overturned the statute on equal protection grounds.<sup>117</sup> Similarly, Traynor's joint concurrence in *Palermo v. Stockton Theatres, Inc.*<sup>118</sup> evidences an activist approach to racial discrimination issues. There, Traynor argued that California's prohibition on aliens' owning land was "clearly unconstitutional, and should, therefore, be stricken down."<sup>119</sup> Specifically, "[i]f the state could prohibit aliens ineligible to citizenship from owning or leasing property it would thereby effectively prevent such persons from conducting ordinary industrial or business enterprises," which would "impose upon the alien ineligible to citizenship an economic status inferior to all others earning a living in the state" that "cannot be sustained under the Fourteenth Amendment."<sup>120</sup> Lastly, in *Sei Fujii v. California*, Traynor concurred with Chief Justice Gibson's opinion that held the Alien Land Law invalid under the Fourteenth Amendment, as it was "obviously designed and administered as an instrument for effectuating racial discrimination," and served no "legitimate interest[] of the state."<sup>121</sup>

Similarly, several of Traynor's free speech opinions warrant an activist characterization. In *First Unitarian Church of Los Angeles v. County of Los Angeles*,<sup>122</sup> Traynor, dissenting, took an activist approach in reviewing the constitutionality of section 19 of article XX of the California Constitution and section 32 of the Revenue and Taxation Code.<sup>123</sup> Although the

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<sup>116</sup> 185 P.2d 805 (Cal. 1947) (Traynor, J., concurring in dissent), *rev'd*, 334 U.S. 410.

<sup>117</sup> *Id.* at 821.

<sup>118</sup> 195 P.2d 1, 9 (Cal. 1948) (Traynor, J., concurring).

<sup>119</sup> *Id.* at 10.

<sup>120</sup> *Id.* at 9–10.

<sup>121</sup> 242 P.2d 617 (Cal. 1952).

<sup>122</sup> 311 P.2d 508, 522 (Traynor, J., dissenting), *rev'd*, 357 U.S. 545 (1958).

<sup>123</sup> Section 19 of article XX "denied a tax exemption to any organization 'advocating the overthrow of the Government of the United States or the State by force or violence or other unlawful means.'" Adrian A. Kragen, *In Memoriam: Roger J. Traynor*,

majority held that free speech under the First Amendment was not an absolute right, and that “the prevention of subversion was an appropriate basis for restricting free speech,” Traynor argued that “[s]ection 19 of article XX of the California Constitution and section 32 of the Revenue and Taxation Code unjustifiably restrict[ed] free speech.”<sup>124</sup> For Traynor, “[t]he majority opinion [went] far beyond any United States Supreme Court decision in upholding legislation that restricts the citizen’s right to speak freely. Section 19 of article XX, implemented by section 32 . . . , arbitrarily assumes that those who seek tax exemptions advocate overthrow of the government unless they declare otherwise.”<sup>125</sup> Thus, for Traynor, a “law with such consequences cannot stand in the face of the constitutional guarantees.”<sup>126</sup>

Traynor’s opinion in *Danskin v. San Diego Unified*<sup>127</sup> was likewise activist in Posner’s terms. In that “landmark case” that “further solidified the rights of free speech and assembly for political dissenters,”<sup>128</sup> Traynor invalidated a California statute that required “school boards [to] allow free use of school auditoriums for public meetings but prohibited use by organizations seeking forcible overthrow of the government.”<sup>129</sup> Writing for the court, as Chief Justice Donald Wright noted, Traynor found that “[i]t is true that the state need not open the doors of a school building as a forum and may at any time choose to close them. Once it opens the doors, however, it cannot demand tickets of admission in the form of convictions and affiliations that it deems acceptable.”<sup>130</sup> Thus, “[s]ince the state cannot compel ‘subversive elements’ directly to renounce their convictions and

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*Chief Justice Traynor and the Law of Taxation*, 35 HASTINGS L.J. 801, 811 (1984) (quoting CAL. CONST. art. XX, § 19 (West 1954) (repealed 1976 and exact language reenacted at CAL. CONST. art. VII, § 9 (West Supp. 1984))). Section 32 “implemented section 19 by requiring any organization applying for a tax exemption to declare that it did not advocate violent overthrow of the government.” *Id.* (citing CAL. REV. & TAX CODE § 32 (West 1970)).

<sup>124</sup> *First Unitarian*, 311 P.2d at 522 (Traynor, J., dissenting).

<sup>125</sup> *Id.* at 527.

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

<sup>127</sup> 171 P.2d 885 (Cal. 1946).

<sup>128</sup> Wright, *supra* note 81, at 1269.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 1270 (quoting *Danskin*, 171 P.3d at 892) (internal quotation marks omitted).

affiliations, it cannot make such a renunciation a condition of receiving the privilege of free assembly in a school building.”<sup>131</sup>

Taken together, Traynor’s opinions in *First Unitarian* and *Danskin* show an activist approach, as he invalidated statutes as violative of freedom of speech protections in both cases. These opinions, together with his racial discrimination jurisprudence and his “judicial deference to legislation in all other areas,”<sup>132</sup> demonstrate that Traynor’s constitutional jurisprudence contains aspects of both an activist and a restrained jurist.

### C. JUDGE POSNER REVISITED: JUSTICE TRAYNOR’S PLACE ON THE ACTIVIST/RESTRAINED SPECTRUM

How then, should Justice Traynor be classified, if one were to classify him in Judge Posner’s activist/restrained terms? He was not an activist in Ben Field’s sense, nor was he purely activist as Posner conceives the word. And although Posner classifies other “great pragmatic judges and Justices,” he does not expressly classify Traynor in activist/restrained terms. Rather, he implicitly labels Traynor an activist judge in discussing judicial pragmatism, first, by quoting Field on Traynor’s judicial decisionmaking method:

Traynor’s landmark decisions diverged from legal convention not only in their results, but in their method. Unlike earlier *judicial activists* who couched their innovations in conventional language, Traynor announced explicitly that he was making public policy. His innovative decisions relied little on precedent. They consisted mainly of policy analysis, and they often drew criticism in the dissents of other California Supreme Court justices for that reason. Traynor’s innovative opinions often referred to untraditional sources, such as academic writings and policy-oriented studies. He believed that modern times demanded judicial creativity and that modern advances in the social sciences would assist the judge in this task.<sup>133</sup>

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<sup>131</sup> *Danskin*, 171 P.2d at 891.

<sup>132</sup> *McCall*, *supra* note 80, at 1251.

<sup>133</sup> Posner, *The Rise and Fall*, *supra* note 5, at 540 (quoting FIELD, *supra* note 6, at 121) (emphasis added).

Second, in *The Rise and Fall of Judicial Self-Restraint*, Posner refers to “the distinguished *pragmatic activist* Roger Traynor.”<sup>134</sup> The following sub-part suggests that Traynor, like Justice Holmes, should be classified as a “mixed” activist/restrained jurists, not simply as an activist.

A comparison of Traynor’s constitutional jurisprudence and Posner’s example of Holmes, whom he classifies as “mixed” activist/restrained, illustrates why Traynor should be classified in this way. As Posner points out, “Holmes’s opinions on the Supreme Judicial Court of Massachusetts upholding the rights of unions, and his later, more famous opinions for the United States Supreme Court dissenting from decisions that invalidated social-welfare legislation on ‘liberty of contract’ grounds, are generally thought to be the apogee of judicial self-restraint.”<sup>135</sup> One of these “more famous opinions” is his dissent in *Lochner v. New York*,<sup>136</sup> which typifies Holmes’s deference to legislatures, as the opening lines of that opinion indicate:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. *But I do not conceive that to be my duty*, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract.<sup>137</sup>

Ursin further demonstrates Holmes’s constitutional deference, quoting Holmes’s earlier essay, *The Path of the Law*.<sup>138</sup> As Ursin notes, Holmes had “suspected that the fear of socialism had influenced judicial action,” and “took aim at “people who no longer hoped to control the legislatures and looked to the courts as expounders of the Constitutions,’ warning that

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<sup>134</sup> *Id.* at 554 (emphasis added).

<sup>135</sup> *Id.* at 526 (footnotes omitted).

<sup>136</sup> 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

<sup>137</sup> *Id.* (emphasis added).

<sup>138</sup> See Ursin, *supra* note 1, at 1292.

'new principles have been discovered outside the bodies of those Constitutions, which may be generalized into acceptance of economic doctrines which prevailed about fifty years ago.'"<sup>139</sup> In particular, "Holmes . . . urged judges to 'hesitate' before 'taking sides upon debatable and often burning questions.'"<sup>140</sup>

Compare Holmes's constitutional deference to Traynor's warning that judges "must necessarily keep their dispassionate distance from that ball of fire that is the living law."<sup>141</sup> Remember too that Traynor's opinions in *Sidener*, *Gospel Army*, *Janssen*, *Goytia*, *In re Bell*, *Payroll Guarantee*, *In re Bushman* can all be characterized as restrained in Posner's terms, just as Holmes's dissent in *Lochner*. Consider, in conclusion, Traynor's words in *Sidener*: "It is not [the judiciary's] concern whether the Legislature has adopted what we might think to be the wisest and most suitable means of accomplishing its objects"<sup>142</sup> and Holmes's in *Lochner*: "I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law."<sup>143</sup>

Despite Holmes's belief that "courts [generally] ought to be deferring to the other branches of government," he carved out several exceptions.<sup>144</sup> As Posner writes, Holmes "was far from uniformly restrained in constitutional cases."<sup>145</sup> According to Posner, Holmes invalidated "government actions [he] found abhorrent."<sup>146</sup> As examples, Posner cites "Holmes's activist dissent in *Abrams*,"<sup>147</sup> which "combined Holmes's conception of Social Darwinism and the "competitive struggle in the intellectual marketplace,"

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<sup>139</sup> *Id.* at 1292 (quoting Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 467–68 (1897)) (internal quotation marks omitted).

<sup>140</sup> *Id.* (quoting Holmes, *supra* note 143, at 468).

<sup>141</sup> *Id.* at 1312 (quoting Traynor, *supra* note 24, at 237) (footnotes omitted) (internal quotation marks omitted).

<sup>142</sup> *Sidener*, 375 P.2d at 653 (quoting State v. Industrial Accident Comm'n, 310 P.2d 7 (Cal. 1957)) (internal quotation marks omitted).

<sup>143</sup> *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

<sup>144</sup> See Posner, *The Meaning of Judicial Self-Restraint*, *supra* note 5, at 18.

<sup>145</sup> Posner, *The Rise and Fall*, *supra* note 5, at 526–27 (footnote omitted).

<sup>146</sup> *Id.* at 527.

<sup>147</sup> *Id.* at 543 (citing *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting)).

and his “activist dissent in *Olmstead*.<sup>148</sup> Similarly, “Holmes was not necessarily inconsistent in wanting to restrict government regulation of speech and the press more than the courts were doing and regulation of wages and hours less,” as “the language and history of the first amendment . . . created an open area in which a belief in a Darwinian struggle for survival among competing ideas could be made law, without usurpation.”<sup>149</sup>

Like Holmes’s activist opinions in *Abrams* and *Olmstead*, as well as his activist approach to free speech jurisprudence, Traynor too, in the areas of racial discrimination and free speech, had specific areas of law in which he was particularly activist. Just as Holmes’s belief in the Social Darwinism and the marketplace of ideas “infused” his First Amendment opinions,<sup>150</sup> so too did Traynor’s abhorrence for the “insidious evil” of racial discrimination result in activist opinions in *Perez*, *Takahashi*, and *Palermo*. Likewise, Traynor’s protection of free speech in *First Unitarian* and *Danskin* resulted in opinions that can be classified as activist.

Thus, as both Holmes’s and Traynor’s constitutional jurisprudence contain restrained and activist strains, and as Posner classifies Holmes as a “mixed” activist/restrained jurist, so too should Traynor be classified as “mixed” activist/restrained. Traynor’s general deference in constitutional law, as evidenced by his opinion in *Sidener*, among others, compares readily to Holmes’s restrained *Lochner* dissent. And just as Holmes penned activist opinions in free speech areas and in *Abrams* and *Olmstead*, so too did Traynor invalidate statutes in select areas: racial discrimination and free speech. Thus, rather than being considered an activist or pragmatic activist, in Posner’s view, Traynor should be characterized as “mixed” activist/restrained.

## V. CONCLUSION

Under Judge Posner’s conception of judicial activism, Ben Field’s conclusion that Justice Traynor was an activist judge is unsupported. Of the cases Field reviewed, only one — *Perez* — falls under Posner’s definition of activist. Traynor’s opinions in *De Burgh*, *Cahan*, *Escola*, and *Greenman* do not.

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<sup>148</sup> *Id.* at 543–44.

<sup>149</sup> Posner, *The Meaning of Judicial Self-Restraint*, *supra* note 5, at 18–19.

<sup>150</sup> *Id.* at 23.

But does a revisiting of Traynor's constitutional jurisprudence nevertheless warrant an activist characterization? A survey of his constitutional opinions shows that like Holmes, Traynor maintained a general deference to the legislature — a restrained view in Posner's terms. In specific areas, however, Traynor's jurisprudence is clearly activist. *Perez*, among other racial discrimination opinions, indicates Traynor's disgust with this "insidiously evil thing." Likewise, Traynor's free speech opinions show a willingness to invalidate statutes and ordinances he felt violated free speech guarantees. Is this enough to warrant an activist classification? Posner's classification of Holmes suggests not. Similar to Traynor, Holmes generally cautioned deference in constitutional law, illustrated most eloquently by his *Lochner* dissent. However, as Posner notes, Holmes was unequivocally activist in his free speech jurisprudence, among others. Thus, just as Posner classified Holmes as a "mixed" activist/restrained judge, so too should he classify Traynor.

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# THE INFLUENCE OF JUSTICE TRAYNOR'S APPROACH TO STATUTORY INTERPRETATION ON MODERN AMERICAN LAW

MARISSA C. MARXEN\*

## I. INTRODUCTION

With the recent “statutorification” of American law, a judge’s approach to statutory interpretation has become increasingly important. Each judge’s approach can determine the outcome of his or her decision, and many judges use differing approaches. Naturally, the approach adopted by an influential judge, like Chief Justice Roger Traynor, whose widely adopted opinions changed the course of law, has the potential to influence the law of the entire nation.

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She wishes to dedicate this paper to her father, Jeffrey L. Marxen, M.D., who died during her first year of law school and always supported her educational endeavors. Additionally, she wishes to thank Professor Michael B. Rappaport of the University of San Diego School of Law for making Legislation and Administrative Law interesting enough to inspire this paper.

## II. THE IMPORTANCE OF STATUTORY INTERPRETATION

Statutory interpretation plays an important role in assuring the separation of powers essential to the proper functioning of our government. As James Madison opined, “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place oblige it to control itself.”<sup>1</sup> The Founding Fathers obliged the government to control itself by creating a system of government based upon the separation of powers. Article I allows the legislature, consisting of the House of Representatives and the Senate, to make the law; article II vests the executive branch with the power to execute the laws; and article III empowers the judiciary to interpret and apply the laws created by the legislature.<sup>2</sup> Frequently, this interpretation involves interpreting the statutes and laws created by Congress.

Today, statutes, not common law, constitute the main source of modern American law.<sup>3</sup> As a result, the judiciary’s interpretive role assumes great importance in “the ‘hard cases’ not clearly answered by the statutory language” because the court must apply and interpret the statutes enacted by Congress while simultaneously refraining from usurping the legislature’s lawmaking power.<sup>4</sup> Thus, “any conflict between the legislative will and the judicial will must be resolved in favor of the former.”<sup>5</sup> Accordingly, “statutory interpretation is not ‘an opportunity for a judge to use words as empty vessels into which he can pour anything he will.’”<sup>6</sup> Rather, a judge must show deference to the legislature and its lawmaking power when interpreting statutes.

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<sup>1</sup> The Federalist No. 51 (1787) (James Madison).

<sup>2</sup> U.S. CONST. ARTICLES I–III.

<sup>3</sup> WILLIAM N. ESKRIDGE, JR. & PHILIP R. FRICKY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 669 (3rd ed. 2001).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* (citing REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 8 (1975)).

<sup>6</sup> *Id.* (quoting Frankfurter, J.) (internal citation omitted).

### III. THEORIES OF STATUTORY INTERPRETATION

“Three different theoretical approaches have dominated the history of American judicial practice. . . .”<sup>7</sup> Each approach rests upon “different versions of the role of the interpreter and the nature of our constitutional system.”<sup>8</sup>

The first approach, *intentionalism*, mandates that the interpreter identify and then follow the *original intent* of the statute’s drafters.<sup>9</sup> Intentionalists look first to statutory language but also “attempt to discern the legislature’s intent by perusing all available sources, including, principally, legislative history.”<sup>10</sup> Supporters of this approach, including Supreme Court Justice Stephen Breyer and former Supreme Court Chief Justice William Rehnquist, “argue that it supports the separation of powers expressed in the Constitution” because “[t]he legislative branch, not the judiciary, has the constitutional power to legislate,” and “in order to avoid ‘making law,’ courts should strive to carry out the legislature’s intent.”<sup>11</sup> Thus, “[i]ntentionalists view themselves as agents of the legislature that enacted the statute, who must avoid imposing their own preferences rather than furthering the choices of the legislature.”<sup>12</sup> Some notable criticisms of intentionalism include arguments that “the intent of a legislative body cannot be ascertained from anything less than the language of the statute approved by that body”; “judges can manipulate legislative history to support their own interpretation”; “in any major piece of legislation, the legislative history is extensive, and there is something for everyone”;<sup>13</sup> and finally, because the legislative history is neither approved by a legislature nor the executive, resort to legislative intent undermines the legislative process required by state and federal constitutions: “approval by the legislatures and presentation to the executive for approval or veto.”<sup>14</sup>

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<sup>7</sup> *Id.* at 670.

<sup>8</sup> *Id.*

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

<sup>10</sup> LINDA D. JELLUM & DAVID CHARLES HRICIK, MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES 97 (2006).

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

<sup>12</sup> *Id.* at 97–98.

<sup>13</sup> ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 36 (1997) (“As Judge Harold Leventhal used to say, the trick is to look over the heads of the crowd and pick out your friends.”).

<sup>14</sup> JELLUM & HRICIK, *supra* note 10, at 98.

The second approach, *purposivism*, dictates that the interpreter choose “the interpretation that best carries out *the statute’s purpose*.<sup>15</sup> Thus, this approach “focuses on the broad goals of a statute, on the problem the legislatures meant to address by passing the statute.”<sup>16</sup> Purposivism differs from the other theories in that it “allows courts to seek meaning from the broadest number of sources to make a more informed decision.”<sup>17</sup> Hence, “[i]t urges the court to consider *all* of the relevant evidence bearing on the meaning of the language at issue because the underlying premise is that the more such evidence the court considers, the more likely it is that the court will arrive at a proper conclusion regarding that meaning.”

The third approach, *textualism*, requires the interpreter to follow *the plain meaning* of the statute’s text.<sup>18</sup> As a result, “[t]extualists look to the text to find ‘a sort of objectified’ intent — the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.<sup>19</sup> This approach stems from a strict view of separation of powers, which believes that if the language of a statute is clear, courts must interpret the statute according to the language only, because “if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it.”<sup>20</sup> Thus, in order to adhere to the separation of powers dictated by the Constitution, the judiciary must not look to the intent of the legislature but only the meaning of the law enacted.<sup>21</sup> Accordingly, this approach “examines the fewest sources” looking only “at the text at issue and also the language of other statutes” but neither the legislative history nor the purpose for the statute.<sup>22</sup> Textualists believe “that by holding Congress to its words, they ensure that only language actually enacted will be given the force of law and, further, that they will not engage in legislating, which is, they believe, the exclusive province of Congress.”<sup>23</sup>

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<sup>15</sup> ESKRIDGE & FRICKEY, *supra* note 3, at 670.

<sup>16</sup> JELLUM & HRICIK, *supra* note 10, at 99.

<sup>17</sup> *Id.* at 100.

<sup>18</sup> ESKRIDGE & FRICKEY, *supra* note 3, at 670.

<sup>19</sup> JELLUM & HRICIK, *supra* note 10, at 95.

<sup>20</sup> Conroy v. Aniskoff, 507 U.S. 511, 528 (1993) (Scalia, J., concurring).

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

<sup>22</sup> JELLUM & HRICIK, *supra* note 10, at 95.

<sup>23</sup> *Id.*

Finally, a more recent approach, *dynamic interpretation*, advanced by William Eskridge, Jr., encourages courts to interpret statutes dynamically.<sup>24</sup> Eskridge notes that if judges interpret the Constitution in light of its text, historical background, subsequent interpretational history, related constitutional facts, and current social facts and the common law in light of the text of precedents, their historical context, subsequent history, related legal developments, and societal context, then why do most judges only consider the text and historical context of statutes?<sup>25</sup> Eskridge contends that statutes, like the Constitution and common law, should “be interpreted ‘dynamically,’ that is, in light of their present societal, political, and legal context.”<sup>26</sup> The aforementioned three prevalent approaches to statutory interpretation “treat statutes as static texts,” examining the intent of the legislature at the time the statute was enacted,<sup>27</sup> and therefore, assuming “that the legislature fixes the meaning of a statute on the date the statute is enacted.”<sup>28</sup> Eskridge notes, however, that “[a]s society changes, adapts to the statute, and generates new variations of the problem which gave rise to the statute, the unanticipated gaps and ambiguities proliferate” and “the legal and constitutional context of the statute may change,” so the intent of the legislature must adapt to the changes of the times.<sup>29</sup>

Generally, “state courts have been more likely to resolve issues of statutory interpretation by construing the apparent meaning of the statutory language — without *any* examination of the statute’s purpose or legislative history,” seemingly utilizing a textualist approach.<sup>30</sup> Beginning in the post-World War II era, however, California “often eschewed a plain meaning

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<sup>24</sup> William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

<sup>25</sup> *Id.* at 1479.

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

<sup>27</sup> Intentionalists would ask how the legislature “would have intended the question to be answered had it thought about the issue when it passed the statute,” while purposivists would ask which approach “furthers the purposes the legislature had in mind when it enacted the statute.” *Id.*

<sup>28</sup> *Id.* at 1479–80.

<sup>29</sup> *Id.* at 1480–98.

<sup>30</sup> ESKRIDGE & FRICKEY, *supra* note 3, at 741 (noting that some surmise this is due to “the dearth of legislative history materials available for state statutes and a more restrained methodology practiced by many state judges”).

approach.”<sup>31</sup> The California Supreme Court began its now prevalent habit of using “a contextual approach to interpret legislation broadly to promote liberal social policy and fairness.”<sup>32</sup> However, this notwithstanding, “statements by ordinary legislators are rarely given much, if any, weight.”<sup>33</sup>

#### IV. THE INFLUENCE OF JUSTICE TRAYNOR

In 1940, Traynor’s appointment to the California Supreme Court occurred at a time when “the lawmaking role of courts was very much in dispute” due to the recent end of the *Lochner* era.<sup>34</sup> His appointment to the bench marked the turn of a new direction for the Court. By the late 1950s, Traynor had become so influential at the California Supreme Court that his views prevailed among the justices, leading the Court to become “the leading supreme court in the nation.”<sup>35</sup>

In 1964, twenty-four years after his appointment as an associate justice, Traynor became chief justice of California. Traynor wrote over 900 opinions during his time on the bench, many of which became landmark decisions adopted by other states, influencing the course of the law.<sup>36</sup> In total, the California Supreme Court produced sixteen decisions followed at least three times by out-of-state courts during Traynor’s tenure on the Court (although admittedly most of these decisions involve tort liability rather than statutory interpretation).<sup>37</sup>

Given how widely followed his decisions were, Traynor’s method of statutory interpretation, which embodies his style of judicial lawmaking and invariably influenced those widely-followed decisions, created law.

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<sup>31</sup> *Id.* (citing *People v. Hallner*, 277 P.2d 393 (Cal. 1954); *McKeag v. Board of Pension Comm’rs of Los Angeles*, 132 P.2d 198 (Cal. 1942)).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 997 (citing *Quelimane Co. v. Stewart Title Guar. Co.*, 960 P.2d 513 (Cal. 1998)).

<sup>34</sup> Edmund Ursin, *How Great Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial Lawmaking*, 57 BUFF. L. REV. 1267, 1290 (2009).

<sup>35</sup> *Id.* at 1276 (citing Jake Dear & Edward W. Jessen, “Followed Rates” and the Leading State Cases, 1940–2005, 41 U.C. DAVIS L. REV. 683, 683, 710 (2007) (noting that “five of the six *most* followed of the ‘most followed’ are tort decisions rendered since 1960”)).

<sup>36</sup> John W. Poulous, *The Judicial Philosophy of Roger Traynor*, 46 HASTINGS L.J. 1643, 1645 (1995).

<sup>37</sup> Jake Dear & Edward W. Jessen, *supra* note 35, at 702.

Through the subsequent adoption of those decisions throughout the country, his method of statutory interpretation impacted the nation.

## V. JUSTICE TRAYNOR'S VIEWS ON JUDICIAL DEFERENCE TO THE LEGISLATURE

As a highly influential judge authoring widely adopted opinions, Traynor's approach to statutory interpretation, which naturally influenced those opinions, is of great importance due to its ability to influence the law when referred to, approved of by, or adopted by other state courts throughout the country.

### A. HISTORICAL CONTEXT OF VIEWS ON STATUTORY INTERPRETATION DURING AND FOLLOWING THE TRAYNOR ERA

Traynor's extrajudicial and judicial writings achieved prominence during the 1950s, when the legal process school, led by Henry Hart and Albert Sacks, displaced formalism and legal realism as the dominant modes of legal thought.<sup>38</sup> Throughout the late 1950s and 1960s, Hart and Sacks used their prominence to dominate and innovate in the field of statutory interpretation, beginning with their book *The Legal Process*, published in 1958.<sup>39</sup>

Hart and Sacks supported a purposivist approach to statutory interpretation.<sup>40</sup> They believed courts possessed the ability to correct mistakes in the text of a statute "when it is completely clear from the context that a mistake has been made," so long as they do not subvert "the legislative process and all other processes which depend on the integrity of the language."<sup>41</sup> Professor Hart "cautioned that law — particularly statutory law, which takes the form of general and prospective directives — is inherently incomplete."<sup>42</sup> Thus, in the absence of a clear directive addressing specific

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<sup>38</sup> Ursin, *supra* note 34, at 1300.

<sup>39</sup> ESKRIDGE & FRICKEY, *supra* note 3, at 699.

<sup>40</sup> *Id.* at 699–700; see also Miranda McGowan, *Do As I Do, Not As I Say: An Empirical Investigation of Justice Scalia's Ordinary Meaning Method of Statutory Interpretation*, 78 Miss. L.J. 129, 136 (2008) ("Henry M. Hart explains that law is 'a purposive activity, a continuous striving to solve the basic problems of social living.'").

<sup>41</sup> *Id.* at 704–05 (citing *The Legal Process* 1375 (1994 ed.)).

<sup>42</sup> McGowan, *supra* note 40, at 136.

problems, Hart and Sacks “believed that officials should fill gaps or resolve ambiguities through “reasoned elaboration.”<sup>43</sup> For Hart and Sacks, reasoned elaboration meant elaborating “the arrangement [e.g., the statute, regulation, or precedent] in a way which is consistent with the other established applications of it and in a way that best serves the principles and policies it expresses,” rather than construing a statute in light of one’s own personal policy preferences.<sup>44</sup>

The purposivist approach of Hart and Sacks assumes that “[e]very statute must be conclusively presumed to be a purposive act.”<sup>45</sup> Thus, courts must “[d]ecide what purpose ought to be attributed to a statute,” and “interpret the words of the statute immediately in question so as to carry out the purpose as best it can.”<sup>46</sup> Because Hart and Sacks’ approach,<sup>47</sup> as compared to other purposivist approaches, was a text-based approach, they believed the “words of a statute guide and restrain interpretation in two ways.”<sup>48</sup> First, the “text illuminates plausible statutory purposes.”<sup>49</sup> Second, the statutory text “constrains the range of statutory interpretations.”<sup>50</sup> Although Hart and Sacks advised referring to a wide range of materials

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

<sup>44</sup> *Id.* (citing HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 147 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994)) (internal quotations omitted).

<sup>45</sup> *Id.* at 137.

<sup>46</sup> Hart & Sacks, *supra* note 44, at 1374.

<sup>47</sup> Hart and Sacks’ approach to statutory interpretation directs that, “[i]n interpreting a statute, a court should:

1. Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then
2. Interpret the words of the statute immediately in question so as to carry out the purpose as best it can, making sure, however, that it does not give the words either —
  - (a) a meaning they will not bear, or
  - (b) a meaning which would violate any established policy of clear statement.”

<sup>48</sup> See William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITTS. L. REV. 691, 693–700 (1987) (citing HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1200 (tentative ed. 1958)).

<sup>49</sup> McGowan, *supra* note 40, at 137.

<sup>50</sup> *Id.*

to “illuminate a statute’s context and purpose,” they also cautioned that interpreters must keep in mind that the legislature is the primary policy-making body and depends on the courts “to effectuate its policies,” thus, “contextual aids such as legislative history . . . help courts . . . shed light on the statute’s ‘general purpose.’”<sup>51</sup> Thus, Hart and Sacks, like Traynor, believed that the court and the legislature should be partners in lawmaking.<sup>52</sup>

Some scholars argue that Traynor’s views more closely aligned themselves with those of Hart and Sacks’ students and successors in the area of statutory interpretation, William Eskridge, Jr. and Philip Frickey. Eskridge and Frickey, however, wrote after Traynor’s time, during the 1980s until Frickey’s death in 2010 (although Eskridge continues to write on the matter). Eskridge and Frickey advanced the aforementioned dynamic theory of statutory interpretation, encouraging an interpretation of statutes which allows them to evolve in light of changed circumstances.<sup>53</sup> They argued that “statutory interpretation involves creative policymaking by judges and is not just the Court’s figuring out the answer that was put ‘in’ the statute by the enacting legislature,” but rather “is a dynamic process, and that the interpreter is inescapably situated historically.”<sup>54</sup> This view is in accord with Traynor’s belief that it is not only appropriate, but desirable, for courts to examine statutes critically. Thus, Hart and Sacks, like Traynor, recognized a lawmaking role for courts but also encouraged deference to the legislature, particularly in the realm of constitutional law.

## B. TRAYNOR’S VIEWS ON STATUTORY INTERPRETATION

Regardless of whether one believes that judges should or should not consider policy, which may factor into *why* judicial lawmaking is good or bad, it is important to analyze *how* a judge who considers social policy relevant to judicial decision-making can constitutionally incorporate that policy

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

<sup>52</sup> *Id.* at 138.

<sup>53</sup> ESKRIDGE & FRICKEY, *supra* note 3, at 707.

<sup>54</sup> William N. Eskridge, Jr., *Statutory Interpretation As Practical Reasoning*, 42 STAN. L. REV. 321, 345 (1990) (citing Eskridge, *Supra* note 24, 1479 (“attacking the view that statutory interpretation is always a search for original legislative intent or purpose”); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988) (“attacking the view that statutory interpretation must focus only on the statutory text”)).

while making a decision where a relevant statute applies. Because Traynor believed that courts “must engage in ‘judicial elaboration’ when applying statutes to situations not anticipated by the drafters,”<sup>55</sup> many place Traynor within the dynamic interpretation approach to statutory interpretation.

Traynor believed courts must interpret statutes in accordance with legislative intent; however, in doing so, the role of the courts also includes making alterations to the statute in order to serve that legislative intent because the legislature lacks the ability to alter statutes to keep pace with the times. In some instances, this means a court’s interpretation may differ from that which might logically stem from the plain text of the statute. Thus, this interpretation may qualify as “legislating from the bench” because a judge is “rewriting a statute” or writing something into the statute that was not written, voted on, and enacted into law by the legislature. However, most would agree that Traynor’s decisions ultimately arrived at the right result. Further, to the extent that his decisions may include consideration of extratextual sources, he cannot be criticized for adopting the approach that best suits his needs, as his decisions interpreting statutes adopt a uniform approach, approving the consideration of as many sources as possible to arrive at the result in conformity with the legislature’s intent.

Because it is impossible to foresee the future and “legislatures are neither omnipresent nor omniscient,” Traynor urged courts to “expect our statutory laws to become increasingly pliable to creative judicial elaboration.”<sup>56</sup> He believed courts should apply statutes as the legislature wanted them applied because the legislature was incapable of amending statutes quickly enough to keep up with the needs of society. This appears to comply with Hart and Sacks’ approach of the time, urging courts to interpret statutes according to their purpose. Thus, Traynor advocated deference to the legislature; however, he felt it was up to the judiciary to interpret legislation in light of the needs of society, or as Justice Holmes would say, “the felt necessities of the time.”<sup>57</sup> As a result, Traynor looked down on

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<sup>55</sup> Poulous, *supra* note 36, at 1686, n.194 (citing Traynor, *supra* note 47, at 617–19).

<sup>56</sup> Roger J. Traynor, *Comment on Courts and Lawmaking, Legal Institutions Today and Tomorrow*, *LEGAL INSTITUTIONS TODAY AND TOMORROW* 60 (Monrad G. Paulsen ed., 1959).

<sup>57</sup> See OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., 1963).

all canons of statutory interpretation that deflect attention from legislative purpose.<sup>58</sup> At the same time, many of Traynor's decisions utilize both grammatical and substantive canons of interpretation such as the doctrine of *in pari material* or the whole act rule.

Despite the fact that Traynor "spent the first decade of his legal career specializing in tax law," a statute-oriented area of the law centered around the Internal Revenue Code and "far removed from the common law style that became his primary legacy," his views on statutory interpretation have received scant attention.<sup>59</sup> Those that have given this subject attention, argue that "[a]lthough Traynor hinted at a seemingly dynamic approach to statutory interpretation, perhaps a natural outgrowth of his creative common law bent, his judicial opinions hew closer to the legal process theories of that era and reflect a decidedly pragmatic cast."<sup>60</sup>

In *Perez v. Sharp*,<sup>61</sup> Traynor authored the opinion overturning a state law prohibiting miscegenation, making the Supreme Court of California the first state supreme court to abolish such laws. In *Perez*, the petitioners, Andrea Perez, a white female, and Sylvester Davis, an African American, sought a writ of mandamus compelling the County Clerk of Los Angeles to issue them a certificate of registry and a license to marry under Cal. Civ. Code, § 69, which provided: "no license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race."<sup>62</sup> Petitioners, members of the Roman Catholic Church, which "has no rule forbidding marriages between Negroes and Caucasians," contended that the statutes were unconstitutional on the grounds that they prohibited the free exercise of their religion and denied to them the right to participate fully in the sacraments of that religion.<sup>63</sup> At first glance, a strict textualist approach would appear to require a ruling upholding the prohibition.

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<sup>58</sup> See e.g., Traynor, *supra* note 56.

<sup>59</sup> Lars Noah, *Divining Regulatory Intent: The Place for A "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255, 278 (2000).

<sup>60</sup> *Id.* at 278–79.

<sup>61</sup> 198 P.2d 17 (Cal. 1948).

<sup>62</sup> *Perez*, 198 P.2d at 17–18 (noting that the relevant statute, Civil Code, section 69, which implemented Civil Code, section 60, provided: "All marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void.").

<sup>63</sup> *Id.* at 18.

Traynor first looked to the language of the statute and held that “[s]ection 69 of the Civil Code and section 60 on which it is based are therefore too vague and uncertain to be upheld as a valid regulation of the right to marry,” a fundamental right.<sup>64</sup> He concluded that “[e]nforcement of the statute would place upon the officials charged with its administration and upon the courts charged with reviewing the legality of such administration the task of determining the meaning of the statute.”<sup>65</sup> Traynor viewed this as an impossible feat due to the failure of the Legislature to supply conceptions of race classification because “[i]f no judicial certainty can be settled upon as to the meaning of a statute, the courts are not at liberty to supply one.”<sup>66</sup> In this respect, Traynor yielded to the lawmaking power of the Legislature by refusing to rewrite the statute. He also held that the statute violated “the equal protection of the laws clause of the United States Constitution by impairing the right of individuals to marry on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups.”<sup>67</sup>

While not explicitly stating he was doing so, Traynor, who spoke out against canons of statutory interpretation in his extrajudicial writings, appears to rely on the substantive canon of statutory interpretation that courts must interpret statutes to advance federal values, including clear statement rules and the advancement of fundamental rights, such as marriage.<sup>68</sup> He also appears to utilize the canon of constitutional avoidance, “which requires courts to construe statutes so as to avoid ruling on potential constitutional questions.”<sup>69</sup> However, he found no interpretation of the statute by which

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<sup>64</sup> *Id.* at 29.

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

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside – an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 940, (2013). While “[i]t is worth noting that clear statement rules have come under sustained attack as an improper exercise of judicial power or policymaking,” others, such as Scalia, note that “[t]he presumption is based on an assumption of what Congress, in our federal system, would or should normally desire.” *Id.* at 957, 1025, n.190 (2013).

<sup>69</sup> *Should the Supreme Court Presume That Congress Acts Constitutionally? The Role of the Canon of Avoidance and Reliance on Early Legislative Practice in Constitutional Interpretation*, 116 HARV. L. REV. 1798, 1799 (2003); see also Edward J. DeBartolo

infringement of the fundamental right of marriage could be avoided and no reasonable interpretation of the statute by which it could be construed as constitutional, and thus, had to strike down the statute.

Next, in order to support his conclusion that the statutes were unconstitutional, Traynor discussed previous amendments to the statutes.<sup>70</sup> He noted that, because states may validly regulate marriage, the fact that the law interfered with a religious right did not provide a *per se* invalidation under the First Amendment (observing that states could validly prevent the practice of bigamy, which is a part of some religions), so long as the law was “directed at a social evil and employs a reasonable means to prevent that evil.”<sup>71</sup> However, if the law was both discriminatory *and* irrational, “it unconstitutionally restricts not only religious liberty but the liberty to marry as well.”<sup>72</sup>

Traynor, in adherence to his legal pragmatism,<sup>73</sup> also considered policy in declaring the law unconstitutional. In terms of policy considerations

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Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). According to this canon, “when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction,” and one of those interpretations is reasonable, “the canon functions as a means of choosing between them,” requiring the court to choose the reasonable interpretation over the unreasonable interpretation, which may require reading a statute’s text in light of its purpose. See Clark v. Martinez, 543 U.S. 371, 385 (2005); see also Almendarez-Torres v. United States, 523 U.S. 224, 237 (1998) (“A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.”).

<sup>70</sup> Perez, 198 P.2d at 21–22.

<sup>71</sup> *Id.* at 18.

<sup>72</sup> *Id.* at 18.

<sup>73</sup> See Ursin, *supra* note 34, at 1314–15 (discussing how “Traynor’s combination of creativity and caution in the realm of statutory and constitutional interpretation resembles the views later articulated by” Judge Posner’s pragmatic jurisprudence, which in turn stemmed from Justice Oliver Wendell Holmes, Jr., and counseled deference to the legislature, but allowed judges, when deciding issues of moral or political nature, to issue an opinion on a constitutional matter based upon that judge’s intuitions of public policy); see also Linda E. Fisher, *Pragmatism Is As Pragmatism Does: Of Posner, Public Policy, and Empirical Reality*, 31 N.M. L. REV. 455, 468 (2001) (discussing how a “pragmatist judge considers stability of the legal system, legal tradition, and deference to other branches of government to be important legal virtues,” but will allow “the service of other social needs” to trump them, “according to notions of good policy”); see also Ursin, *supra* at 1315–16 (“Posner writes that an implication of his pragmatic jurisprudence is that ‘courts will tend to treat the Constitution and the common law, and to a

and fairness, in the absence of an emergency, states may not “base a law impairing fundamental rights of individuals on general assumptions as to traits of racial groups.”<sup>74</sup> Thus, Traynor concluded that “[a] state law prohibiting members of one race from marrying members of another race is not designed to meet a clear and present peril arising out of an emergency.”<sup>75</sup> Further, because the right to marry is an individual right, not a right of a racial group, “[b]y restricting the individual’s right to marry on the basis of race alone,” the statutes at issue violated the Equal Protection Clause of the United States Constitution.<sup>76</sup>

Traynor also examined the history of the legislation at issue as well as the arguments in support thereof, looking at similar statutes (utilizing the doctrine of *in pari materia*, requiring similar statutes to be interpreted in light of each other).<sup>77</sup> One of the justifications for the statute was that the races should not intermix because of the physical inferiority of certain races, but Traynor cited “statistics showing that there is a higher percentage of certain diseases among Caucasians than among non-Caucasians,” and that some diseases were even most prevalent among white persons.<sup>78</sup> While acknowledging that “[t]he Legislature is free to prohibit marriages that are socially dangerous because of the physical disabilities of the parties concerned,”<sup>79</sup> Traynor concluded that because the miscegenation statute condemned “certain races as unfit to marry with Caucasians on the premise of a hypothetical racial disability, regardless of the physical qualifications of the individuals concerned,” no compelling justification could be shown to sustain the discrimination under the statute against the strong presumption against discrimination in the face of the Equal Protection Clause.<sup>80</sup> In essence, Traynor, relying on social science data, used a purposivist approach to examine the purpose of the statute at the

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lesser extent bodies of statute law, as a kind of putty that can be used to fill embarrassing holes in the legal and political framework of society.”).

<sup>74</sup> *Perez*, 198 P.2d at 20.

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

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

<sup>77</sup> *Id.* at 21–22.

<sup>78</sup> *Id.* at 23, nn.3–4.

<sup>79</sup> *Id.* at 24 (citing Civ. Code §§ 79.01, 79.06).

<sup>80</sup> *Id.*

time it was enacted and noted that the statute as enacted could not accomplish its stated purpose.

Traynor also found the statute too vague to be upheld. He argued, “Even if a state could restrict the right to marry upon the basis of race alone, sections 60 and 69 of the Civil Code are nevertheless invalid because they are too vague and uncertain to constitute a valid regulation.”<sup>81</sup> When crafting a statute regulating a fundamental right, “[i]t is the duty of the lawmaking body in framing laws to express its intent in clear and plain language to the end that the people upon whom it is designed to operate may be able to understand the legislative will.”<sup>82</sup> Citizens may not be deprived of liberty for the violation of an uncertain and ambiguous law.<sup>83</sup> “An act is void where its language appears on its face to have a meaning, but it is impossible to give it any precise or intelligible application in the circumstances under which it was intended to operate.”<sup>84</sup> In the statute at issue, the Legislature referred to five races but failed to make provision for applying the statute to persons of mixed race, leading to a problem as to how to apply the statute to a person who had some, but not all, African-American ancestors.<sup>85</sup> If the statute were to apply to people of mixed race, how could the statute be applied?<sup>86</sup> Because the Legislature failed to define what makes one fall into a certain race, the application would lead to an absurd result by forcing the courts to determine whether a person falls into a certain race enumerated under the statute because of any trace of ancestry.<sup>87</sup>

Traynor again examined the Legislature’s purpose in creating the statute, determining that “[t]he apparent purpose of the statute is to discourage the birth of children of mixed ancestry within this state.”<sup>88</sup> He concluded, however, that the purpose could not be accomplished without considering

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<sup>81</sup> *Id.* at 27.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* (citing, *inter alia*, United States v. Cohen Grocery Co., 255 U.S. 81, 89–92 (1921); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1931); Connally v. General Construction Co., 269 U.S. 385, 391 (1926)).

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

<sup>85</sup> *Id.* at 28.

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

<sup>87</sup> *Id.*

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

persons born of mixed ancestry.<sup>89</sup> If a statute regulating fundamental rights cannot be reasonably applied to accomplish its purpose, it is unconstitutional.<sup>90</sup> He then reasoned, “This court therefore cannot determine the constitutionality of the statute in question on the assumption that its provisions might, with sufficient definiteness, be applied to persons not of mixed ancestry.”<sup>91</sup> If the classification of a person of mixed ancestry depends upon a given proportion of Mongolians or Malayans among his ancestors, how can this court, without clearly invading the province of the Legislature, determine what that decisive proportion is?<sup>92</sup> Thus, Traynor used the void for vagueness doctrine, which requires legislatures to enact reasonably clear guidelines, so that men of common intelligence are not “forced to guess at the meaning” of a criminal statute,<sup>93</sup> to conclude the statute failed to provide reasonable notice to men as to its enforcement, and was thus, unconstitutional and void.

Thus, in *Perez*, Traynor showed deference to the Legislature but, ultimately, struck down the statute at issue by using the void for vagueness doctrine; adopting a purposivist approach and looking to the purpose of the Legislature in enacting the statute, pointing out that the statute did not accomplish that purpose; and pointing out that the statute was unconstitutional. By not attacking the Legislature’s purpose in enacting the statute and supporting his decision striking the statute down by showing the statute could not accomplish the Legislature’s purpose, Traynor arrived at his result without infringing on the Legislature’s lawmaking power. Further, it is noteworthy that Traynor struck down the law using these “neutral” approaches without relying only upon notions of morality and personal policy preferences, inasmuch as Traynor himself felt the anti-miscegenation laws were evil.<sup>94</sup> Most importantly, Traynor’s *Perez*

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

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

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

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

<sup>93</sup> See e.g., *Smith v. Goguen*, 415 U.S. 566, 575–73 (1974) (“The doctrine incorporates notions of fair notice or warning, [requiring] legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent ‘arbitrary and discriminatory enforcement.’”).

<sup>94</sup> See Ursin, *supra* note 34, at 1315 (“Traynor’s holding in *Perez v. Sharp* that California’s anti-miscegenation legislation was unconstitutional reflected Traynor’s view of

opinion received resounding approval, commended by many as being far ahead of its time (nineteen years, to be exact) and was even cited by the U.S. Supreme Court decision declaring anti-miscegenation statutes unconstitutional in *Loving v. Virginia* (“The first state court to recognize that miscegenation statutes violate the Equal Protection Clause was the Supreme Court of California”).<sup>95</sup>

*People v. Knowles*<sup>96</sup> — disapproved on another ground in *People v. Beamon*,<sup>97</sup> and superseded by statute on another ground as stated in *People v. Tribble*,<sup>98</sup> nevertheless demonstrates “[t]he fullest expression” of Traynor’s views on the subject of statutory interpretation.<sup>99</sup> *Knowles* involved a statute criminalizing kidnapping. In holding that the statute allowed robbery to be punished under the statute, Traynor expressed his approval of relying on extrinsic aids when interpreting a statute.<sup>100</sup> He noted that courts may properly rely on “the history of the statute, the legislative debates, committee reports, statements to the voters on initiative and referendum measures,” but that the primary source in determining the purpose of the Legislature must be the words of the statute.<sup>101</sup>

In *Knowles*, the defendant contended that for armed robbery, the crime of which he was convicted, Penal Code section 209 cannot be construed to apply to the crime of robbery because the statute “applies only to orthodox kidnapping for ransom or robbery, not to the detention of the victim during the commission of armed robbery.”<sup>102</sup> Traynor rejected this interpretation by analyzing the language of the statute, history of the statute (including relevant amendments), plain meaning of words in the statute, intent of the Legislature, purpose of the statute, similar federal statutes, and other cases

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the ‘insidiously evil thing’ of racial discrimination and qualifies as an application of an ‘outrage jurisprudence.’); see also BEN FIELD, ACTIVISM IN PURSUIT OF THE PUBLIC INTEREST: THE JURISPRUDENCE OF CHIEF JUSTICE ROGER J. TRAYNOR 44 (2003) (pointing out that it was “paradoxical that Traynor used such a conventional method of analysis to reach such innovative results.”).

<sup>95</sup> 388 U.S. 1, 7, n.5 (1967).

<sup>96</sup> 217 P.2d 1, 2–19 (Cal. 1950).

<sup>97</sup> 504 P.2d 905, 914, n.9 (Cal. 1973).

<sup>98</sup> 484 P.2d 589, 592 (Cal. 1971).

<sup>99</sup> Lars Noah, *supra* note 59, at 278–79.

<sup>100</sup> *Knowles*, 217 P.2d at 5–6 (Cal. 1950).

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

<sup>102</sup> *Id.* at 2.

decided under the statute.<sup>103</sup> Traynor concluded that the defendant's "interpretation of section 209 finds no support in its language or legislative history; it could not be sanctioned without a *pro tanto* repeal by judicial fiat."<sup>104</sup>

First, Traynor analyzed the language of the statute, which he quoted as follows: "Every person who seizes, confines . . . or who holds or detains [any] individual . . . to commit extortion or robbery . . . is guilty of a felony."<sup>105</sup> Traynor noted that, first, even the defendant conceded that the ordinary interpretation of the language did not support his argument, and second, under the language of the statute, "one accused of armed robbery who has inflicted bodily harm on the victim, can be charged with a capital offense."<sup>106</sup> Although in his common law opinions, Traynor might have allowed considerations of policy and justice to lead to a different conclusion, in this statutorily controlled case, Traynor contended:

Reasonable men may regard the statute as unduly harsh and therefore unwise; *if they do, they should address their doubts to the Legislature.* It is not for the courts to nullify a statute merely because it may be unwise. '*We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take this statute as we find it.*'<sup>107</sup>

Thus, Traynor shows substantial deference to the Legislature, by adhering to the statute and its purpose, despite the fact that he finds that the statute could be "unduly harsh."

In analyzing the text of the statute, Traynor examined the plain meaning of the words of the statute, finding the conduct at issue applicable to those words. In *Knowles*, the defendant and his accomplice restrained a person in his stockroom for fifteen to twenty minutes and inflicted bodily

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<sup>103</sup> *Id.* at 2–9; *but see, id.* at 18 (Edmonds, J., dissenting, arguing that "the grammatical construction and language of the statute, the legislative history and development of section 209, and the legislative intent as derived from the history and circumstances surrounding the enactment of the 1933 amendment clearly show that one can commit robbery without also being guilty of kidnaping.").

<sup>104</sup> *Id.* at 2.

<sup>105</sup> *Id.* at 7 (bracketing by Traynor).

<sup>106</sup> *Id.* at 3.

<sup>107</sup> *Id.* at 3–4 (quoting Cardozo, J., in *Anderson v. Wilson*, 289 U.S. 20, 27 (1933) (emphasis added)).

harm on that person during the detention while the accomplice “rifled the cash register.”<sup>108</sup> Traynor looked to the plain meaning of the words of section 209, remarking that, “Webster’s New International Dictionary, Unabridged Edition (1943), defines ‘seize’ as ‘To take possession of by force,’ and ‘confine’ as ‘To restrain within limits; to limit; . . . to shut up; imprisonment; to put or keep in restraint . . . to keep from going out.’”<sup>109</sup> Under the plain meaning of the words of section 209, the defendant’s conduct of compelling the victim to enter a room at gunpoint and forcing him to remain in that room for fifteen to twenty minutes clearly fell within the scope of section 209.

Second, Traynor also used the history of the statute in arriving at his conclusion, noting its prior versions and the significance of amendments.<sup>110</sup> He pointed out that certain amendments demonstrated “a deliberate abandonment of the requirement of movement of the victim that characterized the offense of kidnapping proscribed by section 209 before the amendment . . . [that changed the offense] ‘from one which required the asportation of the victim to one in which the act of seizing for ransom, reward or to commit extortion or robbery became a felony.’”<sup>111</sup> Thus, Traynor used the history of the statute to assure he furthered the Legislature’s purpose.

Third, Traynor examined the intent of the Legislature in order to reject the defendant’s contention that “the Legislature intended that the statute apply only to acts of seizure and confinement incident to a ‘traditional act of kidnapping,’” meaning asportation of the victim. In rejecting this contention, he noted that, in amending the statute, the Legislature had broadened, rather than narrowed, the statute, so, it would be illogical to suggest that “conduct aptly described by the statute is not punishable” just because that conduct may have been excluded under the “traditional act of kidnapping.”<sup>112</sup> In doing so, he pointed out that the Legislature unquestionably had “the power to define kidnapping broadly enough to include the offense here committed,” and that “[s]ubject to the constitutional prohibition of cruel and unusual punishment, the Legislature may

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<sup>108</sup> *Id.* at 4.

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

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

<sup>111</sup> *Id.* (citing *People v. Raucho*, 8 Cal. App. 2d 655, 663).

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

define and punish offenses as it sees fit.”<sup>113</sup> Even if their definition of an offense differs from the way other states define that offense or what has ordinarily been defined under that offense, courts cannot (and *should not*) question “the motives of a legislative body.”<sup>114</sup> This statement in particular shows Traynor giving substantial deference to the Legislature. Traynor also noted, “The statutory definition of the proscribed offenses is not rendered uncertain or ambiguous because some of the prohibited acts are not ordinarily regarded as kidnapping.”<sup>115</sup> Traynor elaborated on why the text should be interpreted according to its plain meaning:

When the Legislature has made such acts punishable as kidnapping, this court should not impute to the statute a meaning not rationally supported by its wording. . . . “There is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body.” The will of the Legislature must be determined from the statutes; intentions cannot be ascribed to it at odds with the intentions articulated in the statutes. Section 209 clearly prohibits and punishes the offense committed by defendant; there is no basis for supposing that the Legislature did not mean what it said.<sup>116</sup>

In this analysis of the statute, Traynor exhibits substantial deference to the Legislature by deferring to the text of the statute and refusing to “inquire into the motives” of the Legislature. He displays a true purposivist approach in this opinion, looking to the intent of the Legislature at the time the statute was enacted, seemingly declining to alter the purpose of the statute to fit the present times even though he saw the statute as unduly harsh:

An insistence upon judicial regard for the words of a statute does not imply that they are like words in a dictionary, to be read with no ranging of the mind. . . . Released, combined in phrases that imperfectly communicate the thoughts of one man to another, they challenge men to give them more than passive reading, to consider well

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

<sup>114</sup> *Id.* at 4–5.

<sup>115</sup> *Id.* at 5.

<sup>116</sup> *Id.* (quoting Cardozo, J., dissenting in *United States v. Constantine*, 296 U.S. 287, 298–99) (internal citations omitted).

their context, to ponder what may be their consequences. Speculation cuts brush with the pertinent question: what purpose did the Legislature seek to express as it strung those words into a statute? The court turns first to the words themselves for the answer. It may also properly rely on extrinsic aids, the history of the statute, the legislative debates, committee reports, statements to the voters on initiative and referendum measures. Primarily, however, the words, in arrangement that superimposes the purpose of the Legislature upon their dictionary meaning, stand in immobilized sentry, reminders that whether their arrangement was wisdom or folly, it was wittingly undertaken and not to be disregarded.

"While courts are no longer confined to the language [of the statute], they are still confined by it. Violence must not be done to the words chosen by the legislature." A standard of conduct prescribed by a statute would hardly command acceptance if the statute were given an interpretation contrary to the interpretation ordinary men subject to the statute would give it. "After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. Certainly the court is not at liberty to seek hidden meanings not suggested by the statute or by the available extrinsic aids.<sup>117</sup>

Although Traynor might have felt at liberty to completely rewrite the law if the case were controlled by the common law, he recognized the importance of interpreting statutes according to their ordinary meaning because, if he were to interpret the statute in a manner counterintuitive to its ordinary meaning, then people could not rationally act in a manner that would avoid having their conduct fall under the statute, and the statute could lead to arbitrary enforcement. Thus, just as he did in *Perez*, Traynor

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<sup>117</sup> *Id.* at 5–6 (quoting, first, Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUMB. L. REV. 527, 543; and, second, Addison v. Holly Hill Fruit Products Co. 322 U.S. 607, 618) (internal citations omitted).

interprets the statute at issue in the way that best provides the public notice of what conduct should be avoided in order to prevent prosecution under the statute. While in *Perez*, this entailed striking the statute down entirely, here, it involves upholding the statute and interpreting it according to its plain meaning, and not, as the defendant requested, in a manner contrary to that ordinary meaning. Thus, Traynor found the defendant's interpretation of the statute resting "entirely upon speculation," void of support from the statutory language, contextual implications, and legislative history.<sup>118</sup>

Fourth, Traynor also looked to other statutes,<sup>119</sup> including the federal statute on kidnapping — known as the Lindbergh Law,<sup>120</sup> which served as a model for the California Legislature's revisions to section 209 — and cases interpreting that statute, including, *Gooch v. United States*,<sup>121</sup> noting that that statute did not limit its prohibition to what the defendant contended fell within "orthodox kidnapping for ransom."<sup>122</sup>

Fifth, Traynor looked to other cases decided under the statute, reasoning that the unequivocal language of the statute, as well as the cases decided under the statute, gave "no merit to defendant's contention that the Legislature did not intend to change the substantive nature of the existing crime."<sup>123</sup>

Traynor's *Knowles* opinion, although demonstrating "hints of endorsement for any number of approaches," pilots "a middle and pragmatic course between the extremes of textualism and dynamism, preferring a form of purposivism or what some have called modified intentionalism."<sup>124</sup> For the most part, however, the *Knowles* opinion is a rarity in that most of Traynor's statutory opinions "made no mention of extrinsic aids to construction, focusing only on the drafting history behind a particular provision — particularly tracing revisions of the text over time — to help understand legislative intent where the words did not provide a plain

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<sup>118</sup> *Id.* at 6.

<sup>119</sup> By examining other statutes, Traynor again utilizes a canon of statutory interpretation: the doctrine of *in pari materia*.

<sup>120</sup> 18 U.S.C. § 1201.

<sup>121</sup> 297 U.S. 124, 126 (1936).

<sup>122</sup> *Knowles*, 217 P.2d at 6.

<sup>123</sup> *Id.*

<sup>124</sup> Lars Noah, *supra* note 59, at 279–80.

enough meaning.”<sup>125</sup> However, “[o]n one occasion, he did credit affidavits submitted by legislators involved in the drafting of a statute as a source of relevant guidance.”<sup>126</sup> Thus, “[d]espite an announced willingness to consider pre-enactment materials, their infrequent citation confirms that practical limitations affected the interpretation of state statutes during this period more so than the theoretical disputes prominent today in the federal courts.”<sup>127</sup> Further, *Knowles* became an important case because it was cited approvingly by nine different states for affirming various important principles of law, and Traynor’s analysis was integral to arriving at those conclusions.<sup>128</sup>

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<sup>125</sup> *Id.* at 280; *see also id.*, n.89 (citing *In re Culver*, 447 P.2d 633, 634–37 (Cal. 1968); *Harvey v. Davis*, 444 P.2d 705, 709 (Cal. 1968); *California Motor Transp. Co. v. Public Utils. Comm’n*, 379 P.2d 324, 326 (Cal. 1963); *Burge v. City and County of San Francisco*, 262 P.2d 6, 10–12 & n.7 (Cal. 1953); *People v. Odle*, 230 P.2d 345, 347–49 (Cal. 1951); *In re Garcia’s Estate*, 210 P.2d 841, 842–43 (Cal. 1949); *Loustalot v. Superior Court*, 186 P.2d 673, 676–77 (Cal. 1947); *In re Halcomb*, 130 P.2d 384, 387–88 (Cal. 1942) (Traynor, J., dissenting)).

<sup>126</sup> *Id.* at 280 (citing *Silver v. Brown*, 409 P.2d 689 (Cal. 1966); *Friends of Mammoth v. Board of Supervisors*, 502 P.2d 1049, 1055–56 (Cal. 1972) (“struggling to resolve conflicting post-enactment explanations of intent”)).

<sup>127</sup> *Id.* at 280.

<sup>128</sup> *Morrisey v. State*, 620 A.2d 207, 212 (Del. 1993) (distinguishing facts but approving of the holding allowing for the defendant to be charged with multiple offenses); *State v. Hall*, 86 Idaho 63, 76 (Idaho 1963) (approving of the holding, noting that “[t]rue kidnapping” in the ‘traditional’ or ‘conventional’ sense, however, does not occur whenever there is incidental movement, however slight, of a murder victim.”); *People v. Wesley*, 421 Mich. 375, 411–12 (Mich. 1984); *State ex rel. Le Mieux v. District Court*, 166 Mont. 115, 120 (Mont. 1975) (“We agree with the rationale of *Knowles*.”); *Jacobson v. State*, 89 Nev. 197, 203 (Nev. 1973) (citing *Knowles* for the proposition that “[m]ovement of the victim is only one of several methods by which the statutory offense may be committed.”); *State v. Ginardi*, 111 N.J. Super. 435, 440 (App.Div. 1970) (using *Knowles* to distinguish the factual circumstances in that case); *State v. Clark*, 80 N.M. 91, 94 (N.M. Ct. App. 1969) (citing *Knowles* approvingly: “If there is an unlawful restraining or confining, the length of time involved in such restraint or confinement is immaterial.”); *People ex rel. Eldard v. La Vallee*, 15 A.D.2d 611, 612 (N.Y. App. Div. 3d Dep’t 1961) (approving of *Knowles*: “It is the singleness of the act and not of the offense that is determinative.”); *State v. Walch*, 346 Ore. 463, 470 (Or. 2009) (approving of the holding but distinguishing the applicable Oregon statute); *State v. Innis* 433 A.2d 646 (1981) (“California was not alone in supporting the view that the degree of asportation needed to commit a kidnapping offense could be minimal.”).

Two years later, Traynor authored the opinion in *De Burgh v. De Burgh*.<sup>129</sup> As Traynor later wrote, he “analyzed [California’s recrimination] statute that had been conventionally invoked as providing an absolute defense of recrimination and found that it gave the trial court discretion to grant or deny a divorce as the public interest indicated.”<sup>130</sup> This holding, in turn, has been credited with laying the foundation for California’s no-fault divorce legislation.

In *De Burgh*, a wife sought divorce from her husband on the grounds of extreme cruelty, but her husband cross-complained for divorce on the same ground. At the time, California only permitted divorce if the complaining party could prove one of the statutorily prescribed grounds of fault sufficient to justify a divorce. However, if the other party to the proceeding could prove the complaining party was also at fault, that party proved the defense of recrimination, and no divorce would be granted.<sup>131</sup> Traynor examined whether the case at issue warranted application of the doctrine of recrimination.<sup>132</sup> In determining the issue, as in *Knowles* and *Perez*, he examined the wording and legislative background of the applicable statutes along with the history of the doctrine of recrimination and its objectives.<sup>133</sup>

First, Traynor again used the doctrine of *in pari materia* and examined other provisions on the same topic:

[T]ogether, Sections 111 and 122 of the Civil Code provide: ‘Divorces must be denied upon . . . a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff’s cause of divorce.’ We are bound to consider the additional requirement that such a cause of divorce must be ‘in bar’ of the plaintiff’s cause of divorce.<sup>134</sup>

He explained, “Had the Legislature meant to make every cause of divorce an absolute defense, it could easily have provided that: ‘Divorces must be

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<sup>129</sup> 250 P.2d 598 (Cal. 1952).

<sup>130</sup> Roger J. Traynor, *Law and Social Change in a Democratic Society*, U. ILL. L.F. 230, 232 (1956).

<sup>131</sup> See *id.*

<sup>132</sup> *De Burgh*, 250 P.2d. at 600.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

denied upon . . . a showing by the defendant of any cause of divorce against the plaintiff.”<sup>135</sup>

Second, Traynor also used the tool of reasoning by analogy to other areas of law, ultimately finding analogy to contract law inappropriate because marriage is much more than a contract and can only be terminated with the consent of the state.<sup>136</sup> Thus, in a divorce proceeding, while the court must consider the rights and wrongs of the parties as in contract litigation, it must also examine “the public interest in the institution of marriage.”<sup>137</sup>

Third, Traynor examined the Legislature’s purpose in enacting the statute, which he determined to be fostering the family unit. Traynor noted, “The family is the basic unit of our society, the center of the personal affections that enoble and enrich human life,” and “[s]ince the family is the core of our society, the law seeks to foster and preserve marriage.”<sup>138</sup> However, Traynor also recognized that “when a marriage has failed and the family has ceased to be a unit, the purposes of family life are no longer served and divorce will be permitted.”<sup>139</sup> He elaborated, “[P]ublic policy does not discourage divorce where the relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed.”<sup>140</sup>

In abolishing the doctrine of recrimination, Traynor looked back to the origination of the doctrine, going as far back as the English ecclesiastical jurist, Lord Stowell.<sup>141</sup> He also examined past precedent regarding the doctrine, making a point of overruling certain precedent.<sup>142</sup> He distinguished the statute at issue concerning recrimination from the precedent interpreting the general doctrine of recrimination prior to the statute enacted by the California Legislature in 1872.<sup>143</sup> He also examined the precedents listed by

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 601.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* ..

<sup>142</sup> *Id.* at 601–05 (“To the extent that the following cases support a mechanical application of the doctrine of recrimination, they are disapproved . . .”).

<sup>143</sup> *Id.* at 602.

the commissioners who drafted the Code, noting, “It is apparent from the decisions that were listed that the Legislature intended that divorce cases involving recrimination be governed by the same principles that apply generally throughout our jurisprudence.”<sup>144</sup> He stressed that while the plaintiff’s fault is always important in any case, such fault should not be “exalted above the public interest.”<sup>145</sup> Defenses such as *in pari delicto* must still apply, but respect for the public interest must create an exception to the doctrine of unclean hands, from which the defense of recrimination stems.<sup>146</sup> Thus, “it is clear that the Legislature, in relying upon judicial principles of general application, intended that in divorce litigation the fault of the plaintiff should have no more significance than elsewhere in the law.”<sup>147</sup> Thus, “with this purpose in mind it worded the statute to require that a cause of divorce shown by defendant must be ‘in bar’ of the plaintiff’s cause of divorce” and “would have defeated its own purpose had it closed the avenues to divorce when the legitimate objects of matrimony have been destroyed.”<sup>148</sup> Hence, Traynor’s extensive analysis allowed him to conclude that, “a strict recrimination rule fails in its purpose of denying relief to the guilty,” in uncontested divorce cases where neither spouse is “innocent.”<sup>149</sup>

Next, Traynor looked to California cases decided since the enactment of the Code, social developments over the past several decades (such as the rising divorce rate and recognition of marriage failure as a social problem), divorce laws in other states (some of which required that the plaintiff’s offense be of the same type as the defendant’s offense or that the case involve equal guilt), and the work of leading scholars.<sup>150</sup> Traynor recounted how in 1948, a committee of experts of the American Bar Association strongly urged the elimination of the defense of recrimination,<sup>151</sup> but showed judicial restraint by noting that “[i]n view of the statutory provisions on the subject,

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 602–03.

<sup>147</sup> *Id.* at 603.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 603–05.

<sup>151</sup> *Id.* at 605 (citing Report of Legal Section of National Conference on Family Life 1, 3, 7 (1948); ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 73 et seq. (1950)).

we are not free to go so far.”<sup>152</sup> Further, he also concluded that “the comparative guilt of the parties will be without significance in every case,” but that

some of the evils pointed out by the Bar Association Committee can be avoided within the framework of the existing statute if it is kept in mind that the doctrine of recrimination, like the doctrine of unclean hands of which it is a part, is neither puristic nor mechanical, but an equitable principle to be applied according to the circumstances of each case and with a proper respect for the paramount interests of the community at large.<sup>153</sup>

Ultimately, Traynor “concluded that section 122 of the Civil Code imposes upon the trial judge the duty to determine whether or not the fault of the plaintiff in a divorce action is to be regarded as ‘in bar’ of the plaintiff’s cause of divorce based upon the fault of the defendant.”<sup>154</sup> As applied to the case at hand, he held the evidence presented created ample support to conclude that the parties’ misconduct should not bar a divorce based upon the aforementioned considerations because there had been “a total and irremedial breakdown of the marriage.”<sup>155</sup> In a court’s determination of when a cause of divorce shown against a plaintiff constitutes a bar to the suit for divorce, Traynor ruled that divorce courts, as courts of equity, are “clothed with a broad discretion to advance the requirements of justice in each particular case,” but among things should consider “the prospects of reconciliation, the comparative fault of the plaintiff and the defendant, and the effect of the marital strife upon the parties, their children, and the community.”<sup>156</sup>

In 1969, California became the first state to enact a no-fault divorce statute, which abolished all fault-based grounds for divorce and allowed for only two no-fault grounds, “irreconcilable differences” and “incurable insanity.”<sup>157</sup> The *Report of the Governor’s Commission on the Family*,

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 605–06.

<sup>156</sup> *Id.* at 605–07.

<sup>157</sup> Former Civ. Code, § 4506, added by The Family Law Act, Stats. 1969, ch. 1608, § 8, eff. Jan. 1, 1970, repealed and reenacted as Fam. Code, § 2310 without substantive change, Stats. 1992, ch. 162, § 10, eff. Jan. 1, 1994.

proposing the law, even credited Chief Traynor's *DeBurgh* opinion as its inspiration for the law.<sup>158</sup> This action reflects legislative approval of the decision; however, many question if it would not have been appropriate for Traynor to defer to the Legislature in *DeBurgh* given that they were considering the issue at the time of the decision.

### C. CONCLUSION

Many legal scholars describe Traynor as a judicial activist. Given his stance on the role of courts, Traynor would likely regard this as a compliment. However, although he may have taken an "activist" approach to his common law precedents, as the aforementioned opinions demonstrate, his opinions in cases controlled by relevant legislation demonstrate a mix of creativity and deference to the Legislature (without adopting a strict textualist approach), while still examining considerations of policy. Thus, many believe Traynor's opinions all arrive at the "right result." With his common law decisions, there is less tactical strategy in achieving this right result because courts are given far more discretion in the common law, of which they are the primary lawmakers. However, his opinions involving statutory construction warrant more applause given his ability to stress the importance of the text while not overemphasizing extratextual sources to the extent that he might be considered "legislating from the bench."

Traynor's methodical analysis in cases like *Perez* allowed him to reach innovative results, which although criticized by some at the time, could not be attacked on the grounds that he failed to show deference to the Legislature or was *Lochnerizing*.<sup>159</sup> Traynor, although believing anti-miscegenation laws to be wrong, crafted a methodical analysis that could not be attacked on the grounds that he was basing the decision solely on his personal policy preferences.

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<sup>158</sup> Report of the Governor's Commission on the Family 91 (1966), Comment to § 028.

<sup>159</sup> See *Lochner v. New York*, 198 U.S. 45 (1906) (striking down a labor statute on the basis that it interfered with the freedom of contract); *but see id.* at 75–76 (Holmes, J., dissenting) ("liberty, in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.") (internal quotations omitted).

Further, *DeBurgh* might have come out differently had Traynor taken an approach to interpretation that scorned resort to extratextual sources. *DeBurgh*, in turn, laid the foundation for California to become the first state to adopt no-fault divorce legislation, a pioneering move that has been followed in every state in the nation.<sup>160</sup> Many recognize that Traynor and his innovative California Supreme Court, in becoming the first state high court to introduce no-fault divorce, were integral to this development in the law.

Traynor proved himself to be an unusually influential judge, and the policies of an influential judge are therefore important and influential as well. Traynor's approach, including elements of both purposivism and dynamic interpretation, still demonstrates a consistency that permeated his opinions. These opinions, as previously discussed, became widely adopted by other states — some adopted by the U.S. Supreme Court, while others led to nationwide changes in the law. Justice Traynor's judicial philosophy clearly impacted the law of the United States.

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<sup>160</sup> *Id.* 230, n.4 (citing Linda Elrod & Robert Spector, *A Review of the Year in Family Law*, 33 FAM. L.Q. 865, 911 (2000) (“Currently, all 50 states have enacted some form of no-fault divorce legislation, either based on the parties’ separation for a specified period of time, or based upon the parties’ incompatibility or irreconcilable differences.”).











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