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SAME-SEX MARRIAGE

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PANELISTS:

Professor William N. Eskridge, John A. Garver Professor of Jurisprudence, Yale Law School

Professor Lawrence Rosenthal, Associate Professor, Chapman University School of Law

Professor Matthew J. Parlow, Assistant Professor, Chapman University School of Law (moderator)

PROFESSOR PARLOW: [Professor Parlow began the Dialogue by introducing Professor Eskridge to the audience.]

PROFESSOR ESKRIDGE: What I would like to talk about is in connection with the California same-sex marriage cases. I've filed a brief in those cases, in addition to some of the other cases highlighted by the moderator. But, on the other hand, I have spent my entire career trying to understand the underlying cultural and legal dynamics of the marriage litigation. So I'm very interested in exploring all the kinds of arguments that we have here. What I want to do today is think about the California same-sex marriage cases in a historical perspective in terms of the legal arguments, and then in terms of the deeper cultural and legal arguments that I think underlie these cases.

So, let me start, if I could, with a brief history. And I hope that many of you are from California. You are certainly being educated in California, and you might want to practice law in California, which, believe me, has it over every other state in the country in terms of weather and spirit and robustness of opportunity. So maybe some history of California would be very useful. This was one of the main points of my amicus brief,[1] to sort of give the court a legal and cultural history of gender and sexual minorities in California, and where the marriage litigation fits into in terms of the state's relationship to those minorities. I basically divide my history into three periods. The first goes from 1914 to 1975, before most of you all were born. The second is your lifetime, and that is 1975 to 2003. And then a third period is probably going to be the period, beginning in 2003 that the marriage cases will fit into in some form or another.

Now, the first period, which is the period of my life and is the most important period of the twentieth century, is between 1914 when California made consensual fellatio and cunnilingus a serious crime in this state,[2] to 1975 when California's legislature repealed its consensual sodomy law—not just oral sex, but also anal sex as well.[3] This is a period I call the terror period. It's a period in which gender and sexual minorities—by gender minorities, I mean cross-dressers, transsexuals, et cetera; by sexual minorities, I mean gay men, lesbians, bisexuals, perhaps inter-sexuals—were literally outlaws. The conduct which was characteristic of these minorities was a crime everywhere in California; and these crimes were actually seriously enforced by the state, not just through the criminal law, but through a whole bevy of civil sanctions that literally created a class of

1 Amicus Curiae Brief of Professor William N. Eskridge, Jr. In Support of Parties Challenging the Marriage Exclusion, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S147999), 2007 WL 3307727.

2 Act of Aug. 8, 1915, ch. 586, 1915 Cal. Stat. 1022 (Cal. 1915).

3 William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy*, Nomos, *and Citizenship*, *1961-1981*, 25 HOFSTRA L. REV. 817, 943 (1997) [hereinafter Eskridge, *Lesbian and Gay Intimacy*]; *see also* American Civil Liberties Union, History of Sodomy Laws and the Strategy that Led Up to Today's Decision (June 16, 2003), http://www.aclu.org/lgbt/discrim/11895res20030616.html (last visited May 28, 2008) (describing the circumstances surrounding the repeal of California's sodomy law in 1975) [hereinafter ACLU].

outlaws. This was a class of outlaws that was usually able to closet their status by, like, not dressing in the attire of the opposite sex or not wearing a badge saying they were gay and lesbian or bisexual. But they were outlaws nonetheless.

In addition to its sodomy laws—which were felonies for consensual behavior in California—in addition to those laws, California had a law they called the "vag. lewd law" or lewd vagrancy law.[4] This law was usually used for solicitation—not solicitation for commercial sex which, as Eliot Spitzer[5] is now learning back East, is usually for consensual sex activities in private places—but for solicitation occurring somewhere in public. In this area, Orange County and Los Angeles, literally thousands of people each year were arrested for this kind of crime. It was a misdemeanor, but it could subject you to enormous civil sanctions. And, indeed, in California, in a terrible innovation of the Warren era[6], if you were arrested for either lewd vagrancy, or sodomy, or consensual copulation at the discretion of the judge, you could be sentenced as a sexual psychopath.

If you were sentenced as a sexual psychopath—which was aimed at what they call "moral degenerates" in the forties and fifties—then you could be sent to Atascadero State Hospital.[7] I don't think it still exists as a state hospital. It was known as the "Dachau for Queers," and the reason it was known as that was that, at Atascadero, experimental therapies and medical technologies were used on human beings, many of whom had been put there for consensual activity. They included lobotomies. They included electric shock therapy. They included giving people a drug which stimulated suffocation and drowning—in other words, a pharmacological version of water boarding. These were routine therapies at Atascadero. And you could be sent there for violating these very statutes.

You could lose your license as a teacher. You would be fired as a state employee. You could lose your bar license. You could lose your medical license. So, this was obviously a much smaller group. You might be surprised to know that, if you're in Orange County and in Los Angeles, cross-dressing was a crime. In other words, if you were a woman wearing overalls, you were literally violating municipal codes all over California, and these codes were enforced. People were arrested. Women particularly were arrested for wearing the attire of the opposite sex, which was a crime throughout California in this period.[8]

Well, I think I've given you enough of the law to give you an idea of

4 CAL. PENAL CODE § 647(5) (West 1955).

5 Eliot Spitzer, former governor New York, resigned from office following the discovery of his involvement with prostitutes. David Kocieniewski & Danny Hakim, *Spitzer Resigns in Sex Scandal and Turns His Attention to Healing His Family*, N.Y. TIMES, Mar. 13, 2008, at A1.

6 Earl Warren's era as Governor between 1943–45.

7 William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 FLA. ST. U. L. REV. 703, 716 (1997).

8 *Id*. at 723.

what the legal terrain looked like. Ideologically, what this legal terrain looked like, the coherence that it had, was that sexual and gender minorities were demonized by the state as immoral. These were all crimes against the Bible. *Leviticus* makes sodomy "an abomination" to the Lord.[9] *Deuteronomy*, you might be interested in knowing, makes cross-dressing also "an abomination" to the Lord.[10] These people were demonized as predatory, as threats to children, and were demonized as anti-family. I'll return to that in just a second. Now, that's the period that I call the terror period.

The second period is a period of greater toleration. After the Stonewall riots in 1969, unprecedented numbers of lesbians, gay men, bisexuals, and transgendered people came out of the closet and actually started resisting the very statutes that I'm describing in this earlier period.[11] Most of the statutes were either repealed or, in even more cases, invalidated by the California Supreme Court. The sodomy law was the first to go in 1975.[12] And, later, the California Supreme Court in '79, in the *PT&T* case, actually extended to lesbian and gay employees the protections of state law against discrimination, at least in the employment relationship,[13] a view that the legislature codified its statute in 1992.[14] So, in this period from 1975 to 2003—the period in which most of you all grew up—the state repealed most of the criminal prohibitions. LGBT people were no longer literally outlaws. They were tolerated by the state.

But the idea of tolerance is an idea where there's still a norm. So, gays and lesbians were no longer predatory threats, but they were not considered normal, either. The norm was still heterosexuality. Gay and lesbian Californians were kind of "icky"—kind of second class. And this was also reflected in California law. Shortly before the sodomy law repeal California had made its marriage law gender-neutral as part of the feminist revolution of the 1970s.[15] The county clerks became hysterical.[16] And what they said was: "Well, this now makes it possible for gays and lesbians to get married, which would be the end of civilization." The legislature completely agreed with them. Before you could say, "I now pronounce you man and husband," the legislature in 1977 re-gendered the state marriage law, passing a law saying that marriage does not pertain to same-sex couples.

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9 *Leviticus* 20:13 (King James).

10 *Deuteronomy* 22:5 (King James).

11 The Stonewall riots, involving young drag queens challenging law enforcement, are "universally recognized as the ignition point for the modern lesbian and gay civil rights movement." Barbara J. Cox, *Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1033 (1994).

12 ACLU, *supra* note 3.

13 Gay Law Students Ass'n v. Pac. Tel. & Tel. Co., 595 P.2d 592, 611–13(Cal. 1979).

14 CAL. GOV'T CODE § 12920 (West 2005).

15 Eskridge, *Lesbian and Gay Intimacy*, *supra* note 3, at 943.

16 Professor Eskridge later clarified that in 1955, the combination of the legislature's sodomy reform with the gender neutrality of the marriage law suggested the possibility of gay marriage.

The reasoning of the legislature was quite interesting. The legislature's reasoning—this is embodied in the committee reports that the California Supreme Court is now considering[17]—was that marriage is to protect the wife who is staying at home and raising the children. That's why we need all this marriage law—to protect the wife and the dependent children. Well, gays and lesbians don't need that, because they don't have children. Then, there was a little parenthetical: except, maybe, for some of those lesbians. So, the California Legislature was a little bit clued in, even in 1977.

In 2000, the Knight Initiative[18] encoded also the idea that, not only same-sex marriage is not going to be recognized in California, but even out-of-state same-sex marriages—of which there were none in 2000—would also not be recognized in the State of California. The Knight Initiative passed by a very significant majority in California's referendum process. On the other hand, at the same time you all were doing the Knight Initiative, you were creating—in 1999, and then greatly expanded in 2003—a statewide domestic partnership law.[19] California's domestic partnership law—created by the legislature, signed by the governor—created a new institution for same-sex couples called. If you enter into a domestic partnership, you get *almost* all of the same rights, benefits, obligations, and duties as a different-sex marriage couple would get under California law—not under federal law, but under California law.

Now while you all were doing that, back East we were creating an institution called "civil unions," a very similar idea. Different name, only same-sex couples. Virtually all—or in some states all—of the same rights, duties, obligations, et cetera, that state law can confer on married couples. You see this in Vermont in 2000; Connecticut in 2005, where I live; New Jersey in 2006; New Hampshire in 2007.[20] Oregon, in 2007, adopted a similar law,[21] but they called it "domestic partnership," and, now, as I understand it, it's on hold. Other states like Hawaii, Washington and Maine have created domestic partnership laws that conferred many of the rights and benefits of marriage to same-sex couples.[22]

17 The California Supreme Court subsequently decided this case. *See In re* Marriage Cases, 183 P.3d 384 (Cal. 2008). See generally Amanda Alquist, *The Honeymoon is Over, Maybe for Good: The Same-Sex Marriage Issue Before the California Supreme Court*, 12 CHAP. L. REV. 23 (2008).

18 In 2000, Proposition 22, also known as the "Knight Initiative," declared "[only] marriage between a man and a woman is valid or recognized in California." Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 781 (2001).

19 CAL. FAM. CODE §§ 297–299.6 (West 2004).

20 VT. STAT. ANN. Tit. 15, §§ 1201–1207 (2002); CONN. GEN. STAT. ANN. §§ 46b-38aa to -39 (West 2008); N.J. STAT. ANN. §§ 37:1-28 to -36 (West Supp. 2008); N.H. REV. STAT. ANN. §§ 457-A:1–8 (LexisNexis Supp. 2007).

21 H.B. 607, 74th Leg. (Or. 2007).

22 HAW. REV. STAT. ANN. §§ 572C-1 to -7 (LexisNexis 2005) (entitled "reciprocal beneficiaries"); WASH REV. CODE ANN. §§ 26.60.010–.070 (West Supp. 2008); ME. REV. STAT. ANN. tit. 22, § 2710 (Supp. 2007).

By 2003, LGBT Californians had been tolerated for about a generation and had flourished in California. They've risen to the peaks of state government. They have long been well represented in the legislature.These folks have flourished in the State of California like they flourished nowhere else possibly in the world. And in 2003, and afterwards, the LGBT agenda has been that California now should move from this tolerable-toleration idea to the idea of full equality for LGBT citizens in the State of California.

And that did generate new legislation. In 2006 and 2007, the legislature passed same-sex marriage bills.[23] The Governator[24] in both years vetoed them. And, it's very interesting. He didn't veto them because [imitating Governor Schwarzenegger's voice] "these are girly men trying to do this to us." No, no. No, that was not the reason the Governator vetoed them. Instead, the Governator, in his Governator wisdom, said [imitating Governor Schwarzenegger's voice]: "This legislation, if I signed it, it would confuse—would confuse the litigation," because this litigation was pending. That was the only reason I saw he gave—it would confuse the litigation if he adopted same-sex marriage.

So twice the legislature has voted for same-sex marriage, and twice it's been successfully vetoed, so these cases have gone forward. And it's a whole rainbow coalition of people who are bringing these cases and are lawyering for them. And there are, literally, I think, dozens of amicus briefs, of which one of them is mine. And you might ask, "Well, why aren't they happy enough with domestic partnership?" Indeed, the domestic partnership law, I think, is an enormous step forward. And I think California is fabulous and great, and so on, and so forth. But it should be noted that the domestic partnership law does treat same-sex couples differently in significant ways from the way that married couples are treated. Here are three examples, though it does not exhaust the number of differences.

The difference is that, for domestic partnership in California, there's no ceremonial requirement.[25] There's a statutory requirement for marriage that there be a ceremony.[26] It doesn't have to be religious, but there has to be a ceremony. Moreover, if you want to be in a domestic partnership, you have to show the registrar that you're in an intimate relationship and that

23 Complete Bill History, A.B. 849, 2005–06 Leg., Reg. Sess. (Cal. 2005) (vetoed Sept. 29, 2005), *available at* http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0801-0850/ab_849_bill_20060223_history.html (last visited Sept. 4, 2008); Complete Bill History, A.B. 43, 2007–08 Leg., Reg. Sess. (Cal. 2007) (vetoed Oct. 12, 2007), *available at* http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0001-0050/ab_43_bill_20080114_history.html (last visited Sept. 4, 2008).

24 After starring in the films THE TERMINATOR (Orion Pictures Corp. 1984), TERMINATOR 2: JUDGMENT DAY (TriStar Pictures 1991), and TERMINATOR 3: RISE OF THE MACHINES (Warner Bros. Pictures 2003), Arnold Schwarzenegger was elected governor of California in 2003. *See generally* http://www.schwarzenegger.com.

25 CAL. FAM. CODE §§ 298–298.6 (West 2008).

26 *Id*. §§ 300(a), 421.

you share a common residence.[27] Now, I will tell you, you don't have to do that for marriage. You just show up. "We're not related. It's consensual. Give us the license." But if you're a gay and lesbian couple you have to prove that you're serious—whereas you don't if you're straight.

Second difference—and maybe this is not so big—is that domestic partnerships are excluded from some long-term care benefits, even today. Some of the gaps have been remedied, but this one has not yet. The third I think is the most significant one—is that, if there are no children in the relationship, if it's a domestic partnership, it can be terminated by filling out a form.[28] In contrast, if you're married, you cannot terminate your marriage—no matter how bad or few children—by filling out a form.[29] You've got to go through a divorce process, which could be quite expensive.

I myself disagree with calling this "separate but equal." I don't like to use the term "separate but equal" partly because the "separate but equal" term invokes the memory of racial apartheid, which was much worse. I think providing not all the benefits and obligations are not comparable in any way with racial apartheid. So, I reject that. Moreover, I think calling it "separate but equal" is also inaccurate. It's not equal. It's separate. It's separate but separate. I would also quickly add that the equality is mostly symbolic. There's a ceremonial requirement, the intimacy requirement. These are symbolic. But they're symbolic in an important way.

This is the role that the history plays in my brief—is that, for all of my lifetime, California expended an enormous amount of energy, not just harassing, arresting, and even torturing LGBT people, but also demonizing gays and lesbians as anti-family, as threats to the family, as incapable of human relationships and raising children. And, given that state history of demonization as anti-family, to then perpetuate this in the statute, it seems to me, is open to criticism.

The California marriage cases are asking California to join Massachusetts and Canada, both of which had court decisions requiring, under equal protection principles that the state recognize same-sex marriages.[30] I think most of the briefs acknowledge—the State's brief certainly does, and my brief says so as well—there's no precedent directly on point. So the court has a fair amount of leeway here, it seems to me. What most of the plaintiffs have asked for—and, I'm with them—is that the California Supreme Court should apply its *Perez*[31] precedent. That was its 1948 decision striking down the State's bar to different-race marriage. That is race discrimination, the court said, and it struck down that

27 *Id*. § 297.

28 *Id*. § 299.

29 *See id*. § 2330.

30 *See*, *e.g*., Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961–65 (Mass. 2003); Egan v. Canada, [1995] 2 S.C.R. 513, 528–29, 536 (Can.); Civil Marriage Act, 2005 S.C., ch. 33 (Can.).

31 Perez v. Lippold, 198 P.2d 17 (Cal. 1948).

discrimination—which was unprecedented, both before or since, until the U.S. Supreme Court addressed this issue in *Loving vs. Virginia*[32] twenty years after the *Perez* decision.

What I argue is that the court ought, by analogy, to extend the *Perez* precedent to these cases. I make three arguments. Well, here are three that I do make. One is that, under the *Sail'er Inn* precedent,[33] sex discrimination is now a suspect classification subject to strict scrutiny under the California Constitution. Now, if barring licenses to different-race couples is race discrimination, then, I argue that barring licenses to same-sex couples is sex discrimination. In each case, the regulatory variable, the item that changes, is the race or sex of one of the partners. So, if Carlos wants to marry Diane, and one is European and one is African in descent, then the State's refusal to do that is based upon Carlos' race. If he were African, they would give a license. Because he's not, they won't. But if Carlos wants to marry Joe today, the State won't give him a license, though it will give him a domestic partnership certificate. And the regulatory variable is that Carlos would get the license if he were Caroline—or, even if he cross-dressed as Caroline be able to persuade the near-sighted registrar that he actually was a woman, right? So, the regulatory variable—the item that changes to produce the discrimination—is sex. And if sex discrimination is a suspect classification—as it unquestionably is—then, why should this not get strict scrutiny, which the State says it would not pass?

The State has conceded that. Now the objection is legitimately made: Marriage. Well, this is very different—the whole point of interracial bars was white supremacy, a philosophy of racism; whereas, what California is engaged in is, at most, homophobia and not sexism. I think that's just simply wrong. What California is engaged in, maybe, is a kind of homophobia, but it also is a kind of sexism. It is a kind of patriarchy. Indeed, the Committee Report for the 1977 statute proves it. It's telling you what the legislature was doing. It thought it was preserving traditional gender roles. Marriage is useful because the wife stays at home, takes care of the children. What's more traditional than that?

Indeed, I would go so far as to say this. I think same-sex marriage challenges the deepest gender role—and the one that mainstream Americans are most reluctant to give up. I think the deepest gender role is the way that we, as a society, have constructed romance around the idea of male/female complementarity—that woman is the complement of the man. Man is always the measure. Woman is the complement of the man, and a woman can only achieve personal satisfaction and children through her coupling with a man.

32 388 U.S. 1 (1967).

33 Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 539 (Cal. 1971).

This is not one of the worst prejudice or stereotype that people have. But this is a deeply felt view about gender roles that, indeed, maybe mainstream Californians are not willing to interrogate because there's a difference. So, that's one argument that I make, and that's the deep cultural resistance to that argument.

The second argument that I make: Even if you don't think it's a sex discrimination it's at least a sexual orientation discrimination argument, right? If you don't allow same-sex couples to marry, that has its effect overwhelmingly on gay and lesbian couples, you would think. So, what about sexual orientation—is sexual orientation a suspect classification? Now, the court below said that's never been held in California and it hasn't.[34] The courts below probably don't have the power to do that. The California Supreme Court does have that power.

Sail'er Inn, the leading precedent on sex discrimination, said: We consider it suspect classification if the trait is immutable, if it has been the object of the history of discrimination, and if it's an irrational trait to be used for ordinary state policy.[35] I will tell you, the State has conceded each of these three points. They say, yes, it's immutable—though, I think that's a complicated issue. I don't think it's a matter of choice, like going to Walgreen's and choosing a variety of aspirin. But I think that's a complicated discussion. The State concedes it; so, I have nothing to add to what they're saying. There's certainly been a history of discrimination; and I certainly think it's an irrational characteristic.

And here's the State's response, which I think is quite amusing. The State says: We only recognize, as suspect classifications, traits that affect groups that have no access to the political process. But gay people have lots of access to the political process. They've got an anti-discrimination law in '92.[36] They got marriage in 2006 and 2007.[37] They've already got marriage from the legislature. They're not marginalized. And, the Governator loves them too. You know, so, everybody loves the homosexuals, et cetera.

So they're right about that; gay people do have access to the political process. I think that's quite true. But, of course, the same is true of women. When *Sail'er Inn* recognized sex as a suspect classification, women were—and, I'll give you a hint, still are—a majority of the voting electorate. Women, politically marginalized? When *Sail'er Inn* was

34 *In re* Marriage Cases, 49 Cal. Rptr. 3d 675, 702 n.17 (Ct. App. 2006) (finding that while "gender and race are both recognized as constitutionally suspect classifications[,] . . . classifications based on sexual orientation have not been accorded the same degree of searching constitutional scrutiny.") (internal citations omitted).

35 485 P.2d at 539.

36 CAL. LAB. CODE § 1102.1 (West 1992) (repealed 1999; current version at CAL. GOV'T CODE §§ 12920–22 (West 2007)).

37 *See supra* note 23.

decided, women had been added to Title VII.[38] In 1972, there were dozens and dozens of federal statutes that outlawed sex discrimination in various federal programs, and so on, and so forth. The same was going on in California. So, I don't know where the State's brief is coming from. It's just simply wrong.

I could make the same kind of argument for race. At the very point when race became a suspect classification, racial minorities started to be heard seriously in the political process in states like California and the U.S. Congress. In short, I would argue that sexual orientation should also be a suspect classification. Instead, the State proposes an intermediate standard. I won't go into it because of time, but we can talk about it in the Q&A if you want. It's kind of a balancing test. You look at the importance of the rights denied, the rationality of the trait, and the state interest. I will say this: The State's interests are tradition—which is probably the most powerful argument, to which they devote maybe two sentences to—and avoiding backlash. Well, the problem with the backlash argument is that, in 2006, the legislature voted for same-sex marriage, and none of them was defeated in the next election. There wasn't a referendum. There was no backlash that I could detect. And other instances where the California Supreme Court or the legislature has adopted gay rights, the sodomy repeal in '75, there's not really been a backlash.

We can talk about tradition in the Q&A. Tradition, of course, was ultimately the only argument in favor of different-race marriage bans. And, indeed, tradition was an argument in favor of slavery in the South, where I grew up. So, tradition is not an all-purpose argument, particularly, in an equal protection case. So, it seems to me, on issues of race and sex and sexual orientation, tradition should be talked about, and should be deeply understood. But it's not a definitive answer, at least in precedents, or any guide.

The final thing I told the court—and, I don't say you need to tell them this; it's quite obvious—is that, whatever the California Supreme Court does will not be taking the issue away from the people of California. If they were to require same-sex marriage, faster than you could say Knight Initiative's stepchild, there would be an initiative on the ballot for the people to have a say. And I think that would be fine. What I urged the court was that, what it can do, and the opportunity that it had from the marriage cases, is to reverse the burden of inertia and to create conditions for falsification of stereotypes. This is what Massachusetts has done, for Massachusetts recognized same-sex marriage.[39]

38 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to -17).

39 Professor Eskridge later clarified that the Massachusetts legislature immediately debated, and defeated an amendment to its state constitution.

Opponents could make any kind of wild argument, and they did. You know, that there would be rapes; there would be child molestation; that marriage would decline. And I will tell you, I just published a book on Denmark's laws regarding same-sex marriage,[40] which recognized lesbian and gay relationships in 1989 and where Robert Bork, and all the other opponents of marriage said, "Oh, Scandinavia is now [inaudible]; marriage collapsed in Scandinavia after they recognized registered partnerships." And, that's just simply false. In Denmark, the marriage rate had been plummeting for two decades before '89; where the non-marital child rate had gone up four-fold in two decades, trends that reversed themselves after domestic partnerships were recognized in 1989. Since 1989, the Danish marriage rate has actually gone up, and the non-marital children rate has stabilized for the first time in a century in Denmark. The consequences of gay marriage are usually very minor on both sides of the issue. But you don't know that for sure until the California Supreme Court says: Let's have marriage licenses and let's see what happens. And then you would actually debate about something concrete. Do you want this lesbian couple to be able to ceremonialize their relationship as a marriage? Do you want their children to be able to say that my mommies are legally married to one another and, indeed, did they decide to get married because they're invested in me, et cetera?—which is a very common scenario in the gay and lesbian community.

Now, here are three deeper issues, and then I'll stop. One thing [the moderator] didn't tell you—he told you about all my books and what not—he didn't tell you that when you get law professors started, very often they don't stop until fifty minutes have expired. But I will finish this up in two. There are several deeper things. One, that I've already mentioned, is that I do think that same-sex marriage is a difficult issue for people who are not prejudiced—just normal good people. One reason it's a difficult issue is the deepest challenge to our deeply held gender roles that we have in our society, and where people all over the lot on how attached they are to this complementarity thing. I'm not attached to it, but you might be. And, that's fine.

Second—the LGBT agenda. I think it's widely accepted when within the LGBT community that the LGBT agenda should be family supportive. About a quarter of gay and lesbian couples are raising children. They're raising them in a very serious way. My sister and her partner are raising two wonderful children in Sacramento. They are a credit to their sexual orientation. They're doing a great job. Okay? In my opinion, heterosexuals have a lot to learn from lesbians raising children, as well as vice-versa. But, the question that arises within the lesbian and gay community is, should the community be seeking marriage—an arguably

40 *See* WILLIAM N. ESKRIDGE & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE'VE LEARNED FROM THE EVIDENCE (Oxford Univ. Press 2006).

patriarchal institution—or, should the lesbian and gay community be seeking universal domestic partnerships, universal civil unions? Maybe the goals should be, rather than everybody getting marriage, maybe everybody should get domestic partnerships. It's something that is not as explicitly tied to the religious traditions.

My third point is that the debate over gay marriage ignores the big story of redoing family law. The big story is the regulation of romantic relationships in the West. And, here's where you all are now, is the menu approach. When I was growing up it was marriage or nothing. You either had no recognition, no rights, et cetera, or you were married with all this bundle of stuff that you get.

In California, you have marriage only for different-sex couples at this point. Maybe that will change. Then you have state-wide domestic partnership. Additionally, ever since the *Marvin* case,[41] you've had co-habitation, which has been extended to same-sex couples. And, this action does extend to both different and same-sex couples, where, if you co-habit particularly with an Oscar-winning movie star like Lee Marvin, and dumps you, then you might have contractual and other causes of action for promises that were made. Well, this is a kind of regulation of a relationship. Cohabitation is legal in California, and, you can have legal rights as a cohabiting person, even if you're not a domestic partner or a spouse.

And then, you have also municipal domestic partnership rights, which is that most of your cities do give domestic partnership benefits—mainly healthcare and insurance benefits—to the partners of your city employees. And, in most of the places, it's different sexes or same-sex; but that also cuts across the board. And this is what's going on the reconfiguration as well as expansion of state regulation of romantic relationships. If you're concerned about protecting marriage, this is where the action is. The more competitors that are created to marriage, that probably does contribute to the decline of marriage. But it's not a gay thing. It's a straight thing. Or, it's a straight and gay thing. Moreover, if you're pro-choice, well, you can get more choices. And so, you might like that feature of it. But that's where a lot of the debate ought to be. I'll stop with that.

PROFESSOR PARLOW: [Professor Parlow briefly introduced the discussant of this Dialogue, Professor Larry Rosenthal.]

PROFESSOR ROSENTHAL: Let me start by betraying my ideological bias. Personally, I see no objection, as a matter of policy, to same-sex marriage. To elaborate just a bit, after I was a prosecutor, and

41 Marvin v. Marvin, 557 P.2d 106 (Cal. 1976).

before I came to Chapman, I was Deputy Corporation Counsel for the City of Chicago, and my client was Richard M. Daley, Mayor of Chicago, a nice Irish boy. Yet, much to my surprise, it turned out that Mayor Daley supports same-sex marriage. Mayor Daley comes from a very traditional, south-side Chicago Irish family—but one in which there have been some ugly divorces in recent years, and he took the position that inasmuch as heterosexuals are doing their best to destroy the institution of marriage, if somebody wanted to strengthen the institution of marriage, he was all for it.[42] My own view, as a matter of policy, is that any legal regime that encourages stable and monogamous relationships is a good thing. And, there is, in my view, an avalanche of social science data to support that proposition.

But of course, Professor Eskridge asked us to consider achieving same-sex marriage not by means of a hard slog through the political process. He asked us to achieve same-sex marriage by means of judicial decisions interpreting the Constitution. On that issue, the thought I want to share with you and Professor Eskridge is: Be careful what you ask for.

The doctrinal theories Professor Eskridge advanced—I think at least some of them are perfectly plausible, if not better than plausible. Personally, however, I'm not sure that I share his enthusiasm for the notion that a denial of marriage to same-sex couples is a form of sex discrimination. I think it's a clever argument and yet, we all know, at some level, that society's attitudes toward homosexual and lesbian relationships are quite different than its attitude toward women who want to transcend traditional gender roles. Justice Brennan once described sex discrimination as "an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."[43] Something very different is going on when it comes to discrimination on the basis of sexual orientation.

Professor Eskridge, I think, acknowledges that the opposition to same-sex marriage involves a deeply-rooted cultural norm about how people should find fulfillment in relationships—sexual fulfillment in particular—that is very different than the kind of romantic paternalism that underlay traditional attitudes about the proper roles of women. It involves something specific to homosexual relationships—indeed, a kind of animus toward those relationships that bears some similarity to the traditional animus toward interracial sexual relationships.

After *Brown v. Board of Education*[44] was decided in 1954, the law reviews were full of commentary about that decision. And much of it, in

42 "Marriage as been undermined by divorce, so don't tell me about marriage. You're not going to lecture me about marriage. People should look at their own life and look in their own mirror. Marriage has been undermined for a number of years if you look at the facts and figures on it. Don't blame the gay and lesbian, transgender and transsexual community." CHI. SUN-TIMES, Feb. 19, 2004, at 9.

43 Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion).

44 347 U.S. 483 (1954).

the early years, was critical of *Brown*. In particular, an important article appeared in the *Harvard Law Review*, written by Herbert Wechsler, one of the leading constitutional professors of the day, saying, as a matter of principle, he couldn't see why "separate but equal" violated the equality principle in the Equal Protection Clause.[45] And then, Charles Black, a member of the Yale Law School faculty, wrote one of the greatest law review articles of all time. As I recall, it was about nine pages. I wish those of us writing law review articles today could learn from that example. Let me read you just a brief excerpt:

I was raised in the South, in a Texas city where the pattern of segregation was firmly fixed. I am sure it never occurred to anyone, white or colored, to question its meaning. The fiction of "equality" is just about on a level with the fiction of "finding" in the action of trover. I think few candid southerners deny this. Northern people may be misled by the entirely sincere protestations of many southerners that segregation is "better" for the Negroes, is not intended to hurt them. But I think a little probing would demonstrate that what is meant is that it is better for the Negroes to accept a position of inferiority, at least for the indefinite future.[46]

After Professor Black's article appeared, the fighting in the law reviews about the soundness of *Brown* ended. Everyone understood that Black was speaking truth as a matter of social reality, which was more important than any type of abstract legal reasoning. And, as a matter of social reality, as Professor Eskridge acknowledges, we all know what underlies the reluctance to legalize same-sex marriage. It is a deeply rooted cultural disapproval of same-sex relationships. Now, you can say that that's constitutionally legitimate for the government to express its moral disapproval; or, you can say it's constitutionally illegitimate. I think that is the ground on which this legal debate should turn—but I don't think we have any doubt about what's going on. This debate is not about separate but equal; it is not about romantic paternalism; it is about society's view that homosexual relationships should not be condoned.

Should the Constitution then be read to regard this interest—this interest in enforcing cultural norms—as illegitimate? As I said, legally, Professor Eskridge makes a plausible case in support of his view. Just so, my principal reaction to his argument remains: Be careful what you ask for. Let me remind you of an opinion of the great pragmatist, Justice Holmes, that is little remembered today—a case called *Giles vs. Harris*, decided in 1903.[47] In *Giles vs. Harris*, the plaintiff alleged that, although Alabama law permitted African Americans to register to vote, in fact, there was a

45 Herbert Wechsler, *Toward Neutral Principles of Constitutional* Law, 73 HARV. L. REV. 1, 31-34 (1959).

46 Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960).

47 189 U.S. 475 (1903).

massive conspiracy underway to disenfranchise them. Registrars, for example, imposed all kinds of onerous literacy tests that were not imposed on non-minorities. As a result, the plaintiff, and all other African Americans, was not permitted to register to vote. The allegation was, in Montgomery, Alabama, not a single African American had been permitted to register. The complaint was dismissed and so, as the case went to the Supreme Court, all the allegations were taken as true. And of course, we know they were true. This is what Justice Holmes wrote:

> The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all the plaintiff could get from equity would be an empty form. . . . [R]elief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States.[48]

Now today, if we even remember *Giles* at all, we probably would say it was not one of Justice Holmes' better performances. And yet, I wonder. What if the Supreme Court had announced in 1903 that all forms of racial subjugation were unconstitutional—"separate but equal" and all the rest—and that the great mass of Southern (and many Northern) laws and practices would have to be reformed? What would have happened? I suspect there would not have been a constitutional amendment to repeal the Fourteenth Amendment. But I suspect there would have been a campaign of massive resistance, as there was later, to which the North would not have been prepared to respond with legislation like the Voting Rights Act[49] and the Civil Rights Act.[50] I suspect a decision for the plaintiff in *Giles* would have gone unenforced. And I suspect our tradition of reverence for the judiciary—the tradition that judicial judgments are to be respected—might have turned out very differently. A different decision in *Giles* might have been the greatest constitutional disaster in the history of this country. The plaintiff in *Giles* was right, but that did not really matter when the political groundwork for a legal regime involving profound social transformation in much of the country had not yet been laid.

While the Massachusetts case that recognized the constitutional right to same-sex marriage has been a great victory for gays and lesbians in Massachusetts,[51] we've seen in dozens of other states constitutional amendments added that prohibit same-sex marriage,[52] and which will be

48 *Id*. at 488.

49 Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445.

50 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

51 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

52 Christi Goodman, *State of the Unions: The Debate to Define is Raging Around the Country in*

very difficult to repeal. Gays and lesbians in those states have already paid a high price for the Massachusetts decision. If the California Supreme Court were to rule in favor of the plaintiff in the pending case,[53] perhaps it would be impossible for the opponents of same-sex marriage to amend the California Constitution.[54] But what will happen in other states, or in the United States Congress? In the Congress, there have been substantial majorities in favor of a constitutional amendment to outlaw same-sex marriage as a matter of federal constitutional law.[55] Judicial decisions in favor of same-sex marriage have been a principal impetus of the movement to add to the United States Constitution a prohibition on same-sex marriage.[56] If the risk that same-sex marriage will be imposed on an unwilling public becomes more realistic as a result of judicial decisions, what will happen to the United States Constitution? And how difficult will it be to undo a Federal Marriage Amendment?

I agree with Professor Eskridge that very deeply rooted cultural norms are at stake here. But I wonder where that takes us. Can the Constitution, that functions as our organic law, that is meant to reflect a consensus about the norms governing society—can it really be used to attack deeply rooted cultural norms without causing an enormous backlash? Would judicial recognition of a constitutional right to same-sex marriage prior to the time that the necessary political groundwork has been laid become yet another more example of the law of unintended consequences, which operates with truly ferocious power when you are dealing with deeply rooted social institutions? I think about those well-meaning lawyers in Boston forty years ago who thought that busing was the appropriate remedy to racial segregation in the public schools. And yet, we know today that the law of unintended consequences operated with ferocity in Boston. Not only did busing lead to a re-segregation of schools as white students fled to private schools, but it de-legitimated the whole enterprise of integration, and eventually lost support even in the African-American community.[57] So, I say: Be careful what you ask for.

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the Wake of Massachusetts' Court Decision, STATE LEGISLATURES, Apr. 2004, at 26.

53 *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008). The California Supreme Court has since decided the issue and found for the plaintiff, holding that the "retention of the traditional definition of marriage does not constitute a state interest sufficiently compelling, under the strict scrutiny equal protection standard, to justify withholding that status from same-sex couples," and to the extent that such distinctions are drawn, they are unconstitutional. *Id*. at 452.

54 As it happens, in the November 2008 election, voters in California, as well as Arizona and Florida, approved amendments to their state constitutions that prohibited same-sex marriage. *See* Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1.

55 Only the House of Representatives voted on the merits of the proposed Federal Marriage Amendment, but on both occasions on which votes were held, the proposal secured substantial majorities, although short of the requisite two-thirds. *See* Thomas Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 563, 571 (2008).

56 *See id*. at 540-46.

57 For perhaps the leading account of the problems engendered by the desegregation litigation in Boston and elsewhere, see Derrick A Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

I'm willing to accept the great bulk of Professor Eskridge's case. But where does it lead? Professor Eskridge understands that efforts will be made to secure constitutional amendments banning same-sex marriage; he tells us that he wants to reverse the burden of inertia. Yet, it may be that you reverse the burden of inertia only to have the deeply rooted cultural norms come back and impose some much greater burden on the advocates of same-sex marriage. So when it comes to a judicial attack on this kind of deeply-rooted cultural norm, I say: Be careful what you ask for.

Thank you.

PROFESSOR PARLOW: I think we'll have a quick response from Professor Eskridge and then we'll open it up to some questions.

PROFESSOR ESKRIDGE: Yeah, I think that was really great, actually. If we had the Alabama Supreme Court doing what I'm suggesting, for exactly these arguments, it would be a constitutional train wreck. If we had the California Supreme Court doing it in 1975—constitutional train wreck. But I think the big difference is that California has already moved step-by-step to the very threshold of gay marriage. This is the only thing that remains in terms of formal equality. So the prerequisite, I think, for a court to do this is that there already has been a change in public opinion—not so that sixty percent of the people favor same-sex marriage, but a significant minority probably favors same-sex marriage in California today. Probably even in this room another significant minority are opposed. And, probably, there's a significant minority that is still making up its mind. And that's the prerequisite. So, actually, I don't think there will be a train wreck at all.

Moreover, the Defense of Marriage Act[58] puts the weight of the federal Congress and the federal President behind the idea that, if California had same-sex marriage, Alabama doesn't have to recognize it. To be sure, you didn't need DOMA to do that. The Full Faith and Credit Clause[59] allow Alabama to do that. But give those Alabamans two reasons to think that they won't have to recognize California gay marriages—and I think they've actually internalized that. They know that a lot of things that go on here in California stay in California and are not going to necessarily infect Alabama. So, I'm very much attuned—I've written a whole book on this equality practice thing—I'm very much attuned to what you're saying. And, I do think, the time is now in California. I also do think—if the court rules the other way—I think you'll still get same-sex marriage in California through the legislative process and through some new change in heart on the part of the Governator, or whoever might succeed the Governator. If he

58 Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

59 U.S. CONST. art. IV, § 1.

decides not to run for the Senate, then maybe he will sign it the next time around. So, I think it will come through one of these processes in the next ten years. And, this is the prize. California is the big prize.

PROFESSOR PARLOW: All right, maybe we can get some questions. We'll start with our dean—"dean's prerogative."

DEAN JOHN EASTMAN: Wonderful, both of you. Professor Eskridge, I've got two points—questions. You've made a very strong argument in support of strict scrutiny, which, seems to me, the fundamental flaw in the Massachusetts ruling,[60] that it doesn't go there. It, instead, adopts what's rather an incoherent position—that gay marriage is required even under rational basis review; that we can conceive of no rational ground for distinguishing between heterosexual and homosexual couples, even with respect to procreation and the rearing of children—which seems pretty preposterous on a rational review standard.

So, my first question is: Why do you think Massachusetts Supreme Court Justice Marshall took that tack rather than going to strict scrutiny as you urged? And, then, the second question—it seems to me that in your remarks you also rebut what is a common position: If we get married, what is it to you—how will it hurt your marriage? You've made a rather compelling case that, in fact, gay marriage, like the loosening of heterosexual marriage that has occurred post-*Marvin* and others, actually does alter the nature of the marriage relationship. And, to the extent the state has an interest in fostering that for society, you've made yourself, I think, an argument that there may be a compelling state interest there, if I've read you correctly.

PROFESSOR ESKRIDGE: Okay, let me start with Mayor Daley. I think that Daley thing is absolutely priceless. Here's what has happened in the last century. Marriage has been completely redefined in the last century, exclusively by heterosexuals. It's been redefined in very important ways. Number one, marriage has lost its monopoly in the last century. Gay people were not asking for that. It was straight people who wanted that—Lee Marvin and Michelle Marvin, Oscar-winning actor and his partner. Second is no-fault divorce. You all were also the leaders in that. The California Family Act of 1969,[61] which pioneered the no-fault divorce revolution—that was not gay people. No homosexual agenda there. It was straight people wanting easier exits from the relationship. So, these have been the big changes in marriage. And they have moved

60 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

61 Family Law Act, 1969 Cal. Stat. 3341 (current version at CAL. FAM. CODE § 2310 (West 2007)).

marriage away from the unitive idea of the nineteenth century to a consumerist idea. You call it pro-choice, if you like it. You can call it consumerist if you're mildly critical. I'm mildly critical.

State recognition of same-sex marriage is not consumerist and pro-choice in the same way—its an expansion of *committed* relationships, not an easy way to avoid and escape commitment, as no-fault divorce is.

What gay marriage gives you is not more consumerism—as no-fault divorce has done; as co-habitation has done; even domestic partnership. Instead, what it says is that this couple that's going to be together now has the option of actually entering into serious legal commitments. And, even in California, which does have no-fault divorce, it's not that easy to get divorced—particularly if there are children, particularly if there's acrimony. So, it might not be just expensive, but it's a very difficult process and that can be criticized. So, the way I would say it is, that the move towards same-sex marriage, I'm completely with Mayor Daly. That's the idea.

Now, your other question—I think it's actually a great question, because—if I can gas on for just a few minutes about what I think the Massachusetts Supreme Court Justice Marshall opinion is all about in Massachusetts. Have you all had Con Law? Well, a lot of you have. In Con Law, you'll learn, there's this big difference between rational basis and strict scrutiny—it's very difficult to pass strict scrutiny. You pretty much surrender, usually. But if its rational basis, it's pretty hard to lose that. Even the most incompetent state Attorney General can win on rational basis, because the Justices will give you rational basis. Justice Scalia will say, "Oh, come on now, what about this, is that not a rational basis?"—and you win the case. But, here's what's happening. And, here who's the genius behind it. It's not Daly. It's Thurgood Marshall—Thurgood Marshall, who deserves our undying praise for the work he did in the *Brown* litigation—actually, in my opinion, who is the most brilliant reconceptualizer of the Equal Protection Clause. He said this thirty-five years ago in the *Dandrige* case[62] and then in the *Rodriguez* case,[63] both in dissent. Thurgood Marshall says, here's what we're actually doing in our equal protection cases, and here's what we should be doing. We're not doing strict scrutiny/rational basis—it always fails if it's strict, it always passes if it's rational basis. Thurgood Marshall says, what we're really doing is, we're doing a sliding scale approach when we do Equal Protection cases. We're thinking about how important the right that is being denied to a subgroup is. You know, is this something that is just economic, just a matter of allocation? Or, is this something more fundamental, like voting or marriage? The Supreme Court struck down a poll tax by saying that

62 Dandridge v. Williams, 397 U.S. 471, 508–30 (1970) (Marshall, J., dissenting).

63 San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 70–137 (1973) (Marshall, J., dissenting).

voting is a fundamental interest.[64] If you're a deadbeat dad and you don't pay your child support, Wisconsin said you can't get remarried.[65] The U.S. Supreme Court, with Thurgood Marshall writing, struck that down as a violation of the right to marry[66]—even though, I think that's a pretty good state interest. So, Thurgood Marshall says, the first thing we always look at is how important, how fundamental is the right, or the cluster of rights, that are being denied to a minority?

Second thing to look at is the classification that's being used: How fishy is it? If it's one of the fishiest, like race or sex, that's going to be automatically fatal. If it's just purely economic, that's almost automatically okay. But if it's something intermediate, like maybe sexual orientation—I think that's a pretty fishy classification. I think California has proven that sexual orientation discriminations and classifications are destructive. They not only destroy the lives of sexual minorities, but their real victim is the majority. Because, if you think that you're protecting children from their stepfathers raping them by going after homosexual schoolteachers, you're not only deluding yourself and being very unfair to the lesbian and gay schoolteachers—you are victimizing children, and you're victimizing other people who are victims of rape and sexual assault, while the gendarmerie is engaged in a witch hunt against gays and lesbians. When the state uses its resources for delusional and unproductive reasons, that means it does not have state resources to go after the major problems, and they are overwhelming us. So, it's not like we have an abundance of resources to deal with our problems.

[Thurgood] Marshall's third point is the state interest—how weighty is the state interest? Does the state really have an interest in excluding *this* group? So, it's not a state interest generally in marriage. What is the real state interest in excluding these particular people from the relationship—from the state terms and the benefits and obligations and all that goes with that? Indeed, I think that's what Massachusetts Supreme Court Justice Margaret Marshall said,[67] and I think that's what's going on at the state level. I agree with you. I personally don't see in my casebooks how there's not a rational basis under the traditional approaches. But I don't think that's what she's doing. I don't think that's what the Vermont Court did in the Vermont case, and what the New Jersey Court did in the New Jersey case.[68] And the Attorney General's brief, I think, is onto that.[69]

64 Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966).

65 Zablocki v. Redhail, 434 U.S. 374, 375 (1978).

66 *Id*. at 388.

67 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (Marshall, C.J.).

68 Baker v. State, 744 A.2d 864, 886 (Vt. 1999); Lewis v. Harris, 908 A.2d 196, 224 (N.J. 2005) (both requiring equal rights and benefits for same-sex couples as compared to heterosexual married couples, but not requiring this to be accomplished through the traditional institution of "marriage").

69 Answer Brief of State of California and the Attorney General to Opening Briefs on the Merits at 43–48, 60 n.32, *In re* Marriage Cases, 149 P.3d 737 (Cal. 2006) (No. S147999), 2007 WL 2905413 (discussing the state interest in maintaining the traditional definition of marriage while providing same-sex couples with the same rights and benefits, citing *Baker*, 744 A.2d at 868–69, and *Lewis*, 908 A.2d at

Justice Mosk here in the California Supreme Court made exactly the same point, citing Thurgood Marshall.[70] He says, "here is what's really going on in these cases." And the Attorney General's reviving that—and, I'm with him. I think this makes a lot of sense.

And, I think what's going on in the same-sex marriage cases is, they were doing this kind of balancing that avoids the tiers, you know, strict—because we've now got rational basis. We've got strict scrutiny. Well, sex at the U.S. level, not in California, is intermediate scrutiny. Why? Well, we don't even know, because the Supreme Court keeps applying different standards. And then we have *Evans* and *Romer*,[71] and we have some disability cases where it's called rational basis with "bite."[72] Okay, we've already got the sliding scale, even if you look at it formalistically. And, what Thurgood Marshall said—Marshall, again, I repeat, said it thirty-five years ago. It was genius.

Bowers v. Hardwick[73]—this was the decision that declined to strike down the Georgia sodomy law on privacy grounds. And you can talk for hours on that—and you and I probably could. A lot of arguments to be made both ways; you know, the privacy line, et cetera. But I've read the Blackmun papers. Powell has—I've seen Powell's notes, Blackmun's notes, Brennan's notes, et cetera. And here's the way the conference went. The conference had two moments that are just absolutely amazing moments.

Chief Justice Burger—who was a dedicated homophobe—started off the conference by saying we've got to reverse. You know, this is just really unimaginable, protecting homosexuals. They're demons. These are really awful people, and we can't let this go on. Justice Brennan and Marshall, you know, made shorter statements: We should defer; right to privacy; *Roe v. Wade*, that sort of stuff. Blackmun, *Roe v. Wade*. And so, it got to Powell. And Powell made, I think, the most bizarre argument I've ever seen in conference notes, and Powell was voting to affirm. He was voting to recognize the rights, though he later changed his mind. But, here was his argument to affirm. Powell says [imitating voice of Justice Powell], "Well you know, we've recognized, in our cases, this *Robinson vs. California*[74] (that's this state). Well, we said it would violate the Eighth Amendment for you to imprison someone for being a drug addict or an alcoholic." And Powell countered: "Well you know this fellow, Hardwick,

222, while distinguishing *Goodridge*, 798 N.E.2d at 969).

70 The Attorney General's brief quotes Justice Mosk's concurring opinion (concurring in his own majority) in *Hawkins v. Superior Court*, 586 P.2d 916, 927 (Cal. 1978) (Mosk, J., concurring) (quoting Dandridge v. Williams, 397 U.S. 471, 521 (1970)). *Id*. at 42–43.

71 Romer v. Evans, 517 U.S. 620 (1996).

72 *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); *see also* MARK STRASSER, ON SAME-SEX MARRIAGE, CIVIL UNIONS, AND THE RULE OF LAW: CONSTITUTIONAL INTERPRETATION AT THE CROSSROADS 7–8 (2002).

73 478 U.S. 186 (1986).

74 370 U.S. 660 (1962).

I believe he's addicted to homosexuality. And so, I would say, it would violate the Eighth Amendment to put him in jail,[75] because he's addicted to homosexuality, and so I think I'll vote to affirm."

PROFESSOR ROSENTHAL: I can vouch; by the way, that's a really pretty good imitation.

PROFESSOR ESKRIDGE: Well anyway, when Powell was saying that, their eyes were rolling. Justice Blackmun's notes say: "Can this possibly hold?" Justice Blackmun thinks we're going to win, but on this? This is just really bizarre. So then Justice Stevens said something nice about the Powell rationale, because I think he could sense that Justice Powell felt that he was hanging out there. And Stevens countered: "You know, I think we have to admit—I think I have to make an admission here, that I harbor prejudice." Stevens said this. He says, "I'm prejudiced and I think we have to deal with this"—you know, the American Psychological Association says this is unproductive. The disease is homophobia, says Justice Stevens. The State says the statute is only about homosexual sodomy. That's wrong. The statute regulates all kinds of sodomy, and the homosexual acts are just a tiny percentage of what goes on. And Stevens says, "we just simply can't uphold the statute that's being defended on the basis of prejudice that I share"—that Justice Stevens shared. This was thirty years ago. He probably didn't know a lot of gays and lesbians in 1975. He maybe had never known that that he knew a gay or a lesbian person. But that's one reason he's a judge, to be self-reflective about the role of judges which is to interrogate things like this. And the California Supreme Court, I think, has a historic opportunity.

75 *See* Bowers v. Hardwick, 478 U.S. 186, 197–98 (Powell, J., concurring) (finding it would violate the Eighth Amendment to imprison a person for "20 years for a single private, consensual act of sodomy.").

The Honeymoon is Over, Maybe for Good: The Same-Sex Marriage Issue Before the California Supreme Court

Amanda Alquist[*]

INTRODUCTION

In the past several years, the same-sex marriage debate has been a widely publicized and hotly contested issue in American jurisprudence. This important civil rights issue involves the denial of a fundamental right to a class of persons based on their sexual orientation. Currently, there is no national consensus on the recognition of same-sex marriages or domestic partnerships and civil unions.[1] In California, homosexuals can enter into domestic partnerships.[2] However, under federal law, only unions between a man and a woman will be recognized as a marriage.[3] In California, marriage was available to same-sex couples for a one month period in 2004. During this brief period, it seemed as if homosexuals finally attained equal social and legal recognition of their relationships. However, the wedded bliss was short-lived; these marriages led to a flood of litigation all the way up to the California Supreme Court.[4]

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[*] B.A., California Polytechnic State University San Luis Obispo; J.D. Candidate, University of La Verne College of Law, 2009. My article, "The Migration of Same-Sex Marriage from Canada to the United States: An Incremental Approach," is forthcoming in Volume 30, Issue 1 of the University of La Verne L. Rev. (2008). I would like to thank Professor Diane J. Klein for her brilliant teaching and continual mentorship. This article is dedicated to my husband, Kevin, who has always supported my passion to write about this important civil rights issue.

1 California and Massachusetts are the only two states to currently allow same-sex marriage. Marriage Equality USA, http://www.marriageequality.org (last visited Sept. 26, 2008). Six states offer civil unions and domestic partnerships. *Id*. (follow "Get the Facts" hyperlink; then follow "Current Status" hyperlink). Twenty-six states have state constitutional bans on same-sex marriage. *Id*. Marriage Equality USA's "sole purpose and focus is to end discrimination in civil marriage so that same-sex couples can enjoy the same legal and societal status as opposite-sex couples." *Id*. (follow "About Us" hyperlink).

2 In California, "[d]omestic partners are two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring." CAL. FAM. CODE § 297(a) (West 2004).

3 The Defense of Marriage Act of 1996 (DOMA) does not allow the federal government to recognize any marriage other than one between a man and a woman. 1 U.S.C. § 7 (2005). DOMA also declares that states are not obligated to recognize a same-sex union formed in another state. 28 U.S.C. § 1738C (2005).

4 *See In re* Marriage Cases, No. S147999, petition for review granted (Dec. 20, 2006). While publication of this article was pending, the California Supreme Court decided *In re Marriage Cases*. The rendered decision is discussed in the Author's Addendum, *infra* Parts VII–IX, and in the related case digest *infra* at 12 CHAP. L. REV. 237 (2008).

This Note discusses the 2006 California court of appeal decision, *In re Marriage Cases*. The San Francisco trial court found that California Family Code sections 300[5] and 308.5,[6] which define marriage as between a man and a woman, violated equal protection under the California Constitution.[7] The court of appeal reversed.[8] This Note reviews the legal, factual, and procedural background, including that of the group of cases eventually consolidated into a single action—*In re Marriage Cases*—which is now pending before the California Supreme Court.[9] This Note then explores the arguments made by parties on both sides of the litigation via their appellate briefs, as well as amicus briefs. This Note concludes that the California Supreme Court should reverse the court of appeal and affirm the San Francisco trial court finding that the current California marriage laws violate the state constitution.

I. THE CURRENT STATE OF MARRIAGE LAWS IN CALIFORNIA

A. The Definition of Marriage

Under the California Family Code, "[o]nly marriage between a man and a woman is valid or recognized in California."[10] Section 300 explains that "[m]arriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary."[11] Only unmarried males and unmarried females who are eighteen or older may consent to and consummate a marriage.[12]

Until 1977, California's marriage statutes considered marriage a "personal relation arising out of a civil contract to which the consent of the parties making the contract is necessary."[13] In 1977, the California Legislature amended this definition by adding gender-specific terms in order to prohibit same-sex marriage.[14] This definition of marriage has

5 "Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized by this division, except as provided by Section 425 and Part 4 (commencing with Section 500)." CAL. FAM. CODE § 300(a) (West 2008).

6 "Only marriage between a man and a woman is valid or recognized in California." CAL. FAM. CODE § 308.5 (West 2004).

7 *In re* Marriage Cases, 49 Cal. Rptr. 3d 675 (Ct. App. 2006).

8 *Id*.

9 *Supra* note 4.

10 CAL. FAM. CODE § 308.5 (West 2004).

11 *Id*. § 300(a).

12 *Id*. §§ 301, 302(a).

13 Assemb. B. 43, 2007–08 Leg., Reg. Sess. (Cal. 2006) (describing the status of California's marriage statutes from 1850 to 1977).

14 *Id*. ("In 1977, the Legislature amended the state's marriage law to replace the gender-neutral description of marriage with language specifically limiting marriage to a 'civil contract between a man and a woman.' The Legislature's express purpose for this amendment was to prohibit same-sex couples from marrying."). *See also* ASSEMB. COMM. ON THE JUDICIARY, DIGEST FOR ASSEMB. B. 607, 1977–78 Leg., Reg. Sess., at 23–28 (Assemb. 3d Reading, Cal. 1977), *microformed on* Cal. Leg. State Assemb. Analysis, KA223 1977la Micro (Univ. Microfilms, Int'l) ("Under existing law it is not clear whether

remained unchanged in the thirty years since its adoption.[15]

B. Domestic Partnerships

Domestic partnerships offer same-sex couples legal benefits and protections that are similar to a marriage.[16] Under California law, "[d]omestic partners are two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring."[17] Domestic partnerships are only available to same-sex partners if: (1) they share a common residence; (2) neither partner is married or in a domestic partnership with another person; (3) they are not blood relatives; and (4) they are both at least eighteen years old and capable of consent.[18] Domestic partnerships are also available to opposite-sex partners if they meet the above requirements and if at least one partner is over the age of sixty-two and one or both partners qualify to collect federal Social Security insurance benefits under Title II and Title XVI of the Social Security Act.[19] Once these requirements are met, partners in California may file a Declaration of Domestic Partnership with the Secretary of State.[20]

Registered domestic partners in California enjoy rights similar to those available to married couples. California's Family Code states:

> Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.[21]

This code section also grants specific rights and responsibilities to partners regarding the receipt of death benefits as a surviving partner, parental rights over children, the rights regarding nondiscrimination afforded opposite-sex couples and the right to be free from discrimination by a public agency.[22] Domestic partners also have the same obligations

partners of the same sex can get married. This bill clarifies the situation by providing that of the two partners to a marriage, one must be male and the other female.").

15 California Civil Code section 4101 was repealed in 1992 and replaced by California Family Code section 301 with no substantive change to the definition of marriage. *See* CAL. CIV. CODE § 4101 (West 1997).

16 *See*, *e.g.*, CAL. PROB. CODE § 4716(a) (West 2004) (giving a domestic partner the authority to make medical decisions if their partner lacks the capacity to do so); CAL. INS. CODE § 381.5(a) (West 2005) (giving equal insurance benefits to the domestic partner of an insured); CAL. R&T CODE § 62(p) (West 2008) (providing property tax benefits to transfers between domestic partners); CAL R&T CODE § 18521(d) (West 2008) (state tax returns of domestic partners are treated similar to that of spouses); CAL. CODE OF CIV. PRO. § 377.60 (West 2008) (right to sue for wrongful death of a domestic partner).

17 CAL. FAM. CODE § 297(a) (West 2004).

18 *Id*. § 297(b)(1)–(6).

19 *Id*. *See also* Title II of the Social Security Act, 42 U.S.C. § 402(a) (2004) (old-age insurance benefits); Title XVI of the Social Security Act, 42 U.S.C. § 1381 (2003) (supplemental security income for the aged, blind, and disabled).

20 CAL. FAM. CODE § 297(b) (West 2004).

21 CAL. FAM. CODE § 297.5(a) (West 2008).

22 *Id*. § 297.5(c), (d), (f), (g).

and responsibilities as married persons with regard to community property, debts to third parties and financial support upon dissolution of the partnership.[23] California domestic partnership law essentially applies any law pertaining to married persons—even those with gender-specific terms referring to a spouse—to same-sex partners, including federal laws targeted at opposite-sex couples.[24] While domestic partnership laws offer recognition and significant state law protections for same-sex couples, they do not grant access to over one thousand federal laws that protect opposite-sex married couples.[25]

II. BACKGROUND

A. Facts

Twelve days after being elected, San Francisco Mayor Gavin Newsom attended President Bush's State of the Union speech on January 20, 2004.[26] As the President spoke of outlawing same-sex marriage via a possible constitutional amendment, Newsom decided he wanted to issue marriage licenses to gay and lesbian couples.[27] Newsom's staff researched the issue and determined the language on marriage licenses would need to be made gender neutral.[28] On February 10, 2004, Newsom sent a letter to the County Clerk's office requesting that forms used for the purposes of granting marriage licenses be changed so gender or sexual orientation were not a barrier to obtaining such a license.[29] On February 12th, the City of San Francisco started to provide marriage licenses to same-sex couples.[30] Phyllis Lyon and Del Martin, who founded the first lesbian organization in the United States in 1955,[31] were the first same-sex couple to marry in San Francisco.[32]

Just days after marriage licenses became available, more than 130 couples lined up outside on a cold and rainy Sunday evening to be sure they would be married when city hall opened for business Monday morning.[33] One article capturing the events quoted a local business owner:

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23 *Id*. § 297.5(k)(1).

24 *Id*. § 297.5(e), (j).

25 DAVINA KOTULSKI, WHY YOU SHOULD GIVE A DAMN ABOUT GAY MARRIAGE 15 (2004).

26 Rachel Gordon, *The Battle Over Same-Sex Marriage: Uncharted Territory*, S.F. CHRON., Feb. 15. 2004, at A1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2004/02/15/MNGMN51F8Q1.DTL.

27 *Id*.

28 *Id*.

29 Letter from Gavin Newsom, Mayor of San Francisco, to Nancy Alfaro, San Francisco County Clerk (Feb. 10, 2004), *available at* http://news.findlaw.com/hdocs/docs/glrts/sfmayor21004ltr.pdf.

30 *In re* Marriage Cases, 49 Cal. Rptr. 3d 675, 686 (Ct. App. 2006).

31 The name of the organization founded by Phyllis Lyon and Del Martin is "Daughters of Bilitis." About.com, Lesbian Life, http://lesbianlife.about.com/od/herstory/p/DOB.htm.

32 CNN.com, *Mayor Defends Same-Sex Marriages*, Feb. 22, 2004, http://www.cnn.com/2004/LAW/02/22/same.sex/index.html.

33 Simone Sebastian & Tanya Schevitz, *Marriage Mania Grips S.F. as Gays Line up for Licenses: Scores of Couples Camping Out in the Name of Love*, S.F. CHRON., Feb. 16, 2004, at A1,

> "There has been a general euphoria" . . . Windows throughout the neighborhood . . . were decorated with signs like "Congratulations Newlyweds!" as two miles away couples from around the world descended on City Hall to get married. "People who had gotten marriage certificates rode through the neighborhood waving their certificates and honking their horns . . . ."[34]

More than four thousand marriage licenses were granted to same-sex couples between February 12 and March 11, 2004.[35] In defense of his actions, Newsom said he could not discriminate against people even if it meant the end of his political career.[36]

B. Procedural History

1. Prior to Consolidation

On February 10, 2004, Newsom had issued a press release publicizing the change in marriage license requirements so as to include persons of the same sex.[37] On February 13, 2004, Randy Thomasson and Campaign for California Families filed suit against Mayor Gavin Newsom and San Francisco County Clerk Nancy Alfaro for injunctive and declaratory relief.[38] Although filed the day after San Francisco issued the first gay marriage license, the litigation was originally prepared as a preemptive measure to stop any city action to issues the licenses.[39] Thomasson sued to render the mayor's directive invalid and asked the court to permanently enjoin the defendants from issuing marriage licenses to same-sex couples.[40] The plaintiffs' main assertion was that issuing marriage licenses to same-sex couples would violate state law and that Mayor Newsom did not have the authority to circumvent the California marriage codes as they defined marriage.[41] On February 20, Superior Court Judge Ronald Quidachay denied plaintiffs' request for an immediate stay.[42]

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available at http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2004/02/16/MNGD751O1T1.DTL.

34 CNN.com, *Gay Mecca Fetes Same-Sex Marriages*, Feb. 19, 2004, http://www.cnn.com/2004/US/West/02/19/gay.celebrations.reut/index.html.

35 Bob Egelko, *Court Halts Gay Vows*, S.F. CHRON., Mar. 12, 2004, at A1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2004/03/12/MNGHI5JDDU1.DTL.

36 *Mayor defends same-sex marriages*, *supra* note 32.

37 *Id*. at 2.

38 Verified Amended Complaint for Writ of Mandamus, Declaratory and Injunctive Relief at 1, Thomasson v. Newsom, No. CGC 04-428794 (S.F. Super. Ct. Feb. 13, 2004) [hereinafter CCF Complaint], *available at* http://www.domawatch.org/cases/california/prop22vsanfrancisco/040214ThomassonAmendedComplaint.pdf. Thomasson, a California resident, is the founder and director of Campaign for California Families, a non-profit family values organization. Campaign for California Families, http://www.ccfcalifornia.com (last visited Sept. 26, 2008). According to the organization's website, it is a statewide lobbying organization representing those "who believe the sacred institutions of life, marriage and family deserve utmost protection and respect by government and society." *Id*. (follow "About Us" hyperlink).

39 CCF Complaint, *supra* note 38, at 1.

40 *Id*. at 1.

41 *Id*. at 3.

42 Harriet Chiang, *Lockyer Pleads to Top Court: State Justices Give S.F. Until Friday to Defend Licenses*, S.F. CHRON., Feb. 28, 2004, at A1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2004/02/28/MNG1Q5ALU11.DTL.

A second lawsuit, *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco*, was also filed on February 13, 2004 challenging the City's actions.[43] Unlike the *Thomasson* lawsuit, this action was in direct response to the issuing of the marriage licenses. The plaintiff, Proposition Legal Defense and Education Fund ("Prop. 22 LDEF"), is an organization seeking to enforce Proposition 22, an initiative passed by California voters in March 2000 and codified as Family Code Section 308.5 ("Only marriage between a man and a woman is valid or recognized in California.").[44] Prop. 22 LDEF's main claim was that issuing marriage licenses to same-sex couples violated California law because the Family Code provisions were valid and should be enforced.[45] The plaintiff sought an immediate stay and declaratory relief.[46] On February 17th, Superior Court Judge James Warren denied the request.[47] *Thomasson* and *Prop. 22 LDEF* were consolidated and scheduled for a hearing on March 29, 2004.[48] At that hearing, San Francisco officials were required to show why issuing marriage licenses to same-sex couples was legal.[49]

When the trial court refused to grant a stay in either case, California Attorney General Bill Lockyer filed an original writ petition in the California Supreme Court on February 27, 2004, claiming the actions taken by Mayor Newsom and other city officials were unlawful.[50] On March 11, 2004, the California Supreme Court ordered San Francisco city officials to show cause why a writ of mandate should not issue, which would require city officials to follow and enforce the existing California marriage statutes in the absence of a judicial determination that the statutory provisions were unconstitutional.[51] The court also directed the officials to enforce the existing marriage statutes and banned any further issuance of unauthorized marriage licenses.[52] The court stayed the pending hearings in *Thomasson* and *Prop. 22 LDEF*, but the stay did not "preclude the filing of a separate action in superior court raising a substantive constitutional challenge to the current marriage statutes."[53]

43 *In re* Marriage Cases, 49 Cal. Rptr. 3d 675, 685 (Ct. App. 2006).

44 First Amended Verified Petition for Writ of Mandate and Immediate Stay, and Complaint for Injunctive and Declaratory Relief at 2, Proposition 22 Legal Def. and Educ. Fund v. City and County of S.F., No. CPF 04-503943 (S.F. Super. Ct. Feb. 13, 2004), [hereinafter Prop. 22 LDEF Petition], *available at* http://www.domawatch.org/cases/california/prop22vsanfrancisco/P22vSF_FirstAmndVrfd Pet.pdf.

45 City and County of San Francisco's Cross-Complaint for Declaratory Relief (To Determine Validity of State Statutes) at 4, Proposition 22 Legal Def. and Educ. Fund v. The City and County of S.F., No. CPF 04-503943 (S.F. Super. Ct. Feb. 13, 2004), *available at* http://www.domawatch.org/ cases/california/prop22vsanfrancisco/Prop22City%27sCrossComplaint.pdf.

46 Prop. 22 LDEF Petition, *supra* note 44, at 5.

47 Chiang, *supra* note 42.

48 *Id*.

49 *Id*.

50 Lockyer v. City and County of San Francisco, 95 P.3d 459, 1072 (Cal. 2004).

51 *Id*. at 1073.

52 *Id*.

53 *Id*. at 1074.

Three suits were then filed in superior court challenging the state's marriage statutes, which defined marriage as between a man and a woman.[54] The first complaint was filed by the City of San Francisco, seeking declaratory relief and a petition for writ of mandate.[55] This suit specifically challenged California Family Code sections 300 and 308.5.[56] Two other lawsuits seeking writs of mandate were filed by groups of same-sex couples in Los Angeles and San Francisco Superior Courts, claiming they were prevented from marrying in California or that their out-of-state marriages were not recognized as valid under California law.[57]

The second action, *Tyler v. County of Los Angeles* was filed on February 23, 2004.[58] The *Tyler* petitioners were two same-sex couples; one couple who wanted to marry, and another couple who wanted state recognition of their Canadian marriage.[59] Both couples had been denied a license by the County of Los Angeles because of the current marriage law.[60] The *Tyler* couples claimed that their fundamental right to marry was violated by California's marriage laws.[61] Equality California, a gay rights organization, was granted leave to intervene.[62]

The third action, *Woo v. Lockyer*, was filed in San Francisco Superior Court on March 12, 2004.[63] The advocacy groups Our Family Coalition and Equality California joined the same-sex couple plaintiffs and made claims similar to those in *Tyler* and *City and County of San Francisco* ("*CCSF*").[64] The Superior Court consolidated *Woo* and *CCSF* on April 1, 2004.[65]

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54 *In re* Marriage Cases, 49 Cal. Rptr. 3d 675, 687 (Ct. App. 2006).

55 City and County of San Francisco v. State, No. CGC-04 429539 (S.F. Super. Ct. 2004), *available at* http://www.domawatch.org/cases/california/prop22vsanfrancisco/Final_Decision_04132005.pdf.

56 *In re Marriage Cases*, 49 Cal. Rptr. 3d at 687.

57 *Id*.

58 Tyler v. County of Los Angeles, No. BS-088506 (L.A. Super. Ct. 2004), *available at* http://www.domawatch.org (follow "Index of Cases" hyperlink).

59 Petition for Writ of Mandate or Prohibition at 2, Tyler v. County of Los Angeles, No. BS-088506 (L.A. Super. Ct. Feb. 23, 2004), *available at* http://www.domawatch.org/cases/california/tylervlosangeles/040223PetitionForWritOfMandate.pdf.

60 *Id*. at 4.

61 *Id*. at 5.

62 *In re Marriage Cases*, 49 Cal. Rptr. 3d at 687 n.3. Equality California is an organization that "works to achieve equality and secure legal protections for LGBT people." About EQCA, - Equality California, http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKrH&b=4025493 (last visited Sept. 26, 2008).

63 Third Amended Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, Woo v. Lockyer, No. CGC-04-504038 (S.F. Super. Ct. Aug. 31, 2004), *available at* http://www.domawatch.org/cases/california/sanfranciscovstate/Woo_3rd_AmndPet.pdf.

64 "Our Family Coalition promotes the rights and well-being of Bay Area lesbian, gay, bisexual, and transgender families with children and prospective parents through education, advocacy, social networking, and grassroots community organizing." Our Family Coalition: Home, http://www.ourfamily.org (last visited Sept. 26, 2008).

65 City and County of San Francisco v. State, 27 Cal. Rptr. 3d 722, 726 (Ct. App. 2005).

On August 12, 2004, the California Supreme Court issued a writ of mandate in *Lockyer* requiring San Francisco city officials to enforce the existing state marriage statutes defining marriage as between a man and a woman.[66] Finding that California Family Code provisions had been violated, the court directed officials

> to take all necessary remedial steps to undo the continuing effects of the officials' past unauthorized actions, including making appropriate corrections to all relevant official records and notifying all affected same-sex couples that the same-sex marriages authorized by the officials are void and of no legal effect.[67]

In limiting its decision to the validity of the approximately four thousand same-sex marriages performed in San Francisco, the court did not issue an opinion regarding the constitutionality of California's marriage statutes:

> To avoid any misunderstanding, we emphasize that the substantive question of the constitutional validity of California's statutory provisions limiting marriage to a union between a man and a woman is not before our court in this proceeding, and our decision in this case is not intended, and should not be interpreted, to reflect any view on that issue. We hold only that in the absence of a judicial determination that such statutory provisions are unconstitutional, local executive officials lacked authority to issue marriage licenses to, solemnize marriages of, or register certificates of marriage for same-sex couples, and marriages conducted between same-sex couples in violation of the applicable statutes are void and of no legal effect. Should the applicable statutes be judicially determined to be unconstitutional in the future, same-sex couples then would be free to obtain valid marriage licenses and enter into valid marriages.[68]

2. Consolidation and Trial

Before the California Supreme Court reached its final decision in *Lockyer*, the cases discussed above were coordinated and assigned to San Francisco Superior Court Judge Richard A. Kramer.[69] The Judicial Council coordinated *CCSF, Tyler,* and *Woo* with the two proceedings stayed as a result of the *Lockyer* case (*Thomasson* and *Prop. 22 LDEF*) on June 14, 2004.[70] This single proceeding, entitled *Marriage Cases*, was coordinated to address the constitutional challenges to California's marriage statutes.[71] In addition to these cases, a sixth case, *Clinton v. State of California*, was added to the coordinated proceeding on September 8, 2004.[72] *Clinton* had been filed on March 12, 2004 in San Francisco Superior Court by six same-sex couples seeking to have their marriage licenses upheld.[73]

66 *Lockyer*, 95 P.3d 459, 464 (Cal. 2004)
67 *Id*.
68 *Id*.
69 *Marriage Cases*, Judicial Council Coordination Proceeding No. 4365, S.F. Super. Ct. (2004).
70 *Id*. at 1 n.1.
71 *Id*.
72 *Id*.
73 Complaint for Declaratory Relief by Same-Sex Married Couples Challenging the Constitutionality of the Family Code at 2, Clinton v. State, No. CGC-04-429548 (S.F. Super. Ct. 2004), *available at* http://www.domawatch.org/cases/california/clintonvstate/Complaint.pdf.

The trial court hearing for the six coordinated actions took place on December 22–23, 2004.[74] "Spectators, including most of the 12 plaintiff couples and a number of their supporters, lined up in the courthouse corridors more than an hour before the hearing and filled the courtroom during the daylong proceedings."[75] One such spectator was Stuart Gaffney, an original plaintiff from the *Lockyer* action, who married his partner of seventeen years in San Francisco on the first day marriage licenses were issued.[76] After the hearings, Gaffney commented: "Our very lives were before the court. . . . People who don't know us are telling us whether we can get married or not. . . . We're trying to get that happiest day of our lives back."[77] On April 13, 2005, the trial court ruled that the California Family Code provisions defining marriage as between a man and a woman violated equal protection under the state constitution.[78]

While the United States Constitution uses intermediate scrutiny for gender classifications,[79] the California Constitution views gender as a suspect classification requiring the higher standard of strict scrutiny.[80] The intermediate scrutiny standard requires that state action serve "important governmental objectives, and must be substantially related to achievement of those objectives."[81] But strict scrutiny generally requires the government to prove a "compelling interest" in creating a suspect classification.[82]

In 1971, the California Supreme Court set forth the principle that the strict scrutiny standard of review applies where suspect classifications such as sex are used.[83] The court held that sex qualifies as a suspect classification because it is an immutable trait, such as race, for which a class of persons is treated differently without regard to capabilities.[84] In applying the strict scrutiny standard of review for gender classifications, the trial court in *Marriage Cases* first determined that "Family Code provisions limiting marriage in California to opposite-sex unions are subject to strict judicial scrutiny because they rest on a suspect classification (gender). . . ."[85] The two separate classifications created by the marriage statutes are same-sex and opposite-sex. These criteria are

74 *In re* Marriage Cases, 49 Cal. Rptr. 3d 675, 688 (Ct. App. 2006).

75 Bob Egelko, *Tradition vs. Equality Argued in S.F. Court: Advocates, Foes Lay Out their Cases Before Judge*, S.F. CHRON., Dec. 23, 2004, at A-1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2004/12/23/MNGM3AGB3B1.DTL.

76 Rona Marech, *Those who filed suit*, S.F. CHRON, Dec. 21, 2004, at A12, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2004/12/21/MNGN8AEV0J1.DTL.

77 Egelko, *supra* note 75.

78 *In re Marriage Cases*, 49 Cal. Rptr 3d at 688.

79 *See* Craig v. Boren, 429 U.S. 190, 197–99 (1976).

80 Catholic Charities of Sacramento v. Superior Court, 32 Cal. 4th 527, 564 (2004) (citing Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 539–42 (Cal. 1971)).

81 *Craig*, 429 U.S. at 197.

82 *Id*. at 220.

83 *Sail'er Inn*, 485 P.2d at 539.

84 *Id*. at 540.

85 *In re* Marriage Cases, 49 Cal. Rptr. 3d 675, 688 (Ct. App. 2006).

used to discriminate against individuals because their partner's gender becomes the sole basis for determining eligibility for marriage under the law. Therefore, "for the purpose of an equal protection analysis, the legislative scheme creates a gender-based classification."[86] The trial court went on to say: "It is well established that a gender-based classification is a 'suspect' classification and thus subject to the strict scrutiny of analysis under the equal protection clause of the California Constitution."[87]

The court also applied strict scrutiny because the marriage statutes infringed upon a fundamental right.[88] The trial court noted that California courts had previously determined the right to marry as a fundamental constitutional right.[89] And the Supreme Court of California held in 1948 that "the essence of the right to marry is freedom to join in marriage with the person of one's choice."[90] Under the California marriage statutes, homosexual persons are denied the fundamental right to marry a partner of one's choosing.

Not only did the trial court rule that the California marriage statues failed to meet strict scrutiny,[91] it also held that the marriage statutes failed to meet even the rational basis test because the statutes did not further a legitimate state interest.[92] The state argued that because marriage had traditionally been between a man and a woman, the state had a legitimate interest in reserving marriage for opposite-sex unions.[93] Rejecting this argument, the court noted, "The state's protracted denial of equal protection cannot be justified simply because such constitutional violation has become traditional."[94] The court concluded that "California's traditional limit of marriage to a union between a man and a woman is not a sufficient rational basis to justify Family Code sections 300 and 308.5. Simply put, same-sex marriage cannot be prohibited solely because California has always done so before."[95] The State of California, the Campaign for California Families,[96] and the Prop. 22 LDEF all filed separate appeals, which were consolidated on December 1, 2005 by the California court of appeals into one action now known as *In re Marriage Cases*.[97]

86 *Marriage Cases*, Judicial Council Coordination Proceeding No. 4365, S.F. Super. Ct. (2004). at 17.

87 *Id*. at 19 (citing Catholic Charities of Sacramento, Inc. v. Superior Court, 32 Cal. 4th 527, 564 (2004).

88 *See Sail'er Inn*, 485 P.2d 529 at 539.

89 *See Marriage Cases*, at 19 (quoting *In re* Carrafa, 143 Cal. Rptr. 848, 850 (Ct. App. 1978)).

90 Perez v. Sharp, 198 P.2d 17, 21 (Cal. 1948).

91 *In re* Marriage Cases, 49 Cal. Rptr. 3d. 675, 688 (Ct. App. 2006).

92 *Id*.

93 *See* Final decision, *Marriage Cases*, at 6.

94 *Id*. at 7.

95 *Id*. at 8.

96 On appeal, the *Thommasson* case was captioned *Campaign for California Families v*. *Newson*. *See In re Marriage Cases*, 49 Cal. Rptr. 3d at 727.

97 California Courts - Appellate Court Case Information, 1st Appellate District, Docket (Register of Actions), City and County of San Francisco v. State of California et al., http://appellatecases.

3. On Appeal

The legal issue decided by a three judge panel of the California court of appeal was: "Did the trial court err when it concluded Family Code statutes defining civil marriage as the union between a man and a woman are unconstitutional?"[98] The appeal was argued on July 10, 2006,[99] and the court of appeal reversed.[100]

Presiding Justice William McGuiness delivered the majority opinion, joined by Justice Joanne Parrilli.[101] Justice McGuiness decided that it was not the role of the appellate court to decide which party advanced the most compelling idea of what marriage is, but to determine whether the statutory definition of marriage in California is unconstitutional because homosexual persons are not afforded the option of marrying the partner of their choosing.[102] The majority opinion made seven main points: (1) opponents of same-sex marriage lack standing to pursue claims for declaratory relief;[103] (2) the fundamental due process right to marry did not encompass a right to same-sex marriage;[104] (3) the California Family Code provisions restricting marriage to opposite sex couples did not impermissibly discriminate on basis of gender;[105] (4) the disparate impact of such provisions on gays and lesbians did not trigger strict scrutiny equal protection analysis;[106] (5) the California state constitutional right of privacy does not encompass a right to same-sex marriage;[107] (6) federal and state guarantees of free expression do not encompass the right of gays and lesbians to express commitments in civil same-sex marriages;[108] and (7) under the rational basis test, restrictive Family Code provisions furthered a legitimate state interest and thus did not violate equal protection rights of gays and lesbians.[109]

Applying the rational basis test, the appellate court concluded that the statutes were constitutional because they did not deprive homosexuals of a vested right to same-sex marriage, nor did they discriminate against

courtinfo.ca.gov/search/case/dockets.cfm?dist=1&doc_id=62337&doc_no=A110449 (last visited Sept. 27, 2008).

98 *In re Marriage Cases*, 49 Cal. Rptr. 3d at 684. The court specifically references California Family Code sections 300, 301, 302, and 308.5. *Id*.

99 Minutes, California Court of Appeal, First Appellate District (.July 10, 2006), *available at* http://www.courtinfo.ca.gov/courts/minutes/documents/AJUL0306.PDF (last visited Sept. 27, 2008).

100 *In re Marriage Cases*, 49 Cal. Rptr. 3d at 726–27.

101 Bob Egelko, *The Battle Over Same-Sex Marriage, Same-Sex Marriage Ban Upheld in Ruling*, S.F. CHRON., Oct. 6, 2006, at A-1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/10/05/BAG4KLJAF24.DTL.

102 *In re Marriage Cases*, 49 Cal. Rptr. 3d at 685.

103 *Id*. at 691.

104 *Id*. at 699.

105 *Id*. at 706.

106 *Id*. at 709.

107 *Id*. at 714.

108 *Id*. at 717.

109 *Id*.

homosexuals under the suspect class of gender.[110] The court ruled that requiring a person to choose another of the opposite sex in order to legally marry was rationally related to California's interest in maintaining the heterosexual nature of marriage as it had always historically been defined.[111] The court also reasoned that same-sex couples were afforded similar rights as heterosexual married couples under the state's domestic partnership laws.[112]

Reflecting on the legislative intent of amending the gender-neutral marriage provisions in 1977, the court observed that Assembly Bill No. 607 was passed to amend the marriage statute "to prohibit persons of the same sex from entering lawful marriage."[113] The appellate court stated that it is the role of the legislature, and not the judiciary, to change a statute or to grant homosexuals a right not offered by the existing law.[114] According to Judge McGuiness, changes to the marriage laws would have to come from the people of California through the legislative process because it is not the role of judges to redefine social institutions.[115]

C. Current Status

After the court of appeal issued its opinion, six petitions for review were filed by November 14, 2006.[116] On December 20, 2006, the California Supreme Court granted certiorari in *In re Marriage Cases*.[117] The case was argued before the court on March 4, 2008, with a ruling due by June 4, 2008.[118] In addition to briefs filed by the parties, there are a total of thirty nine amicus briefs filed in support of either side of the action,[119] including those filed by cities, bar associations, religious organizations, law professors, and gay rights organizations.[120]

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110 *Id*. at 686.

111 *Id*. at 720.

112 *Id*. at 695.

113 *Id*. at 692 (citing S. COMM. ON THE JUDICIARY, ANNALYSIS. OF ASSEMB. B. NO. 607, 1977–78 Leg., Reg. Sess., at 1 (Cal. 1977) (as amended May 23, 1977)). For a history of the amendments, see *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 468 n.11 (Cal. 2004).

114 *In re Marriage Cases*, 49 Cal. Rptr. 3d at 685.

115 *Id*.

116 Media Advisory Release No. 41, Judicial Council of California, California Supreme Court Accepts Same-Sex Marriage Cases for Review (Dec. 20, 2006), *available at* http://www.courtinfo.ca.gov/presscenter/newsreleases/MA41-06.PDF (last visited Sept. 27, 2008).

117 Bob Egelko, *Marriage Law Goes to High Court: State Supreme Court Sets Aside Appellate Ruling on Same-Sex Issue, Agrees to Hear Arguments*, S.F. CHRON., 21 Dec. 2006, at B-1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/12/21/BAGEKN357O24.DTL.

118 *See* Julia Cheever, *Divided California Supreme Court Hears Same Sex Marriage Case*, S.F. SENTINEL.COM, Mar. 4, 2008, http://www.sanfranciscosentinel.com/?p=10775 (last visited Sept. 27, 2008).

119 *See* DOMAwatch.org – California, *Proposition 22 Legal Defense & Education Fund v. City and County of San Francisco, consolidated with Thomasson v. Newsom*, http://www.domawatch.org/stateissues/california/prop22vsanfrancisco.html (collecting amicus briefs from the Court of Appeal action *In re Marriage Cases*).

120 *See id*.

III. THE LEGAL ISSUE BEFORE THE CALIFORNIA SUPREME COURT

The California Supreme Court will be deciding the issue:

> Does California's statutory ban on marriage between two persons of the same sex violate the California Constitution by denying equal protection of the laws on the basis of sexual orientation or sex, by infringing on the fundamental right to marry, or by denying the right to privacy and freedom of expression?[121]

IV. THE BEST ARGUMENTS OF THE PARTIES

A. The Best Legal Arguments for the Unconstitutionality of the Ban on Same-Sex Marriage

The four petitioners' briefs make numerous arguments aimed at demonstrating the unconstitutionality of the existing law. But the City of San Francisco's opening brief presents the argument that will most likely persuade the California Supreme Court to reverse the court of appeal's ruling and is the most inclusive brief in terms of issues covered.[122] The City of San Francisco's brief begins with a history of discrimination against homosexuals as well as a general history of marriage.[123] It then proceeds with a discussion of constitutional and social discrimination.[124] The brief and its supplemental parts provide the strongest legal argument for the parties in favor of same-sex marriages, particularly with a discussion of the inferior status of domestic partnerships compared to heterosexual marriages.

The San Francisco brief makes three arguments why California's Family Codes are unconstitutional. First, excluding homosexuals from the institution of marriage is not rationally related to a legitimate governmental interest.[125] According to San Francisco, "[t]he marriage exclusion is irrational, and for that reason the Court need not reach the remaining questions in the case: whether the marriage laws should be subject to strict equal protection scrutiny . . . ."[126] The brief urges that the marriage exclusion will fail the rational basis test if it is "inconsistent with existing State policy towards lesbians and gay men."[127] The rational basis test requires a two step analysis. "There must be some rationality in the nature of the class singled out *and* a rational relationship between the legislative

121 News Release No. S.C. 51/06, Judicial Council of California, Summary of Cases Accepted During the Week of December 18, 2006 (Dec. 22, 2006), *available at* http://www.courtinfo.ca.gov/courts/supreme/summaries/WS121806.PDF.

122 *See* Petitioner City and County of San Francisco's Opening Brief on the Merits, In re Marriage Cases, No. S147999 (Cal. 2007) [hereinafter San Francisco Brief].

123 *Id*. at 6–26.

124 *Id*. at 32.

125 *Id*.

126 *Id*. at 33.

127 *Id*.

goal and the class singled out for unfavorable treatment."[128] The California court of appeal found the test satisfied because the state had an interest in retaining the historical nature of marriage as a heterosexual institution.

However, this line of reasoning is erroneous and was previously overruled when used to support anti-miscegenation laws. The United States Supreme Court determined that the purpose of such laws was to promote white supremacy despite the state's rationalization that "blacks and whites were treated equally because both were barred from interracial marriage."[129] The prominent scholar, William Eskridge, argues that "[m]ost of the restrictions, such as the bar to different-race marriage, are legally constructed practices reflecting divisive social prejudice rather than sound policy. *Loving* [*v*. *Virginia*] is at odds with the philosophy that historical pedigree alone justifies a dividing practice restricting who may enjoy state benefits."[130] Just as the United States Supreme Court found in *Loving*, the California Supreme Court should recognize that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[131]

As described in his book, *Sex and Reason*,[132] Richard A. Posner believes that the vital personal right of marriage enunciated in *Loving* does not apply to homosexuals in a literal context, because the *Loving* Court only addressed heterosexual marriage.[133] Posner notes that "if the freedom to marry" principle of *Loving* is applied to homosexuals and "taken seriously, the deprivation to the homosexual couple denied the right to marry would carry a heavy weight."[134] Posner appears to argue that unless the right to marry is downplayed, homosexuals could claim they are being denied a significant right. But while the Supreme Court may have only considered heterosexual marriage in *Loving*, the main principle underlying the freedom to marry can still be examined and applied in the context of same-sex marriage.

Even if the California Supreme Court finds a rational basis for discriminating against homosexuals with respect to marriage, the Family Code provisions would still be subject to strict scrutiny because they single out homosexuals as a suspect class.[135] To establish a suspect class, a party

128 *Id*. at 32 (citing Young v. Haines, 718 P.2d 909, 918 (Cal. 1986)) (internal quotations omitted) (emphasis added).

129 DAVID MOATS, CIVIL WARS: A BATTLE FOR GAY MARRIAGE 132 (Harcourt 2004).

130 WILLIAM N. ESKRIDGE, JR. , FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT: THE CASE FOR SAME-SEX MARRIAGE 160 (Free Press 1996).

131 Loving v. Virginia, 388 U.S. 1, 12 (1967).

132 RICHARD A. POSNER, *Homosexuality: The Policy Questions*, *in* SEX AND REASON 291, 312–13 (Harvard Univ. Press 1992), *reprinted in* ANDREW SULLIVAN, SAME-SEX MARRIAGE PRO AND CON: A READER 186 (Vintage Books 2004).

133 *Id*. at 188. (reprinting RICHARD A. POSNER, HOMOSEXUALITY: THE POLICY QUESTIONS, (Harvard Univ. Press 1992).

134 SULLIVAN, *supra* note 132, at 188 (internal quotations omitted).

135 San Francisco Brief, *supra* note 122, at 60.

must show: "(1) the group has suffered a history of discrimination and stigmatization; and (2) the discrimination is based on characteristics that have no bearing on the group's ability to perform in society."[136] The California Legislature has enacted laws prohibiting discrimination against homosexuals in education, employment, housing, parenting and other areas.[137] These laws offer protection for homosexuals in public and private spheres, showing the state's recognition of "the existence and the pervasiveness of sexual orientation discrimination, and the ability of lesbians and gay men to contribute to society in all aspects of economic, public and private life."[138]

Strict scrutiny analysis should be applied because the marriage statutes discriminate against homosexuals on the basis of sex. The marriage statutes are not sex-neutral because classification as either male or female is required to determine who is eligible for marriage under the law, and the right to marry is determined based on the sex of the would-be spouse that an individual chooses.[139] The court of appeal did not apply a strict scrutiny test for discrimination on the basis of sex because it held that men and women were treated equally under the law.[140] In other words, both men and women could marry persons of the opposite sex. The petitioners argue that rights belong to individuals, and that the court of appeal's holding implies that discrimination against one class is allowed so long as a parallel class suffers the exact same discrimination.[141] The fact that homosexuals are discriminated against on an equal basis still means they suffer discrimination solely based on the sex of their partner.

The San Francisco brief reminds us that a law grounded in history or custom can be invalidated by the judiciary on constitutional grounds.[142] It specifically discusses the mixed-race marriage laws, which were struck down for violating the liberty interests and equal rights of those they affected, despite being rooted in tradition.[143] The fact that homosexuals have not previously been afforded the right to marry is not a valid reason for concluding that they have no reasonable expectation of a privacy right to marry the person of their choice. The court need not uphold the Family Codes simply because they follow the custom and tradition of excluding homosexuals from marriage.

The next issue addressed is privacy rights. The California Constitution protects the privacy rights of its citizen.[144] The California

136 *Id*. (citing Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 540 (Cal. 1971)).
137 San Francisco Brief, supra note 122,at 63–64.
138 *Id*. at 64.
139 *Id*. at 73.
140 *Id*. at 74.
141 *Id*. at 74–75.
142 *Id*. at 41–42.
143 *Id*. at 43.
144 *Id*. at 82 (citing CAL. CONST. art. 1, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty . . . and pursing and

Family Code infringes upon a homosexual's right to "autonomy privacy" derived from California case law and described as "the interest in making intimate personal decisions or conducting personal activities without observation, intrusion or interference."[145] In *Ortiz v. Los Angeles Police Relief Ass'n*, the California court of appeal held that California's constitutional right to privacy includes the right to marry.[146] After becoming engaged to an incarcerated felon, the *Ortiz* plaintiff was fired by her employer, an association that provided compensation to police officers.[147] Although the court found in favor of the employer after balancing certain safety reasons against the plaintiff's personal interest, the court emphasized the plaintiff's right of privacy to marry, and especially the right to marry the person of her choice.[148] Here, the state denies homosexuals the right to marry a person of their choice and invades their right to autonomous privacy by excluding them from civil marriage. This is only lawful if the state can show a compelling government interest in excluding homosexuals from this institution.[149] San Francisco argues that because the state failed to even meet the rational basis test, the marriage laws do not advance a compelling state interest.[150]

B. Best Arguments for the Constitutionality of the Statutory Ban

Strong arguments in support of the California Family Code, and against same-sex marriage, are set forth in a brief by the Campaign for California Families and in an amicus curiae brief by the public interest organization, Judicial Watch. The amicus brief focuses on the role of the courts in deciding the constitutionality of the statutes, while the Campaign for California Families brief addresses the merits of the claim.

1. The Traditional Definition of Marriage

The Campaign for California Families brief presents the strongest argument for upholding the California Family Code.[151] Its argument is deeply rooted in the traditional definition of marriage,[152] pointing to the fact that the United States Supreme Court upheld marriage as the union between a man and a woman.[153] Arguing that the definition of marriage is

obtaining safety, happiness, and privacy.")).

145 *Id*. at 82 (citing Hill v. Nat'l Collegiate Ath. Ass'n, 865 P.2d 633, 654 (Cal. 1994)) (internal quotations omitted).

146 *Id*. at 83 (citing Ortiz v. Police Relief Ass'n, 120 Cal. Rptr. 2d 671, 681 (Ct. App. 2002)).

147 *Ortiz*, 120 Cal. Rptr. at 673–74.

148 *Id*. at 678–79.

149 San Francisco Brief, *supra* note 122, at 86–87 (citing Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797, 818 (Cal. 1997).

150 *Id*. at 87.

151 Answer Brief Campaign for California Families on the Merits at 13, *In re* Marriage Cases, No. S147999 (Cal. June 7, 2007) [hereinafter CCF Brief] (citing Griswold v. Connecticut, 381 U.S. 479, 486 (1965)).

152 *Id*. at 8.

153 *Id*. at 11–13.

older than the state statutes at issue here, the respondents assert that "[m]arriage is not merely a creation of statute, but is an institution that is older than the Constitution, state statutes and court decisions."[154] This point demonstrates that the government does not create rights, but instead creates social institutions to regulate people seeking to express, obtain, and protect their rights.

The brief also cites the 1877 case of *Meister v. Moore*, which held that marriage statutes "regulate the mode of entering into the contract, but they do not confer the right."[155] The idea is that the government cannot change the institution of marriage to include homosexuals, because the coming together of a man and woman in marriage existed before the creation of the social institution.

The Campaign for California Families argues that the institution of marriage is the foundation of society.[156] Emphasizing the procreative nature of the marital relationship, its brief states, "marriage statutes reflect that reality and provide governmental approval and support for the institution upon which society depends for its future."[157] Respondents argue that same-sex couples are seeking to break down the structure and purpose of traditional marriage while also asking to become a part of the institution.[158] But even heterosexuals who join in traditional marriage do not always procreate and, therefore, under the respondent's argument, do not contribute to the foundation and future of society. Following this reasoning, it seems that all infertile heterosexual couples as well as all those who do not intend to bear children should also be denied access to marriage.

The Campaign for California Families' argument fails to acknowledge that a marriage may occur for reasons other than procreation. William Eskridge notes that opponents of same-sex marriage often claim that fostering family values requires reserving marriage for those who want to (naturally) procreate and raise a family.[159] But Eskridge counters this argument: "Families need not be heterosexual, and they need not procreate. The state has always allowed couples to marry even though they do not desire children or are physically incapable of procreation. Marriage in an urbanized society serves companionate, economic, and interpersonal goals that are independent of procreation."[160]

Opponents of same-sex marriage attack the analogy between banning homosexuals from marriage and anti-miscegenation laws, by claiming that marriage was designed to bring men and women together, while race was

154 *Id*. at 13 (citing *Griswold*, 381 U.S. at 486).
155 *Id*. at 12 (citing Meister v. Moore, 96 U.S. 76, 78–79 (1877)).
156 *Id*. at 8.
157 *Id*. at 12.
158 *Id*. at 6–7.
159 ESKRIDGE, *supra* note 130, at 12.
160 *Id*.

added to the institution.[161] Some argue that *Loving* struck down anti-miscegenation laws because the institution of marriage was corrupted by laws promoting racism.[162] Supporters of this claim cite marriage scholar David Blankenhorn to argue that the institution of marriage should not be manipulated for individual wants, nor should concepts "that are alien and even hostile to the institution's core forms, meanings and reasons for being" be grafted onto the institution of marriage.[163] It is undisputed that the institution of marriage has never applied to homosexual unions, and doing so would graft the recognition of a new type of partnership onto marriage. But unlike the past, where discrimination was grafted onto marriage, conferring marital rights to same sex couples would serve as recognition that rights have been denied to homosexuals.

Blankenhorn writes, "today's proponents of same-sex marriage in the United States are seeking to restructure marriage and use it for a special purpose. That purpose is to gain social recognition of the dignity of homosexual love."[164] But if heterosexuals can enter a marriage to gain social recognition of the dignity of their love, why should homosexuals be denied the same opportunity? The Campaign for California Families' brief argues that the purpose of marriage is not to help change public attitudes, but to perpetuate society.[165] However, marriage is a widely recognized social institution where cultural attitudes play out in the public sphere. The current nature of the marital institution prevents homosexuals from participating in this part of society. Just as the anti-miscegenation laws were struck down as discriminating against mixed-race couples in the 1960s, allowing same-sex unions to be part of the marriage institution will strike down the similar discrimination faced by same-sex couples today.

According to the respondents, laws defining marriage as a union between a man and a woman do not actually discriminate on the basis of sexual orientation. They argue that "regardless of sexual orientation, any person can marry any person of the opposite sex," meaning marriage *is* available to homosexuals—as long as they marry a person of the opposite sex.[166] After all, individuals seeking to marry are not questioned by the

161 CCF Brief, *supra* note 151, at 16–17.

162 *Id*. at 17 (citing Loving v. Virginia, 388 U.S. 1, 11–12 (1967)).

163 *Id*.(citing DAVID BLANKENHORN, THE FUTURE OF MARRIAGE 175–76 (Encounter Books 2007)). "David Blankenhorn is founder and president of the Institute for American Values, a private, nonpartisan organization devoted to contributing intellectually to the renewal of marriage and family life and the sources of competence, character, and citizenship in the United States." Institute for American Values, About David Blackenhorn, http://www.americanvalues.org/html/about_david_blankenhorn.html (last visited Sept. 27, 2008).

164 CCF Brief, *supra* note 151, at 18 (citing BLANKENHORN, *supra* note 163, at 177–78).

165 *Id*. at 18.

166 *Id*. at 34. A similar argument was struck down by the United States Supreme Court in *Loving v. Virginia*. *See* 388 U.S. 1, 8–9 (1967) (rejecting the state's argument "that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from . . . the very heavy burden of justification").

state about their sexual orientation.[167] Therefore, equal protection of the law is not violated because the law was not enacted with the intent to discriminate against individual homosexuals, even if they are part of a suspect class.[168] The respondents argue that homosexuals still have the right to marry any person of the opposite sex—the same right that is afforded to all members of their own sex.

Claiming that homosexuals do not receive disfavored treatment under the marriage laws makes no sense, considering Mayor Gavin Newsom had to take controversial action to provide equal treatment to homosexual couples who wished access to marriage. Heterosexuals are favored by the law within the definition set out in the marriage provisions. Their sexual orientation is more convenient because the law finds the expression of that orientation valid. While the state does not make an outright inquiry into a person's sexual orientation before granting a marriage license, the state does take indirect action by only allowing one group's sexual orientation to be valid under the law. Although homosexuals can get married, heterosexuals are afforded the full right to choose their partner as their spouse while homosexuals are not.

2. Judicial Restraint

If the California Supreme Court decides to uphold the decision of the court of appeal, the amicus curiae brief by Judicial Watch offers a straightforward line of reasoning regarding judicial restraint.[169] Judicial Watch, Inc. is a public interest organization founded in 1994, and funded by private foundations—mainly conservative groups.[170] Judicial Watch follows litigation and often files amicus curiae briefs.[171] Instead of focusing on the individual rights of homosexuals, the Judicial Watch brief focuses on the balance of governmental powers and the judiciary's ability to demonstrate restraint, emphasizing the reasons to avoid "judicial activism" by focusing on the role of the judiciary in reviewing constitutional issues. The brief stressed the need for judicial restraint when the court hears constitutional issues so as to not override action taken by the legislature that duly enacted a statute.[172]

167 CCF brief, *supra* note 151, at 34.

168 *Id*. at 35.

169 Brief of *Amicus Curiae* Judicial Watch, Inc. in Support of the State of California and Governor Arnold Schwarzenegger, No. S147999 (Cal. June 20, 2007) [hereinafter Judicial Watch Brief].

170 *See* About Us, Judicial Watch, http://www.judicialwatch.org/about.shtml (last visited Sept. 27, 2008).

171 According to the organization's website, Judicial Watch is a "conservative, non-partisan educational foundation, promotes transparency, accountability and integrity in government, politics and the law." *Id*. The website provides information regarding current areas of law in which Judicial Watch has either filed a lawsuit or amicus curiae brief. Examples include suits against international, federal and local governments. *See generally id*.

172 Judicial Watch Brief, *supra* note 169, at 9.

The Judicial Watch brief argues that the California Supreme Court must make two presumptions "out of respect for a coordinate branch of government."[173] First, the court should begin with the premise that the California Legislature wrote and enacted laws within constitutional limits.[174] "[W]hen the Legislature has enacted a statute with the relevant constitutional prescriptions clearly in mind. . . the statute represents a considered legislative judgment as to the appropriate reach of the constitutional provision."[175] Second, according to the court:

> All presumptions and intendments are in favor of the constitutionality of a statute enacted by the legislature; all doubts are to be resolved in favor and not against the validity of a statute; that before an act of a coordinate branch of the government can be declared invalid by the judiciary for the reason that it is in conflict with the Constitution, such conflict must be clear, positive, and unquestionable . . . .[176]

The Judicial Watch brief argues that judicial restraint is most important when issues arise under substantive due process and equal protection.[177] Once a court deems an individual's rights and interests constitutionally protected, it is difficult to change such status through the legislative process.[178] The United States Supreme Court noted that once this status is conferred, "a right is effectively removed from the hands of the people and placed into the guardianship of unelected judges."[179] Courts should be reluctant to change what represents the will of the people as enacted through the legislature.

The Judicial Watch brief supports the California court of appeal's decision. In relation to substantive due process and equal protection, the brief argues that the appellate court correctly identified the right being asserted by the plaintiffs as a specific right to same-sex marriage.[180] The Judicial Watch brief also argues that the appellate court was correct in ruling that the asserted "right" has not existed before in American history, and creating a right to same-sex marriage is, therefore, a novel idea.[181] The brief concludes that the California court of appeal was correct in holding that such novelty "precludes its recognition as a constitutionally protected fundamental right."[182]

173 *Id*. at 10.
174 *Id*.
175 *Id*. at 10–11 (citing Pac. Legal Found. v. Brown, 624 P.2d 1215, 1221 (Cal. 1981)).
176 *Id*. at 11–12 (citing Jersey Maid Milk Prods. Co. v. Brock, 91 P.2d 577, 586–87 (Cal. 1939)).
177 *Id*. at 15–16.
178 *Id*. at 17.
179 *Id*. at 16 (quoting Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1250 (11th Cir. 2004)).
180 *Id*. at 24.
181 *Id*. at 22–23.
182 *Id*. at 26 (citing *In re* Marriage Cases, 49 Cal. Rptr. 3d 675, 704 (2006)).

V. HOW THE CALIFORNIA SUPREME COURT SHOULD RULE

The California Supreme Court should reverse the ruling of the appellate court by reinstating the trial court's ruling that the California Family Code provisions are unconstitutional. In reaching this decision, the California Supreme Court should give great weight to the briefs filed by the City and County of San Francisco because they give an in-depth review of the totality of the issues presented by *In re Marriage Cases*. Unlike the respondent's briefs, San Francisco's arguments are not based solely on historical or traditional notions of the institution of marriage. The petitioners focus on the liberty interests denied to individuals and on the social discrimination perpetuated by denying homosexuals equal marriage rights. If the California Supreme Court rules similar to the trial court, and finds that the Family Code provisions are unconstitutional, it will help end discrimination against homosexuals by removing their unions from a second class status. Allowing same-sex couples the right to marry ensures these individuals full recognition, protection, and equality under the law—at least at the state level. The California Supreme Court should reinstate the trial court ruling, which found that the California Family Code provisions defining marriage as only the union between a man and a woman violates the California Constitution.

AUTHOR'S ADDENDUM

Editor's Note: After this article was written, the California Supreme Court issued its landmark ruling on same-sex marriage. This addendum addresses that opinion and discusses whether the California Supreme Court utilized the arguments analyzed in Part IV.

VI. THE CALIFORNIA SUPREME COURT'S RULING: *IN RE MARRIAGE CASES*

On May 15, 2008, the California Supreme Court issued a ruling for *In re Marriage Cases*.[183] The 4-3 decision overturned the court of appeal ruling that the California Constitution was not violated by defining marriage as between a man and a woman. In its landmark ruling, the majority held:

> We therefore conclude that in view of 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.[184]

The court narrowed the issue to whether the California Constitution prohibited the creation of separate unions for same-sex and opposite-sex couples when both are "officially recognized family relationships that

183 183 P.3d 384 (Cal. 2008).
184 *Id*. at 400.

afford[] all of the significant legal rights and obligations traditionally associated under state law with the institution of marriage."[185] In this context, the court found that "failing to designate the official relationship of same-sex couples as marriages violates the California Constitution."[186]

In the majority opinion, Chief Justice Ron George concluded that:

> [T]he 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.[187]

In applying strict scrutiny, the court refused to classify same-sex couples as second-class citizens. The court recognized that "retaining the designation of marriage exclusively for opposite-sex couples and providing only a separate and distinct designation for same-sex couples" effectively treats same-sex relationships differently under the law.[188] Furthermore, allowing same-sex couples to marry does "not deprive opposite-sex couples of any rights and will not alter the legal framework of marriage."[189]

VII. THE BEST ARGUMENTS OF THE PARTIES SET FORTH IN THEIR BRIEFS

Part IV of this article set forth the best arguments contained in the parties' briefs. Part IV analyzed the City and County of San Francisco's brief as the best argument in favor of striking down the ban on same-sex marriage. Part IV also analyzed two opponent's briefs—one by the Campaign for California Families and an amicus curie brief by Judicial Watch—which argued that the ban on same-sex marriage was valid under the California Constitution.

A. The Best Legal Arguments for the Unconstitutionality of the Ban on Same-Sex Marriage

The San Francisco brief set forth compelling arguments surrounding privacy rights. In analyzing this brief, this article pointed to the use of *Ortiz v. Los Angeles Police Relief Association*. The *Ortiz* court held that the California constitutional right to privacy includes the right to marry.[190] The *In re Marriage Cases* majority relied on *Ortiz* to hold that "the state constitutional right to marry . . . now also clearly falls within the reach of the constitutional protection afforded to an individual's interest in personal autonomy by California's explicit state constitutional privacy clause."[191]

185 *Id*. at 398.
186 *Id*.
187 *Id*. at 401.
188 *Id*. at 402.
189 *Id*. at 401.
190 Ortiz v. Los Angeles Police Relief Ass'n, 120 Cal. Rptr. 2d 670 (Ct. App. 2002).
191 *In re Marriage Cases*, 183 P.3d at 420.

The San Francisco brief also argued that, despite being grounded in history and tradition, a law can still be invalidated. As an example, the San Francisco brief discussed bans on mixed-race marriage, which violate individual liberty interests.[192] This article subsequently argued that the "fact that homosexuals have not previously been afforded the right to marry is not a valid reason for concluding that they have no reasonable expectation of a privacy right to marry the person of their choice."[193] The California Supreme Court agreed: "Tradition alone, however, generally has not been viewed as a sufficient justification for perpetuating, without examination, the restriction or denial of a fundamental *constitutional* right."[194]

B. Best Arguments For the Constitutionality of the Statutory Ban

1. The Traditional Definition of Marriage

The Campaign for California Families' brief (CCF brief) presented arguments that focus on the traditional definition and understanding of marriage as the union of a man and a woman. The CCF brief contended that "because only a man and a woman can produce children biologically with one another, the constitutional right to marry necessarily is limited to opposite-sex couples."[195] The California Supreme Court called this argument "fundamentally flawed."[196] The court emphasized that the constitutional right to marry was independent from the ability to procreate:

> A person who is physically incapable of bearing children still has the potential to become a parent and raise a child through adoption or through means of assisted reproduction, and the constitutional right to marry ensures the individual the opportunity to raise children in an officially recognized family with the person with whom the individual has chosen to share his or her life.[197]

The court noted that the constitutional right to marry has never been reserved only to those who are physically capable of having children.[198] Indeed, the court acknowledged that the legal recognition and protection of marriage is just as important to children raised by same-sex couples as it is for children raised by heterosexual couples.[199]

2. Judicial Restraint

The amicus curie brief by Judicial Watch, Inc. ("Judicial Watch brief") focused on the role that judges play in statutory interpretation while

192 *See* Loving v. Virginia, 388 U.S. 1 (1967).

193 *See supra* Part IV.

194 *In re Marriage Case*s, 183 P.3d at 427 (citing Perez v. Sharp, 198 P.2d 17 (Cal. 1948) and Sail'er Inn, Inc. v. Kirby, 485 P.2d 529 (Cal. 1971)) (emphasis added).

195 *Id*. at 430 (discussing the CCF brief's arguments).

196 *Id*.

197 *Id*. at 431.

198 *Id*.

199 *Id*. at 433.

arguing that judges need to recognize the balance of power in a democratic system.[200] While it does not directly cite the Judicial Watch brief, Justice Corrigan's dissent notes the particular need for restraint in constitutional interpretation, and states that the judiciary should be extremely cautious when interpreting statutes embattled in an ongoing debate when the voters have not yet settled the issue.[201] While she stated her belief that same-sex couples should be allowed to call their unions marriage, her dissent was based on the premise that "[t]he process of reform and familiarization should go forward in the legislative sphere and in society at large."[202]

VIII. THE NEXT STEP

Campaign for California Families filed a stay, requesting that same-sex marriages not be allowed until California voters decide whether to amend the state constitution to ban same-sex marriage in the November 2008 election. The California Supreme Court denied the stay and declared the ruling in *In re Marriage Cases* final at 5 p.m. on June 16, 2008.[203] That same day, counties began issuing marriage licenses to same-sex couples.[204] However, an initiative to constitutionally ban same-sex marriage has qualified to appear on the ballot in November 2008.[205] If passed, the constitutional amendment will overrule the court's decision and define marriage as between a man and a woman in California. A state constitutional ban would mean that any same-sex marriages previously performed in California would no longer be valid or recognized under state law.

200 *See* Judicial Watch Brief, *supra* note 169.

201 *In re Marriage Cases*, 183 P.3d at 471 (Corrigan, J., dissenting).

202 *Id*. at 470.

203 *See* News Release No. 31, Judicial Council of California, California Supreme Court Denies Rehearing and Stay in Marriage Cases (June 4, 2008), *available at* http://www.courtinfo.ca.gov/presscenter/newsreleases/NR31-08.PDF (last visited Sept. 27, 2008).

204 Wyatt Buchanan et al., *Wave of Weddings for Bay Area Same-Sex Couples*, S.F. CHRON., June 17, 2008, at A1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/06/17/MND911A5DK.DTL&hw=Wave+of+weddings+for+Bay+Area+same+sex+couples&sn=004&sc=646.

205 If passed, Proposition 8 will change the California Constitution "to eliminate the right of same-sex couples to marry in California." *See* SEC. OF STATE, CALIFORNIA GENERAL ELECTION: OFFICIAL VOTER INFORMATION GUIDE 54 (Aug. 11, 2008) (providing the "official title and summary" for Proposition 8 as prepared by the Attorney General), *available at* http://www.voterguide.sos.ca.gov/title-sum/pdf/prop8-title-summary.pdf. For the full text of Proposition 8, see *id*. at 128, *available at* http://www.voterguide.sos.ca.gov/text-proposed-laws/text-of-proposed-laws.pdf#prop8.

The Uneasy Case for California's "Care Custodian" Statute

David Horton[*]

INTRODUCTION

In about a decade, California will be "the grayest state in the nation."[1] More than six million residents—one-seventh of the population—will be over age sixty-five.[2] This demographic sea change, unprecedented longevity,[3] and the growing number of elders who opt to remain in their own homes as they age has "push[ed] demand for home care services, such as bathing and dressing, meal preparation and driving clients on errands."[4] Home caregivers—who earn an average of $20,283 per year[5] and are exempt from federal minimum wage and overtime laws[6]—will be tending to a generation that has amassed seventy percent of the country's wealth,[7] and passes about a trillion dollars by inheritance each year.[8]

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1 Steve Geissinger, *Baby Boomer Issues Looming*, OAKLAND TRIB., Oct. 2, 2006, *available at* 2006 WLNR 17028019 (quoting California Assemblywoman Patty Berg).

2 *See* Jennifer Coleman, *Report: California Population Will Grow Older, More Diverse*, S.J. MERCURY NEWS, Nov. 23, 2005, at B5, *available at* 2005 WLNR 18879683; Press Release, Governor Schwarzenegger Announces the California Nurse Education Initiative, Apr. 13, 2005, *available at* http://gov.ca.gov/index.php?/press-release/2046 (last visited June 23, 2008).

3 *See*, *e.g.*, U.S. Bureau of the Census, *Longevity and Health Characteristics*, at 3-1, *available at* http://www.census.gov/prod/1/pop/p23-190/p23190-g.pdf (last visited June 23, 2008) (noting that "life expectancy at birth ha[s] reached a record high").

4 Barbara Correa, *Home Sweet Home: Elderly Parents, Children Need Early Talk About Care*, DAILY NEWS (L.A.), April 3, 2008, at B1, *available at* 2008 WLNR 6391885; *see also* Sandra Block, *Elder Care Shifting From Nursing Homes*, U.S.A. TODAY, June 25, 2007, at 1B, *available at* 2007 WLNR 11917438 (noting that the percentage of people over seventy-five in care facilities fell more than three percent from 1985 to 2004). Even the "frailest elderly remain in their own homes." Michael Vitez, *National Conference on Aging Delivers Wake-up Call to Boomers*, PHILADELPHIA INQUIRER, March 11, 2007, at A4, *available at* 2007 WLNR 4598239.

5 *See* California Employment Development Department, Home Health Aid Fact Sheet, *available at* http://www.calmis.ca.gov/file/HealthCare/HCC-Home-Health-Aides.pdf (last visited June 23, 2008).

6 *See* Long Island Care, Ltd. v. Coke, 127 S.Ct. 2339, 2345 (2007) (holding that the Fair Labor Standards Act does not apply to a "domestic worker who provides 'companionship services' to elderly and infirm men and women").

7 *See* Marilyn Gardner, *Love and Money and Fraud*, CHRISTIAN SCI. MONITOR, Aug. 9, 2006, at 14, *available at* 2006 WLNR 13703280.

8 *See* John Leland, *Breaking the Silence*, N.Y. TIMES, Mar. 18, 2008, at H1 (calling this "[t]he largest intergenerational transfer of wealth in American history"). Even after estate taxes, experts predict that beneficiaries will receive between $24 trillion and $65.3 trillion between 1998 and 2052. *See* John J. Havens & Paul G. Schervish, *Why The $41 Trillion Wealth Transfer Estimate is Still Valid: A Review of Challenges and Questions*, 7 J. GIFT PLAN. 11, 49 (2003).

At the intersection of these trends stands a novel California statute. Probate Code section 21350 presumptively voids testamentary gifts to "a care custodian of a dependent adult."[9] No other state bars devises to caregivers.[10] Yet Section 21350 defines "care custodian" and "dependent adult" broadly. A "care custodian" includes any non-relative "providing health services or social services to an elder or dependent adult."[11] A "dependent adult" is anyone over sixty-four "whose physical or mental abilities have diminished because of age."[12]

Thus, on its face, the statute suggests that a beneficiary can forfeit a legacy by "simply cooking for an elderly person, driving a house-bound individual to the bank or doctor, or going shopping for them."[13] To avoid this perverse result, California courts uniformly held that Section 21350 governed "*professional* 'care custodians'"[14] and not "well-meaning friend[s]."[15] Recently, however, in *Bernard v. Foley*,[16] the California Supreme Court rejected these views and held that the statute's text contains neither a "professional or occupational limitation" nor a "preexisting personal friendship exception."[17] Despite the California Supreme Court's "customary and proper reticence in encouraging legislative action,"[18] the majority, concurring, and dissenting opinions in *Bernard* placed the onus on the legislature to clarify the statute.[19]

The legislature tasked the California Law Revision Commission with "considering the overall effectiveness of the current statutory scheme."[20] On May 14, 2008, the Commission proposed redefining (1) "care custodian" as "a person who provides health or social services to a dependent adult for compensation, as a profession or occupation" and (2) "dependent adult" as a person who is eligible for appointment of a conservator.[21]

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9 CAL. PROB. CODE § 21350(a)(6) (West 2007).

10 *See* Jessica Garrison, *Caregivers' Inheritance Is Blocked*, L.A. TIMES, Aug. 22, 2006, at 3, *available at* 2006 WLNR 14500607.

11 *See* CAL. PROB. CODE § 21350(c) (West 2007); CAL. WELF. & INST. CODE § 15610.17(y) (West 2007).

12 *See* CAL. PROB. CODE § 21350(c) (West 2007); CAL. WELF. & INST. CODE § 15610.23(a) (West 2007).

13 *In re* Conservatorship of Estate of Davidson, 6 Cal. Rptr. 3d 702, 711–12 (Ct. App. 2003).

14 *Id*. at 713.

15 *In re* Conservatorship of McDowell, 23 Cal. Rptr. 3d 10, 22 (Ct. App. 2004).

16 139 P.3d 1196 (Cal. 2006).

17 *Id*. at 1204–05.

18 *Bernard*, 139 P.3d at 1210 (George, C.J., concurring).

19 *See id*. at 1207–08 ("In the event, however, we have mistaken the Legislature's intention, that body may readily correct our error."); *id*. at 1210 (George, C.J., concurring) ("[T]he Legislature would do well to consider modifying or augmenting the relevant provisions"); *id*. at 1214 (Corrigan, J., dissenting) ("[T]here is no reason to believe the Legislature intended such an outcome.").

20 *See* ASSEMB. B. 2034, 2005–2006 Leg., Reg. Sess. (Cal. 2006), *available at* http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_2001-2050/ab_2034_bill_20060907_chaptered.pdf.

21 *See* Cal. Law Revision Comm'n, Memorandum 2008-21, Study L-622, Donative Transfer Restrictions, May 14, 2008, at 19–20, *available at* http://clrc.ca.gov/pub/2008/MM08-21.pdf.

These amendments would limit the statute and thus vastly improve it. Yet despite the Law Revision Commission's license to re-imagine the law, it accepts the premise that byzantine rules must regulate devises to caregivers. I respectfully challenge that assumption. I highlight four points that I believe have not received their due in the debate over how to reform Section 21350. The first is that California courts uniquely respect testamentary autonomy. In other states, scholars complain that "courts are as committed to ensuring that testators devise their estates in accordance with prevailing normative views as they are to effectuating testamentary intent."[22] This is not so in California. The "care custodian" provision—which substitutes a categorical legislative determination for a testator's express wishes—deviates from this tradition. Second, the legislature enacted Section 21350 to create a presumption of wrongdoing when lawyers receive devises in estate plans they had authored. However, California common law already recognized that exact presumption. Thus, the statute changed little about a lawyer's right to inherit from a client. Yet when with little fanfare the legislature extended the statute to caregivers, it fundamentally altered a caregiver's ability to accept a legacy from a patient. At the same time, the good reasons to preclude lawyers from profiting from their own draftsmanship do not apply to caregivers.

Third, the Law Revision Commission offers three rationales for retaining the "care custodian" clause: (1) caregivers have the opportunity to exert undue influence; (2) elders depend on caregivers; and (3) gifts to caregivers seem inherently "undue."[23] To be sure, caregivers enjoy dominion over impaired elders. Yet caregivers provide services that, even if remunerated, are selfless and socially beneficial. As a normative matter, it is unclear why gifts to caregivers should be suspect. Fourth, an inflexible rule is not a good fit for the deeply personal question of a testator's intent. The undue influence doctrine covers the same terrain at less risk of disregarding autonomy or penalizing kindness.[24]

This essay contains two parts. Part I sketches the history of the "care custodian" provision and the cases that have struggled to interpret it. Part II examines the Law Revision Commission's tentative recommendations and concludes that, although they would enhance the "care custodian" provision, they would not preclude it from causing dubious results.

22 Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236 (1996).

23 *See* Cal. Law Revision Comm'n, *supra* note 21, at 7–8.

24 California's potent Elder Abuse and Dependent Adult Civil Protection Act also provides for treble damages, recovery for pain and suffering, and attorneys' fees in elder abuse actions. *See* CAL. WELF. & INST. CODE §§ 15600–15675 (West 2007).

I. TESTAMENTARY AUTONOMY IN CALIFORNIA, SECTION 21350, AND THE "CARE CUSTODIAN" STATUTE

"[V]irtually the entire law of wills derives from the premise that an owner is entitled to dispose of his property as he pleases in death as in life."[25] Thus, courts often make grandiose statements about testamentary autonomy. For example, "the right to testamentary disposition of one's property is a fundamental one which reaches back to the early common law,"[26] "does not depend upon its judicious use,"[27] and includes the prerogative "to make an unjust or an unreasonable or even a cruel will."[28]

Yet all states regulate testamentary gifts. The most common reasons courts refuse to enforce an otherwise valid will are the doctrines of incapacity and undue influence.[29] Incapacity requires proof that at the time the testator signed the will, she could not understand (1) the meaning of the testamentary act, (2) the extent of her property, and (3) her important relationships.[30] Undue influence is more complex. Indeed, all wills stem from influence.[31] Thus, courts hold that influence is "undue" only when it is "brought to bear directly on the testamentary act, sufficient to overcome the testator's free will, amounting in effect to coercion destroying the testator's free agency."[32] Cases usually hinge on whether a contestant has raised a presumption of undue influence. To do so, a contestant must prove that (1) the testator and the defendant had a confidential relationship, (2) the defendant actively participated in the will's preparation or execution, and (3) the defendant unduly profited from the will.[33] If a contestant establishes these elements, the burden shifts to the defendant to show an absence of undue influence by a preponderance of the evidence.[34]

In most jurisdictions, scholars complain that courts use these rules to impose hegemonic norms.[35] *In re Kaufmann's Will*[36] is an oft-cited

25 John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975). I will use the terms, "testator" and "will," even though this essay pertains equally to trusts.

26 *In re* Fritschi's Estate, 384 P.2d 656, 659 (Cal 1963).

27 *In re* McDevitt's Estate, 30 P. 101, 106 (Cal. 1892).

28 *In re* Martin's Estate, 151 P. 138, 141 (Cal. 1915).

29 Fraud can also invalidate a will, although it appears less often in cases. *See* Estate of Newhall, 214 P. 231, 235 (Cal. 1923) ("[F]alse representations . . . have been held to constitute fraud if it can be shown that they were designed to and did deceive the testator into making a will different in its terms from that which he would have made had he not been misled.").

30 *See In re* Conservatorship of Bookasta, 265 Cal. Rptr. 1, 3 (Ct. App. 1989).

31 *See*, *e.g.*, Ray D. Madoff, *Unmaking Undue Influence*, 81 MINN. L. REV. 571, 575 (1997).

32 Rice v. Clark, 47 P.3d 300, 304 (Cal. 2002).

33 *See* Estate of Sarabia, 270 Cal. Rptr. 560, 563 (Ct. App. 1990).

34 *See id*. A contestant does not need to establish the presumption to win. *See* David v. Hermann, 28 Cal. Rptr. 3d 622, 631 (Ct. App. 2005) (finding the trial court properly "did not rely on the presumption, but rather applied the general principle of undue influence to a review of all the evidence").

35 Madoff, *supra* note 31, at 576 ("[T]he undue influence doctrine denies freedom of testation for people who deviate from judicially imposed testamentary norms—in particular, the norm that people should provide for their families"); *see also* Jeffrey G. Sherman, *Undue Influence and the Homosexual*

example of this tendency. In that case, Robert Kaufmann, the scion of a wealthy jeweler, left his estate to his lover and business partner, Walter Weiss, instead of his brothers, Joel and Aron. Robert enclosed a letter with his will that articulated his profound feelings for Walter.[37] Nevertheless, a New York appellate court concluded that the will stemmed from Walter's undue influence. The court expressed doubt that Robert could have chosen to bequeath his fortune to an "unrelated" person.[38] It then dismissed the letter as "utterly unreal, highly exaggerated and pitched to a state of fervor and ecstasy."[39] Cases such as *Kaufmann* have prompted some commentators to declare that incapacity and undue influence serve, "not to protect freedom of testation, but rather to protect the testator's family against disinheritance."[40]

California jurisprudence has been far more protective of idiosyncrasy. A mid-century study found that in contests—generally brought by unhappy heirs-at-law—juries invalidated legacies seventy-seven percent of the time.[41] Yet appellate courts reversed a whopping fifty percent of these verdicts for insufficient evidence.[42] Rather than insulating juries from reviewing courts, in 1988 the legislature eliminated the right to a jury trial for will contests.[43] Thus, the state has a tradition of taking testamentary freedom seriously.

Three doctrinal nuances illustrate this point. First, in capacity cases, California courts have insisted that a contestant prove that the testator was of "unsound mind" at the very moment she executed the will.[44] They thus have rejected incapacity claims, even when faced with strong evidence of testator impairment before and after the signing. In *Estate of Mann*,[45] for

Testator, 42 U. PITT. L. REV. 225, 267 (1981) ("[T]estamentary plans will continue to be unduly jeopardized so long as courts regard homosexuality as a special case"); Leslie, *supra* note 22, at 236; Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 210 (2001) (asserting that courts "manipulate mental capacity doctrines such as 'undue influence' . . . to reach results more in accord with the family paradigm").

36 247 N.Y.S.2d 664 (App. Div. 1964).

37 The letter left no doubt that Robert was in love with Walter:

> Walter gave me the courage to start something which slowly but eventually permitted me to supply for myself everything my life had heretofore lacked: an outlet for my long-latent but strong creative ability in painting . . . a balanced, healthy sex life which before had been spotty, furtive and destructive; an ability to reorientate myself to actual life and to face it calmly and realistically. All of this adds up to Peace of Mind—and what a delight, what a relief after so many wasted, dark, groping, fumbling immature years to be reborn and become adult!

Id. at 671.

38 Indeed, the court telegraphs its holding in the opinion's second sentence. *See id*. at 665 ("The contestants are the distributes of and the proponent is unrelated to the decedent.").

39 *Id*. at 674.

40 Madoff, *supra* note 31, at 619.

41 *See* Note, *Will Contests on Trial*, 6 STAN. L. REV. 91, 92 (1953).

42 *See id*. at 92 n.4.

43 *See* CAL. PROB. CODE § 8252(b) (West 2007) ("The court shall try and determine any contested issue of fact that affects the validity of the will.").

44 *In re* Lingenfelter's Estate, 241 P.2d 990, 996 (Cal. 1952).

45 229 Cal. Rptr. 225 (Ct. App. 1986).

example, the testator had dementia and was placed under a conservatorship. She was "not eating or caring for herself properly; . . .she was unclean and smelled like urine," and would often "forget[ ] dates, the time of year, and what she was doing."[46] Nevertheless, the court of appeal reversed a jury determination of incapacity because the only witnesses to the will's execution "all testified decedent was aware of what she was doing at the time."[47]

Second, in undue influence cases, most states deem a beneficiary to have "actively participated" in the will's creation if she "directed the testator to the drafting lawyer, made the appointment for the testator, or even merely knew of the contents of the will."[48] However in California, "the mere fact of the beneficiary procuring an attorney to prepare the will is not sufficient."[49] For instance, in *Estate of Fritschi*,[50] the California Supreme Court held that the testator's mistress did not "actively participate" in a will that favored her to the detriment of the testator's children even though she attended discussions about the estate plan, located a witness for the will, gave the testator a pen, and remained just outside the room.

Third, most jurisdictions do not look beyond whether a beneficiary is related to a testator when deciding whether she would "unduly profit":

> A 'natural' disposition is one which provides for a testator's heirs at law. As one court succinctly put it: '[T]he natural object of a will maker's bounty is one related to him/her by consanguinity.' The status of the beneficiary, rather than the quality of the beneficiary's relationship to the testator, determines what is a natural disposition for purposes of the undue influence analysis. In determining status, courts have generally relied on the intestacy statutes as a model for naturalness.[51]

California takes the opposite approach. For example, in *Estate of Sarabia*[52]—a case that provides a vivid counterpoint to *Kaufmann*—Guillermo Sarabia, an opera singer, left his estate to his agent and companion, Leonard Gibbs.[53] Sarabia's brother filed a contest, arguing that Gibbs's profit was "undue" since he was not related to Sarabia and would take nothing without the will.[54] The court of appeal disagreed, reasoning that a fact-finder must place itself in a testator's shoes to determine whether profit is "undue":

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46 *Id*. at 227–28.

47 *Id*. at 230.

48 Madoff, *supra* note 31, at 587.

49 *See* Estate of Bould, 287 P.2d 8, 16 (Cal. Ct. App. 1955) (collecting cases).

50 384 P.2d 656, 661 (Cal. 1963).

51 Madoff, *supra* note 31, at 590–91 (quoting *In re* Estate of Maheras, 897 P.2d 268, 273 (Okla. 1995)).

52 270 Cal. Rptr. 560 (Ct. App. 1990).

53 *Id*. at 561.

54 *See id*. at 563.

> For the trier of fact to decide what influence was 'undue' clearly entails a qualitative assessment of the relationship between the decedent and the beneficiary. . .. The trier of fact derives from the evidence introduced an appreciation of the respective relative standings of the beneficiary and the contestant to the decedent in order that the trier of fact can determine which party would be the more obvious object of the decedent's testamentary disposition.[55]

Thus, because Sarabia was less close to his brother than to Gibbs, the court held that Gibbs's profit was not "undue."[56]

Yet, as protective as California courts were of testamentary autonomy, they regarded one class of bequests as suspect—those to the drafting attorney. Such devises automatically gave rise to a presumption of undue influence.[57] This bright-line rule made sense; by definition, the drafting attorney enjoys a confidential relationship with the testator and plays an active role in the will's preparation and execution. Although the drafting attorney might not unduly profit from the will, lawyers are fiduciaries for their clients, and thus "proof that the benefit to an attorney was 'undue' is not required to trigger a presumption of undue influence."[58] Similarly, courts held lawyers to a higher standard for rebutting the presumption, requiring "clear and satisfactory evidence."[59]

In sum, freedom of testation was not just lofty rhetoric in California; rather, it was woven into the fabric of the common law. Events in the early 1990's would test these principles.

A. Section 21350

In 1992, the *Los Angeles Times* published a searing exposé of James D. Gunderson, an Orange County lawyer who had written himself into many of his elderly clients' estate plans.[60] From his law offices inside Leisure World—a gated retirement community so large it became its own municipality[61]—Gunderson routinely prepared wills that lavished bequests upon himself.[62] These gifts included $3.5 million from a 98-year-old blind

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55 *Id*. at 564.

56 *See id*. at 565–66.

57 *See* Estate of Lind, 257 Cal. Rptr. 853, 856 (Ct. App. 1989); *see also* Estate of Auen, 35 Cal. Rptr. 2d 557, 562–63 (Ct. App. 1994) (rejecting attorney's claim that the traditional three-element test for the presumption of undue influence applies). Similarly, Probate Code section 6112 creates a presumption of "duress, menace, fraud, or undue influence" for testamentary gifts to a necessary subscribing witness. Section 6112 actually liberalized this rule; previously, such gifts were absolutely void to the extent they exceeded the witness's intestate share. *See* CAL. PROB. CODE § 51, repealed by Stats. 1983, c. 842, § 18, operative Jan. 1, 1985.

58 *Auen*, 35 Cal. Rptr. 2d at 562.

59 *In re* Phillipi's Estate, 172 P.2d 377, 378 (Cal. Ct. App. 1946). Conversely, an interested witness—like a defendant in a common law undue influence action—must refute the presumption of invalidity by a preponderance of the evidence. *See* CAL. PROB. CODE § 6112 (West 2007).

60 *See* Davan Maharaj, *Lawyer Inherited Millions in Stock, Cash From Clients*, L.A. TIMES, Nov. 22, 1992, at A1, *available at* 1992 WLNR 4030163.

61 *See California Retirement Community to Become City of Seniors*, Mar. 3, 1999, *available at* http://www.cnn.com/US/9903/03/leisure.world.01 (last visited June 30, 2008).

62 *See* Davan Maharaj, *Leisure World Lawyer Heir to Clients' Millions*, L.A. TIMES, Nov. 22,

and deaf man[63] and $250,000 from a woman whom Gunderson had described in court papers as "unable to pay her bills or manage her assets."[64] Gunderson also peppered his instruments with clauses that shifted tax liability to other beneficiaries[65] and insulated his "inheritance" from contests.[66]

The articles sparked outrage and threatened to eviscerate the standing of the probate bar and bench.[67] The California Legislature responded swiftly. Less than a year after the stories broke, it passed a bill—A.B. 21—to "unambiguously prohibit the most patently offensive actions of Gunderson."[68] A.B. 21 created Probate Code section 21350, which invalidates transfers to "disqualified person[s]": the drafting attorney, their family, their law partners, and their employees.[69] New Section 21351 carved out narrow exceptions. The first is for the transferor's relatives and

1992, at A1, *available at* 1992 WLNR 4029997.

63 *See* An Maharaj, *4 Clients Whose Estates Enriched James D. Gunderson: Merrill A. Miller*, L.A. TIMES, Nov. 22, 1992, at A43, *available at* 1992 WLNR 4029597 [hereinafter, Maharaj, *Merrill A. Miller*].

64 *See* Davan Maharaj, *4 Clients Whose Estates Enriched James D. Gunderson: Emerald Mary Sully*, L.A. TIMES, Nov. 22, 1992, at A43, *available at* 1992 WLNR 4027557; *see also* Davan Maharaj, *4 Clients Whose Estates Enriched James D. Gunderson: Margaret Hough*, L.A. TIMES, Nov. 22, 1992, at A43, *available at* 1992 WLNR 4029045 (describing a conveyance of real property that Gunderson recorded in his favor a year after the owner had died); Davan Maharaj, *4 Clients Whose Estates Enriched James D. Gunderson: Martin L. Fisher*, L.A. TIMES, Nov. 22, 1992, at A43, *available at* 1992 WLNR 4027466 (describing Gunderson receiving ninety-nine percent of a client's estate). The story soon went national. *See Judge Removes Attorney as Trustee*, WASH. TIMES, Dec. 14, 1992, at A6, *available at* 1992 WLNR 149893; *Attorney Investigated for Estate Dealings*, SEATTLE TIMES, Dec. 14, 1992, at A12, *available at* 1992 WLNR 1087089; *Lawyer Stripped of Control of Elderly Clients' Money*, ORLANDO SENTINEL, Dec. 14, 1992, at A8, *available at* 1992 WLNR 4370156; *California Lawyer Queried on Wills*, BOSTON GLOBE, Dec. 14, 1992, at 6, *available at* 1992 WLNR 1852585.

65 *See* Maharaj, *Merrill A. Miller*, *supra* note 63.

66 *See* Davan Maharaj, *Bill Targets "No Contest" Estate Ploy*, L.A. TIMES, Dec. 10, 1992, at B1, *available at* 1992 WLNR 4009546.

67 *See* Editorial, *Laws Must Be Toughened to Protect the Elderly from Exploitation*, L.A. TIMES, Nov. 25, 1992, at B6, *available at* 1992 WLNR 4036978 ("38 other states have adopted tougher guidelines set by the American Bar Assn. prohibiting lawyers, under threat of disbarment, from preparing trusts or wills in which they are beneficiaries. California should do the same."); George C. Balderas, Letter to the Editor, L.A. TIMES, Dec. 13, 1992, at B11, *available at* 1992 WLNR 4017373 (describing a talk radio show which featured "a string of callers all relating negative experiences with their attorneys."); Robert R. Shively, Letter to the Editor, L.A. TIMES, Dec. 13, 1992, at B11, *available at* 1992 WLNR 4018065 ("[H]ow did Mr. Gunderson persuade Superior Court probate judges to approve such wills for probate?"). High-level figures tried to control the damage. The president of the State Bar of California "stress[ed] how important it is for any person who questions the actions of an attorney to report this behavior." Harvey I. Saferstein, Letter to the Editor, L.A. TIMES, Dec. 7, 1992, at B6, *available at* 1992 WLNR 4065722. The Supervising Judge of the Orange County Probate Department called for "a comprehensive review of the Probate Code, the Probate Court Rules and the Attorney Rules of Ethics." Tully H. Seymor, *Living Trusts, Probate Court Duties in Supervising Estates Reviewed*, L.A. TIMES, Dec. 20, 1992, at B6, *available at* 1992 WLNR 4071077.

68 ASSEMB. COMM. ON THE JUDICIARY, B. ANALYSIS., A.B. 21, 1993–1994 Leg., Reg. Sess.(Cal. 1993) ("AB 21 was introduced in response to . . . the activities of a probate attorney, Mr. James D. Gunderson, from Orange County"), *available at* http://info.sen.ca.gov/pub/93-94/bill/asm/ab_0001-0050/ab_21_cfa_930208_101917_asm_comm.

69 *See* CAL. PROB. CODE § 21350(a)(1)–(3) (West 2007); *id*. § 21350.5. The bill also made "[a]ny person who has a fiduciary relationship with the transferor . . . who transcribes the instrument or causes it to be transcribed" a "disqualified person." *Id*. § 21350(a)(4).

spouse or domestic partner.[70] Another requires a neutral lawyer to attest in a "certificate of independent review" that the gift was voluntary.[71] A third permits the lawyer to prove that "the transfer was not the product of fraud, menace, duress, or undue influence" (1) by clear and convincing evidence, (2) not based solely on the testimony of any "disqualified person."[72] If the lawyer fails, she must pay the contestant's costs and attorneys' fees.[73]

Some lawmakers, including Governor Wilson, and members of the press saw the statute as a potent weapon against financial elder abuse.[74] Yet rather than blazing a trail, the statute largely codified the common law. As noted, California courts already assumed that devises to drafting attorneys flowed from undue influence[75] and required "clear and satisfactory evidence" to overcome this presumption.[76] To be sure, Section 21350 also prohibited drafting attorneys from carrying their burden with their own testimony and saddled them with paying a successful contestant's attorneys' fees and costs.[77] Ironically, though, its next biggest change was probably to create exceptions to what had been an inflexible presumption of invalidity.[78] Thus, perceptions notwithstanding, Section 21350 did little to change the state of the law.

B. The "Care Custodian" Provision

In 1997, the state's booming in-home care industry led the Trusts and Estates Section of the Bar to sponsor a novel amendment to the statute. The Trusts and Estates Section was concerned about the sway that "practical nurse[s]" and others "hired to provide in-home care" have over "demented elder[s]."[79] The legislature responded with A.B. 1172. Noting that "practical nurses or other caregivers hired to provide in-home care. . . are often working alone and in a position to take advantage of the person they are caring for,"[80] the legislature added a "care custodian of a

70 *See id*. § 21351(a).

71 *See id*. § 21351(b).

72 *See id*. § 21351(d). As originally enacted, the statute excluded testimony from all "disqualified persons." *See* CAL. PROB. CODE § 21351(d) (2001), amended by Stats. 2002, c. 412 (S.B.1575), § 1.

73 *See id*.

74 *See* Davan Maharaj, *Wilson Signs Bill to Protect Estates of the Elderly*, L.A. TIMES, Aug. 3, 1993, at B1, *available at* 1993 WLNR 4201678 (quoting Wilson as declaring that section 21350 "gives the state sufficient ammunition against these legal vultures who are preying on the vulnerable members of our society.")

75 *See supra* note 57 and accompanying text.

76 *See supra* note 58 and accompanying text.

77 *See supra* notes 71–72 and accompanying text.

78 *See supra* note 70.

79 California Law Revision Commission, Study L-622, Mar. 10, 2008, at 2, *available at* http://www.clrc.ca.gov/pub/2008/MM08-13.pdf (last visited June 30, 2008) (quoting Letter from Don Green and Marc B. Hankin to David Long, State Bar of California Director of Research, Oct. 16, 1996) ("A 'practical nurse' (or other caregiver hired to provide in-home care for an aging progressive dementia victim) might find it too easy to take advantage of the dependence and close working relationship to induce the demented elder to make testamentary gifts").

80 S. RULES COMM., B. ANALYSIS, ASSEMB. B. 1172, 1997–1998 Leg., Reg. Sess. (Cal. Aug.8, 1997), *available at* http://info.sen.ca.gov/pub/97-98/bill/asm/ab_1151-1200/ab_1172_cfa_19970828_

dependent adult" to Section 21350's litany of "disqualified person[s]."[81] Thus, the statute now reads:

> [N]o provision, or provisions, of any instrument shall be valid to make any donative transfer to any of the following: (1) The person who drafted the instrument. (2) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, the person who drafted the instrument. (3) Any partner or shareholder of any law partnership or law corporation in which the person described in paragraph (1) has an ownership interest, and any employee of that law partnership or law corporation. . .. (6) A care custodian of a dependent adult who is the transferor.[82]

The statute defines "dependent adult" and "care custodian" broadly. Even though the Trusts and Estates Section described the protected class as "dementia victim[s],"[83] the term "dependent adult" includes anyone over sixty-four "whose physical or mental abilities have diminished because of age."[84] Likewise, despite the legislature's preoccupation with nurses "*hired* [for] in-home care,"[85] the term "care custodian" includes a catalog of specific entities and individuals, plus a sweeping catch-all: "[a]ny other. . . person providing health services or social services to elders or dependent adults."[86] This liberal scope would soon cause mischief.

193607_sen_floor.html.

81 CAL. PROB. CODE § 21350(a)(6) (West 2007).

82 *Id*. § 21350(a).

83 California Law Revision Commission, Study L-622, *supra* note 79.

84 *See* CAL. PROB. CODE § 21350(c) (West 2007) ("[T]he term 'dependent adult' has the meaning as set forth in Section 15610.23 of the Welfare and Institutions Code and also includes those persons who . . . are older than age 64"); CAL. WELF. & INST. CODE § 15610.23(a) (West 2007).

85 S. RULES COMM., B. ANALYSIS, ASSEMB. B. 1172, 1997–1998 Leg., Reg. Sess. (Cal. Aug. 8, 1997), *available at* http://info.sen.ca.gov/pub/97-98/bill/asm/ab_1151-1200/ab_1172_cfa_19970828_193607_sen_floor.html.

86 *See* CAL. PROB. CODE § 21350(c) (West 2007) ("The term 'care custodian' has the meaning as set forth in Section 15610.17 of the Welfare and Institutions Code."); CAL. WELF. & INST. CODE § 15610.17(y) (West 2007). In full, Welfare and Institutions Code section 15610.17 states:

> 'Care custodian' means an administrator or an employee of any of the following public or private facilities or agencies, or persons providing care or services for elders or dependent adults, including members of the support staff and maintenance staff: [¶] (a) Twenty-four-hour health facilities, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code. [¶] (b) Clinics. [¶] (c) Home health agencies. [¶] (d) Agencies providing publicly funded in-home supportive services, nutrition services, or other home and community-based support services. [¶] (e) Adult day health care centers and adult day care. [¶] (f) Secondary schools that serve 18- to 22-year-old dependent adults and postsecondary educational institutions that serve dependent adults or elders. [¶] (g) Independent living centers. [¶] (h) Camps. [¶] (i) Alzheimer's Disease day care resource centers. [¶] (j) Community care facilities, as defined in Section 1502 of the Health and Safety Code, and residential care facilities for the elderly, as defined in Section 1569.2 of the Health and Safety Code. [¶] (k) Respite care facilities. [¶] (l) Foster homes. [¶] (m) Vocational rehabilitation facilities and work activity centers. [¶] (n) Designated area agencies on aging. [¶] (o) Regional centers for persons with developmental disabilities. [¶] (p) State Department of Social Services and State Department of Health Services licensing divisions. [¶] (q) County welfare departments. [¶] (r) Offices of patients' rights advocates and clients' rights advocates, including attorneys. [¶] (s) The office of the long-term care ombudsman. [¶] (t) Offices of public conservators, public guardians, and court investigators. [¶] (u) Any protection or advocacy agency or entity that is designated by the Governor to fulfill the requirements and assurances of the following: [¶] (1) The federal Developmental

C. Cases Interpreting the "Care Custodian" Provision

The "care custodian" statute first reared its head in *Estate of Shinkle*.[87] Laverne Shinkle was seventy-seven years old and in poor health. Her closest relative was a cousin she had not seen for forty years.[88] After she fractured a hip at home, she recovered at South Valley Hospital, a skilled nursing facility. There she met C.J. Thompson, the volunteer long-term care ombudsman.[89] Despite rules prohibiting ombudsmen from befriending patients, Thompson helped Shinkle run errands, pay her bills, and balance her checkbook. Even when he was sent to another facility and she returned home, he visited her. When she said she wanted to leave her property to him, he arranged for her to consult with an estate planner.[90]

The trial court struck down the devise to Thompson and the courts of appeal affirmed. The court of appeal explained that the definition of "care custodian" expressly includes a "long-term care ombudsman."[91] In response, Thompson asserted that his transfer and Shinkle's discharge from the facility meant that he was not her ombudsman at the time she executed the trust.[92] He cast himself as "only an 'informal friend,' providing 'friendly aid to an at-home individual.'"[93] The court was not persuaded. It held that Thompson's ombudsman status helped him meet Shinkle, earn her confidence, and learn intimate details about her.[94] It then refused to disturb the trial court's finding that Thompson had not disproved undue influence under Section 21351.[95]

Two years later, *In re Conservatorship of Estate of Davidson*[96] wrestled with whether a good friend provided "health services or social services" and thus was a disqualified "care custodian." In the 1960's, Dolores Davidson and her husband met Stephen Gungl and his partner.

Disabilities Assistance and Bill of Rights Act of 2000, contained in Chapter 144 (commencing with Section 15001) of Title 42 of the United States Code, for protection and advocacy of the rights of persons with developmental disabilities. [¶] (2) The Protection and Advocacy for the Mentally Ill Individuals Act of 1986, as amended, contained in Chapter 114 (commencing with Section 10801) of Title 42 of the United States Code, for the protection and advocacy of the rights of persons with mental illness. [¶] (v) Humane societies and animal control agencies. [¶] (w) Fire departments. [¶] (x) Offices of environmental health and building code enforcement. [¶] (y) Any other protective, public, sectarian, mental health, or private assistance or advocacy agency or person providing health services or social services to elders or dependent adults.

87 119 Cal. Rptr. 2d 42 (Ct. App. 2002).

88 *Id*. at 50.

89 Ombudsmen are trained, state-certified volunteers who "serve as advocates for residents in long-term-care facilities." *Id*. at 44.

90 *See id*. at 46.

91 *See id*. at 53 (explaining that "care custodian" includes "'an employee of . . . [t]he office of the long-term care ombudsman'") (quoting CAL. WELF. & INST. CODE § 15610.17(s)).

92 *See id*. at 54.

93 *Id*.

94 *See id*. ("But for the ombudsman program, Thompson would not have met Shinkle, would not have had access to her financial and personal information, and would not have gained her trust.").

95 *See id*. at 56.

96 6 Cal. Rptr. 3d 702 (Ct. App. 2003).

The two couples forged a close bond, and spent birthdays, anniversaries, and holidays together.[97] About ten years later, Davidson's husband died. Gungl visited often, helped out around the house, and, when Davidson could no longer drive, he chauffeured her. Davidson called Gungl and his partner "her boys."[98] In 1990, she executed a will leaving her estate to her cousin, Elaine Morken.

In 1992, Davidson began to decline. Gungl and his partner cooked, gardened, and banked for Davidson, bought her groceries and medications, and drove her to the doctor.[99] In 1995, Gungl, who was revising his and his mother's estate plan, recommended that Davidson place her assets in a trust. In 1996, Davidson signed an instrument that left $5,000 to Morken and the balance of her estate to Gungl. In 1998, Morken and her husband—who only saw Davidson a few times a year—learned about the new estate plan.[100] They complained to the public guardian about Gungl and asked the court to appoint a conservator for Davidson. In the conservatorship proceeding, Gungl submitted an accounting that revealed he had written twenty-four checks from Davidson to himself that he had labeled "salary" or wages."[101] When Davidson died in 2000, Morkin's husband[102] challenged the trust under Section 21350.

The trial court determined that Section 21350 did not apply to Gungl. The court of appeal affirmed on three independent grounds. First, the court held that Gungl's sporadic acts of kindness were "unsophisticated care and attention," not "health services or social services."[103] The court reasoned that a contrary result would penalize good Samaritans:

> [V]irtually *any* individual providing personal care to a dependent adult, no matter how intimately and personally connected they might be, would be disqualified from receiving a gift, bequest, devise, or other donative transfer from the dependent adult under a trust or will unless they were related to the dependent by blood or marriage. Appellant's interpretation of 'care custodian' is so broad as to include not only the provision of health care or social services, but such acts as simply cooking for an elderly person, driving a house-bound individual to the bank or doctor, or going shopping for them.[104]

Second, the court examined the history of the "care custodian" provision and found that the legislature meant to bar gifts only to professional caregivers.[105] The court admitted that Davidson had

97 *See id*. at 705.

98 *See id*.

99 *See id*. at 706, 712.

100 *See id*. at 707. Davidson was wary that the Morkens intended to place her in a nursing home and seize control of her financial affairs. *See id*.

101 *See id*. at 716. The court in the conservatorship proceeding surcharged Gungl for $7,782.70 of unaccounted expenses. Although it called Gungl's "actions . . . sloppy, disorganized, and often unwise," it refused to find that Gungl acted in bad faith. *See id*. at 716 n.12.

102 Elaine Morken died shortly before Davidson. *See id*. at 705.

103 *Id*. at 713.

104 *Id*. at 711–12.

105 *See id*. at 713–14.

compensated Gungl for his services.[106] Nevertheless, it credited Gungl's testimony that he simply used this money to reimburse himself for out-of-pocket expenses.[107] Third, the court determined that the statute did not apply to people like Gungl, whose "provision of care developed naturally from a preexisting genuinely personal relationship."[108] Finally, even assuming that Gungl was a "care custodian," the court held that he had carried his burden under Section 21351 of proving that "Davidson's decision to leave the bulk of her estate to [him] rather than the Morkens was based on a long-standing affectionate relationship between the two, and not undue influence."[109]

Similarly, *In re Conservatorship of McDowell*[110] held that Section 21350 did not apply to a "well-meaning friend." In February, 2000, Kathryn McDowell, a retiree, met Ann Netcharu.[111] Netcharu bought McDowell coffee and food. When McDowell returned from a stint in the hospital that summer, Netcharu washed her and changed her diapers.[112] In August, the court appointed a public guardian as McDowell's conservator.[113] In September, 2000, Netcharu took McDowell to three different lawyers before finding one willing to draft a will. McDowell left half of her estate to Netcharu. Before she signed the will, she said she relied on Netcharu "for medical care, home maintenance, food and clothing," and wanted to leave her money "because [she] was assisting her."[114] The public guardian sought to nullify that will and create a new one leaving McDowell's estate to charity.[115] The trial court granted the petition and held that Section 21350 voided the gift to Netcharu.[116]

The court of appeal reversed, acknowledging that McDowell had known Netcharu for a mere six months when she executed her estate

106 *Id*. at 716.

107 *Id*. at 717 & n.13.

108 *Id*. at 716. The court articulated a three-factor test to determine whether an individual is a "care custodian": "(1) the length of time the individuals had a personal relationship before assuming the roles of caregiver and recipient; (2) the closeness and authenticity of the personal relationship; and (3) whether any money was paid for the provision of care." *Id*.

109 *Id*. at 719. Oddly, the court then held that Morken's husband had failed to establish a presumption of common law undue influence, reasoning that Gungl neither actively participated in the execution of the trust nor unduly benefited. *See id*. at 721–22. The court had already opined that Gungl had met his burden under section 21351 of disproving undue influence by clear and convincing evidence—a more rigorous showing than that required to rebut the conventional presumption of undue influence. Thus, the issue of whether Morken's husband had established a presumption of common law undue influence should have been superfluous.

110 23 Cal. Rptr. 3d 10 (Ct. App. 2004).

111 *See id*. at 16.

112 *See id*.

113 *See id*. at 12.

114 *Id*. at 17.

115 *See id*. at 13. This procedure, where a conservator seeks court permission to take an action on behalf of the conservatee, is called a "petition for substituted judgment." *See* CAL. PROB. CODE § 2580(a) (West 2007).

116 *See McDowell*, 23 Cal. Rptr. 3d. at 13.

plan.[117] Nevertheless, relying heavily on *Davidson*, it reasoned that Netcharu did not provide "health services or social services" because she had never engaged in care-giving in any other capacity:

> [T]here is no evidence [Netcharu] generally offered care services to the elderly and dependent adult population as a paid or volunteer provider. Nor is there evidence that [her] relationship with Ms. McDowell grew out of a preexisting professional or occupational connection or that [Netcharu] and Ms. McDowell had a quid pro quo arrangement, under which Ms. McDowell reasonably expected [Netcharu] to provide care, and [Netcharu] reasonably expected something in return. Rather, the court found that [Netcharu] was a well-meaning friend.[118]

Thus, the court of appeal remanded the case for the lower court to consider the conservator's other claims: whether the doctrines of incapacity and undue influence vitiated the will.[119]

But two years later, in *Bernard v. Foley*,[120] the California Supreme Court saw the statute through a different prism than *Shinkle*, *Davidson*, or *McDowell*. James Foley and his girlfriend, Ann Erman, were Carmel Bosco's "longtime personal friends."[121] In 1991, Bosco created a trust that left her sister, Ann Cassell, a third of her estate, and made other relatives residual beneficiaries.[122] Over the next decade, Bosco amended her trust three times, naming different trustees, but preserving her original dispositional scheme.[123]

In 2001, Bosco learned that she had cancer.[124] On June 12, 2001, she amended her trust again, nominating Foley as successor trustee. This was the first time she had mentioned either Foley or Erman in her estate plan. In July, at Erman's "repeated urging," Bosco moved in with her and Foley.[125] Bosco could not care for herself, and so Erman and Foley shopped for her, cooked for her, managed her finances, cleaned her room, did her laundry, bathed her, changed her diapers, and administered an array of medications.[126] In August and September of 2001, Bosco amended her trust twice more, giving Foley additional power as trustee and removing devises to other relatives.[127] Finally, on September 25, she signed the seventh amendment, which left "the 'lion's share'" of her property to Foley and Erman.[128] She died three days later.[129]

117 *See id*. at 22.
118 *Id*. at 21–22.
119 *See id*. at 26.
120 139 P.3d 1196 (Cal. 2006).
121 *Id*. at 1197. Erman, in fact, had once been married to Bosco's nephew. *See id*. at 1198 n.2.
122 *See id*. at 1210 (George, C.J., concurring).
123 *See id*.
124 *See id*.
125 *Id*.
126 *Id*. at 1202.
127 *See id*. at 1211.
128 *Id*.
129 *See id*. at 1210–11.

Justice Werdegar, joined by Justices Baxter and Chin, held that Foley and Erman were "care custodians." The majority strictly adhered to the text of Section 21350. It reasoned that the statute incorporates "[a]ny. . . person" tendering "health services or social services" into the definition of the term "care custodian."[130] At the same time, the majority noted that the statute says nothing about the person's vocation or history with the dependent adult.[131] The majority therefore overruled *Shinkle*, *Davidson*, and *McDowell* to the extent they recognized "a professional or occupational limitation" or "a preexisting personal friendship exception."[132] The majority noted that this "may in some instances result in inequity," but declined to second-guess the legislature.[133] Finally, the majority emphasized that Foley and Erman were not beneficiaries who only later became "care custodians"; instead, they had never appeared in Bosco's testamentary instruments until after they had begun caring for her.[134] Accordingly, because Foley and Erman had provided "substantial, ongoing health services," the majority voided the bequests to them.[135]

Chief Justice George concurred, reasoning that the case was a shining example of why the legislature wisely refused to delineate between paid and unpaid caregivers. The Chief Justice noted that even amateur caregivers enjoy dominion over their charges.[136] Yet the Chief Justice also conceded that the statute could produce "counterintuitive" results.[137] He opined that less cause for skepticism exists when a dependent adult confers a gift on a friend who "provide[s] substantial, ongoing health services. . . for an extended period."[138] He therefore called on the legislature to add a temporal element to the "care custodian" provision.[139]

Justice Corrigan, joined by Justices Kennard and Moreno, dissented. Justice Corrigan took issue with the majority's construction of the statute, noting that the definition of "care custodian" contains twenty-four examples of entities and institutions. Given that backdrop, Justice Corrigan

130 *Id*. at 1202 (majority opinion).

131 *See id*. at 1204.

132 *Id*. at 1202. Bizarrely, the majority later claimed to be overruling *Shinkle*, *Davidson*, and *McDowell* "to the extent they interpreted section 21350 as allowing for a preexisting personal friendship exception," while saying nothing about *Davidson* and *McDowell's* discrete professional or occupational exception. *Id*. at 1209 n.14. In light of the rest of the opinion, this must be an inadvertent omission.

133 *See id*. at 1208 ("[W]e need not strain to discern (because we are not free to impose a universally desirable result in terms of public policy.") (internal quotations omitted).

134 *See id*. at 1209 ("Foley and Erman became beneficiaries of the Trust only pursuant to changes decedent made in her will while she was living with them and they were providing her with care services.").

135 *Id*. at 1197, 1202.

136 *See id*. at 1211 (George, C.J., concurring).

137 *Id*. at 1212.

138 *Id*. at 1211.

139 *See id*. at 1212 (proposing that a bequest created "within one year following the commencement of a new nonprofessional caregiving relationship or within one year preceding the death of the dependent adult, will be subject to the presumption of undue influence").

explained, the catch-all phrase "[a]ny other. . . person providing health services or social services" must be understood as encompassing others "who provide[ ] care or assistance through some formal relationship, rather than on a private friendship or familial basis."[140] Justice Corrigan also doubted that lawmakers intended to disincentivize kindness and generosity:

> In terms of public policy, it seems unwise to penalize Good Samaritans by making them less eligible to receive the gratitude of those they help, the kinder they have been. As the majority opinion points out, Foley and Erman welcomed the decedent into their own home and performed a variety of challenging, personal, and distasteful tasks to ease the burdens of her final illness. The law should not cast a jaundiced eye on those who provide such care to family or friends, and there is no reason to believe the Legislature intended such an outcome.[141]

Finally, *In re Estate of Odian*[142] followed *Bernard* and determined that a "paid live-in companion" was a "care custodian." In 2000, Helen Odian, an eighty-four year-old who lived alone, hired Catharina Vulovic to shop, cook, perform chores, and drive. Odian eventually asked Vulovic to live with her in return for $500.00 per week.[143] They spent holidays together. Odian became close to Vulovic's children. She told friends that "she would not have lived as long" without Vulovic and "that she wanted to leave her estate to [her]."[144] In 2001, however, when a financial advisor recommended that Odian prepare a trust, Odian explained that she wanted to name charities as beneficiaries.[145] The day before Odian's appointment to sign the trust, the financial advisor received a fax, written by Vulovic, that Odian wanted to draft her own will. Odian then signed a form estate plan—in which Vulovic had filled in all the blanks—that left her estate to Vulovic. The financial advisor was unable to contact Odian afterwards. An investigator from adult protective services and a psychologist met with Odian and found her unable to recall details about her life, including Vulovic's name.[146]

The trial court voided the gifts on several grounds: incapacity, undue influence, and the "care custodian" statute.[147] The court of appeal affirmed. The court reasoned that *Bernard* doomed Vulovic's claims that the statute did not apply because of her friendship with Odian or because she "was arguably not a professional caregiver."[148] The court then addressed the thornier issue of whether Vulovic had provided the kind of services that makes one a "care custodian." Vulovic argued that *Davidson* remained

140 *Id*. at 1213 (Corrigan, J., dissenting).
141 *Id*. at 1214 (internal citations omitted).
142 51 Cal. Rptr. 3d 390, 392 (Ct. App. 2006).
143 *Id*. at 393.
144 *Id*.
145 *Id*. at 393.
146 *Id*. at 395.
147 *Id*. at 392.
148 *See id*. at 398–99.

good law to the extent it suggested that "services such as cooking, cleaning, shopping and driving do not amount to health or social services of a care custodian."[149] Although the court agreed that this aspect of *Davidson* had survived *Bernard*,[150] it construed *Davidson*'s holding differently:

> *Davidson* did not actually hold that services such as those are not social services within the meaning of the statute. In *Davidson*, the court found, primarily, that the beneficiary of the estate was not a care custodian because his role as the decedent's caregiver arose naturally from his long-term friendship with her and not from his employment as a caregiver. Secondarily, the court *questioned* whether services such as cooking, gardening, running errands, providing transportation, grocery shopping and providing assistance with banking could be equated with social services.[151]

Likewise, *Odian* noted that *Bernard* mentioned that "substantial and ongoing health services" make one a "care custodian" but did not discuss "social services."[152] Calling it "a question of first impression," *Odian* held that "an expansive interpretation of 'social services'. . . best promotes the Legislature's objective of protecting vulnerable dependent adults from exploitation."[153] Because Vulovic was a "paid live-in caregiver" who "took care of [Odian's] home" and "cooked, cleaned, and drove" Odian, the court determined that she was a "care custodian."[154]

D. The Current State of the Law

The most glaring problem with the definition of "care custodian" is that it is virtually boundless: "[a]ny [other]. . . person[] providing health services or social services to elders or dependent adults."[155] Even though *Bernard* held that "health services" must be "substantial" and "ongoing," it conjured these limiting principles out of thin air[156]—an odd move in light

149 *Id*. at 399 (internal quotations omitted).

150 *See id*. at 399 n.7 ("In *Bernard*, the court disapproved *Davidson* only to the extent that *Davidson* held that section 21350(a) allows for a 'preexisting personal friendship exception.' Thus, *Davidson* remains citable authority with respect to its discussion of the social services issue.") (internal citations omitted).

151 *Id*. at 399–400 (internal citations omitted).

152 *Id*. at 400. ("In *Bernard*, the court did not discuss the meaning of the term 'social services,' and it did not hold, as appellant contends, that *only* the provision of substantial ongoing health services renders a caregiver a care custodian . . . .").

153 *Id*. at 401.

154 *Id*. The court also held that Vulovic had failed to rebut the presumption under section 21351, as she attacked the evidence offered against her, rather than offered affirmative evidence of her own. *See id*. at 402.

155 *See* CAL. PROB. CODE § 21350(c) (West 2007); CAL. WELF. & INST. CODE § 15610.17(y) (West 2007). Similarly, the term "dependent adult" includes any person over sixty-four who has "diminished because of age." CAL. PROB. CODE § 21350(c) (West 2007); CAL. WELF. & INST. CODE § 15610.23(a) (West 2007). Of course, one would be hard-pressed to find anyone over sixty-four who did *not* fit this bill.

156 *Compare* Bernard v. Foley, 139 P.3d 1196, 1197, 1202 (Cal. 2006) *with id*. at 1214 n.3 (Corrigan, J., dissenting) ("The majority imports the terms *substantial* and *ongoing* care into the statute without supporting citation of statutory language or legislative history.").

of the majority's textualist approach to statutory interpretation.[157] Moreover, although *Bernard* took pains to point out that it might reach a different result if "friends who were [already] testamentary beneficiaries of a testator *subsequently* became care custodians"[158]—a situation in which the caregiver would have little incentive to exploit the elder—the statute does not address the issue. If *Bernard* could not create a preexisting friendship exception in the face of legislative silence, then it cannot defensibly create a preexisting beneficiary exception in the face of legislative silence. Thus, as long as the California Supreme Court gives the statutory language talismanic significance, one cannot minister to a senior without running the risk of becoming a "care custodian."[159]

The meaning of "social services" is equally, if not more, elusive. Although *Odian* asserts that *Davidson* merely "*questioned*" whether duties "such as cooking, gardening, running errands, providing transportation, grocery shopping and. . . banking" could be "social services,"[160] *Odian* is incorrect. *Davidson* squarely held that "errands, chores, and household tasks. . . cannot be equated with the provision of 'health services and social services.'"[161] *Odian*'s self-proclaimed "expansive interpretation of 'social services'" better accords with *Bernard*'s reluctance to read exclusions into the statute.[162] Yet, if "social services" means nothing more than "socializing" or "helping," then Section 21350 sweeps within its ambit any bequest from an elder to a friend. This cannot be the legislature's intent. One can rectify *Odian* with *Davidson* because *Odian*, unlike *Davidson*, featured a salaried, live-in caregiver. Volovic shared almost every waking moment with Odian, and thus had more of an opportunity to control her.[163] Such distinctions, however, are born of common sense, not anything in the definition of "care custodian." Thus, the statute desperately needs reform.

157 *See id*. at 1204 (majority opinion) (rejecting Foley and Erman's arguments "[i]n light of the statutory language").

158 *Id*. at 1209 (emphasis added).

159 The *Bernard* majority dismissed fairness concerns because the "certificate of independent review" in "section 21351 provides a clear pathway to avoiding section 21350." *Id*. at 1208. Yet after practicing at an estate planning firm and researching both reported and unreported cases for this article, I have never heard of anyone actually using the "certificate of independent review" procedure. The consensus among estate planning attorneys was that few testators were willing to pay for an independent attorney to undertake the searching investigation necessary to rule out caretaker overreaching. In addition, the specter of malpractice liability made them reluctant to participate in the certification process.

160 *Odian*, 51 Cal. Rptr. 3d at 399–400.

161 Bernard v. Foley, 139 P.3d 1196, 1197, 1202 (Cal. 2006).

162 *Odian*, 51 Cal. Rptr. 3d at 402.

163 *Compare id*., 51 Cal. Rptr. 3d 390 *with In re* Conservatorship of Estate of Davidson, 6 Cal. Rptr. 3d 702, 712 (Ct. App. 2003) ("during the time period most relevant to this case, Davidson was still essentially maintaining her independence").

II. THE LAW REVISION COMMISSION'S TENTATIVE RECOMMENDATIONS

The Law Revision Commission recently voted to limit the definition of "care custodian" to paid caregivers:

> 21362. (a) "Care custodian" means a person who provides health or social services to a dependent adult for compensation, as a profession or occupation. The compensation need not be paid by the dependent adult.
>
> (b) For the purposes of this section, "health and social services" include, but are not limited to, the administration of medicine, medical testing, wound care, housekeeping, shopping, cooking, transportation, assistance with hygiene, and assistance with finances.[164]

The Commission also proposed (1) recasting "dependent adult" as someone for whom "[a] court would have appointed a conservator for the person. . . if a petition for conservatorship had been filed,"[165] (2) clarifying that the statute applies "only if the donative instrument was executed during the period in which the care custodian provided services to the transferor,"[166] (3) reducing the burden on caregivers to disprove undue influence[167] from clear and convincing evidence to a preponderance of the evidence, and (4) allowing caregivers to carry this burden solely through the testimony of a "disqualified person."[168]

These changes would ameliorate the statute's fundamental defect—its staggering breadth. In addition, restricting the term "care custodian" to paid caregivers would align the text with its animating concerns about those "*hired* to provide in-home care."[169] Yet the proposals also elucidate that this area of law does not lend itself to regulation. Indeed, they raise many new questions. Would the new definition of "care custodian"—an individual who caretakes "for compensation, *as a profession or occupation*"—apply to Volovic, who drew a salary but "had never previously worked as a caregiver and was arguably not a professional

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164 Cal. Law Revision Comm'n, s*upra* note 21, at 19.

165 *Id*. at 19–20.

166 *Id*. at 21.

167 The Commission eliminates the statute's reference to "menace or duress," correctly noting that none of the rationales for the presumption justify "terms of art that describe extreme forms of coercion." *Id*. at 5.

168 *See* Minutes of Meeting, California Law Revision Comm'n, April 10, 2008, at 3, 5, *available at* http://www.clrc.ca.gov/pub/Minutes/Minutes2008-04.pdf (last visited Oct. 24, 2008). Although an express preexisting friendship exception could achieve many of these goals, it would also create uncertainty by requiring courts to define a "friend." *See*, *e.g*., Ethan J. Leib, *Friendship and the Law*, 54 UCLA L. REV. 631, 638–47 (2007) (proposing a ten-factor "set of criteria [which] may be useful in delineating the contours of the friendship relation."); Laura A. Rosenbury, *Friends With Benefits?*, 106 MICH. L. REV. 189, 205 (2007) (noting that courts refuse to enforce instructions for a trustee to make distributions to the settlor's unidentified "friends" for lack of an ascertainable beneficiary).

169 CAL. S. B. ANALYSIS., ASSEMB. B. 1172, July 8, 1997 (emphasis added); *see also* Kirsten M. Kwasneski, Comment, *The Danger of a Label: How Legal Interpretation of "Care Custodian" Can Frustrate a Testator's Wish to Make a Gift to a Personal Friend*, 36 GOLDEN GATE U. L. REV. 269, 290 (2006) (proposing that the Legislature amend section 21350 to "encompasses only those individuals who are in the occupation of providing caretaking services.").

caregiver[?]"[170] Why exempt C.J. Thompson in *Shinkle*, whose role as ombudsman, for which he earned no "compensation," gave him access to sensitive financial information about elderly patients?[171] What does the slippery phrase "health services or social services" mean?[172] As noted above, these terms are so vague that they seem to encompass any manner of providing assistance to an elder. They thus invite arbitrary line-drawing regarding the nature and degree of chores; it is now unclear where "unsophisticated care and attention"[173] ends and full-blown "social services" begin. Moreover, they contain a fundamental perversity—the more kindness one displays toward an elder, the more likely it is that one will be statutorily disinherited.[174] Finally, what is it about the caregiving relationship that justifies making caregivers, paid or otherwise, "disqualified person[s]"? I examine this last question in the next section.

A. Policy Rationales for Retaining the "Care Custodian" Provision

The Law Revision Commission offers three reasons for retaining the "care custodian" provision: (1) caregivers have an opportunity to unduly influence their patients; (2) "dependent adults" are especially vulnerable; and (3) devises to caregivers are likely "unnatural."[175] I discuss each in turn.

1. Opportunity to Exert Undue Influence

The Commission correctly notes that "[t]he intimacy, privacy, and duration of a care custodian relationship provides a significant opportunity to exert undue influence on a dependent adult."[176] But this may be equally true of other relationships that would not fall within the revised statute: an elder's family, close friends, doctors, spiritual advisors, and volunteer caregivers. Moreover, courts routinely announce that the "mere opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient" to prove undue influence.[177] Indeed, that is why California courts have demanded "a showing that the beneficiary actively participated in the preparation of the will" and actually

170 *In re* Estate of Odian, 51 Cal. Rptr. 3d 390, 399 (Ct. App. 2006).

171 *See* Estate of Shinkle, 119 Cal. Rptr. 2d 42, 54 (Ct. App. 2002) ("But for the ombudsman program, Thompson would not have met Shinkle, would not have had access to her financial and personal information, and would not have gained her trust.").

172 The Law Revision Commission's illustrative list, *see supra* note 21, does not answer this question. It includes, *but is not limited to* "housekeeping, shopping . . . transportation . . . [and] assistance with finances" (emphasis added).

173 *In re* Conservatorship of Estate of Davidson, 6 Cal .Rptr. 3d 702, 713 (Ct. App. 2003).

174 Justice Corrigan alludes to this point. *See* Bernard v. Foley, 139 P.3d 1196, 1214 n.3 (Cal. 2006) (Corrigan, J., dissenting) ("Those who provide only trivial or undependable care may inherit, while those whose care is substantial and ongoing are not only to be denied, but also assessed costs and attorney fees.").

175 *See* Cal. Law Revision Comm'n, *supra* note 21, at 7–8.

176 *Id*.

177 *In re* Welch's Estate, 272 P.2d 512, 514 (Cal. 1954).

"affect[ed] the contents of the will" to shift the burden to the beneficiary.[178] The "care custodian" provision only presumes that caregivers actively participate in the preparation and execution of the will because of a historical accident—Section 21350 first governed gifts to drafting attorneys, who *by definition* create the will. The common law also indulged in the sensible inference that lawyers actively participate in their client's will.[179] Conversely, there is no inexorable tether between the act of caregiving or the role of a caregiver and the contents of an elder's estate plan. Thus, to the extent the statute assumes that caregivers dictate their patients' testamentary instruments, its basis for doing so is unclear. To the extent it dispenses with this requirement, it ignores a factor that California courts have recognized as a telling indication of undue influence.

2. Vulnerability of "Dependent Adults"

The Commission explains that "a transferor may be dependent on a care custodian for assistance with the necessities of life" and may also suffer from debilitating conditions "that could make the transferor more vulnerable to pressure and manipulation."[180] The Commission sets the statute on firmer ground by changing the definition of "dependent adult" from anyone over sixty-four[181] to individuals who would require a conservator.[182]

Nevertheless, evidence of a testator's impairment does not factor into the test for raising the presumption of undue influence. As such, making it a pillar for a novel extension of the presumption is unusual. Although a few cases have mentioned the testator's susceptibility to bolster their conclusion that a beneficiary obtained a gift by undue influence, the general rule is that "proof of the testator's mental weakness does not establish more than a conjecture that the will is the result of undue influence."[183] California courts have also required a testator to be severely incapacitated to lose the right to devise property. Even being under a conservatorship does not suffice.[184] Thus, without significantly more, the fact that "dependent adults" may be particularly vulnerable to undue influence is not a persuasive basis for barring gifts to "care custodians."

3. "Undue Profit" to Caregivers

Finally, and most importantly, the Commission contends that, "[a]n estate plan may be considered unnatural if it provides a large gift to a person who is not related to the transferor or is remotely related, while

178 Estate of Swetmann, 102 Cal. Rptr. 2d 457, 466 (Ct. App. 2000) (collecting cases); *see also* Estate of Bould, 287 P.2d 8, 16 (Cal. Ct. App. 1955) (collecting cases).

179 Estate of Auen, 35 Cal. Rptr. 2d 557, 562 (Ct. App. 1994).

180 Cal. Law Revision Comm'n, *supra* note 21, at 8.

181 *See supra* note 155.

182 Cal. Law Revision Comm'n, supra note 21, at 19–20.

183 William H. Lindsley et al., *Wills*, 64 CAL. JUR. 3D § 188 (2007) (collecting cases).

184 *See Estate of Mann*, 229 Cal. Rptr. 225, 230-31 (Ct. App. 1986).

providing a less generous gift to close relations."[185] According to the Commission, this rationale is a valid basis for distinguishing between paid and unpaid caregivers: "While a large gift to a paid employee may appear 'unnatural,' the same gift to a friend or Good Samaritan may not."[186]

Yet the hallmark of the "undue profit" element under California law—what makes the state's undue influence doctrine so progressive—is its fact-intensive flexibility.[187] Indeed, the test calls for the judge to place herself in the testator's shoes—to disregard labels and examine the substance of each relationship.[188] The Law Revision Commission is absolutely correct that *some* testamentary gifts to caregivers "may" seem unnatural, especially if they come at the expense of close friends or family. But this will not always be the case. For example, in *Shinkle* and *Odian*, the "care custodian" provision invalidated transfers even though the caregivers were closer to the testators in their final years than any other person.[189] At the same time, both cases featured strong countervailing evidence that called the caregivers' motives into question.[190] Trial courts and the doctrine of undue influence "exist[ ] to resolve"[191] questions of whether a testamentary gift is "natural" or whether a profit is "due." A bright-line rule is a poor fit.

Moreover, not only is *any* assumption about "undue profit" troubling, but this particular assumption—that all testamentary gifts to paid caregivers are "undue"—is hardly convincing. Caregivers make little money,[192] rarely have health insurance,[193] and perform invaluable and often distasteful tasks. Elders "need catheters, oxygen tanks, and wheelchairs. They need someone to put a spoon in their mouths, to get them on the toilet, to pull on their socks, and to remind them what day it is. They need someone to oversee an arsenal of medications and a cadre of medical specialists."[194] Indeed, "[i]ndividuals with three or four chronic illnesses have 8 to 14 physicians taking care of them. The complexity for caregivers is a tremendous challenge."[195] Especially in states such as California, where

185 Cal. Law Revision Comm'n, *supra* note 21, at 8.

186 *Id*.

187 *See supra* note 52, at 564.

188 *See id*.

189 Estate of Shinkle, 119 Cal. Rptr. 2d 42, 50 (Ct. App. 2002) (noting that the testator's closest relative was a cousin whom she had not seen for four decades); *In re* Estate of Odian, 51 Cal. Rptr. 3d 390, 392–93 (Ct. App. 2006).

190 *See Shinkle*, 119 Cal. Rptr. 2d at 47–48 (Ct. App. 2002) (noting that Thompson suggested that Shinkle make an estate plan and was close behind her during meetings with her lawyer); *Odian*, 51 Cal. Rptr. 3d at 394 (noting that Volovic apparently isolated Odian and filled out her will for her).

191 Bernard v. Foley, 139 P.3d 1196, 1215 (Cal. 2006) (Corrigan, J., dissenting).

192 *See supra* notes 5–6 and accompanying text.

193 *See* Bob Moos, *Who'll Care for Aging Boomers?*, DALLAS MORNING NEWS, July 4, 2007, at 1A, *available at* 2007 WLNR 12671984 (estimating that only half of caregivers have health insurance, and "[i]f a caregiver has coverage, it's usually because of a spouse or another job.").

194 *Elder Care Challenges and Solutions: Hearing Before the Senate Joint Econ. Comm.*, 116th Cong. (2007) (testimony of Virginia Morris), *available at* 2007 WLNR 9245900.

195 Michael Vitez, *National Conference on Aging Delivers Wake-up Call to Boomers*, PHILA. INQUIRER, Mar. 11, 2007, at A4, *available at* 2007 WLNR 4598239.

seniors often have valuable illiquid assets, such as real estate, a senior could very well want to reward a caregiver for his or her efforts but be unable to do so during life. Thus, there should be nothing inherently suspect about a bequest to a paid caregiver.

CONCLUSION

The "care custodian" provision casts a long shadow over California probate law. Currently, its definitions are so broad, and exceptions so narrow, that it is doctrinally and theoretically incoherent. As the law now stands, when an unrelated beneficiary helps an elder in any fashion, they do so at their own peril. The California Law Revision Commission's tentative recommendations would circumscribe the statute and thus are a good first step. But before its mandate to rethink the statute expires, the Commission should seriously consider whether to abandon the "care custodian" provision once and for all.

Medical Marijuana and the Limits of the Compassionate Use Act: *Ross v. RagingWire Telecommunications*

Deborah J. La Fetra[*]

Gary Ross suffered a back injury while serving his country in the United States Air Force and treats the continuing pain and spasms with marijuana, pursuant to California's Compassionate Use Act.[1] Due to his ongoing ingestion of marijuana, Ross failed the pre-employment drug test required by RagingWire Telecommunications, Inc., an information technology company.[2] Upon receiving notice of this failure, Ragingwire fired Ross, who had begun work a few days prior. Ross sued the company for discrimination under California's Fair Employment and Housing Act (FEHA)[3] and for wrongful termination in violation of public policy.[4]

The sympathetic facts of Ross's plight—particularly his status as an honored veteran—might have invited the California Supreme Court to look for narrow grounds to uphold his complaint.

But on January 24, 2008, the California Supreme Court rejected Ross's claims, based on a plain-language reading of the Compassionate Use Act. The court reviewed the language of the Compassionate Use Act, which makes no reference to employment, and also made note of the proponents' ballot arguments, which spoke of protecting patients from criminal penalties for marijuana and keeping cancer patients out of jail.[5] The court explained that "[n]o state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law . . . even for medical users. Instead of attempting the impossible . . . California's voters merely exempted medical users and their primary caregivers from criminal liability under two specifically designated state statutes."[6]

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1 Ross v. RagingWire Telecomm., Inc., 174 P.3d 200, 202 (Cal. 2008) (citing CAL. HEALTH & SAFETY CODE § 11362.5 (West 2008), added by initiative, Proposition 215, as approved by voters, General Election (Nov. 5, 1996)).

2 *Id*.

3 CAL. GOV'T CODE § 12900–12996 (West 2008).

4 *Ross*, 174 P.3d at 203.

5 *Id*. at 206.

6 *Id*. at 204 (citing 21 U.S.C. §§ 812, 844(a)); Gonzales v. Raich, 545 U.S. 1, 26–29 (2005);

Given the Compassionate Use Act's "modest objectives and the manner in which it was presented to the voters for adoption," the text of the initiative and the arguments supporting its passage yielded "no reason to conclude the voters intended to speak so broadly, and in a context so far removed from the criminal law, as to require employers to accommodate marijuana use."[7] Thus, the court held that "[n]othing in the text or history of the Compassionate Use Act suggests the voters intended the measure to address the respective rights and duties of employers and employees," and the nondiscrimination requirements of the Fair Employment and Housing Act simply did not apply.[8]

In so holding, the court gave a nod to California's strong tradition of direct democracy, explaining that "the initiative power is strongest when courts give effect to the voters' formally expressed intent, without speculating about how they might have felt concerning subjects on which they were not asked to vote."[9] The court further cited *People v. Galambos*—an earlier California court of appeal decision interpreting the Compassionate Use Act—in which the court observed, "the proponents' ballot arguments reveal a delicate tightrope walk designed to induce voter approval, which we would upset were we to stretch the proposition's limited immunity to cover that which its language does not."[10]

Written by Justice Werdegar, the majority opinion's simple reference to the plain language of the operative law and voters' intent contrasts sharply with Justice Kennard's dissent on the FEHA issue. Justice Kennard first laments that the decision is "conspicuously lacking in compassion,"[11] and then attempts to manufacture a reason to force Ragingwire to employ Ross, relying in large part on the lack of evidence that Ross's job actually was impaired by his marijuana use.[12] The judiciary, of course, is not meant to impose its own views of the wisdom or "compassion" present in a statute. Instead, judges are supposed to interpret and apply the law.[13]

Ross also argued that he was wrongfully terminated in violation of public policy, tethering his claim to the right of medical self-determination.[14] None of the justices agreed, however, and the court

United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491–95 (2001).

7 *Ross*, 174 P.3d at 206–07.

8 *Id*. at 202–04.

9 *Id*. at 207; *see also* People v. Mower, 49 P.3d 1067, 1070 (Cal. 2002) (concluding that the Compassionate Use Act provides only an affirmative defense to a criminal prosecution and the defendant has the burden of proof).

10 128 Cal. Rptr. 2d 844, 848 (Ct. App. 2002).

11 *Ross*, 174 P.3d at 209 (Kennard, J., concurring and dissenting).

12 *Id*. (Kennard, J., concurring and dissenting). The lack of evidence is unsurprising given (1) that the case never made it past the demurrer stage, and (2) the extremely short tenure of Ross's employment. *Id*. at 203.

13 *See* Bonnell v. Med. Bd. of Cal., 82 P.3d 740, 744 (Cal. 2003).

14 *Ross*, 174 P.3d at 208.

unanimously disposed of the claim in short order, holding that:

> [D]efendant has not prevented plaintiff from having access to marijuana. Defendant has only refused to employ plaintiff. To assert that defendant's refusal to employ plaintiff affects his access to marijuana is merely to restate the argument that the Compassionate Use Act gives plaintiff a right to use marijuana free of hindrance or inconvenience, enforceable against third parties. That argument we have already rejected.[15]

Essentially, Ross could not overcome the hurdle that marijuana possession and use violates federal law all of the time,[16] and California law most of the time. He could not claim an overarching right to possession and use that trumps these legislatively-announced public policies.

This article focuses on two aspects of the employment situation presented in *Ross v. Ragingwire*. First, this article discusses the public policies motivating employers to keep their workplaces drug-free, even when faced with an employee using medical marijuana under the Compassionate Use Act. Second, this article explores the language of both the Compassionate Use Act and the Fair Housing and Employment Act and the potential ramifications if the statutes had been combined to create a new cause of action. Finally, this article concludes that the California Supreme Court's decision was more than just a correct application of the Compassionate Use Act's language; the decision furthered justice as well. A contrary result would have conflated a criminal-defense statute into employment law governed by the broad-ranging provisions of FEHA. The effect on California businesses would have been severe, placing employers between the rock of federal and state laws prohibiting drug-use and the hard place of being required to permit employees, potentially impaired by medical marijuana use, to continue in the workplace.

I. PUBLIC POLICY SUPPORTS EMPLOYER EFFORTS TO MAINTAIN A DRUG-FREE WORKPLACE

Employers have numerous reasons to maintain a drug-free workplace. Among them, employers can lose government funding for projects if they permit employees to use illegal drugs. Impaired employees miss more work than their drug-free co-workers and are more likely to make mistakes when they are at work. Employers may become liable for misdeeds

15 *Id*. at 209 (internal citation omitted); *see also id*. at 216 (Kennard, J., concurring and dissenting) (agreeing with the majority on this point).

16 Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 822–823, 872 (2000) (describing Marijuana as a "Schedule I" substance, such that its use or distribution is prohibited unless it is part of a Federal Drug Administration pre-approved research study conforming to stringent storage and record keeping requirements); Wyatt Buchanan, *Pot dispensaries shut in response to federal threat*, S.F. CHRON., Feb. 7, 2008, at B1 (noting the closure of seven medical marijuana dispensaries in San Francisco after the Drug Enforcement Agency notified landlords that they are subject to property seizure and jail time if they continue to allow the sale of marijuana on the premises, following similar notices and closures of dozens of dispensaries in southern California in the summer of 2007).

committed by their drug-using employees. Any one of these scenarios could cause adverse economic consequences to an employer, as well as to the employer's shareholders, employees, or customers if the value of the business suffers. As the Nebraska Supreme Court succinctly explained, a company establishes drug-free workplace rules to "improve work safety, to ensure quality production for customers, and to enhance its reputation in the community by showing that it has taken a visible stand against chemical abuse and the associated detrimental effects."[17]

A. Employers Must Comply with Drug-Free Workplace Statutes

Companies that contract with the State of California or the federal government have special concerns with regard to maintaining a drug-free workplace. All recipients of state funding must comply with California's Drug-Free Workplace Act of 1990, regardless of the monetary value of the contract or grant.[18] These recipients must provide annual certification that their employees are prohibited from using controlled substances, including marijuana, as a prerequisite to their continued receipt of state grants.[19] The Act further requires contractors and grantees to establish a drug-free awareness program to inform employees about the dangers of, and penalties for, drug use and the availability of drug counseling.[20] Each employee must agree to abide by the contractor's or grantee's drug policy as a condition of employment.[21] The employer's penalty for failing to comply is suspension of payments under the contract or grant, termination of the contract or grant, or both. Furthermore, the contractor or grantee may be subject to debarment.[22]

Moreover, California recipients of federal aid must provide a drug-free workplace for employees.[23] Under federal law, employers must notify each employee of the prohibition against using controlled substances, including marijuana, and the penalty for violating the law: The suspension or termination of a particular grant and ultimately, debarment for up to five years from future grants.[24] Both the state and federal Drug-Free Workplace Acts provide that violating the obligations of the Act or making a false

17 Dolan v. Svitak, 527 N.W.2d 621, 626 (Neb. 1995); *see also* Smith v. Zero Defects, Inc., 980 P.2d 545, 550 (Idaho 1999) (an employer has "a right to expect its employees to refrain from conduct that may bring dishonor on the business."); Farm Fresh Dairy, Inc. v. Blackburn, 841 P.2d 1150, 1153 (Okla. 1992) (public policy supports drug testing to promote safety in the workplace).

18 CAL. GOV'T CODE §§ 8350–8387 (West 2008).

19 *Id*. §§ 8351(a), 8355.

20 *Id*. § 8355(b)(2)–(4).

21 *Id*. § 8355(c).

22 *Id*. § 8356(a).

23 41 U.S.C. § 702 (2000).

24 41 U.S.C. §§ 702(a)(1)(A), 702(b) (2000); *see also* 49 U.S.C. § 5331 (2000); 49 C.F.R. § 40.85(a) (2006) (United States Department of Transportation requirements that all public transportation employers test employees for controlled substances, including marijuana); 49 U.S.C. § 20140 (2000) (same for railroad carriers); 49 U.S.C. § 31306 (2000) (same for commercial motor carriers); 49 U.S.C. § 45102 (2000) (same for air carriers, per Federal Aviation Administration regulations).

certification of compliance can result in the contract's suspension or termination, and may result in debarment of the non-complying contractor or grantee.

B. Marijuana Use has an Adverse Impact on Employee Performance

California employers have statutory authorization to remove drug-using employees from the workplace.[25] These employers have legitimate reasons for wanting to do so, even if they are not subject to the federal or state Drug-Free Workplace laws. Employer fears of employee absenteeism, shiftlessness, or malfeasance while under the influence of marijuana, even when recommended for medical purposes, rest on medical studies demonstrating a wide range of impacts that can occur, especially with prolonged ingestion of the drug. While not discounting the potential benefits to patients and recommending further study, American Medical Association studies state that marijuana ingested for medicinal purposes may have the same biological side-effects as marijuana ingested for recreational purposes.[26] Marijuana increases the heart rate, and a person's blood pressure may decrease on standing. Marijuana intoxication can cause "impairment of short-term memory, attention, motor skills, reaction time, and the organization and integration of complex information."[27] Users may experience intensified senses, increased talkativeness, altered perceptions, and time distortion followed by drowsiness and lethargy.[28] "Heavy users may experience apathy, lowered motivation, and impaired cognitive performance."[29]

These effects translate into potential problems in the workplace. People who smoke marijuana frequently, but do not smoke tobacco, have more health problems and miss more days of work than nonsmokers.[30] Many of these extra sick days are due to respiratory illnesses.[31] Marijuana

25 CAL. LAB. CODE § 1025 (West 2008) ("Nothing in [the Alcohol and Drug Rehabilitation] chapter shall be construed to prohibit an employer from refusing to hire, or discharging an employee who, because of the employee's current use of alcohol or drugs, is unable to perform his or her duties, or cannot perform the duties in a manner which would not endanger his or her health or safety or the health or safety of others."); *accord* Lamke v. Sunstate Equip. Co., 387 F. Supp. 2d 1044, 1053 (N.D. Cal. 2004) (Section 1025 "does not express substantial and fundamental public policy against termination of employment").

26 American Medical Association Council on Scientific Affairs, Featured Report: Medical Marijuana (A-01) (2001), http://www.ama-assn.org/ama/pub/category/13625.html (last visited Feb. 21, 2008) [hereinafter AMA Report] (citing Pierri J. Chait, Effects of Smoked Marijuana on Human Performance: A Critical Review, in Marijuana/Cannabinoids: Neurobiology and Neurophysiology 387–424 (A. Bartke & L. Murphy, eds., CRC Press 1992)).

27 *Id*.; W. Hall & N. Solowij, *Adverse Effects of Cannabis*, 352 LANCET 1611–16 (1998).

28 AMA Report, *supra* note 26.

29 *Id*.

30 United States Dep't of Health & Human Servs., Nat'l Insts. of Health, Nat'l Inst. on Drug Abuse, InfoFacts: Marijuana 3 (Apr. 2006), *available at* http://www.drugabuse.gov/PDF/InfoFacts/Marijuana06.pdf (citing Michael R. Polen, et al., *Health Care Use by Frequent Marijuana Smokers Who Do Not Smoke Tobacco*, 158 WEST J. MED 596–601 (1993)).

31 *Id*.

compromises the ability to learn and remember information, so that a user's job performance and intellectual or social skills are more likely to diminish.[32] Other studies associate marijuana smoking with increased absences, tardiness, accidents, workers' compensation claims, and job turnover. For example, "[a] study among postal workers found that employees who tested positive for marijuana on a pre-employment urine drug test had 55 percent more industrial accidents, 85 percent more injuries, and a 75 percent increase in absenteeism compared with those who tested negative for marijuana use."[33] A recent study by the United States Department of Health and Human Services found that, of workers who admitted ingesting marijuana within the past month, 13.1% worked for three or more employers in the past year; 16.1% missed two or more days of work in the past month due to illness or injury; and 16.9% skipped one or more days of work in the past month.[34] For those workers who did not use marijuana in the past month, only 5.2% worked for three or more employers in the past year; 11.2% missed two or more days of work in the past month due to illness or injury; and 8.3% skipped one or more days of work in the past month.[35] The most dramatic findings, therefore, relate to a marijuana user's ability to maintain consistency in his employment, both in staying with one employer for more than a few months and actually showing up for work.

C. Off-Duty Marijuana Use also Affects Employee Performance and is of Legitimate Concern to Employers

Some argue that there is a distinction between on-duty and off-duty marijuana use. In *Ross*, the employee argued that California Health & Safety Code section 11362.785(a), which states, "[n]othing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of

32 *Id*. at 4.

33 *Id*. at 5 (citing Craig Zwerling, et al., *The Efficacy of Preemployment Drug Screening for Marijuana and Cocaine in Predicting Employment Outcome*, 264 JAMA 2639–43 (1990); A.J. Gruber, et al., *Attributes of Long-Term Heavy Cannabis Users: A Case-Control Study*, 33 PSYCHOL. MED. 1415, 1415–22 (2003) (finding that heavy marijuana abusers reported that the drug impaired several important measures of life achievement including cognitive abilities, career status, social life, and physical and mental health)); *see also* Teahan v. Metro-N. Commuter R.R., 80 F.3d 50, 54 (2d Cir. 1996) (noting the link between alcohol and drug use and excessive absenteeism); Willner v. Thornburgh, 928 F.2d 1185, 1192–93 (D.C. Cir. 1991) (citing these and other studies and concluding, "[t]hese studies and others mentioned in the Postal Service report thus confirm what one would expect—an extremely high correlation between a positive result in a pre-employment drug test and subsequent employment problems.").

34 SHARON L. LARSON, ET AL., DEP'T OF HEALTH & HUMAN SERVS., WORKER SUBSTANCE USE AND WORKPLACE POLICIES AND PROGRAMS 62 (2007), *available at* http://oas.samhsa.gov/work2k7/work.pdf (surveying full-time workers from 2002–04). These numbers are very close to the percentages reported by workers who used other illicit drugs, such as heroin, cocaine, and methamphetamines, where the survey found 12.3% worked for three or more employers in the past year; 16.4% missed two or more days of work in the past month due to illness or injury; and 16.3% skipped one or more days of work in the past month. *Id*.

35 *Id*.

employment," means that while employers are not required to accommodate the actual ingestion or storage of marijuana on company premises, employers *are* required to accommodate employees under the influence of marijuana ingested elsewhere.[36] The dissent agreed with this argument.[37] In syllogistic form, the argument goes like this:

1. Employers are not required to accommodate the presence or ingestion of marijuana on company premises.
2. Ross possesses and ingests marijuana at home, not on company premises.
3. Therefore, employers are required to accommodate Ross's marijuana use.

This combines the logical fallacy of negative premises with the fallacy of illicit process of a major term. In formal terms of Aristotelian logic, the premise is the universal negative proposition that "employers *are not* required to accommodate drug use on the premises" from which the dissent infers the contrapositive of that proposition, that "employers *are* required to accommodate drug use off the premises." "By the laws of logic, however, the inference of the contrapositive is invalid where the starting proposition is a universal negative."[38] Compounding this logical error is the invalidity of the major term. In *Logic for Lawyers*, former Third Circuit Court of Appeals Judge Ruggero J. Aldisert cited the following example of the fallacy, which bears a striking resemblance to Ross's argument:

1. Larceny is a crime.
2. Driving under the influence is not larceny.
3. Therefore, driving under the influence is not a crime.[39]

The major term of the premise is "crime," while the major term that follows is "driving." To come to a logical conclusion, the major term must exist in the premise. Similarly, the dissent's major term of "ingesting marijuana at home" does not exist in the premise, in which the major term is "ingesting marijuana at work."

Moreover, the biomedical facts of marijuana use do not allow for such separation between on-duty and off-duty use. While many effects of marijuana dissipate over a short period of time, others—such as respiratory ailments and decreased cognitive ability resulting from prolonged exposure

36 Ross v. RagingWire Telecomm., Inc., 174 P.3d 200, 207–08 (Cal. 2008) (quoting CAL. HEALTH & SAFETY CODE § 11362.785(a) (West 2008)).

37 *Id*. at 209–10 (Kennard, J., concurring and dissenting).

38 Bailey v. Maryland, 294 A.2d 123, 129 n.4 (Md. Ct. Spec. App. 1972); *see also* RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING 156–58 (3d ed., National Institute for Trial Advocacy 1997).

39 Ernest F. Lidge III, *The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove That the Employer's Action Was Materially Adverse or Ultimate*, 47 U. KAN. L. REV. 333, 364 (1999) (citing RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING 153–54 (1990)).

to marijuana—remain concerns over the long term. For example, memory defects may last as long as six weeks after an individual's last use.[40] These effects, particularly on cognitive abilities that may cause lapses in judgment, are a valid concern for employers.[41]

D. A Policy Favoring Drug-Free Workplaces has no Discernable Impact on the Availability of Willing and Able Workers

In his opening brief to the California Supreme Court, Ross argued that an adverse ruling "will deprive the State of California the benefit of thousands of productive workers."[42] Yet under the court's ruling, employers still may choose to permit individuals who use medical marijuana to continue their employment—at least if they are not bound by the various federal or state Drug-Free Workplace Acts. Even after *Ross*, employers are permitted, but not *required* to continue employing medical marijuana-using employees.[43] Moreover, there is no evidence of the number of "productive workers" who are at risk of being fired if employers retain a choice of whether to accommodate medical marijuana use.[44]

The experience of other states belies this fearmongering. The medical marijuana statutes of other states contain explicit provisions that employers need not accommodate the use of medical marijuana by their employees.[45]

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40 Abbie Crites-Leoni, *Medicinal Use of Marijuana: Is the Debate a Smoke Screen for Movement Toward Legalization?*, 19 J. LEGAL MED. 273, 280 (1998) (citing Schwartz, et al., *Short-Term Memory Impairment in Cannabis-Dependent Adolescents*, 143 AM. J. DIS. CHILD. 1214 (1989)).

41 *See* Burger v. Unemployment Comp. Bd. of Review, 801 A.2d 487, 490–91 (Pa. 2002) (noting that where a nurse's aide was fired after acknowledging her use of marijuana every night, "[t]here is no question Claimant could be fired for her drug use; a responsible nursing home cannot be criticized for this," but found her actions did not constitute "willful misconduct" to justify denial of unemployment benefits); *In re* Cahill, 585 A.2d 977, 979 (N.J. Super. Ct. App. Div. 1991) (finding that where a firefighter's current alcoholism and illegal drug use would probably cause injury to himself or to others, an "employer is not required to assume . . . that the employee will limit alcohol and other drug consumption to off-duty hours, or that the effects of drugs will be dissipated by the time work begins," especially because firefighters are "subject to being called to duty when needed").

42 Appellant's Opening Brief at 37, Ross v. RagingWire Telecomm., Inc., 174 P.3d 200 (Cal. 2008) (No. S138130).

43 Similarly, the language in Health & Safety Code section 11362.785(d)—"[n]othing in this article shall require a governmental, private, or any other health insurance provider or health care service plan to be liable for any claim for reimbursement for the medical use of marijuana"—does not mean that a health insurance provider is prohibited from reimbursing the cost of medical marijuana. That choice is left in the hands of the insurers. Incidentally, this provision also marks a significant distinction between medical marijuana and prescription drugs lawfully obtained. CAL. HEALTH & SAFETY CODE § 11362.785(d) (West 2007).

44 *See* Brosnahan v. Brown, 651 P.2d 274, 289 (Cal. 1982) (en banc) (upholding Proposition 8 and finding that "petitioners' forecast of judicial and educational chaos is exaggerated and wholly conjectural"); *In re* Estate of Maniscalco, 11 Cal. Rptr. 2d 803, 806 (Ct. App. 1992) (rejecting "unsupported speculation" of "dire consequences" "without statistical or evidentiary basis").

45 *See*, *e.g.*, ALASKA STAT. § 17.37.040(d) (2006) ("Nothing in this chapter requires any accommodation of any medical use of marijuana (1) in any place of employment"); COLO. CONST. art. XVIII, § 14(10)(b) ("Nothing in this section shall require any employer to accommodate the medical use of marijuana in any work place."); MONT. CODE ANN. § 50-46-205(2)(b) (2007) ("Nothing in this chapter may be construed to require: (b) an employer to accommodate the medical use of marijuana in any workplace.); NEV. REV. STAT. ANN. § 453A.800 (LexisNexis 2005) ("The provisions of this

Lacking the modifiers of "on the premises" or "during the hours of employment," these statutes plainly permit employers to refrain from hiring medical marijuana users who test positive on pre-employment drug tests, apparently without causing dire consequences.

E. Employers may be Liable for Actions of Impaired Employees

History abounds with cases of employers found liable because their employees were driving vehicles, operating heavy equipment, or otherwise performing tasks made more dangerous by their being under the influence of alcohol or drugs.[46] More recently, however, California courts are even willing to consider bizarre and unforeseeable acts, or brutal, violent, and sexual crimes, as falling within the "scope of employment" to reach the employer's deeper pocket.[47] Facing the expanding specter of liability, employers must be able to cull out job applicants whose alcohol or drug use raises the likelihood of threats to the safety of the workplace, other employees or third parties.[48] "Forcing the employers to retain current drug

chapter do not: 2. Require any employer to accommodate the medical use of marijuana in the workplace."); OR. REV. STAT. § 475.340 (2005) ("Nothing in ORS 475.300 to 475.346 shall be construed to require: (2) An employer to accommodate the medical use of marijuana in any workplace."); WASH. REV. CODE ANN. § 69.51A.060(4) (West 2007) ("Nothing in this chapter requires any accommodation of any medical use of marijuana in any place of employment").

46 *See*, *e.g*., Howell v. Ferry Transp., Inc., 929 So. 2d 226, 227–231 (La. Ct. App. 2006) (holding employer liable for negligent hiring and supervision when employee truck driver caused an accident killing seven people and subsequently tested positive for marijuana); Or v. Edwards, 818 N.E.2d 163, 169 (Mass. App. Ct. 2004) (holding landlord liable for negligent hiring when a stoned and drunk custodian kidnapped, raped, and murdered a five-year-old girl, which the court found to be a foreseeable consequence of the landlord's failure to inquire about the custodian's history of alcohol and drug abuse).

47 *See*, *e.g*., Doe v. Capital Cities, 58 Cal. Rptr. 2d 122, 129–30 (Ct. App. 1996) (aspiring actor could pursue a FEHA sexual harassment claim against ABC/Capital Cities for rape and beating by a casting director); Weeks v. Baker & McKenzie, 74 Cal. Rptr. 2d 510, 514 (Ct. App. 1998) (law firm liable under FEHA for compensatory and punitive damages for partner's sexual harassment of his secretary); *cf*. Mary M. v. City of Los Angeles, 814 P.2d 1341, 1352 (Cal. 1991) (finding it unjust for an employer to disclaim responsibility for injuries occurring in the course of its characteristic activities where a police officer raped a woman he had arrested and placed in his squad car); Lisa M. v. Henry Mayo Newhall Mem'l Hosp., 907 P.2d 358, 362 (Cal. 1995) (finding that an employer may be vicariously liable for the employee's tort—even if it was malicious, willful, or criminal—if the employee's act was an "outgrowth" of his employment, "inherent in the working environment," "typical of or broadly incidental to" the employer's business, or, "in a general way, foreseeable from [his] duties."); *see also* Laura L. Hirschfeld, *Legal Drugs? Not Without Legal Reform: The Impact of Drug Legalization on Employers Under Current Theories of Enterprise Liability*, 7 CORNELL J.L. & PUB. POL'Y 757, 795–99, 805–07 (1998) (citing seminal examples of extreme employee behavior in Bushey v. United States, 398 F.2d 167, 168 (2d Cir. 1968) (a Coast Guard employee on leave, "in the condition for which seamen are famed," turned the valves that controlled the water flow into the drydock where the [ship] was docked, resulting in a flood that caused the ship to list, slide off its blocks and fall against the wall, partially sinking both the ship and the drydock); Rodgers v. Kemper Constr. Co., 124 Cal. Rptr. 143, 143, 146-47 (Ct. App. 1975) (holding the subcontractor vicariously liable for the beer-fueled, brutal beating received by two of the general contractor's employees at the hands of two of the subcontractor's employees.)).

48 *See* Christine Neylon O'Brien, *Facially Neutral No-Rehire Rules and the Americans with Disabilities Act*, 22 HOFSTRA LAB. & EMP. L.J. 114, 115 (2004) ("When substance abuse impairs an employee at work, it negatively impacts the quality of products produced and services performed, and consequently, detracts from the profitability of the business.").

users would close off one of the few methods that modern employers have left to insulate themselves from unlimited liability"[49] for every wrongful act committed by employees. Employers should not be saddled with a work force engaged in drug use that is largely prohibited by law.

II. THE BREADTH OF THE COMPASSIONATE USE ACT AND FEHA COMBINE TO COVER AN EXTREMELY WIDE RANGE OF ACTIVITY

With the *Ross* decision, California employers can breathe a sigh of relief because a contrary result would have had far-ranging implications. There is a huge swath of individuals covered under both the Compassionate Use Act and FEHA, governing situations far removed from this case.

A. The Compassionate Use Act Permits the Use of Marijuana for Virtually Any Malady, as Authorized by "Healers" of All Varieties

Californians voted for Proposition 215, the Compassionate Use Act, based on ballot materials that emphasized the need for seriously ill people to obtain marijuana to relieve symptoms related to AIDS, chemotherapy treatments, and other very serious ailments. The Compassionate Use Act authorized the use of marijuana for these purposes, but it also did a lot more. Ballot literature emphasized that the proposition would allow "seriously and terminally ill patients to legally use marijuana, if, and only if, they have the approval of a licensed physician."[50] But this argument suggested limitations not found in the text of the law. For example, Health & Safety Code section 11362.5 may be read to allow the use of marijuana by patients that are not seriously and terminally ill,[51] and the law contains no requirement that the recommendation come from a licensed physician. For example, in *People v. Spark*,[52] the court opined:

> [T]he voters of California did not intend to limit the compassionate use defense to those patients deemed by a jury to be "seriously ill." As is evidenced by the entirety of the language of subdivision (b)(1)(A) and the language of subdivision (d) of section 11362.5, the question of whether the medical use of marijuana is appropriate for a patient's illness is a determination to be made by a physician. A physician's determination on this medical issue is not to be second-guessed by

49 Hirschfeld, *supra* note 47, at 840.

50 CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION, NOVEMBER 5, 1996, *ARGUMENT IN FAVOR OF PROPOSITION 215* at 60**,** *available at* http://library.uchastings.edu/ballot_pdf/1996g.pdf [hereinafter Ballot Pamphlet].

51 CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West 2007) provides:

> To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or *any other illness* for which marijuana provides relief.

(emphasis added).

52 16 Cal. Rptr. 3d 840, 846–47 (Ct. App. 2004).

jurors who might not deem the patient's condition to be sufficiently "serious."[53]

The campaign literature also suggested that marijuana use is appropriate for a limited number of specific diseases: cancer, glaucoma, AIDS, multiple sclerosis, epilepsy, and spinal cord injuries.[54] The primary sponsor of Proposition 215, Dennis Peron's Californians for Compassionate Use, published a brochure stating that marijuana has been shown to "help migraine headaches, relieve menstrual cramps, help overcome insomnia, and mitigate withdrawal from alcohol and other hard drugs."[55] So while the ballot materials and *Ross* focused on the least controversial uses of medical marijuana, the broad language in the actual statute supports a much wider range of illnesses for which marijuana may be approved. For example, in *People v. Jones*,[56] evidence of physician "approval" for marijuana use to combat migraine headaches—the physician's comment, "It might help; go ahead"—was sufficient to raise a defense under the Compassionate Use Act even where the physician disclaimed any intention to "recommend" marijuana use.[57]

Moreover, Proposition 215 does not define the term "physician."[58] This ambiguity could lead to a broad definition if courts employ the dictionary definition of the term.[59] A "physician" may be a person "skilled in the art of healing" regardless of whether that person is a licensed medical doctor.[60] "A wide variety of professionals are skilled in the art of healing,

53 However, there must be *some* physical aspect to the ailment. *See* People v. Trippet, 66 Cal. Rptr. 2d 559, 568–69 (Ct. App. 1997) (noting that the Compassionate Use Act does not protect against prosecution of marijuana use for "spiritual purposes.").

54 Ballot Pamphlet, *supra* note 50, at 62.

55 Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J.L. REFORM 707, 716 (1998), citing Californians for Compassionate Use, Brochure (1996) (internal quotations omitted).

56 4 Cal. Rptr. 3d 916, 918 (Ct. App. 2003).

57 *See* Allison L. Bergstrom, *Medical Use of Marijuana: A Look at Federal & State Responses to California's Compassionate Use Act*, 2 DEPAUL J. HEALTH CARE L. 155, 177 (1997) ("The question remains open as to whether a physician's tacit approval, perhaps through a simple nod in response to a patient's stated intention to use marijuana, would meet the threshold requirement for approval.").

58 *See* CAL. HEALTH & SAFETY CODE § 11362.5 (West 2008). In 2004, the Legislature enacted Section 11362.7(a), which provided a definition for "Attending physician":

> [A]n individual who possesses a license in good standing to practice medicine or osteopathy issued by the Medical Board of California or the Osteopathic Medical Board of California and who has taken responsibility for an aspect of the medical care, treatment, diagnosis, counseling, or referral of a patient and who has conducted a medical examination of that patient before recording in the patient's medical record the physician's assessment of whether the patient has a serious medical condition and whether the medical use of marijuana is appropriate.

Statutes enacted by initiative cannot be amended by the Legislature, however, so this definition must be confined to the registration identification program of that particular code section. *See* Rossi v. Brown, 889 P.2d 557, 561 n.2 (Cal. 1995) ("Once adopted, unless the measure otherwise provides, an initiative statute may be amended or repealed only by a statute approved by the voters.").

59 *See*, *e.g.*, Martin v. Superior Court, 281 Cal. Rptr. 682, 685 (Ct. App. 1991) (using a dictionary to define "law enforcement officer" broadly in Proposition 115).

60 WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 887 (9th ed. 1989); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1367 (3d ed. 1996) ("A person who heals or exerts a healing influence.").

including chiropractors, homeopaths, and a variety of therapists."[61] Alternatively, courts could define "physician" more narrowly, based on other statutes in the Health & Safety Code and the ballot arguments.[62] But the courts have not yet ruled on this question and the ambiguity remains. If physicians other than medical doctors are authorized to recommend marijuana, this may increase the range of conditions for which patients obtain approval to use marijuana to treat their symptoms. While licensed medical practitioners have an affirmative defense under state law,[63] they may be unwilling to prescribe marijuana either because they feel the benefits do not outweigh the risks, or they may fear prosecution under federal drug laws.[64] Alternative healers, on the other hand, may exercise less restraint.[65] Had the California Supreme Court held that Ragingwire must accommodate Ross's marijuana use, the decision would have had consequences far beyond the facts of this case. If an employer must accommodate an employee's medical marijuana use based on a physician's note to treat back spasms and pain, then the employer equally must accommodate an employee's medical marijuana use based on a healer's half-hearted approval (but not recommendation) that the employee "go ahead and try" marijuana for an entire range of ailments that a jury might describe as "not serious."

B. FEHA's Anti-Discrimination Provisions Cover a Wide Range of Physical and Medical Ailments

The California Fair Employment and Housing Act establishes the following civil rights:

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61 Michael Vitiello, *Proposition 215: De Facto Legalization*, 31 U. MICH. J.L. REFORM 707, 719; *see also* CAL. BUS. & PROF. CODE §§ 1000–1058 (West 2008) (regulation of chiropractors); *id*. §§ 2620–2696 (physical therapy).

62 *See* CAL. HEALTH & SAFETY CODE § 11024 (West 2008); Ballot Pamphlet, *supra* note 50, at 50 (specifying "licensed physician").

63 *See* CAL. HEALTH & SAFETY CODE § 11362.5(c) (West 2008).

64 *See* Conant v. McCaffrey, 172 F.R.D. 681, 700 (N.D. Cal. 1997) (concluding that federal officials "may only prosecute physicians who recommend medical marijuana to their patients if the physicians are liable for aiding and abetting or conspiracy."). Subsequently, "the court entered a permanent injunction limiting the government's ability to revoke a physician's DEA registration if he or she recommends medical marijuana based upon a sincere medical judgment . . ." but did not rule on the claim regarding the exclusion of doctors from the Medicare and Medicaid programs." Pearson v. McCaffrey, 139 F. Supp. 2d 113, 116 n.2 (D.D.C. 2001). However, the Department of Justice disagreed:

> [A] practitioner's action of recommending or prescribing Schedule I controlled substances is not consistent with the "public interest" (as that phrase is used in the federal Controlled Substances Act) and will lead to administrative action by the Drug Enforcement Administration (DEA) to revoke the practitioner's registration. DOJ and . . . HHS will send a letter to national, state, and local practitioner associations and licensing boards which states unequivocally that DEA will seek to revoke the DEA registrations of physicians who recommend or prescribe Schedule I controlled substances.

Executive Office of the President, Office of National Drug Control Policy, *The Administration's Response to the Passage of California Proposition 215 and Arizona Proposition 200*, 62 Fed. Reg. 6164 (Feb. 11, 1997).

65 *See* Vitiello, *supra* note 61, at 720–21.

> (a) The opportunity to seek, obtain and hold employment without discrimination because of race, religious creed, color, national origin, ancestry, *physical disability*, *mental disability*, *medical condition*, marital status, sex, age, or sexual orientation is hereby recognized as and declared to be a civil right.
>
> (b) The opportunity to seek, obtain, and hold housing without discrimination because of race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, *disability*, *or any other basis prohibited by Section 51 of the Civil Code* is hereby recognized as and declared to be a civil right.[66]

Civil Code section 51 also prohibits discrimination based on "medical condition,"[67] which is incorporated into the housing discrimination prohibition of Government Code section 12921(b). It is also unlawful, in the employment context, "[f]or an employer, because of the . . . physical disability, mental disability, medical condition . . . to refuse to hire or employ the person . . . ."[68]

The California Legislature intended FEHA to have a very broad scope, even compared to the federal Americans with Disabilities Act of 1990. Section 12926.1 of the California Government Code highlights the difference by declaring:

> The law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990 (Public Law 101-336). Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections.[69]

Under the federal Americans with Disabilities Act (ADA), a person can claim the protections of the Act when the disability "substantially limits" a major life activity. An impairment is "substantially limiting" if the person is either "unable to perform a major life activity that the average person in the general population can perform," or is significantly restricted in the condition, manner or duration under which a major life activity can be performed compared to an average person in the general population.[70] By contrast, FEHA requires only that the impairment "limit," rather than *substantially* limit, a major life activity.[71] An impairment limits a major life activity if it "makes the achievement of a major life activity more difficult."[72] FEHA's less stringent standard is intended to provide

66 CAL. GOV'T CODE § 12921 (West 2008) (emphasis added).

67 CAL. CIV. CODE § 51(b) (West 2008).

68 CAL. GOV'T CODE § 12940 (West 2008). *But see* 2 CAL. ADMIN. CODE § 7293.6(d) ("The unlawful use of controlled substances or other drugs shall not be deemed, in and of itself, to constitute a physical disability or a mental disability.").

69 CAL. GOV'T CODE § 12926.1(a) (West 2008).

70 29 C.F.R. §1630.2(j); *see also* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 195–196 (2002) (quoting 29 C.F.R. § 1630.2(j)); Fraser v. Goodale, 342 F.3d 1032, 1040 (9th Cir. 2003) (quoting 29 C.F.R. § 1630.2(j)).

71 CAL. GOV'T CODE §12926(k)(1)(B)(i) (West 2008); *see also* Colmenares v. Braemar Country Club, 63 P.3d 220 (Cal. Ct. App. 2003).

72 CAL. GOV'T CODE § 12926(k)(1)(B)(ii) (West 2008).

protection for a significant number of conditions that would not be protected under the ADA, including episodic conditions which lack the permanency to be considered "substantial" under federal law.[73]

Moreover, while the ADA does not cover disabilities that can be remedied by "mitigating factors" such as medication or eyeglasses,[74] FEHA evaluates the impairment without regard to mitigating factors that could be, or actually are, taken.[75] The ADA also requires that an employee's "substantial impairment" is such that an employee cannot perform a broad range or class of jobs as compared to the average person having comparable skills, abilities, and training.[76] Thus, the ADA will not cover an employee's inability to perform a *particular* job.[77] In contrast, FEHA does cover situations where an impairment prevents an employee from performing one particular job.[78] The California Supreme Court has noted FEHA's expansive reach.[79]

The California Legislature recently imported these broad FEHA standards and definitions to each of the thirty-three employment anti-discrimination statutes scattered throughout the California Code.[80] "FEHA's list of prohibited discrimination standards is more extensive than any of the statutes Chapter 788 amends."[81] Moreover, Chapter 788 extends the authority of the Agricultural Labor Relations Board to decertify any labor organization that the Department of Fair Employment and Housing finds to have discriminated based on any standard listed in the FEHA.

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73 *Id*. § 12926.1(c).

74 *See* Sutton v. United Air Lines, 527 U.S. 471, 482 (1999); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 521 (1999).

75 CAL. GOV'T CODE § 12926.1(c) (West 2008).

76 Sutton, *supra* note 74, at 491–92.

77 *Id*. (emphasis added).

78 As stated in California Government Code section 12926.1(c):

> Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, "working" is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments.

See also Jensen v. Wells Fargo Bank, 102 Cal. Rptr 55, 64 (Ct. App. 2000) (quoting § 12926.1(c)); Cripe v. City of San Jose, 261 F.3d 877, 895 (9th Cir. 2001) (quoting § 12926.1(c)).

79 *See* Rojo v. Kliger, 801 P.2d 373, 383 (Cal. 1990) ("While the FEHA conferred certain new rights and created new remedies, its purpose was not to narrow, but to expand the rights and remedies available to victims of discrimination."); Colmenares v. Braemar Country Club, Inc., 63 P.3d 220, 227 (Cal. 2003) (FEHA defines physical disability more broadly than the federal Americans with Disabilities Act.).

80 2004 Cal. Legis. Serv. 4592–610 (West). The affected statutes are: CAL. EDUC. CODE §§ 44100, 44858, 45293, 69958, 87100, 88112 (West Supp. 2008); CAL. GOV'T CODE §§ 19572, 19572.1, 19702, 19704, 19793; CAL. LAB. CODE §§ 1735, 1777.6, 3095 (West Supp. 2008); CAL. MIL. & VET. CODE § 130 (West Supp. 2008); CAL. PUB. UTIL. CODE §§ 25051, 28850, 30750, 50120, 70121, 90300, 95650, 98161, 100303, 101343, 102402, 103403, 120504, 125523 (West Supp. 2008); CAL. UNEMP. INS. CODE § 1256.2 (West Supp. 2008); and CAL. WELF. & INST. CODE §§ 11320.31, 11322.62, 14087.28 (West Supp. 2008).

81 2004 Cal. Stat. 788; Jason L. Eliaser, *Consistency in California's Employment Discrimination Laws: Chapter 788's Dissemination of FEHA Standards*, 36 MCGEORGE L. REV. 871, 873 (2005).

Had the California Supreme Court held that the Compassionate Use Act required accommodation under FEHA, the combination of the broad language in the Compassionate Use Act and the comprehensive reach of FEHA would have placed employers in an untenable position that drafters of these statutes could not have independently have envisioned.

CONCLUSION

Applying the plain language of the Compassionate Use Act, the California Supreme Court properly respected the intent of the voters to permit a large number of patients to use marijuana free from the threat of criminal prosecution, while recognizing that the Act does not stand as a statutory trump card over every other statute and common law duty. Employers who contract with, or receive grants from, the federal and state governments are required to comply with drug-free workplace laws or risk serious penalties, including debarment. All employers are legitimately concerned with the hazards presented by employees who are physically or mentally impaired due to marijuana use, particularly when such impaired employees may cause harm to their co-workers or customers, rendering their employers liable under common law tort theories. Rather than stretching the language of the Compassionate Use Act to cover employment situations never mentioned in the statute or contemplated by the voters, and creating an untenable situation for all California employers, the California Supreme Court's ruling correctly recognizes the limitations of the Act as written.

California's Determinate Sentencing Law: How California Got it Wrong . . . Twice

Travis Bailey[*]

INTRODUCTION

Imagine that California's Determinate Sentencing Law ("DSL") has been found unconstitutional by the United States Supreme Court. And, suppose the Supreme Court found California was violating a defendant's Sixth Amendment right to trial by jury. But, after receiving instruction on how the sentencing procedures could be made constitutional, California decides to implement a quick fix—an amendment of the sentencing statute. Instead of following the guidance of the Supreme Court, California adopts an alternate remedy—not used by any other state—that still violates the Constitution. Unfortunately, this is the current reality in California.

"[E]limination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion."[1] This passage comes from California's DSL, which was enacted in 1977. Determinate sentencing statutes provide statutorily defined terms of imprisonment that must be imposed if a defendant is found guilty. In California, for most crimes, the statutes provide lower, middle, and upper terms.[2] Prior to the enactment of California's DSL, most crimes carried an indeterminate sentence range, within which judges could choose a sentence of any length.[3] Since 1977, however, determinate sentencing laws have not gone unchallenged. The Unites States Supreme Court addressed

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1 Uniform Determinate Sentencing Act, ch. 1139, § 273, 1976 Cal. Stat. (1977) (codified at CAL. PENAL CODE § 1170(a)(1) (West 2008)).

2 For example, the California Penal Code states:

> Any person who commits an assault upon the person of a peace officer or firefighter with a semiautomatic firearm and who knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties, when the peace officer or firefighter is engaged in the performance of his or her duties, shall be punished by imprisonment in the state prison for five, seven, or nine years.

CAL. PENAL CODE § 245(d)(2).

3 *See* Nicole Eiland, *Sentence Structure*: *The Supreme Court's Decision in* Cunningham *Closely Follows the Jurisprudence Set Forth in* Apprendi *and* Blakely, LOS ANGELES LAWYER, July–Aug. 2007, at 31, 36.

determinate sentencing laws in *Apprendi v. New Jersey*,[4] *Blakely v. Washington*,[5] *United States v. Booker*,[6] and, finally, in *Cunningham v. California*, which declared California's sentencing procedures unconstitutional.[7]

Cunningham gave California three ways to amend the DSL: (1) employ a jury to find facts used to impose the upper term; (2) give judges broad discretion to choose a term from within a statutory range; or (3) find another solution consistent with the Court's Sixth Amendment jurisprudence.[8] The California Supreme Court reacted to *Cunningham* by finding the sentencing law unconstitutional in *People v. Sandoval*,[9] and by amending its sentencing laws[10] and Rules of Court.[11] But these reforms did not comply with the recommendations in *Cunningham*. California did not include a jury in the sentencing process and did not give its judges broad discretion to choose a sentence of any length within a set range. Instead, California granted its judges "sound discretion" to choose any of the three statutorily specified terms.[12] This Note explains why California's previous DSL was unconstitutional, and why, even as amended, California's current DSL still runs afoul of the Sixth Amendment.

Part I of this Note describes the history of California's DSL, including relevant case law from *Almendarez-Torres*[13] to *Cunningham*. This part briefly explains *People v. Black*,[14] the California Supreme Court's pre-*Cunningham* attempt to save California's DSL. This part then explains the California Legislature's post-*Cunningham* amendment of the DSL. These lines of cases are crucial to understanding *People v. Sandoval*,[15] California's latest ruling on determinate sentencing.

Part II of this Note analyzes California's attempt to make its DSL constitutional through legislative amendment,[16] amendment of its Rules of Court, and the California Supreme Court's opinion in *Sandoval*. This part suggests that California's legislative and judicial branches failed to reform California's DSL in a manner consistent with *Cunningham*. California's remedy, while coming close to the Supreme Court's recommendations and

4 Apprendi v. New Jersey, 530 U.S. 466 (2000).
5 Blakely v. Washington, 542 U.S. 296 (2004).
6 United States v. Booker, 543 U.S. 220 (2005).
7 Cunningham v. California, 127 S. Ct. 856 (2007).
8 *Id*. at 871.
9 People v. Sandoval, 161 P.3d 1146 (Cal. 2007).
10 Act of March 30, 2007, 2007 Cal. Legis. Serv. 4 (West) (codified as amended at CAL. PENAL CODE § 1170 (West 2008)).
11 Cal. Order No. 07-83, 2007 Cal. Legis. Serv. R-40–47 (West).
12 Act of March 30, 2007, 2007 Cal. Legis. Serv. 4, 5 (West) (codified at CAL. PENAL CODE § 1170 (West 2008)); *see infra* Parts I, II.
13 Almendarez-Torres v. United States, 523 U.S. 224 (1998).
14 People v. Black, 113 P.3d 534 (Cal. 2005).
15 People v. Sandoval, 161 P.3d 1146 (Cal. 2007).
16 Act of March 30, 2007, 2007 Cal. Legis. Serv. 4 (West) (codified as amended at CAL. PENAL CODE § 1170 (West 2008)).

what other states employ, still falls short of the constitutional threshold.

Part III discusses how California can make its DSL constitutional after *Sandoval*. This part describes the remedies recommended by the Supreme Court.[17] This part also describes the constitutionally valid method used by most states affected by *Apprendi*, *Blakely*, and *Booker* to sentence convicted defendants—the use of a jury as the finder of facts needed to impose a sentence above the statutory maximum.[18]

Finally, Part IV of this Note recommends that California amend its DSL to make the upper, middle, and lower sentences advisory. California's actions demonstrate a desire to retain this sentencing triad, even though adding a jury to the sentencing process would burden the system.[19] Still, if California made its guidelines advisory, California's DSL would be constitutional by its 2009 sunset date. This remedy would be less burdensome than grafting a jury onto the sentencing process, and would comply with the Sixth Amendment by giving judges broad discretion in sentencing.

I. DETERMINATE SENTENCING LAW FROM *APPRENDI* TO *CUNNINGHAM*, INCLUDING THE CALIFORNIA LEGISLATURE'S ATTEMPTED PATCH

A. An Explanation of California's DSL Prior to the 2007 Amendment

California's DSL was enacted in 1977 to eliminate disparity and to promote uniformity in sentencing.[20] Prior to the 2007 amendment, section 1170(b) of the California Penal Code provided a different sentencing procedure. Under the previous version of the statute, the court was to impose the middle term of imprisonment specified in the statute unless there were aggravating or mitigating circumstances.[21] If aggravating circumstances were found, the higher sentence was justified.[22] A judge could justify a higher term based on a preponderance of the evidence.[23] In *Cunningham*, the Supreme Court found California's DSL unconstitutional, because this determination should be made by a jury under a beyond-a-reasonable-doubt standard.[24]

17 Cunningham v. California, 127 S. Ct. 856, 871 (2007).

18 Don Stemen & Daniel F. Wilhelm, *Finding the Jury: State Legislative Responses to* Blakely v. Washington, 18 FED. SENT'G REP. 7, 8 (2005).

19 *Sandoval*, 161 P.3d at 1161.

20 *See supra* note 1 and accompanying text.

21 CAL. PENAL CODE § 1170(b) (West 2004) (amended 2007).

22 *See id*.

23 *See* Cunningham v. California, 127 S. Ct. 856, 870 (2007).

24 *See id*.

B. *Almendarez-Torres v. United States*: The Beginning of the Supreme Court's Focus on Sentencing Law

The line of cases leading up to *Cunningham* and *Sandoval* began with *Almendarez-Torres v. United States*.[25] In 1998, Hugo Almendarez-Torres pled guilty to reentry into the United States as a deported alien, a violation of 8 U.S.C. section 1326.[26] Despite that the offense carried a maximum punishment of two years in prison, the sentencing court imposed a term of eighty-five months based on Almendarez-Torres' past commission of an aggravated felony that he admitted before entering his plea.[27] This longer sentence was based upon Section 1326(b)(2), which authorized up to twenty years imprisonment for an alien who had previously committed an aggravated felony, had subsequently been deported, and then reentered the country again illegally.[28]

At the sentencing hearing, and again on appeal, Almendarez-Torres claimed that the indictment failed to allege the prior conviction.[29] Because the indictment did not allege the prior conviction, Almendarez-Torres claimed that any sentence beyond the ordinary two years for a Section 1326 violation was constitutionally invalid.[30] The district court, Fifth Circuit, and the Supreme Court all rejected his argument.[31] The Supreme Court concluded that Section 1326(b)(2) was a penalty provision that authorized the sentencing court to increase the sentence for a repeat offender and did not define a separate crime.[32] Thus, the Supreme Court stated, "neither the statute nor the Constitution requires the Government to charge the factor that it mentions, an earlier conviction, in the indictment."[33] Therefore, prior convictions were considered sentencing factors and not elements of a separate crime.

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25 523 U.S. 224 (1998). For a more detailed explanation of *Almendarez-Torres*, see Mohammed Saif-Alden Wattad, *The Meaning of Guilt: Rethinking* Apprendi, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 501, 514–15 (2007).

26 *Almendarez-Torres*, 523 U.S. at 227. Under this section, any alien who:

> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under title 18, or imprisoned not more than 2 years, or both.

8 U.S.C. § 1326(a) (2000).

27 *Almendarez-Torres*, 523 U.S. at 227.

28 8 U.S.C § 1326(b)(2) (2000).

29 *Almendarez-Torres*, 523 U.S. at 227.

30 *See id*.

31 *Id*. at 227, 247.

32 *Id*. at 226.

33 *Id*. at 226–27.

C. *Jones v. United States*: Facts are Elements of an Offense and Need to be Proven to a Jury

One year later, the Supreme Court decided *Jones v. United States*.[34] Jones was charged with carjacking under 18 U.S.C. section 2119, which carried a maximum sentence of fifteen years.[35] He was also charged with "using or aiding and abetting the use of a firearm during . . . a crime of violence, in violation of 18 U.S.C. § 924(c)."[36] The indictment made no mention of the latter two sections of the statute, which authorize an increased sentence if serious bodily injury or death results from the carjacking.[37] The jury found Jones guilty as charged.[38]

The case took a surprising turn when the presentence report recommended that Jones be sentenced to twenty five years for the carjacking because one of the victims was seriously injured.[39] Even though the serious bodily injury was not mentioned in the indictment or proven to a jury, the district court found, by a preponderance of the evidence, that the victim had suffered serious bodily injury, and sentenced Jones to twenty-five years for the subdivision (2) violation.[40] The Ninth Circuit affirmed the sentence, and did not read Section 2119(2) as setting out an element of an independent offense.[41] The Supreme Court reversed, concluding that the serious injury subdivision was a separate offense.[42] As a separate offense, the serious injury must be "charged in the indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict."[43] The Court clarified that the factual elements of an offense must be independently proved, and not merely used for sentencing consideration.[44]

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34 Jones v. United States, 526 U.S. 227 (1999). *See generally* Kathleen H. Morkes, *Where Are We Going, Where Did We Come From: Why the Federal Sentencing Guidelines Were Invalidated and the Consequences for State Sentencing Schemes*, 4 AVE MARIA L. REV. 249, 258–61 (2006).

35 *Jones*, 526 U.S. at 230.

> Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—(1) be fined under this title or imprisoned not more than 15 years, or both . . . .

18 U.S.C. § 2119 (2000).

36 *Jones*, 526 U.S. at 230; 18 U.S.C § 924(c) (1998).

37 *Jones*, 526 U.S. at 230; 18 U.S.C. § 2119(2)–(3) (1998) ("if serious bodily injury . . . results, be fined under this title or imprisoned not more than 25 years, or both . . ." if death results, be fined under this title or imprisoned for any number of years up to life, or both . . . .").

38 *Jones*, 526 U.S. at 231.

39 *Id*.

40 *Id*.

41 *Id*. at 231–32.

42 *Id*. at 251–52.

43 *Jones*, 526 U.S. at 252.

44 *Id*. at 232 (citing Hamling v. United States, 418 U.S. 87 (1974); United States v. Gaudin, 515 U.S. 506 (1995)).

D. *Apprendi v. New Jersey*: The Right of Defendants to Have a Jury Find Facts that Will Enhance a Sentence Beyond the Statutory Maximum

Jones set the stage for *Apprendi* by categorizing what appeared to be a sentencing enhancement as an aggravating fact, and requiring that fact to be proven beyond a reasonable doubt.[45] By invalidating New Jersey's sentencing law, *Apprendi* required juries to find, beyond a reasonable doubt, any fact that will increase a sentence beyond the statutory maximum.[46] The defendant in *Apprendi* pled guilty to two counts of second-degree possession of a firearm for an unlawful purpose and one count of the third-degree unlawful possession of an antipersonnel bomb.[47] The firearm offense carried a maximum sentence of ten years.[48] His sentence, however, was enhanced based upon a finding by a preponderance of the evidence that he acted "with a purpose to intimidate an individual or group of individuals because of race,"[49] and the trial court imposed a twelve year prison term.[50] Defendant appealed, arguing "the Due Process Clause of the United States Constitution requires that the finding of bias upon which his hate crime sentence was based must be proved to a jury beyond a reasonable doubt."[51] The Appellate Division of the Superior Court of New Jersey affirmed, and a divided New Jersey Supreme Court reached the same outcome.[52]

The case eventually reached the Supreme Court, which relied heavily on the holdings in *Jones v. United States*,[53] but criticized *Almandarez-Torres v. United States* as an "exceptional departure from the historic practice[.]"[54] The *Apprendi* court held, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[55] This case marked the beginning of the end for the Court's previous "hands-off approach" to non-capital sentencing procedure.[56]

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45 *Id*.

46 Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); *see generally* Ann Marie Tracey, *Has the Fat Lady Sung on Sentencing Guidelines? The Impact of* Booker, Blakely, Apprendi, *and* Foster *on Ohio's Sentencing Protocol*, 34 N. KY. L. REV 71, 78–82 (2007).

47 *Apprendi*, 530 U.S. at 469–70.

48 *Id*. at 468.

49 *Id*. at 468–69.

50 *Id*. at 471.

51 *Id*. (internal citation omitted).

52 *Id*. at 471–72.

53 *See*, *e.g*., *id*. at 472–73, 476, 479 n.5, 480 n.7, 483 n.11, 487–88. Regarding federal law, the *Jones* Court held, "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones v. United States, 526 U.S. 227, 243 n.6 (1999).

54 *Apprendi*, 530 U.S. at 487. See supra Part I.B for a discussion of *Almanderez-Torres*.

55 *Id*. at 490.

56 *See* Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 46–52 (2006) (discussing the Supreme Court's history regarding non-capital sentencing prior to

E. *Blakely v. Washington*: The "Statutory Maximum" is Clarified for *Apprendi* Purposes

Blakely v. Washington clarified *Aprendi's* holding by defining the term "statutory maximum" as the maximum sentence that a judge could impose based solely on the facts reflected in the jury verdict or what the defendant admitted.[57] The *Blakely* defendant pled guilty to kidnapping, and was sentenced to ninety months in prison after the trial court determined that he acted with deliberate cruelty.[58] The statutory maximum for his crime was fifty-three months, which the trial judge could enhance only if he found facts and conclusions of law that reflected "substantial and compelling reasons justifying an exceptional sentence."[59] But the facts contained in the plea were insufficient to support the "exceptional" sentence,[60] nor were facts supporting this "exceptional" sentence found by a jury under the beyond a reasonable doubt standard.[61] Defendant appealed, arguing that the sentencing procedure violated his Sixth Amendment right to have a jury find, beyond a reasonable doubt, "all facts legally essential to his sentence."[62] The Supreme Court agreed, and "clarified that the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant, and not the maximum sentence a judge may impose after finding additional facts."[63]

F. *United States v. Booker*: The Supreme Court finds the Federal Sentencing Guidelines Unconstitutional and finds that "Advisory" Provisions Would not Implicate the Sixth Amendment

Apprendi made it clear that any fact used to increase a sentence beyond the statutory maximum needed to be found by a jury.[64] *Blakely* defined the statutory maximum as the maximum term that could be imposed based solely on the facts reflected in the jury verdict or admitted by the defendant.[65] *Booker*, taking this line of reasoning one step further, found the federal sentencing guidelines unconstitutional because they established mandatory sentences, without any fact-finding by a jury.[66]

Apprendi, and the drastic turn towards regulation around the turn of the century).

57 Blakely v. Washington, 542 U.S. 296, 303 (2004).

58 *Id*. at 298.

59 *Id*. at 299.

60 *Id*. at 303–04.

61 *Id*.

62 *Id*. at 301.

63 Fern L. Kletter, Annotation, *Application of Apprendi v. New Jersey and Blakely v. Washington to State Controlled Substance Proceedings*, 26 A.L.R. 6TH 511, 511 (2007).

64 *Apprendi*, 530 U.S. at 490.

65 *Blakely*, 542 U.S. at 303.

66 United States v. Booker, 543 U.S. 220, 233–34 (2005).

In two separate cases, defendants were convicted of charges relating to the distribution of cocaine.[67] The first defendant's sentence was increased by more than eight years based on the trial judge's—and not the jury's—finding that the defendant possessed additional quantities of drugs.[68] In the second case, the judge found facts that would have added ten years to the defendant's sentence, but the judge declined to apply the enhancements.[69]

The Supreme Court held that the Federal Sentencing Guidelines are incompatible with the Sixth Amendment because the Guidelines are "mandatory and impose binding requirements on all sentencing judges."[70] "Merely advisory provisions, recommending but not requiring the selection of particular sentences in response to differing sets of facts, all Members of the Court agreed, would not implicate the Sixth Amendment."[71] The Supreme Court went on to say that, "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."[72]

G. *People v. Black I*: The California Supreme Court's First Attempt to Avoid the United States Supreme Court's Holdings and Find the California DSL Constitutional

Black was charged with continuous sexual abuse of a minor, and two counts of lewd and lascivious conduct with a child.[73] He was found guilty, and the judge imposed a sixteen year sentence—the upper term under the sentencing guidelines.[74] The trial court listed several aggravating factors as reasons for imposing the upper term.[75] Defendant appealed, arguing that under the Sixth Amendment, he has a right to have a jury find, beyond a reasonable doubt, the existence of aggravating factors used to justify the imposition of the upper term.[76]

The California Supreme Court, in a 6-1 decision, ruled that California's DSL was constitutional and outside of the *Apprendi* rule.[77]

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67 *Id*. at 220. For more analysis, see generally M.K.B. Darmer, *The Federal Sentencing Guidelines After Blakely and Booker: The Limits of Congressional Tolerance and a Greater Role for Juries*, 56 S.C. L. REV. 533 (2005).

68 *Booker*, 543 U.S. at 227.

69 *Id*. at 228–29.

70 *Id*. at 233.

71 Cunningham v. California, 127 S. Ct. 856, 860 (2007) (quoting *Booker*, 543 U.S. 223) (internal quotations omitted).

72 *Booker*, 543 U.S. at 233.

73 People v. Black, 113 P.3d 534, 536 (Cal. 2004) (hereinafter "*Black I*").

74 *Id*. at 536–37.

75 *Id*. at 551. The court gave the following reasons for imposing the upper term: "Defendant forced his stepdaughter to have intercourse with him on numerous occasions, defendant's stepdaughter was particularly vulnerable, defendant abused a position of trust and confidence, and defendant inflicted emotional and physical injury on his stepdaughter." *Id*.

76 *Id*.

The court reasoned that the United States Supreme Court's prior decisions "[did] not draw a bright line."[78] Ultimately, the California Supreme Court found that the "defendant's constitutional right to a jury trial was not violated by the trial court's imposition of the upper term sentence for his conviction of continuous sexual abuse or by its imposition of consecutive sentences on all three counts."[79] This was California's first attempt to save its DSL post-*Apprendi*, *Blakely*, and *Booker*. Despite California's DSL being a clear example of what the Justices in *Apprendi*, *Blakely*, and *Booker* found unconstitutional, California disregarded the Supreme Court's rulings in an attempt to preserve the 1977 sentencing law.

H. *Cunningham v. California*: The Supreme Court Finds California's DSL Unconstitutional

The California Supreme Court found that California's DSL was constitutional in *Black*, but the United States Supreme Court disagreed when it decided *Cunningham*. The Supreme Court invalidated California's DSL because judges, not juries, had the power to find facts and enhance sentences based upon facts that were not admitted by the defendant or found within the jury's verdict.[80] Cunningham was tried and convicted of continuous sexual abuse of a minor under the age of fourteen.[81]

> Under the California Determinate Sentencing Law, the offense was punishable by one of three precise terms of imprisonment: a low-term sentence of 6 years, a middle-term sentence of 12 years, or an upper-term sentence of 16 years. The judge could impose either the lower-, middle-, or upper-term sentence based on his findings on various aggravating and mitigating factors.[82]

"The trial judge found by a preponderance of the evidence six aggravating circumstances, among them, the particular vulnerability of Cunningham's victim, and Cunningham's violent conduct, which indicated a serious danger to the community."[83] "In mitigation, the judge found one fact: Cunningham had no record or prior criminal conduct. Concluding that the aggravators outweighed the sole mitigator, the judge sentenced Cunningham to the upper term of 16 years."[84] Cunningham appealed, arguing that his Sixth Amendment right to a jury trial had been violated because the facts that elevated his sentence were found by a judge using the preponderance of the evidence standard, instead of a jury of his peers

77 *See* Jonathan D. Soglin et al., Blakely, Booker, *&* Black*: Beyond the Bright Line*, 18 FED. SENT'G. REP. 46 (2006) for a closer look at *People v. Black*, and an explanation of how *Black* departs from the *Apprendi*, *Blakely*, and *Booker* line of cases.

78 *Black*, 113 P.3d at 547.

79 *Id*. at 550.

80 Cunningham v. California, 127 S. Ct. 856, 870 (2007).

81 *Id*. at 860. The minor was his ten-year-old son. *See* 2005 Cal. LEXIS 7128.

82 Eiland, *supra* note 3, at 31.

83 *Cunningham*, 127 S. Ct. at 860.

84 *Id*. at 860–61.

employing the beyond-a-reasonable-doubt standard.[85]

The Supreme Court stated California's DSL does not resemble the advisory system that the *Booker* court had in mind.[86] Instead, under California's system, "judges are not free to exercise their discretion to select a specific sentence within a defined range."[87] The judge in Cunningham did not have an option to choose a sentence between six and sixteen years. He was required to impose a sentence of "12 years, nothing less and nothing more, unless he found facts allowing the imposition of a sentence of 6 or 16 years."[88] The Supreme Court made its view crystal clear when it reiterated that, "[f]actfinding to elevate a sentence from 12 to 16 years, our decisions make plain, falls within the province of the jury employing a beyond-a-reasonable-doubt standard, not the bailiwick of a judge determining where the preponderance of the evidence lies."[89]

According to the Supreme Court, either the judge needs to be given broad discretion to choose a sentence within a set range, or a jury needs to be used as the finder of any fact that could enhance a defendant's sentence. California's DSL "allocate[d] to judges sole authority to find facts permitting the imposition of an upper term sentence,"[90] and thus the system violated the Sixth Amendment. The Court concluded by stating that "[t]he ball . . . lies in [California's] court" as to how to fix its DSL.[91]

I. California's Legislature Reacts Quickly in Response to the Supreme Courts Holding in *Cunningham*

Cunningham was decided on January 22, 2007.[92] Within a week, the California Legislature was already analyzing the rules laid down in *Cunningham* and attempting to remedy the defect found by the Supreme Court.[93] The California Senate held an urgent meeting on January 30, 2007 to discuss *Cunningham*, and how the sentencing law could be made constitutional.[94] In an attempt to address the *Cunningham* ruling, the Legislature decided that the key issue was whether it should amend the Penal Code to provide that if a crime is punishable by a lower, middle, or upper term of imprisonment, the "choice of appropriate term would rest

85 *Id*. at 860.

86 *Id*. at 870. In *Booker*, the Supreme Court held that the Federal Sentencing Guidelines were unconstitutional because they were mandatory, and not merely advisory. *See supra* Part I.F. California's DSL, like the Federal Sentencing Guidelines, creates a mandatory procedure.

87 *Cunningham*, 127 S. Ct. at 870 (internal quotations omitted).

88 *Id*.

89 *Id*.

90 *Id*.

91 *Id*. at 871 (quoting United States v. Booker, 543 U.S. 220, 265 (2004)).

92 *Cunningham*, 127 S. Ct. at 856.

93 2007 Cal Legis. Serv. page no. 4 (West).

94 *Id*. In the comments of Senate Bill 40, the Senate explained, "[i]t is the intent of the Legislature in enacting this provision to respond to the decision of the United States Supreme Court in Cunningham v. California." *Id*.

within the sound discretion of the court."[95]

The California Senate answered the question in the affirmative and amended Penal Code section 1170 to give judges the discretion to impose the lower, middle, or upper term authorized by statute.[96] The Bill further stated that the legislative intent was to address the Supreme Court's decision in *Cunningham*, and to "maintain stability in California's criminal justice system while the criminal justice and sentencing structures in California sentencing are being reviewed."[97] The Legislation was set to become effective March 30, 2007, and was scheduled to sunset in 2009.[98]

II. CALIFORNIA'S POST-*CUNNINGHAM* ATTEMPTS TO REPAIR THE DETERMINATE SENTENCING LAW

A. The Legislative Amendment Does Not Meet the Requirements of the Supreme Court and the Constitution

As mentioned above, the sole reason for Senate Bill 40 was to remedy the defect found in California's DSL by the United States Supreme Court.[99] The changes made, however, still failed to adequately address the problem. According to *Cunningham,* judges needed to be given broad discretion to choose a sentence from a specified range, or juries needed to be used to find facts that justify the imposition of upper term sentences.[100] The Legislature, however, chose to implement a different solution.[101]

The California Legislature gave judges discretion to choose one of the sentences from the already established sentencing triad, not discretion to choose a sentence somewhere between a determined range.[102] The amended law allowed judges to impose the lower, middle, or upper term at their discretion.[103] This limited discretion was not what the Supreme Court had in mind when it used the term, "broad discretion" in *Booker*.[104] Nor was the statute amended to include any fact-finding role for the jury in relation to sentencing, as required by *Cunningham*.[105]

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95 *Id*.

96 *Id*. at 5. Prior to the amendment, the statute read, "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." People v. Sandoval, 161 P.3d 1146, 1152 (Cal. 2007).

97 2007 Cal Legis. Serv. page no. 4 (West).

98 *Id*. at 4, 6. This means that, if no further legislative action is taken, the provisions of the bill will be repealed on January 1, 2009.

99 *Id*. at 4.

100 Cunningham v. California, 127 S. Ct. 856, 871 (2007).

101 2007 Cal Legis. Serv. page no. 5 (West). The Senate decided that "when a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the . . . choice of the appropriate term shall rest within the sound discretion of the court." *Id*.

102 *Id*.

103 *Id*.

104 United States v. Booker, 543 U.S. 220, 233 (2005) ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.").

105 CAL. PENAL CODE § 1170 (West 2007).

B. Judicial: Both the Rules of Court and the California Supreme Court's Holding in *Sandoval* Fail to Render the DSL Constitutional

1. The California Judicial Council Amends the Rules of Court in Response to the Legislatures Amendment of Penal Code Section 1170

On May 18, 2007, the California Judicial Council amended the California Rules of Court, to become effective on May 23, 2007.[106] The Judicial Council changed the definition of circumstances in aggravation from "facts that justify the imposition of the upper prison term" to "factors that the court may consider in its broad discretion in imposing of the three authorized prison terms referred to in Section 1170(b)."[107] The Judicial Council also changed the meaning of circumstances in mitigation to resemble that of circumstances in aggravation—that is, simply factors to be considered by the court.[108] The Judicial Council made it mandatory for a judge to give reasons for whichever sentence he chooses, whether it be the lower, middle, or upper term.[109]

The Judicial Council amended the Rules of Court so that they complied with the Senate's amendments of Section 1170(b). The Judicial Council reiterated that judges are given broad discretion to choose between one of the three statutorily defined sentences, and no longer need to find an aggravating fact in order to impose the upper term; the judge simply needs to give his reasons for imposing any sentence.[110]

2. The California Supreme Court Grants Review of *People v. Sandoval* and Upholds the Amendments made by the California Legislature

After *Cunningham*, Senate Bill 40, and the amendments by the Judicial Council, the stage was set for the California Supreme Court to rule on a case involving DSL issues. It did not take long. The California Supreme Court granted review in *People v. Sandoval* to "determine whether [the] defendant's Sixth Amendment rights as defined in *Cunningham v. California* were violated by the imposition of an upper term sentence and, if so, the remedy to which she is entitled."[111] In July 2007, the California Supreme Court issued the opinion for *Sandoval*, which attempted to reconcile California's DSL—as amended by Senate Bill 40—with the requirements of the Sixth Amendment.

106 Cal. Jud. Council, List of Amendments to the California Rules of Court: Adopted on May 18, 2007, effective May 23, 2007, http://www.courtinfo.ca.gov/rules/amendments/may2007.pdf (last visited June 25, 2008).

107 *Id*. at 1.

108 *Id*.

109 *Id*. at 2.

110 *Id*. at 3.

111 People v. Sandoval, 161 P.3d 1146, 1150 (Cal. 2007) (citations omitted).

The defendant was charged with the premeditated murders of two men and with the attempted premeditated murder of a third man.[112] She was convicted and sentenced to fourteen years, including an eleven-year upper term for the premeditated murder of the first man.[113] On appeal, the defendant argued that the imposition of the upper term violated her federal constitutional right to a jury trial.[114] The court of appeal made a minor change to the sentence for attempted premeditated murder and affirmed the judgment, rejecting the defendant's Sixth Amendment claim.[115]

The California Supreme Court stated that the aggravating circumstances found were based upon the evidence presented at trial, but not directly at issue in the trial.[116] Therefore, the court said, the defendant did not have the incentive or opportunity to challenge the evidence supporting these aggravating circumstances during the trial.[117] After reviewing the evidence and all of the aggravating circumstances found by the trial court, the California Supreme Court found that the imposition of the upper term violated the defendant's Sixth Amendment right, the error was not harmless, and that the imposition of the upper term on the first count needed to be reversed and remanded for resentencing consistent with *Cunningham*.[118] The court could not conclude beyond a reasonable doubt that, if instructed on the aggravating circumstances, the jury would have reached the same conclusion that the trial court reached.[119]

The Attorney General urged the court to amend the statute to give judges broad discretion to choose between the three sentences.[120] Incidentally, while the case was pending, the California Legislature amended the statute through SB40 as recommended by the Attorney General.[121] Therefore, the court found that the only issue remaining was "what type of resentencing proceedings must be conducted in those cases," in which a Sixth Amendment error is found, requiring a reversal and remand in order to cure the defect.[122]

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112 *Id*.

113 *Id*. The trial court gave the following aggravating factors as reasons for imposing the upper term:

> [C]rime involving a great amount of violence . . . incredibly callous behavior. [Defendant] had no concern about the consequences of her action. The victims were particularly vulnerable . . . . [and] were inebriated. Clearly, [Defendant] was the motivating force behind these actions. Her actions showed planning and premeditation.

Id. at 1153–54.

114 *Id*. at 1150.

115 *Id*. The Court of Appeal modified the sentence for attempted premeditated murder from eighteen months down to one year.

116 *Id*. at 1155.

117 *Sandoval*, 161 P.3d at 1155.

118 *Id*. at 1150.

119 *Id*. at 1156.

120 *Id*. at 1158.

121 *Id*. at 1159.

122 *Id*.

The court instructed the lower courts to conduct sentencing in a manner consistent with the amendments to the DSL, as modified by the legislature.[123] Trial judges now have to give reasons, not facts, for imposing any of the three statutorily defined sentences.[124] Previously, the middle term required no justification, because the middle term was presumed unless mitigating or aggravating circumstances were found.[125] Regarding the use of juries to find aggravating circumstances, the court claimed that "engrafting a jury trial onto the sentencing process established in the former DSL would significantly complicate and distort the sentencing scheme."[126]

The court justified the judicial reformation of the sentencing rules, and decided that applying retroactive changes would not violate the *ex post facto* clause because the changes did not alter "substantial personal rights," but simply changed the "mode of procedure."[127] "In summary, the felony sentencing process continues much as it existed before except that selection of the appropriate prison term is now entirely discretionary and the middle term is no longer the presumptive term."[128] Aggravating factors need not be found by a jury or trial court, facts need not be proven beyond a reasonable doubt, and factors need not be mentioned in the pleadings.[129] Judges do, however, need to give reasons for imposing a particular term, including the middle term.[130]

This is the second time that the California Supreme Court has gotten it wrong. The same court found in *Black* that California's DSL was not unconstitutional, despite that it obviously was.[131] *Cunningham* was decided shortly after *Black*, and found the law unconstitutional.[132] The California Supreme Court has been wrong on this subject before, and they got it wrong again by backing the California Legislature and Senate Bill 40.

123 *Id*. at 1160.

124 *Id*.

125 *Id*. at 1160–61.

126 *Id*. at 1161. The court also mentioned that neither the DSL or the Judicial Council's sentencing rules "were drafted in contemplation of a jury trial on aggravating circumstances." *Id*. Further, it would be difficult for prosecutors to select which aggravators should be tried to a jury, because no absolute list of aggravating circumstances exists. Prosecutors would also be exercising discretion that was meant for the judge.

127 *Id*. at 1165.

128 J. Richard Couzens & Tricia Ann Bigelow, *Lifting the Fog of* Cunningham*:* Black II, Sandoval, *and Senate Bill 40*, at 30, CAL. CTS. REV. (Summer 2007).

129 *Id*.

130 *Id*.

131 *Black*, 113 P.3d 534, 550 (Cal. 2005).

132 Cunningham v. California, 127 S. Ct. 856 (2007).

III. POTENTIAL REMEDIES: EMPLOY A JURY IN THE SENTENCING PROCESS, LEGITIMATELY GIVE JUDGES BROAD DISCRETION, OR RETURN TO INDETERMINATE SENTENCING

This legislative and judicial reformation of the sentencing procedures in California falls short of passing constitutional muster. The Supreme Court emphasized—through *Apprendi*, *Blakely*, *Booker*, and then, again, in *Cunningham*—that in order to make California's DSL constitutional, judges need to be given "broad discretion"[133] to choose a sentence from within a specified range, or aggravating facts need to be found by a jury beyond a reasonable doubt.[134] It seems unlikely that the Supreme Court intended a mandatory sentencing triad to fall under the rubric of "broad discretion." In fact, the term, "broad discretion" is used in conjunction with the word "range,"[135] and not with a set of statutorily determined mandatory sentences.

Sandoval essentially leaves defendants in their previous position. The upper term may still be imposed without a jury finding any facts beyond a reasonable doubt, and the sentence options are still limited to the three statutorily defined terms. In fact, judges are not required to find any facts, and only need to give reasons for imposing whichever sentence they choose. [136] Judges have been given more discretionary power, but it is still limited, which is neither acceptable nor comparable to "broad discretion." The initial home-run for defendants in *Cunningham* turned out to be a bunt when the California Supreme Court handed down *Sandoval*. The positive news is the amendment to Section 1170 will sunset in 2009, which means there will be a chance to amend the law for the better.

The Supreme Court left it up to California as to what the state wanted to do in order to render its DSL constitutional.[137] The Supreme Court gave three options: Follow the lead of other states that employ a jury in the sentencing process, permit judges to "genuinely . . . exercise broad discretion within a statutory range," or "otherwise alter its system, so long as the State observes Sixth Amendment limitations declared" by the Supreme Court.[138] The Court listed specific states that modified their

133 *Id*. at 871.

134 *Id*.

135 *See* Apprendi v. New Jersey, 530 U.S. 466, 481 (2000) ("As in *Williams*, our periodic recognition of judges' broad discretion in sentencing—since the 19th-century shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range . . . ."); Blakely v. Washington, 542 U.S. 296, 342 (2004) (Bryer, J., dissenting) ("The modern history of preguidelines sentencing likewise indicates that judges had broad discretion to set sentences within a statutory range based on uncharged conduct."); United States v. Booker, 543 U.S. 220, 233 (2005) ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.") (internal citations omitted).

136 *See* CAL. PENAL CODE § 1170(b) (West 2008).

137 *Cunningham*, 127 S. Ct. at 871.

138 *Id*.

sentencing laws as examples of the first two options.[139] California chose the last option, which gave no guidance. California clearly has not been capable of rendering its own DSL constitutional on several occasions.

A. The Use of Juries to Find Facts for Sentencing Purposes

The Supreme Court's first recommended option—keeping the triad system while installing a jury component into the sentencing procedure—is partially in use by California.[140] Full use of this option can be easily achieved because, as the Supreme Court pointed out, California already employs a jury to determine statutory sentencing enhancements.[141] Further, seven out of the nine states confronted with this problem have decided that requiring the aggravating facts to be proven to a jury is a good solution.[142]

Kansas was the first state to invalidate and reform its own sentencing procedures based on *Apprendi*.[143] After the Kansas Supreme Court found its sentencing law unconstitutional, the Kansas Legislature amended the invalidated law to include a jury in the process.[144] Kansas now requires any factor that could increase a defendant's sentence to be found beyond a reasonable doubt by a unanimous jury of no less than six jurors.[145] By altering their sentencing procedure this way, Kansas was able to keep using the same statutorily defined sentences and bring its sentencing procedure within the bounds of the Constitution.

139 *Id*. at 871, nn.17–18 (listing Alaska, Arizona, Kansas, Minnesota, North Carolina, Oregon, and Washington as states that have retained determinate sentencing, but which have amended their statutes to incorporate the use of a jury within the sentencing procedures, and listing Indiana and Tennessee as states that have amended their sentencing procedures to permit judges to genuinely exercise broad discretion in choosing a sentence).

140 *Cunningham*, 127 S. Ct. at 871.

141 *Id*.; *see also* CAL. PENAL CODE § 1170.1(e) (West 2008) (using juries to find facts needed to enhance sentences); People v. Black, 113 P.3d 534, 545 (Cal. 2005) (noting that, unlike aggravating circumstances, statutory enhancements must be charged in the indictment, and the underlying facts must be proved to the jury beyond a reasonable doubt) (internal citations omitted).

142 *Cunningham*, 127 S. Ct. at 871, n.17.

143 State v. Gould, 23 P.3d 801, 814 (Kan. 2001). The district court made findings as to certain aggravating factors that increased Gould's sentence beyond the statutory maximum. The district court, rather than the jury, made these findings as required by K.S.A. 21-4716(a). *Apprendi* requires that such findings be made by the jury beyond a reasonable doubt. Because Kansas law authorizing upward departure sentences directly contravenes this requirement, the law is unconstitutional. *See also* Michael M. O'Hear, *The End of Bordenkircher: Extending the Logic of* Apprendi *to Plea Bargaining*, 84 WASH. U. L. REV. 835, 869 (2006) (noting that Kansas was the first state to modify its sentencing procedure to include jury fact-finding).

144 *See* KAN. STAT. ANN. § 21-4718(b) (2007). Under Kansas law, the district attorney must move to seek an upward durational departure sentence. The court then determines if the evidence supporting the alleged fact or factors that may increase the penalty for a crime shall be presented to a jury during the trial or after determination of innocence or guilt. If it is in the interest of justice, the court shall hold a separate departure sentence proceeding before the trial jury, as soon as practicable. If a trial juror is unavailable, an alternate can be used, but at no time can the sentencing proceeding be conducted before less than six jurors. In order for the upper term to be given, the jury must find unanimously beyond a reasonable doubt that the fact or factor exists.

145 *Id*.; *see also* Stemen & Wilhelm, *supra* note 18, at 8.

The California Supreme court expressed the opinion that engrafting a jury onto the sentencing procedure would burden the system and complicate the proceedings.[146] The court further stated that many of the aggravating circumstances were drafted to guide judges' discretion, not "for the purpose of requiring factual findings by a jury."[147] But, inevitably, "[s]ome facts are more conducive to jury fact-finding than others."[148] Clearly, the use of a jury during sentencing is feasible, as seven other states already employ a jury to find facts used for the sentencing of defendants.[149]

In his *Blakely* dissent, Justice Breyer argued that the use of a jury for sentencing would raise the time and financial costs of trial.[150] This may be a valid point, but sentencing hearings always have to take place, and the information has to be presented to a judge. Jury deliberations may take longer than a judge's deliberation, but a simple form—much like a special verdict form—could be drafted by the attorneys and be given to the jurors to expedite the process. Further, rendering the law constitutional may be well worth the slight increase in judicial resources.

B. Give Judges Broad Discretion by Amending the DSL to Follow Tennessee and Indiana in Making the Three Specified Terms "Advisory"

A second option is to keep the sentencing triad in place, but designate the statutorily defined sentences "advisory." In *Booker*, the Supreme Court decided that advisory guidelines would not violate the constitution.[151] This would mean judges would not have to use the suggested terms, but instead would have the freedom to impose a sentence anywhere between the upper and lower term. Several states, including Tennessee and Indiana, have gone this route to keep their statutorily defined sentences on the books.

In the wake of *Booker*, the Tennessee Legislature amended the state sentencing guidelines, making the predetermined statutorily defined sentences advisory.[152] The statute now reads, "[i]n imposing a specific sentence within the range of punishment, the court shall consider, but is not bound by, the following advisory sentencing guidelines."[153] Prior to the amendment, the statute had not included the word "advisory," and instead called for the imposition of specific terms based upon specific scenarios.[154]

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146 People v. Sandoval, 161 P.3d 1146, 1161 (Cal. 2007).

147 *Id*.

148 Darmer, *supra* note 67, at 571.

149 Cunningham v. California, 127 S. Ct. 856, 871 n.17 (2007).

150 Blakely v. Washington, 542 U.S. 296, 340 (2004) (Breyer, J., dissenting).

151 United States v. Booker, 543 U.S. 220, 233 (2005). See *supra* part II.F for discussion of *Booker*.

152 TENN. CODE ANN. § 40-35-210 (2006).

153 *Id*.

154

> (c) The presumptive sentence for a Class B, C, D and E felony shall be the minimum sentence in the range if there are no enhancement or mitigating factors. The presumptive

Indiana also employs an advisory system.[155] According to the Indiana statute, an "advisory sentence means a guideline sentence that the court may voluntarily consider as the midpoint between the maximum sentence and the minimum sentence."[156] Essentially, there is a range set by the minimum and maximum sentence, because the middle term is advisory. The judge is not required to use the advisory sentence, except in certain circumstances.[157] In all other circumstances where the statute gives a minimum, an advisory, and a maximum sentence, the sentencing judge can choose any sentence length between the minimum and maximum term.[158]

If the California Legislature changes the mandatory sentences to advisory, judges would have broad discretion to choose a sentence between the lower and upper term, bringing California's DSL within the requirements of the Constitution. Essentially, California would fall in line with the Supreme Court's ruling in *Booker*,[159] and join Indiana and Tennessee as states that preserved their determinate sentencing laws by switching to advisory sentences.

C. Do Away with Sentencing Triad Completely and Return to Indeterminate Sentencing

The third option is to amend the sentencing law to do away with the sentencing triad all together. Judges would be given the authority to use broad discretion in imposing a sentence of any length within a statutory range. This is how sentencing was done in California prior to 1977. Although this relatively simple remedy would cure the constitutional defect, California is not likely to choose this option.

> sentence for a Class A felony shall be the midpoint of the range if there are no enhancement or mitigating factors.
>
> (d) Should there be enhancement but no mitigating factors for a Class B, C, D or E felony, then the court may set the sentence above the minimum in that range but still within the range. Should there be enhancement but no mitigating factors for a Class A felony, then the court shall set the sentence at or above the midpoint of the range. Should there be mitigating but no enhancement factors for a Class A felony, then the court shall set the sentence at or below the midpoint of the range.
>
> (e) Should there be enhancement and mitigating factors for a Class B, C, D or E felony, the court must start at the minimum sentence in the range, enhance the sentence within the range as appropriate for the enhancement factors, then reduce the sentence within the range as appropriate for the mitigating factors. Should there be enhancement and mitigating factors for a Class A felony, the court must start at the midpoint of the range, enhance the sentence within the range as appropriate for the enhancement factors, and then reduce the sentence within the range as appropriate for the mitigating factors.

TENN. CODE ANN. § 40-35-210 (2001).

155 IND. CODE ANN. § 35-50-2-1.3(a) (2007).

156 *Id*.

157 *Id*. Under the Indiana law, the sentencing judge is only required to use the advisory sentence when imposing consecutive sentences in accordance with Indiana Code section 35-50-1-2, when imposing an additional fixed term to an habitual offender, or when imposing an additional fixed term to a repeat sexual offender.

158 *Id*.

159 United States v. Booker, 543 U.S. 220, 233 (2005).

CONCLUSION AND RECOMMENDATION

California's DSL is still unconstitutional. Judges are no longer required to find facts by a preponderance of the evidence. Instead, judges simply need to give reasons for imposing whichever term they choose. The California Legislature and California Supreme Court call this, "broad discretion." Unfortunately, California's current scheme would not fall under the United States Supreme Court's understanding of "broad discretion." California judges are still required to impose one of three terms, and are not free to impose a sentence anywhere between the lower and upper term. I recommend that California alter its system so as to make the defined sentences advisory. By doing this, California could keep its determinate sentencing mostly intact, avoiding the burden of grafting a jury onto the sentencing process while bringing the determinate sentencing law within the bounds of the Sixth Amendment. Until an acceptable change is made, California will continue to sentence defendants in a way that violates their constitutional rights.

The Sixth District of the California Court of Appeal Throws a Curveball: The Use of Juvenile Adjudications as Strikes in California Post-*People v. Nguyen*

Benjamin Price[*]

INTRODUCTION

Michael Jones, age twenty-six, has been convicted of robbery in an adult criminal proceeding. Because he suffered a prior juvenile adjudication for the same offense when he was seventeen years old, the Deputy District Attorney alleged that the juvenile adjudication was a strike under California's Three Strikes Law. As a result, Michael's sentence was double what it would normally have been for a first-time robbery offense. As he is sitting in jail, he receives word that his friend is being charged with kidnapping. He remembers that his friend suffered a prior juvenile adjudication for assault when he was sixteen years old. When Michael's friend comes to visit him in jail, he laments the fact that his friend will suffer double the normal penalty due to the assault adjudication being used as a strike. "Actually," his friend tells him, "my lawyer says that the District Attorney can no longer use that juvenile adjudication as a strike against me." Michael is very upset and calls his attorney. His attorney promises to research the issue and see if a re-sentencing hearing can be arranged.

This is the scene across California. California's Three Strikes Law provides that a convicted felon with certain prior felony convictions will receive a sentence beyond the statutory maximum for the current offense.[1] The statute specifically allows for juvenile adjudications to be used as strikes under certain conditions.[2] However, recent case law has complicated the application of this statute. In *Apprendi v. New Jersey*, the U.S. Supreme Court held that "*[o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable

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1 CAL. PENAL CODE § 1170.12 (West Supp. 2008).

2 *Id.* § 1170.12(b)(3).

doubt."[3] While most federal circuit courts and California appellate courts have interpreted the *Apprendi* "prior conviction" exception to include juvenile adjudications,[4] the Ninth Circuit Court of Appeals in *United States v. Tighe*[5] and the Sixth District of the California Court of Appeal in *People v. Nguyen*[6] held that juvenile adjudications do not fall within the *Apprendi* exception. These are not the only courts to reexamine the use of juvenile adjudications as prior convictions for sentence enhancement purposes.[7] The court in *Nguyen* observed that, while only one law review article argued for the use of juvenile adjudications as strikes, "a growing number of state courts have taken the view that *Apprendi* bars the use of juvenile adjudications to enhance adult sentences over and above the otherwise statutorily-set maximum," and that "[c]ommentators are virtually unanimous in that view."[8] The California Supreme Court has granted review of the *Nguyen* decision,[9] and the ruling will have a large impact on whether California will join the "growing number" of courts and commentators arguing for a ban on the use of juvenile adjudications as sentence enhancers.

This Comment first argues that juvenile adjudications should continue to be used as strikes under the Three Strikes Law, and therefore the California Supreme Court should reverse *Nguyen*.[10] Part I provides a discus-

3 Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

4 *See* Burge v. United States, 407 F.3d 1183 (11th Cir. 2005); Jones v. United States, 332 F.3d 688 (3d Cir. 2003); Smalley v. United States, 294 F.3d 1030 (8th Cir. 2002); United States v. Crowell, 493 F.3d 744 (6th Cir. 2007); United States v. Matthews, 498 F.3d 25 (1st Cir. 2007). The only federal circuit to hold that a juvenile adjudication cannot be used as a strike is the Ninth Circuit. United States v. Tighe, 266 F.3d 1187, 1194 (9th Cir. 2001); *see also* People v. Linarez, 66 Cal. Rptr. 3d 762, 766 (Ct. App. 2007); People v. Grayson, 66 Cal. Rptr. 3d 603, 610–11 (Ct. App. 2007); People v. Tu, 64 Cal. Rptr. 3d 878, 888 (Ct. App. 2007); People v. Palmer, 47 Cal. Rptr. 3d 864, 870–71 (Ct. App. 2006); People v. Buchanan, 49 Cal. Rptr. 3d 137, 145 (Ct. App. 2006); People v. Superior Court, 7 Cal. Rtpr. 3d 74, 82 (Ct. App. 2003), *review denied*, 2004 Cal. LEXIS 2034 (Mar. 3, 2004), *cert. denied*, 543 U.S. 884 (2004); People v. Lee, 4 Cal. Rptr. 3d 642, 647 (Ct. App. 2003); People v. Smith, 1 Cal. Rptr. 3d 901, 905–06 (Ct. App. 2003).

5 266 F.3d 1187, 1194 (9th Cir. 2001).

6 62 Cal. Rptr. 3d 255, 281 (Ct. App. 2007), *review granted*, 169 P.3d 882 (Cal. 2007).

7 *See* State v. Brown, 879 So. 2d 1276, 1290 (La. 2004); Pinkston v. State, 836 N.E.2d 453, 462–63 (Ind. Ct. App. 2005); State v. Chatman, 2005 WL 901138 at *6 (Tenn. Crim. App. 2005) (unpublished).

8 *Nguyen*, 62 Cal. Rptr. 3d at 269, 269 n.9 (contrasting several state court decisions with the views of Kevin Holman, *Should Little Joey's Juvenile Adjudication Be Used Against Him When He Becomes Joe the Habitually Violent Felon?*, 25 J. JUV. L. 45 (2005)). In *Nguyen*, the Sixth District of the California Court of Appeal decided to follow the trend toward the exclusion of juvenile adjudications as strikes:

> [We] join the small but growing number of courts across the county [sic] that have likewise concluded that *Apprendi* and its progeny compel us to recognize that the Sixth Amendment right to a jury trial is an integral part of the process that is due before a prior conviction may be used to increase the maximum sentence for a criminal offense.

Id. at 256.

9 169 P.3d 882 (Cal. 2007). The United States Supreme Court has consistently denied certiorari to appeals from cases discussing this issue. *See Burge*, 407 F.3d 1183, *cert. denied*, 546 U.S. 981 (2005); *Jones*, 332 F.3d 688, *cert. denied*, 540 U.S. 1150 (2004); *Smalley*, 294 F.3d 1030, *cert. denied*, 537 U.S. 1114 (2003); *Crowell*, 493 F.3d 744, *cert. denied*, 128 S. Ct. 880 (2008); *Matthews*, 498 F.3d 25, *cert. denied*, 128 S. Ct. 1463 (2008).

10 I will only focus on the constitutionality of using juvenile adjudications to enhance a sentence

sion of the purpose, history, and provisions of the Three Strikes Law. This part also discusses the unique characteristics of the juvenile justice system and how these unique characteristics complicate the use of prior juvenile adjudications as strikes. This part then gives a background of *Apprendi*, the cases leading up to *Apprendi* and how both federal and California courts have interpreted *Apprendi* in the context of juvenile adjudications. Part II argues for the inclusion of juvenile adjudications in *Apprendi*'s exception based on (1) the justification for considering recidivism in sentencing; (2) the reliability of juvenile adjudications to indicate recidivism; and (3) the positive impact of using juvenile adjudications as strikes on the juvenile justice system and society in general. This Comment concludes by discussing possible future ramifications of the California Supreme Court's review of *Nguyen*, both in California and nationwide.

I. THE THREE STRIKES LAW, THE CALIFORNIA JUVENILE SYSTEM, AND THE *APPRENDI* PROBLEM

A. The History, Purpose, and Provisions of the Three Strikes Law

In 1994, California voters approved Proposition 184 in a general election.[11] Proposition 184 was codified in California Penal Code section 1170.12.[12] Section 1170.12 is commonly known as "The Three Strikes Law."[13] Proponents of the Three Strikes Law argued that it would keep society safe from habitual offenders,[14] while opponents argued that the Three Strikes Law would remove judges' power to keep sentences proportional to the crime and the criminal.[15]

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beyond the statutory maximum. Precedent clearly states that judges may use juvenile adjudications to enhance sentences within the statutory limits. United States v. Williams, 891 F.2d 212, 215 (9th Cir. 1989) (allowing an adult's criminal sentence to be enhanced because of a conviction at a prior proceeding to which the right to a jury trial did not attach). *Nguyen* briefly mentions *Williams* and does not reject its holding. 62 Cal. Rptr. 3d at 272 ("[I]n both *United States v. Williams* and *United States v. Johnson*, the defendants were given sentences within the normal range of the federal sentencing guidelines."). California Rules of Court also include "the defendant's prior convictions as an adult or *sustained petitions in juvenile delinquency proceedings*" as aggravating circumstances. CAL. R. CT. 4.421 (West 2007) (emphasis added).

11 Dan Morain & Virginia Ellis, *Voters Approve 'Three Strikes' Law, Rejecting Smoking Measure*, L.A. TIMES, Nov. 9, 1994, at A3.

12 CAL. PENAL CODE § 1170.12 (West Supp. 2008).

13 Morain & Ellis, *supra* note 11.

14 Republican Bill Morrow, incumbent candidate for State Assembly Member, explained:

> I am a co-author and strongly support the 'three strikes' legislation. Such a law will cause people inclined to criminal behavior to think twice about committing a crime when they are assured that commission of a third felony will land them in prison for life. When repeat offenders are jailed for good, the public will be protected from their predation and can rest assured they will not be loosed upon society again.

Campaign '94: Issues and Answers, L.A. TIMES (Orange County Ed.), Oct. 23, 1994, at B3.

15 Tonatiuh Rodriguez-Nikl, also a candidate for State Assembly Member at the time, explained her opposition:

> [The Three Strikes Law] violates the freedom judges must have to ensure that the punishment is proportional to the crime. Violent crime is actually down. Crime hysteria is up and the 'three strikes' law feeds that hysteria . . . . The 'three strikes' law would result in filling

The Three Strikes Law gives minimum sentence standards for persons who have already been convicted of one or more felonies.[16] If the individual already has one prior felony conviction, the sentence will be double what the sentence would ordinarily be for the current offense.[17] If the individual has two or more prior felony convictions, the sentence for the current offense will be an indeterminate term of life imprisonment with a minimum term of one of the following, whichever is greater:

> [1] three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions, or [2] twenty-five years or [3] the term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.[18]

The Three Strikes Law states, "[a]ny offense defined in subdivision (c) of Section 667.5 [of the California Penal Code] as a violent felony or any offense defined in subdivision (c) of Section 1192.7 [of the California Penal Code] as a serious felony in this state" will qualify as a felony for the sentence enhancement purposes of the law.[19] A prior juvenile adjudication is a prior felony conviction if:

> (A) The juvenile was sixteen years of age or older at the time he or she committed the prior offense, and (B) The prior offense is (i) listed in subdivision (b) of Section 707 of the Welfare and Institutions Code, or (ii) listed in this subdivision as a felony, and (C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law, and (D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.[20]

B. The Goals and Unique Characteristics of the California Juvenile Justice System Compared to the Adult Criminal Justice System

In California, the juvenile justice system is significantly different from the adult criminal justice system. The goals of the juvenile courts are protection and rehabilitation of the minor, rather than punishment.[21] One of

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> up prisons while draining billions of dollars that can be used for social programs. I favor lighter sentences and more money for education.

Id.

16 CAL. PENAL CODE § 1170.12 (West Supp. 2008).

17 *Id*. § 1170.12(c)(1).

18 *Id*. § 1170.12(c)(2).

19 *Id*. § 1170.12(b)(1). California Penal Code section 667.5 includes the following as violent felonies: murder or voluntary manslaughter, mayhem, rape, sodomy. California Penal Code section 1192.7 lists twelve serious felonies, including arson, carjacking, and burglary.

20 *Id*. § 1170.12(b)(3).

21 NAT'L COUNCIL ON CRIME AND DELINQUENCY, JUVENILE JUSTICE POLICY STATEMENT 3 (Apr. 1991); *In re* Florance, 300 P.2d 825, 827 (Cal. 1956) (en banc) ("The primary consideration in proceedings to declare a minor a ward of the juvenile court is the minor's welfare."); *In re* Charles C., 284 Cal. Rptr. 4, 5 (Ct. App. 1991) ("[A] juvenile commitment is geared toward treatment and rehabilitation with the state providing substitute parental care for wayward youths during their *minority*.") (em-

the ways the system protects the minor is with proceedings that are by design less formal and intimidating than their adult counterparts.[22] The proceedings are not criminal in nature[23] and juveniles are not convicted, but deemed to be a ward of the court.[24] The delinquent juvenile is not sentenced, but the court conducts a disposition hearing to determine what outcome will best serve the juvenile.[25] Punishments range from the juvenile being sent home to his or her parents[26] to being committed in a detention facility operated by the California Department of Corrections and Rehabilitation, Division of Juvenile Facilities, for a period of time not to exceed the equivalent sentence for the same offense in an adult proceeding.[27]

California also allows a minor the opportunity to seal his or her record. Under California law, juveniles may petition the court to have their records sealed when they reach the age of eighteen or five years after the juvenile court's jurisdiction terminates.[28] This option is not available for juveniles tried in adult criminal court, but they may have their records expunged after an honorable discharge from a youth authority facility.[29] This allows rehabilitated juveniles the opportunity to avoid difficulties in obtaining employment because it erases a juvenile's conviction from his or her record.

Traditionally, the due process rights afforded to adults in criminal courts have not been given to juveniles, because the goal of the juvenile justice system is rehabilitation and not punishment.[30] However, in *In re Gault*, the U.S. Supreme Court held that juveniles in juvenile proceedings have the right to counsel, the right to receive notice of charges, the privilege against self-incrimination, and the right to confront and cross-examine witnesses.[31] Three years later, the Court held that a juvenile's guilt must be

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phasis in original).

22 *In re Charles C*., 284 Cal. Rptr. at 6.

23 People v. Arias, 51 Cal. Rptr. 2d 770, 817 (Ct. App. 1996) ("Juvenile proceedings are not criminal prosecutions.").

24 CAL. WELF. & INST. CODE § 602 (West Supp. 2008).

25 *Id*. § 706.

26 *Id*. § 727(a).

27 *Id*. § 731.

28 *Id*. § 781(a). One observer notes that, under the Three Strikes Law, a sealed juvenile adjudication can still be used as a strike:

> The sealed record statute provides that if the juvenile committed an offense under section 707(b) of the Welfare and Institutions Code, the record will not be sealed until six years after the last offense. This is specifically applicable to the 'three strikes' law which allows juvenile offenses committed under section 707(b) to be used as strikes. However, the three strikes law has no limit on how far back it may look for use of a prior juvenile adjudication. The juvenile adjudication could have taken place twenty years ago, and the prosecution may still use it to constitute a strike. This is in direct opposition to the sealed record statute, which states once a record is sealed, "the proceedings shall be deemed never to have occurred . . . ."

Tonya K. Cole, *Counting Juvenile Adjudications as Strikes Under California's 'Three Strikes' Law: An Undermining of the Separateness of the Adult and Juvenile Systems*, 19 J. Juv. L. 335, 344–45 (1998).

29 Holman, *supra* note 8 at 47; CAL. WELF. & INST. CODE § 1772 (West Supp. 2008).

30 *See* McKeiver v. Pennsylvania, 403 U.S. 528, 553 (1971) (plurality opinion).

31 *In re* Gault, 387 U.S. 1 (1967).

proven beyond a reasonable doubt rather than by a preponderance of the evidence.[32] Juveniles are also protected against double jeopardy.[33] However, in *McKeiver v. Pennsylvania,* the Court held that not all due process rights enjoyed by adults are required in juvenile proceedings.[34] The Court concluded that jury trials are not required in juvenile hearings because they would disrupt the intimate nature of the juvenile proceedings and are not necessary for accurate fact-finding.[35] The Court emphasized that its decision gives the states discretion to decide whether juveniles are afforded a jury trial.[36] However, California does not require jury trials in juvenile proceedings because juvenile proceedings are reformatory in nature and not penal.[37]

On March 8, 2000, Proposition 21 became law and gave prosecutors greater ability to try juveniles in adult criminal court.[38] Juveniles in California who are at least fourteen years of age and charged with murder or certain sexual assault crimes must be tried as an adult in criminal court.[39] Prosecutors may choose between criminal or juvenile court when a juvenile of at least sixteen years of age commits any offense listed in California Welfare & Institutions Code section 707(b).[40] Prosecutors can also file charges in criminal court against any juvenile that is sixteen years of age or older and has a prior felony adjudication.[41]

Proposition 21 reduces the number of juvenile adjudications that can be used as strikes.[42] However, there are still many juvenile offenses that can be used as strikes that either cannot be charged in adult proceedings at all,[43] or where prosecutors have a choice between adult and juvenile court.[44]

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32 *In re* Winship, 397 U.S. 358 (1970). This is important, because the reliability of prior convictions is questioned when the standard of proof is less than beyond a reasonable doubt. In *Apprendi*, the United States Supreme Court only stated what *does* constitute sufficient procedural safeguards (a right to a trial by jury and proof beyond a reasonable doubt) and what *does not* (judge-made findings under a lesser standard of proof). Apprendi v. New Jersey, 530 U.S. 466, 476 (2000).

33 Breed v. Jones, 421 U.S. 519, 541 (1975).

34 *McKeiver*, 403 U.S. at 533.

35 *Id*. at 550.

36 *Id*. at 553.

37 *Id*. at 568.

38 Anthony Costanzo, *Proposition 21: The Future of an Illusion*, 24 J. JUV. L. 68, 73 n.41 (2004). Proposition 21 amended section 777 of the California Welfare and Institutions Code. *Id*. at 68.

39 CAL. WELF. & INST. CODE § 602(b) (West Supp. 2008).

40 *Id*. § 707(d)(1). These offenses include murder, robbery, torture, kidnapping, etc. *Id*. § 707(b).

41 *Id*. § 707(d)(3). The prior felony must have been committed when he or she was fourteen years of age or older. *Id*.

42 Holman, *supra* note 8.

43 These are the offenses that qualify as strikes under California Penal Code sections 667.5 or 1192.7 that are not listed in California Welfare and Institutions Code sections 602(b) (the prosecutor must try the case in adult criminal court) or 707(b) (the prosecutor may try the case in adult criminal court). Some offenses include non-aggravated mayhem, kidnapping with-out bodily harm or ransom, and extortion.

44 If the offense is a strike and is listed under California Welfare and Institutions Code section 707(b), the prosecutor has discretion to try the case in adult criminal court under California Welfare and Institutions Code section 707(d)(1) (2008). Examples of these offenses are arson, assault with a fire-

C. The U.S. Supreme Court and *Almendarez-Torres*, *Jones*, and *Apprendi*—Enhancing a Sentence Beyond the Statutory Maximum with Prior Convictions

In *Almendarez-Torres v. United States*, the Supreme Court held that prior convictions could be treated as sentencing factors that raise the maximum penalty of an offense.[45] In September 1995, Hugo Almendarez-Torres was indicted by a federal grand jury for a violation of 8 U.S.C. section 1326(a), which makes it a crime for a deported alien to return to the United States.[46] Without a prior conviction, the maximum prison term is two years.[47] Section 1326(b)(2) authorizes a maximum prison term of twenty years if the initial deportation "was subsequent to a conviction for commission of an aggravated felony."[48] Almendarez-Torres pled guilty and admitted in a hearing that he had been deported pursuant to three convictions for aggravated felonies.[49]

Almendarez-Torres argued that the prior aggravated felony convictions were elements of a crime, and because the government failed to include the prior convictions in the indictment, he could not be sentenced beyond the statutory maximum of two years as set forth in Section 1326(a).[50] The district court rejected this argument and gave Almendarez-Torres a prison term, ranging from seventy-seven to ninety-six months. The Fifth Circuit affirmed the verdict.[51] The Supreme Court agreed and found that an indictment does not need to set forth sentencing factors[52] because a prior conviction is a sentencing factor and not a separate element of a crime.[53]

One year later, in *Jones v. United States*, the Court further explained the reason for allowing a prior conviction to serve as a sentence enhancement, rather than an element of the crime that must be proven to a jury.[54] Nathaniel Jones was indicted for a violation of 18 U.S.C. section 2119,[55] which stated that a person possessing a firearm who takes a motor vehicle from another person by force will receive a sentence of not more than fifteen years in prison.[56] However, Section 2119(2) states that if serious bodily injury resulted, the punishment was not to exceed twenty-five years.[57]

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arm, torture, kidnapping for ransom, etc.

45 523 U.S. 224, 246–47 (1998).

46 *Id*. at 227; 8 U.S.C. § 1326(a) (2006).

47 8 U.S.C. § 1326(a) (2006).

48 *Id*. § 1326(b)(2).

49 *Almendarez-Torres*, 523 U.S. at 227.

50 *Id*.; *see also* Hamling v. United States, 418 U.S. 87, 117 (1974) (holding that an indictment must set forth each element of the crime).

51 *Almendarez-Torres*, 523 U.S. at 227.

52 *Id*. at 228.

53 *Id*. at 243.

54 526 U.S. 227, 251–52 (1999).

55 *Id*. at 230.

56 18 U.S.C. § 2119 (1988).

57 *Id*.

Although Section 2119(2) was not included in the jury instructions defining the offense, the district court sentenced Jones to the full twenty-five years permitted under subsection (2).[58] The district court held that subsection (2) was a sentencing factor, rejecting Jones' argument that it set out an element of the offense and could not be applied because it had not been charged in his indictment.[59] The Ninth Circuit affirmed this decision.[60]

The Supreme Court, however, reversed the district court and the Ninth Circuit because the fact of severe bodily harm was not charged in the indictment and tried before the jury.[61] In this particular case, the aggravating factor was not a prior conviction but the presence of severe bodily harm resulting from carjacking. The Court explained that prior convictions are constitutionally distinct from other sentence-enhancing factors, and therefore could be used under *Almendarez-Torres* to increase the penalty for an offense without treating them as an element of the current offense.[62] It clarified that, "unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees."[63]

One year later in *Apprendi*, the Supreme Court further clarified the rationale in *Almendarez-Torres* and *Jones*.[64] On December 22, 1994, Charles Apprendi fired several bullets into the home of an African-American family that had recently moved into an all-white neighborhood.[65] Apprendi made a statement, which he later retracted, that suggested that his motive was race-based.[66] Apprendi pleaded guilty to two counts of "second-degree possession of a firearm for an unlawful purpose, and one count of the third-degree offense of unlawful possession of an antipersonnel bomb."[67] As a part of the plea agreement, the prosecution reserved the right to request the court to impose an enhanced sentence if the crime was committed with a biased purpose pursuant to a state hate-crime statute.[68] After accepting the pleas, the prosecutor filed a motion to enhance the sentence and the court held an evidentiary hearing to determine if the shooting was committed with a biased purpose.[69] The court found "that the crime was motivated by racial bias" and applied the hate crime enhancement.[70]

58 *Jones*, 526 U.S. at 231.
59 *Id*.
60 *Id*.
61 *Id*. at 231–33.
62 *Id*. at 249.
63 *Id*.
64 530 U.S. 466, 487–90 (2000).
65 *Id*. at 469.
66 *Id*.
67 *Id*. at 469–70 (internal citations omitted).
68 *Id*. at 470.
69 *Id*.
70 *Id*. at 471 (internal quotations omitted).

The Appellate Division and New Jersey Supreme Court affirmed.[71]

The U.S. Supreme Court reversed the New Jersey courts because the issue of whether Apprendi had a racial motive in committing the crime had not been submitted to a jury and proven beyond a reasonable doubt.[72] The Court explained that the reason the judge in *Almendarez-Torres* could consider the prior conviction as a sentence enhancer without violating due process and Sixth Amendment concerns was because procedural safeguards attached to the fact of the prior conviction.[73] The Court established the following rule: "*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[74]

D. How Federal and California Courts Have Approached the Problem of Whether it is Appropriate to Include Prior Juvenile Adjudications Under the *Apprendi* Exception

In California, the Three Strikes Law allows judges to enhance sentences beyond the statutory maximum because of prior convictions.[75] Previously, courts in California held that the use of juvenile adjudications as strikes complies with *Apprendi*'s rule.[76] However, there is now disagreement among the California courts of appeal on this issue.[77] There is also disagreement among the federal circuit courts. Six federal circuit courts have now ruled on the issue of whether juvenile adjudications qualify as convictions for purposes of the *Apprendi* exception.[78] The U.S. Supreme Court has yet to decide the issue.[79]

The Ninth Circuit was the first to decide the issue. In *United States v. Tighe*, the Ninth Circuit held that a juvenile adjudication does not fall under the *Apprendi* exception unless it was proved to a jury beyond a reasonable doubt.[80] The court relied on the following language from *Jones*: "[U]nlike virtually any other consideration used to enlarge the possible penalty for an

71 *Id*. at 471–72.

72 *Id*. at 497.

73 *Id*. at 488.

74 *Id*. at 490 (emphasis added).

75 CAL. PENAL CODE § 1170.12 (West 2004).

76 *See Apprendi*, 530 U.S. at 490.

77 *See* People v. Nguyen, 62 Cal. Rptr. 3d 255, 280 (2007).

78 *See* United States v. Burge, 407 F.3d 1183, 1191 (11th Cir. 2005) (allowing juvenile adjudications to be used as sentence-enhancing prior convictions); United States v. Jones, 332 F.3d 688, 696 (3d Cir. 2003) (same); United States v. Smalley, 294 F.3d 1030, 1033 (8th Cir. 2002) (same); United States v. Crowell, 493 F.3d 744, 750 (6th Cir. 2007) (same); United States v. Matthews, 498 F.3d 25, 36 (1st Cir. 2007) (same); United States v. Tighe, 266 F.3d 1187, 1194–95 (9th Cir. 2001) (excluding "[j]uvenile adjudications that do not afford the right to a jury trial and a beyond-a-reasonable-doubt burden of proof" from use as sentence-enhancing prior convictions).

79 *See Burge*, 407 F.3d 1183, *cert. denied*, 546 U.S. 981 (2005); *Jones*, 332 F.3d 688, *cert. denied*, 540 U.S. 1150 (2004); *Smalley*, 294 F.3d 1030, *cert. denied*, 537 U.S. 1114 (2003); *Crowell*, 493 F.3d 744, *cert. denied*, 128 S.Ct. 880 (2008); *Matthews*, 498 F.3d 25, *cert. denied*, 128 S.Ct. 1463 (2008).

80 266 F.3d at 1194.

offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees."[81] The court reasoned that the Supreme Court created an exception for prior convictions because those prior convictions were themselves established through procedural safeguards.[82] The court then concluded that because of the language of *Jones*, a right to a jury trial is indispensable for a prior conviction to be used to enhance a sentence beyond the statutory maximum.[83] To date, the Ninth Circuit is the only circuit court to hold this view.

The Eighth Circuit was the next circuit court to decide the issue. In 2002, it held in *U.S. v. Smalley* that juvenile adjudications fall under the *Apprendi* exception.[84] The court relied on the following language from *Apprendi*:

> [T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.[85]

The court noted that the Supreme Court clearly stated what falls within the *Apprendi* exception, but the Court did not take a clear position on other possibilities.[86] The Eighth Circuit also found it significant that the Supreme Court in *Apprendi* didn't quote the *Jones* decision relied on by the Ninth Circuit in *Tighe*.[87] The Eighth Circuit observed that the Supreme Court in *Apprendi* only discussed the right to a trial by jury and proof beyond a reasonable doubt as *examples* of procedural protections, not mandatory indicators of reliability.[88] The Eighth Circuit then stated that the question "should not turn on the narrow parsing of words, but on an examination of whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption."[89] The court then listed the procedural protections that juveniles do enjoy in juvenile proceedings: "The right to notice, the right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination."[90] The court further observed that judges in juvenile proceedings have to find guilt beyond a reasonable doubt,[91] concluding that the combination of these protections is sufficient to provide the reliability that

81 *Id*. at 1193 (quoting *Jones*, 526 U.S. at 249) (emphasis removed to match original opinion of *Jones*).
82 *Id*. at 1194.
83 *Id*.
84 *Smalley*, 294 F.3d at 1033.
85 *Id*. at 1032; *Apprendi*, 530 U.S. at 496.
86 *Smalley*, 294 F.3d at 1032.
87 *Id*.
88 *Id*.
89 *Id*. at 1033.
90 *Id*.
91 *Id*.

Apprendi requires.[92] Finally, the court noted that "the use of a jury in the juvenile context would 'not strengthen greatly, if at all, the factfinding function' and is not constitutionally required."[93] Four circuit courts have followed the reasoning in *Smalley*.[94]

The California courts have followed the pattern of their federal counterparts. The California Supreme Court, like the United States Supreme Court, has not decided the issue.[95] The California appellate courts agree with the reasoning in *Smalley*, with one exception.[96] The first California appellate court to decide the issue was the Second District. In *People v. Bowden*, the court held that non-jury trial juvenile adjudications can be used to enhance a sentence in an adult proceeding beyond the statutory maximum.[97] The court cited to the dissent in *Tighe*:

> We agree with the *Tighe* dissent that this language in *Jones* does not support such a broad conclusion. The dissent stated, "In my view, the language in *Jones* stands for the basic proposition that Congress has the constitutional power to treat prior convictions as sentencing factors subject to a lesser standard of proof because the defendant presumably received all the process that was due when he was convicted of the predicate crime. For adults, this would indeed include the right to a jury trial. For juveniles, it does not. Extending *Jones*' logic to juvenile adjudications, when a juvenile receives all the process constitutionally due at the juvenile stage, there is no *constitutional* problem (on which *Apprendi* focused) in using that adjudication to support a later sentencing enhancement."[98]

Subsequent California courts of appeal have agreed with *Bowden*.[99]

However, in *People v. Nguyen*, the Sixth District of the California Court of Appeal held that a juvenile adjudication is not a prior conviction within the *Apprendi* exception.[100] The court noted that, while all the appellate courts to consider the issue have held that juvenile adjudications fall within the *Apprendi* exception, "a growing number of state courts have taken the view that *Apprendi* bars the use of juvenile adjudications to enhance adult sentences over and above the otherwise statutorily set maximum."[101]

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92 *Id*.

93 *Id*. (quoting McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971) (plurality opinion)).

94 *See* United States v. Jones, 332 F.3d 688, 696 (3rd Cir. 2003); United States v. Burge, 407 F.3d 1183, 1190 (11th Cir. 2005); United States v. Crowell, 493 F.3d 744, 750 (6th Cir. 2007); United States v. Matthews, 498 F.3d 25, 35 (1st Cir. 2007).

95 *See* People v. Nguyen, 62 Cal. Rptr. 3d 255 (Ct. App. 2007), *review granted*, 169 P.3d 882 (Cal. 2007).

96 *Id*. at 269–70.

97 People v. Bowden, 125 Cal. Rptr. 2d 513, 518 (Ct. App. 2002).

98 *Id*. (citing United States v. Tighe, 266 F.3d 1187, 1200 (9th Cir. 2001) (Brunetti, J., dissenting)).

99 *See* People v. Linarez, 66 Cal. Rptr. 3d 762, 766 (Ct. App. 2007); People v. Grayson, 66 Cal. Rptr. 3d 603, 610–11 (Ct. App. 2007); People v. Tu, 64 Cal. Rptr. 3d 878, 888 (Ct. App. 2007); People v. Palmer, 47 Cal. Rptr. 3d 864, 870–71 (Ct. App. 2006); People v. Buchanan, 49 Cal. Rptr. 3d 137, 145 (Ct. App. 2006); People v. Superior Court, 7 Cal. Rtpr. 3d 74, 82 (Ct. App. 2003), *review denied* 2004 Cal. LEXIS 2034 (Mar. 3, 2004), *cert. denied*, 543 U.S. 884 (2004); People v. Lee, 4 Cal. Rptr. 3d 642, 647 (Ct. App. 2003); People v. Smith, 1 Cal. Rptr. 3d 901, 905–06 (Ct. App. 2003).

100 62 Cal. Rptr. 3d at 256–57.

101 *Id*. at 269 (citing State v. Brown, 879 So. 2d 1276, 1290 (La. 2004); Pinkston v. State, 836

The court also stated that "[c]ommentators are virtually unanimous in that view."[102]

The court justified its holding by rejecting three of the most common arguments in favor of including prior juvenile adjudications in the *Apprendi* exception. First, the court rejected the argument that recidivism is different than other facts that enhance sentences.[103] The court observed that *Apprendi* does not specifically except recidivism, but only prior convictions.[104] Moreover, the court stressed that there is a difference between using recidivism to enhance a sentence *within* the statutory limits, and using it to enhance *beyond* those limits.[105] Additionally, the court objected to what it saw as an unwarranted assumption that juvenile adjudications prove recidivism.[106]

The court rejected the second argument that juvenile adjudications are reliable enough to be included within *Apprendi*'s exception.[107] First, the court responded to the argument that, because juries in juvenile adjudications were deemed to be unnecessary in *McKeiver*, they do not increase reliability for *Apprendi* purposes.[108] The court stated that the inability of the jury to add additional accuracy in fact-finding is not the real reason there is no constitutional right to a jury trial in juvenile adjudications.[109] The court explained that juries would destroy the rehabilitative function and intimate atmosphere of juvenile adjudications.[110] Second, the court cited statistical reports included in *Ballew v. Georgia*,[111] which suggested that the lower the number of jurors, the lower the reliability of the verdict.[112] The court implied, contrary to the Supreme Court's holding in *McKeiver*, that juries would add reliability and accuracy to fact-finding in a juvenile proceeding.[113]

Third, the court rejected the view that juries are not indispensable to due process in the context of sentencing above the statutory maximum.[114] The court discussed various ways in which the trial by jury is a fundamental part of the American criminal justice system.[115] In the context of en-

N.E.2d 453 (Ind. Ct. App. 2005) (unpublished); State v. Chatman, 2005 WL 901138 (Tenn. Crim. App. 2005)).

102 *Id*. The court then observed that only one law review article argues in support of the inclusion of juvenile adjudications within the *Apprendi* exception. *Id*. at n.9; *see* Holman, *supra* note 8, at 54–55.

103 *Nguyen*, 62 Cal. Rptr. 3d at 270.

104 *Id*. at 271.

105 *Id*.

106 *Id*. at 272–73.

107 *Id*. at 273.

108 *Id*.

109 *Id*.

110 *Id*.

111 435 U.S. 223 (1978).

112 *Nguyen*, 62 Cal. Rptr. 3d at 274.

113 *Id*. at 275. In *McKeiver v. Pennsylvania*, the U.S. Supreme Court held that juries would add little reliability and accuracy in fact-finding in a juvenile proceeding. 403 U.S. 528, 553 (1971).

114 *Nguyen*, 62 Cal. Rptr. 3d at 276–77.

115 *Id*.

hancing a sentence beyond the statutory maximum, the court, like the Ninth Circuit in *Tighe*, relied on the language from *Jones* that discusses the right to a trial by jury and proof beyond a reasonable doubt.[116] The court concluded that, because juvenile adjudications are not prior convictions within the *Apprendi* exception, they cannot be used pursuant to the Three Strikes Law to enhance a sentence in an adult proceeding beyond the statutory maximum.[117]

Since *Nguyen*, three other California courts of appeal have criticized its reasoning.[118] Thus, there is a split among both the federal and California appellate courts concerning whether a prior juvenile adjudication can be used to enhance a sentence in an adult proceeding beyond the statutory maximum. The split among the California courts will soon be resolved, as the California Supreme Court has granted review.[119]

II. JUDGES ACT IN ACCORDANCE WITH *APPRENDI* BY USING JUVENILE ADJUDICATIONS AS STRIKES IN CALIFORNIA

The California Supreme Court should reverse *Nguyen* and hold that juvenile adjudications are appropriately included within the *Apprendi* exception. Recidivism continues to be the most traditional reason for sentence enhancement.[120] Juvenile adjudications are sufficiently reliable to indicate recidivism and are accompanied by a multiplicity of procedural protections.[121] Furthermore, using juvenile adjudications to enhance adult sentences promotes the rehabilitative purpose of the juvenile justice system and has a positive impact on society through the deterrence of future crimes and incarceration of recidivists.[122]

A. Juvenile Adjudications Can Be Included Within *Apprendi*'s Exception Because Recidivism is a Traditional Basis for Sentence Enhancement

Juvenile adjudications can be used to enhance a sentence in an adult criminal proceeding because they indicate recidivism and recidivism is the most traditional basis for sentence enhancement.[123] Recidivism "demonstrates beyond a reasonable doubt that a defendant has engaged in serious criminal behavior in the past."[124] Recidivism "is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sen-

116 *Id*. at 277.

117 *Id*. at 278–79.

118 People v. Tu, 64 Cal. Rptr. 3d 878, 888 (Ct. App. 2007); People v. Grayson, 66 Cal. Rptr. 3d 603, 609–10 (Ct. App. 2007); People v. Linarez, 66 Cal. Rptr. 3d 762, 766 (Ct. App. 2007).

119 People v. Nguyen, 67 Cal. Rptr. 3d 460 (2007).

120 Almendarez-Torres v. United States, 523 U.S. 224, 243 (1998).

121 *E.g*., People v. Grayson, 66 Cal. Rptr. 3d 603, 610–11 (Ct. App. 2007).

122 *See* discussion *infra* Part III.C.

123 People v. Nguyen, 62 Cal. Rptr. 3d 255, 271 (Ct. App. 2007) (citing People v. Fowler, 84 Cal. Rptr. 2d 874, 877 n.2 (Ct. App. 1999)).

124 *Fowler*, 84 Cal. Rptr. 2d at 877. (internal citations omitted).

tence."[125] It is therefore "distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing."[126] Recidivism is appropriately considered for sentencing because it "demonstrates the defendant's character and the likelihood of future criminality."[127]

However, *Nguyen* observes that there is a difference between using recidivism to enhance a sentence *within* the statutory limits and using recidivism to enhance a sentence *beyond* the statutory limits.[128] *Apprendi*'s general rule against letting a judge use a fact to enhance a sentence beyond the statutory maximum contains an exception for prior convictions.[129] *Nguyen* found that the critical issue is how narrowly *Apprendi*'s exception should be interpreted—whether the offense being used to enhance beyond statutory limits has to be a conviction in name, or whether it can be another offense found by a reasonable doubt (such as a juvenile adjudication) that indicates recidivism.[130] Prior convictions are excepted from *Apprendi*'s rule, not because they are called convictions, but because of what they represent—a finding of guilt following all procedural protections due to the defendant. Therefore, so long as judgments indicating recidivism carry with them sufficient procedural protections, judges may use them to enhance a sentence beyond the statutory maximum.

Do juvenile adjudications indicate recidivism? The court in *Nguyen* had a problem with using juvenile adjudications as strikes because it believes that juvenile adjudications do not carry sufficient procedural protections to reliably indicate recidivism.[131] But if juvenile adjudications are found to be sufficiently reliable, then they indicate recidivism because they show evidence of prior criminal wrongdoing by the defendant. Therefore, the next issue to be considered is whether juvenile adjudications are reliable enough to indicate recidivism.

125 *Almendarez-Torres*, 523 U.S. at 243.

126 Jones v. United States, 526 U.S. 227, 249 (1999).

127 Ellen Marrus, *"That Isn't Fair, Judge": The Costs of Using Prior Juvenile Delinquency Adjudications in Criminal Court Sentencing*, 40 HOUS. L. REV. 1323, 1339 (2004). At times, defendants will argue that using a prior conviction to enhance the penalty for the current offense violates the constitutional protection against double jeopardy. The United States Supreme Court has explained that it is not the former offense that the defendant is being punished for again, but rather the current offense. *See* Gryger v. Burke, 334 U.S. 728, 732 (1948) (explaining that the enhancement on the subsequent offense "is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because [it is] a repetitive one").

128 *Nguyen*, 62 Cal. Rptr. 3d at 271 (finding a distinction between "'factors relating both to offense and the offender' that judges may constitutionally consider 'in imposing a judgment *within the range* prescribed by statute' and unconstitutional consideration of factors that mandate imposition of a sentence greater than the maximum sentence authorized by the jury's verdict" (quoting Apprendi v. New Jersey, 530 U.S. 466, 481 (2000) (internal citations omitted) (emphasis in original)).

129 *Apprendi*, 530 U.S. at 490.

130 *Nguyen*, 62 Cal. Rptr. 3d at 271 ("[W]e see the question before us as whether 'prior convictions' ought to be interpreted expansively to include other judgments, which are by definition *not* criminal or convictions, but which do reflect recidivism.").

131 *Id*. at 272–73.

B. Juvenile Adjudications are Sufficiently Reliable to Indicate Recidivism and be Included Under *Apprendi*'s Exception Because They Contain Sufficient Procedural Safeguards

A majority of the California courts of appeal that have decided the issue agree that juvenile adjudications are sufficiently reliable to be used as a prior conviction within the *Apprendi* exception.[132] Likewise, a majority of the federal circuits that have decided the issue also agree that juvenile adjudications are sufficiently reliable for sentence enhancement beyond the statutory maximum.[133]

Juvenile adjudications carry with them a full range of procedural protections. Therefore, they are reliable enough to indicate recidivism and enhance a sentence beyond the statutory maximum.[134] Juveniles have the right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination.[135] Especially noteworthy is that the standard of proof in a juvenile proceeding is guilt beyond a reasonable doubt.[136] *Apprendi* mentions this as one of the reasons adult convictions are reliable enough to be excepted from the general rule for sentence enhancers.[137] Additionally, juveniles are protected from double jeopardy.[138] These are all important protections that make juvenile adjudications more reliable.

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132 *See* People v. Smith, 1 Cal. Rptr. 3d 901, 905 (Ct. App. 2003); People v. Lee, 4 Cal. Rptr. 3d 642, 647 (Ct. App. 2003); People v. Superior Court (Andrades), 7 Cal. Rptr. 3d 74, 86 (Ct. App. 2003); People v. Buchanan, 49 Cal. Rptr. 3d 137, 145 (Ct. App. 2006); People v. Palmer, 47 Cal. Rptr. 3d 864, 871 (Ct. App. 2006); People v. Tu, 64 Cal. Rptr. 3d 878, 887–88 (Ct. App. 2007); People v. Grayson, 66 Cal. Rptr. 3d 603, 610–11 (Ct. App. 2007); People v. Linarez, 66 Cal. Rptr. 3d 762, 766–67 (Ct. App. 2007).

133 *See* United States v. Smalley, 294 F.3d 1030, 1033 (8th Cir. 2002); United States v. Jones, 332 F.3d 688, 696 (3d Cir. 2003); United States v. Burge, 407 F.3d 1183, 1190–91 (11th Cir. 2005); United States v. Crowell, 493 F.3d 744, 750 (6th Cir. 2007); United States v. Matthews, 498 F.3d 25, 35–36 (1st Cir. 2007).

134 *Apprendi*, 530 U.S. at 488; *Smalley*, 294 F.3d at 1033 (concluding that the question is "whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exception [to *Apprendi's* general rule]."). In his dissenting opinion in *Tighe*, Justice Brunetti explained:

> In my view, the language in *Jones* stands for the basic proposition that Congress has the constitutional power to treat prior convictions as sentencing factors subject to a lesser standard of proof because the defendant presumably received all the process that was due when he was convicted of the predicate crime. For adults, this would indeed include the right to a jury trial. For juveniles, it does not.

United States v. Tighe, 266 F.3d 1187, 1200 (9th Cir. 2001) (Brunetti, J., dissenting). Even the majority opinion in *Tighe* recognized that it is the reliability of the prior conviction that makes it the exception to *Apprendi*'s rule:

> Thus, *Jones*' recognition of prior convictions as a constitutionally permissible sentencing factor was rooted in the concept that prior convictions have been, by their very nature, subject to the fundamental triumvirate of procedural protections intended to guarantee the *reliability* of criminal convictions: fair notice, reasonable doubt and the right to a jury trial.

Id. at 1193 (emphasis added).

135 *Smalley*, 294 F.3d at 1033.

136 *In re* Winship, 397 U.S. 358, 367 (1970).

137 *Apprendi*, 530 U.S. at 488.

138 Breed v. Jones, 421 U.S. 519, 541 (1975).

Opponents of using juvenile adjudications as strikes often cite the Supreme Court's language in *Jones* that discusses the right to a trial by jury.[139] For example, the Ninth Circuit held that the "exception to *Apprendi*'s general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt."[140] However, the Supreme Court in *Apprendi* only stated that the right to a trial by jury and proof beyond a reasonable doubt constitute sufficient procedural safeguards, while judge-made findings under a lesser standard of proof do not.[141] The Court did not determine the reliability of situations that are between these two poles.[142] The Eighth Circuit explained: "In other words, we think that it is incorrect to assume that it is not only sufficient but necessary that the 'fundamental triumvirate of procedural protections . . . underly an adjudication before it can qualify for the *Apprendi* exemption."[143] Furthermore, the United States Supreme Court has held that juries are not necessary in juvenile proceedings because they add little to the reliability of the verdict:

> *The imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function*, and would, contrarily, provide an attrition of the juvenile court's assumed ability to function in a unique manner. It would not remedy the defects of the system. Meager as has been the hoped-for advance in the juvenile field, the alternative would be regressive, would lose what has been gained, and would tend once again to place the juvenile squarely in the routine of the criminal process.[144]

Despite the holding in *McKeiver*, the Sixth District California Court of Appeal in *Nguyen* attempts to cast doubt on it by citing *Ballew v. Georgia*.[145] In *Ballew*, the Court discussed studies showing that the smaller the number of jurors, the less reliable the verdict.[146] The studies, published in 1963, concern reliability based on the number of *jurors* in *adult proceedings*, not the reliability of a verdict in a *bench trial* in *juvenile proceedings*.[147] *Nguyen* also attempts to distinguish *McKeiver*:

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139 *Tighe*, 266 F.3d at 1193 ("[U]nlike virtually any other consideration used to enlarge the possible penalty for an offense . . . *a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees*.") (quoting *Jones*, 526 U.S. at 249); *see also* People v. Nguyen, 62 Cal. Rptr. 3d 255, 280–81 (Ct. App. 2007) (holding "that a juvenile adjudication is not a prior conviction within the meaning of *Apprendi* because the juvenile offender does not have the right to a jury trial.").

140 *Tighe*, 266 F.3d at 1194.

141 United States v. Smalley, 294 F.3d 1030, 1032 (8th Cir. 2002) (citing *Apprendi*, 530 U.S. at 488).

142 *Id*.

143 *Id*. This so-called "triumvirate of procedural protections" is only a list of examples, and the Ninth Circuit has stated that "[t]he right to counsel [which juveniles have in juvenile proceedings] is more fundamental than the right to a jury trial." United States v. Williams, 891 F.2d 212, 215 (9th Cir. 1989).

144 McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971) (emphasis added).

145 People v. Nguyen, 62 Cal. Rptr. 3d 255, 274–75 (Ct. App. 2007) (citing Ballew v. Georgia, 435 U.S. 223, 232–33 (1978)).

146 *Ballew*, 435 U.S. at 232–33.

147 *Id*. at 233 n.11 (citing Edwin J. Thomas & Clinton F. Fink, *Effects of Group Size*, 60 PSYCHOL.

> The lesson we draw from *Ballew* and *McKeiver* is *not* that judicial fact-finding is unreliable—clearly, it is reliable enough to afford due process where juvenile *dispositions* are the outcome of the adjudicative process—but that, in the absence of a jury waiver, *only* jury fact-finding by six or more persons deliberating together is reliable enough to afford due process in non-petty criminal cases, where the outcome of the adjudicative process is imprisonment.[148]

However, because judicial fact-finding is sufficiently reliable to deprive juveniles of their physical liberty, it is also sufficiently reliable to enhance an adult's sentence so long as it was accompanied by the procedural protections due in a juvenile proceeding.[149]

Nguyen next declares, "[w]henever the length of a sentence imposed on an adult offender is involved, the case is by definition criminal, and it implicates the Sixth Amendment's right to a jury trial."[150] The court further states that "a criminal sentence must reflect the judgment of a jury of at least six members, even if it is a prior conviction, unless that jury is waived."[151] Other California courts of appeal disagree with this assertion and argue that the Three Strikes Law does not convert a juvenile adjudication into an adult criminal conviction: "The three strikes law's use of juvenile adjudications affects only the length of the sentence imposed on an adult offender, not the finding of guilt in the adult court nor the adjudication process in the juvenile court."[152] Moreover, "[t]he [United States Supreme] Court specifically has recognized by dictum that a jury is not a necessary part even of every criminal process that is fair and equitable."[153]

Not only is judicial fact-finding generally reliable, it is accompanied by a wide range of other procedural protections in a juvenile proceeding, including a burden of proof of guilt beyond a reasonable doubt. Therefore, juvenile adjudications are sufficiently reliable for *Apprendi* purposes.

BULL. 371, 373 (1963)).

148 *Nguyen*, 62 Cal. Rptr. 3d at 275.

149 The Ninth Circuit also came to this conclusion with regard to enhancing a sentence *within* the statutory limits. United States v. Williams, 891 F.2d 212, 215 (9th Cir. 1989) ("If it does not violate due process for a juvenile to be deprived of his or her liberty without a jury trial, we fail to find a violation of due process when a later deprivation of liberty is enhanced due to this juvenile adjudication.").

150 *Nguyen*, 62 Cal. Rptr. 3d at 275. The court continued:

> When the Three Strikes law uses the fact of a prior juvenile adjudication to enhance a sentence, it is doing so for the purpose of enhancing an adult defendant's sentence, and it is bound by the rules that govern criminal cases. . . . By letting a juvenile adjudication "stand in" for "evidence of past criminal conduct" the law is relying on the judgment of a fact finder that is constitutionally unacceptable in a criminal case in the absence of the defendant's waiver.

Id.

151 *Id*. at 276. Of course, judges issue sentences every day based on facts not tried before a jury. This includes the use of juvenile adjudications to enhance a sentence *within* the statutory limits. *See supra* note 10. Whatever the court means by this statement, California law allows for a jury to decide if the accused actually suffered the prior conviction or juvenile adjudication at all. CAL. PENAL CODE § 1025; *see* People v. Bowden, 125 Cal. Rptr. 2d 513, 517 (Ct. App. 2002) ("[T]he defendant has a statutory right to a jury trial, at least on the issue whether the defendant suffered the prior conviction").

152 People v. Fowler, 84 Cal. Rptr. 2d 874, 877 (Ct. App. 1999).

153 McKeiver v. Pennsylvania, 403 U.S. 528, 547 (citing Duncan v. Louisiana, 391 U.S. 145, 149–50 n.14, 158 (1968)).

C. The Use of Juvenile Adjudications as Strikes has a Positive Effect on the Juvenile Justice System

The use of juvenile adjudications as strikes provides rehabilitation through a deterrent effect and results in better representation of the juvenile's interests through more aggressive representation. The goal of the juvenile justice system is rehabilitation, rather than punishment.[154] The use of juvenile adjudications as strikes does not frustrate that purpose; rather, it promotes it. As discussed previously, enhancing the sentence of the current offense because of a prior offense does not result in an increased punishment for the former offense, but only an increased punishment for the current offense.[155] Therefore, using juvenile adjudications as strikes will not result in a prospective increase in punishment for the juvenile adjudication. The focus of the juvenile justice system will not shift to punishment. In fact, the juvenile justice system's focus on rehabilitation will be promoted through deterrence. When a juvenile is aware that his juvenile adjudication could be used as a strike in a subsequent adult proceeding, the juvenile will have a very good reason to avoid criminal activity in the future. This is a goal of the Three Strikes Law—not just isolation of criminals from society, but deterring people from committing violent felonies in the first place.[156]

Because the use of a juvenile adjudication as a strike provides a deterrent effect and an incentive to rehabilitate, it follows that adequate counsel must be available to inform a juvenile of the ramifications of being found a ward of the court. Juveniles have the right to counsel and the right to be notified that they may have counsel appointed for them if they cannot afford counsel.[157] However, there is a problem with under-representation of juveniles in the juvenile justice system.[158] This raises another argument against using juvenile adjudications to enhance an adult sentence.[159] However, while juvenile adjudications resulting without the aid of counsel or valid waiver of that right cannot be used as strikes, the same cannot be said for adjudications where the juvenile was adequately represented.

154 *In re* Charles C., 284 Cal. Rptr. 4, 5 (Ct. App. 1991) ("While the aim of adult incarceration is punishment, a juvenile commitment is geared toward treatment and rehabilitation with the state providing substitute parental care for wayward youths.").

155 Almendarez-Torres v. United States, 523 U.S. 224, 243 (1998).

156 *See supra* note 14 and accompanying text.

157 *In re* Gault, 387 U.S. 1, 41 (1967).

158 Less than fifty percent of juveniles appearing in juvenile court are represented by counsel. Nicole M. Romine, *A Compromised Solution: Balancing the Constitutional Consequences and the Practical Benefits of Using Juvenile Adjudications for Sentence Enhancement Purposes*, 45 WASHBURN L.J. 113, 130 (2005); Richard E. Redding, *Using Juvenile Adjudications for Sentence Enhancement Under the Federal Sentencing Guidelines: Is It Sound Policy?*, 10 VA. J. SOC. POL'Y & L. 231, 247 (2002). Redding also discusses studies that show that juveniles are frequently unable to have effective counsel because of the drain on public defender resources. *Id*. at 250.

159 Romine, *supra* note 158, at 131. The United States Supreme Court has held that it is unconstitutional to use a felony conviction obtained without the benefit of counsel or a valid waiver of that right to enhance a subsequent conviction. Burgett v. Texas, 389 U.S. 109, 114–16 (1967).

This discussion introduces another important impact of the use of juvenile adjudications as strikes on the juvenile justice system—more aggressive representation.[160] Lawyers acting as counsel in the juvenile justice system tend to "act more as a guardian ad litem than a zealous advocate."[161] These attorneys may believe that it is in the best interest of the child to be deemed a ward of the court and, because the adjudications seemingly have little consequence after becoming an adult, that aggressive representation is unnecessary.[162] This is not the case in a system, such as California's, where juvenile adjudications can have significant importance in adult criminal proceedings. Therefore, lawyers will be more likely to raise more objections, bring more pretrial motions, and appeal more frequently.[163]

Is this a bad thing? Some say it is, arguing that aggressive representation will result in clogged dockets and some guilty juveniles being acquitted.[164] Some might argue that aggressive representation may also eventually turn the juvenile justice system into a shadow of its adult counterpart. However, the benefits of aggressive representation far outweigh any possible negative consequences. The interests of the child will be represented zealously and weighed against the interests of the state. Aggressive representation on behalf of the child will make it more likely that justice will be done.

What would happen if the use of juvenile adjudications as strikes was prohibited? Barring the use of juvenile adjudications as strikes would swamp California courts with resentencing claims, resulting in a waste of judicial resources.[165] Barring the use of juvenile adjudications as strikes would also result in "undeserved lighter sentences" for repeat offenders.[166] Recidivism is recidivism at whatever age. If the California Supreme Court affirms *Nguyen*, the goals of the Three Strikes Law, approved by the people, will be frustrated. Repeat offenders will receive lighter sentences than they deserve, and juveniles will not be deterred from committing subsequent crimes.

CONCLUSION AND OUTLOOK FOR THE FUTURE

Until the summer of 2007, California appellate courts were unanimous in their approval of the use of prior juvenile adjudications as strikes. In *Nguyen*, one of those courts held that prior juvenile adjudications cannot be used as strikes because there is no right to a trial by jury in juvenile proceedings. The court argued that this did not come within the exception to *Apprendi*'s general rule: "*Other than the fact of a prior conviction*, any fact

160 Marrus, *supra* note 127, at 1354.
161 *Id*.
162 *Id*.
163 *Id*. at 1354–55.
164 *Id*. at 1355.
165 *Id*. at 1348.
166 *Id*.

that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[167] The decision has been appealed, and the California Supreme Court has granted review.[168]

The California Supreme Court should reverse the *Nguyen* decision and restore uniformity and predictability to the juvenile and criminal justice systems. Prior juvenile adjudications have sufficient procedural protections to reliably indicate recidivism, a traditional sentencing factor. Furthermore, using prior juvenile adjudications as strikes promotes the rehabilitative purpose of the juvenile justice system and the purpose of the Three Strikes Law to keep society safe.

This issue's importance extends beyond California's borders. In *Nguyen*, the court repeatedly indicates that it sees a rising tide of courts and commentators combining to argue against the use of juvenile adjudications to extend a sentence in an adult proceeding beyond statutory limits. Because California's Three Strikes Law is a well-known statute that allows for sentence enhancement beyond the statutory maximum, the ruling of the California Supreme Court in *Nguyen* impact this issue nationwide.

167 Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

168 People v. Nguyen, 62 Cal. Rptr. 3d 255, *review granted*, 169 P.3d 882 (Cal. 2007).

Nothing is Sacred: Why Georgia and California Cannot Bar Contractual Jury Waivers in Federal Court

Brian S. Thomley[*]

INTRODUCTION

Federal courts have long recognized that the right to a civil jury trial may be waived in advance by private agreement.[1] But contractual jury waivers are now unenforceable under Georgia and California law.[2] No one has explored whether the *Erie* doctrine requires federal courts exercising diversity jurisdiction in Georgia and California to bar these waivers under Georgia or California law. This Comment proposes that federal courts must continue to enforce these waivers under federal law.

Part I compares federal law on contractual jury waivers with the laws of the states. While federal statutes do not expressly allow these waivers, federal courts enforce them because the U.S. Supreme Court and the Federal Arbitration Act (FAA) have endosed similar pre-dispute agreements.[3] Georgia and California courts, unlike the courts of other states, bar these waivers because they are not expressly allowed by statute. But these states' legislatures do not necessarily prohibit these waivers.

Part II compares federal interests in enforcing contractual jury waivers with Georgia's and California's interests in barring them. Federal courts have an interest in upholding agreements that reduce the expense and delay of litigation for parties and courts. Georgia and California, however, have an interest in preventing parties from unfairly bargaining away the constitutional right to a jury trial.

Part III traces the U.S. Supreme Court's development of the constitutional doctrine from *Erie Railroad Co. v. Tompkins*,[4] which provides that federal courts sitting in diversity must apply the 'substantive'

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1 *See* Debra T. Landis, *Contractual Jury Trial Waivers in Federal Civil Cases*, 92 A.L.R. FED. 688, 691 (1989); Jay M. Zitter, *Contractual Jury Trial Waivers in State Civil Cases*, 42 A.L.R.5TH 53, 53 (1996).

2 Bank S., N.A. v. Howard, 444 S.E.2d 799, 800 (Ga. 1994); Grafton Partners, L.P. v. Superior Court, 116 P.3d 479, 492 (Cal. 2005).

3 9 U.S.C. §§ 1–16 (2000).

4 304 U.S. 64 (1938).

law of the state. As for state 'procedural' rules, two alternative tests have evolved. The 'guided' *Erie* test generally requires the application of a federal statute or Federal Rule of Civil Procedure that covers the issue. If no federal statute or Rule applies, the 'unguided' *Erie* test requires the application of state law if applying federal law would substantially affect the outcome of litigation, unless there are countervailing federal interests.

Part IV proposes that the *Erie* doctrine requires federal courts to continue to enforce contractual jury waivers under federal law. The *Erie* doctrine applies because there is a conflict between federal and state law. In *Simler v. Conner*, the U.S. Supreme Court commanded that federal law govern the Seventh Amendment right to a jury trial. Alternatively, this part proposes that the FAA would control, because it satisfies both prongs of a 'guided' *Erie* test. First, the FAA is broad enough to cover the issue by making arbitration agreements enforceable, because contractual jury waivers are implicit parts of such agreements. Second, the FAA is a valid exercise of Congress' constitutional power to regulate procedure.

Alternatively, Part IV proposes that federal common law would control under an 'unguided' *Erie* test. Under the U.S. Supreme Court's *Erie* jurisprudence, the 'knowing and voluntary' standard satisfies the three prongs of this test. First, whether a judge or jury decides a dispute is a matter of procedure. Second, applying federal law would not substantially affect the outcome of litigation. Third, even if the application of federal law were outcome-determinative, federal interests in enforcing agreements that make litigation more efficient outweigh Georgia's and California's interests in protecting the right to a jury.

I. COMPARISON OF FEDERAL AND STATE LAW ON CONTRACTUAL JURY WAIVERS

A. The Federal Constitution and Statutes Allow Contractual Jury Waivers

The Seventh Amendment to the U.S. Constitution provides that, in civil cases in federal courts, "the right of trial by jury shall be preserved."[5] This provision says nothing about whether it may be waived. But the U.S. Supreme Court, in *Bank of Columbia v. Okely*, said that this provision requires federal courts to preserve the *right* to a jury, not the jury itself; and "the benefit of [this right] may, therefore, be relinquished."[6] Thus, the Seventh Amendment right to a jury may be waived.

Congress has expressly recognized that parties may also waive their rights to a jury during litigation. An 1865 act recognized waiver by written stipulation to the clerk of court.[7] The Federal Rules of Civil Procedure, promulgated by the U.S. Supreme Court pursuant to legislative authority,

5 *See* U.S. CONST. amend. VII.

6 17 U.S. (4 Wheat.) 235, 244 (1819).

incorporate the 1865 act by recognizing waiver by express stipulation.[8] The Rules also allow waiver by failure to file a timely request for a jury trial or by raising equitable issues that are not entitled to a jury trial.[9]

Parties may also waive their rights to a jury *prior to* litigation. In 1925, the FAA made arbitration agreements as enforceable as any other contract.[10] Parties that agree to submit their dispute to an arbitrator necessarily waive their rights in advance to submit that dispute to a jury.[11] One may argue that the right to a jury only attaches once the parties have submitted their dispute to a court of law. But the legislative history of the FAA suggests that an arbitration agreement implicates the right to a jury by stating that "[t]he constitutional right to a jury trial is adequately safeguarded" in such agreements.[12]

Congress has not expressly recognized pre-litigation jury waivers outside of arbitration agreements. But the U.S. Supreme Court commands federal courts to uphold parties' rights to enter into pre-dispute agreements that do not clearly violate law or public policy.[13] Thus, federal courts must enforce valid contractual jury waivers unless Congress has expressly stated or necessarily implied that they violate law or public policy.

Congress has never expressly stated or necessarily implied that contractual jury waivers are contrary to law. In *Kearney v. Case*, the U.S. Supreme Court interpreted the 1865 act that allowed jury trial waiver by written stipulation to the clerk of court.[14] The Court observed that the statute was ambiguous as to whether it excluded other methods of waiver.[15] The Court concluded that, "both by express agreement in open court, and by implied consent, the right to a jury trial could be waived."[16] Thus, the Court affirmed a decision in which it had allowed waiver by private agreement in advance of litigation.[17] The FAA, likewise, does not indicate that arbitration is the only method of waiving the jury prior to litigation.

Also, contractual jury waivers are not contrary to public policy. Rather, the FAA declares a strong public policy favoring them. A primary purpose of the FAA was to support agreements that reduce the expense and

7 Act of Mar. 3, 1865, ch. 86, § 4, 13 Stat. 501 (current version at FED. R. CIV. P. 39).

8 FED. R. CIV. P. 39(a) (2008).

9 *Id*. 38(d), 39(a).

10 United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16 (2000)).

11 *E.g*., L & R Realty v. Conn. Nat'l Bank, 715 A.2d 748, 753 (Conn. 1998) ("[J]ury trial waivers entered into in advance of litigation are similar to arbitration agreements in that both involve the relinquishment of the right to have a jury decide the facts of the case.").

12 S. REP. NO. 68-536, at 3 (1924) (emphasis added).

13 *See infra* Part I.B.

14 79 U.S. (12 Wall.) 275, 282 (1871).

15 *Id*.

16 *Id*.

17 *Id*. at 281 (citing Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235 (1819)).

delay of litigation.[18] Contractual jury waivers are implicit parts of arbitration agreements and serve the same interests.[19] Also, an arbitration agreement "involves a greater compromise of procedural protections" than a contractual jury waiver.[20] Thus, "[p]ublic policy that permits parties to waive trial altogether surely does not forbid waiver of trial by jury."[21]

B. The U.S. Supreme Court Allows Contractual Jury Waivers

In 1819, the U.S. Supreme Court, in *Bank of Columbia v. Okely*, enforced a contractual jury waiver.[22] In *Okely*, the defendant made a note negotiable at a bank whose charter provided for collection of debts by a summary proceeding without a jury.[23] The trial court held that this waiver was void under the Seventh Amendment.[24] The U.S. Supreme Court reversed, holding that the waiver was valid and enforceable.[25] The Court reasoned that the defendant, "in consideration of the credit given him . . . voluntarily relinquished his claims to the ordinary administration of justice" by his "submission to the law of the contract."[26]

In 1871, the U.S. Supreme Court affirmed *Okely* in *Kearney v. Case*.[27] Thus, consistent with the Court's view that courts must enforce agreements that do not clearly violate law or public policy,[28] pre-dispute agreements are enforceable under federal law unless Congress has expressly stated or necessarily implied that they are prohibited.

In 1874, the U.S. Supreme Court retreated from this view. In *Home Insurance Co. v. Morse*, the Supreme Court of Wisconsin upheld, under

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18 *See infra* Part II.A.

19 *See id*.

20 *See* Telum, Inc. v. E.F. Hutton Credit Corp., 859 F.2d 835, 838 (10th Cir. 1988).

21 *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 132 (Tex. 2004). The Texas Supreme Court explained why jury waivers are preferable to arbitration agreements:

> By agreeing to arbitration, parties waive not only their right to trial by jury but their right to appeal, whereas by agreeing to waive only the former right, they take advantage of the reduced expense and delay of a bench trial, avoid the expense of arbitration, and retain their right to appeal. The parties obtain dispute resolution of their own choosing in a manner already afforded to litigants in their courts. Their rights, and the orderly development of the law, are further protected by appeal. And even if the option appeals only to a few, some of the tide away from the civil justice system to alternate dispute resolution is stemmed.

Id.

22 17 U.S. (4 Wheat.) 235 (1819), *construed in* Rodenbur v. Kaufman, 320 F.2d 679, 684 (D.C. Cir. 1963) ("[P]arties, at least in situations where summary procedure is clearly to be desired, may in advance contract to waive a trial by jury."), *and* Smith-Johnson Motor Corp. v. Hoffman Motors Corp., 411 F. Supp. 670, 676–77 (E.D. Va. 1975) ("It seems clear that contractual provisions waiving trial by jury in civil actions are neither illegal nor contrary to public policy.").

23 *Id*. at 241.

24 *Id*. at 237–38.

25 *Id*. at 246.

26 *Id*. at 243.

27 *See supra* note 17.

28 *See* Baltimore & Oh. Sw. Ry. Co. v. Voigt, 176 U.S. 498, 505 (1900).

Okely, an agreement adopted pursuant to a state statute that waived a foreign insurance company's rights to remove a lawsuit to federal court.[29] The U.S. Supreme Court reversed, holding that the agreement was "illegal and void."[30] The Court added, in dicta: "There is no sound principle upon which [arbitration agreements and contractual jury waivers] can be specifically enforced."[31] The Court explained:

> A man may not barter away his life or his freedom, or his substantial rights. . . . In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.[32]

Under the reasoning of *Morse*, the rules of dispute resolution are fixed by Congress and federal courts have no power to allow parties to alter them by private agreement in advance of litigation.[33] Thus, pre-dispute agreements were considered illegal and against public policy unless expressly authorized by statute.

The Court upheld *Morse* into the early twentieth century.[34] The Court did not embrace arbitration agreements until Congress made them enforceable in 1925.[35] Congress intended the FAA to reverse courts' refusals to enforce such agreements.[36] Congress also intended that such agreements were to be as enforceable as any other contract.[37] Thus, the Court has since enforced them if valid under ordinary contract law.[38]

In the late twentieth century, however, the Court rejected *Morse* by enforcing pre-dispute agreements without legislative authority.[39] In *National Equipment Rental*, *Ltd*. *v*. *Szukhent*, the Court enforced an agreement to appoint an agent for service of process under ordinary

29 87 U.S. (20 Wall.) 445, 447, 457 (1874), *abrogated in* Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

30 *Id*. at 451, 458.

31 *Id*. at 450.

32 *Id*. at 451.

33 David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1093 (2002).

34 *Id*. at 1094–95.

35 *Id*.

36 Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270 (1995).

37 *Id*. at 271; 9 U.S.C. § 2 (2000) ("A written provision . . . to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

38 *See* Stephen J. Ware, *Arbitration Clauses*, *Jury-Waiver Clauses*, *and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 170–72 (2004).

39 Taylor & Cliffe, *supra* note 33, at 1095.

principles of agency.[40] In *Bremen v. Zapata Off-Shore Co.*, the Court held that a forum selection clause was presumptively enforceable if valid under contract law.[41] The Court in *Bremen* renounced a broad reading of *Morse* and explained that such clauses should be enforceable because they encourage freedom of contract and stimulate trade and commerce.[42]

The U.S. Supreme Court has not squarely held that contractual jury waivers are enforceable. But *Szukhent* and *Bremen* have abrogated the view in *Morse* that these waivers are contrary to law and public policy. These decisions also herald a modern era in which parties have virtually unlimited rights to control their disputes. G. Richard Shell argues that "the modern Court has shown more fidelity to an absolute principle of freedom to contract than the Courts that preceded it."[43]

C. Federal Courts Enforce Contractual Jury Waivers if they were 'Knowing and Voluntary'

In the late twentieth century, the lower federal courts began to enforce contractual jury waivers.[44] Federal courts recognize that "contractual provisions waiving trial by jury in civil actions are neither illegal nor contrary to public policy."[45] These courts analogize to the U.S. Supreme Court's liberal enforcement of contractual jury waivers and other pre-dispute agreements in *Okely*, *Szukhent* and *Bremen*.[46]

Federal courts enforce most pre-dispute agreements under state contract law.[47] But the U.S. Supreme Court commands that federal law apply to contractual jury waivers. In *Simler v. Conner*, the federal court of appeals in a diversity action denied the plaintiff's request for a jury trial because state law characterized his claims for relief as equitable.[48] The U.S. Supreme Court reversed, holding that federal law controlled the characterization of his claims.[49] The Court commanded that "the right to a jury trial in the federal courts is to be determined as a matter of federal law."[50] The Court explained that "[o]nly through a holding that the jury trial right is to be determined according to federal law can the uniformity in

40 375 U.S. 311, 316 (1964).

41 407 U.S. 1, 10 (1972), *superseded by statute*, 28 U.S.C. § 1404(a) (2008).

42 *Id*. at 9–10 & n.10.

43 G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 433, 433 (1993). *See generally id*. at 452–62 (discussing the Court's presumptive enforcement of pre-dispute agreements under cases such as *Szukhent* and *Bremen*).

44 *See* Landis, *supra* note 1, at 691.

45 *E.g.*, Smith-Johnson Motor Corp. v. Hoffman Motors Corp., 411 F. Supp. 670, 677 (E.D. Va. 1975).

46 *See*, *e.g.*, *id*. at 675–77.

47 *See* Ware, *supra* note 38, at 181–97.

48 372 U.S. 221, 221 (1963).

49 *Id*. at 222.

50 *Id*.

its exercise which is demanded by the Seventh Amendment be achieved."[51]

In a criminal case, "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[52] In *D.H. Overmyer Co. of Ohio v. Frick Co.*, the U.S. Supreme Court enforced a waiver of due process rights to notice and a hearing in a civil case because it was "voluntary, knowing, and intelligently made."[53] Thus, after *Overmyer*, federal courts "have overwhelmingly applied the knowing and voluntary standard" to determine whether the Seventh Amendment may be waived.[54] This standard is a constitutional one that is separate from, and higher than, contract law.[55]

To determine whether a waiver was 'knowing and voluntary,' a court examines (1) whether the waiver was conspicuous, (2) whether it was negotiable, (3) the relative sophistication of the parties, and (4) their relative bargaining power.[56] The circuits are split as to which party has the burden of proving whether a contractual jury waiver was knowing and voluntary.[57] Most circuits place the burden on the party seeking to *enforce* the waiver because, "as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver."[58] The Sixth Circuit places the burden on the party seeking to *avoid* the waiver, applying a "presumption in favor of validity in the interest of liberty of contract."[59]

D. The Courts of Most States Enforce Contractual Jury Waivers

States are not required to provide the right to a civil jury trial, because the Seventh Amendment has not been incorporated into the Fourteenth Amendment and applied to the states.[60] Nevertheless, every state provides for the right, either by constitution or statute.[61]

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51 *Id.*

52 Brady v. United States, 397 U.S. 742, 748 (1970).

53 *See* 405 U.S. 174, 185–86 (1972).

54 K.M.C. Co. v. Irving Trust Co., 757 F.2d 752, 756 (6th Cir. 1985). Scholars disagree as to the appropriate standard applicable to such waivers. *E.g.*, *compare* Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2000) (knowing and voluntary) *with* Ware, *supra* note 38 (contract law).

55 *See K.M.C.*, 757 F.2d at 755–56 (citing *Overmyer*, 405 U.S. at 183).

56 RDO Fin. Servs. Co. v. Powell, 191 F. Supp. 2d 811, 813–14 (N.D. Tex. 2002). *See generally* Sternlight, *supra* note 54, at 677–95 (2000) (discussing how courts apply the factors under the knowing and voluntary standard).

57 *Powell*, 191 F. Supp. 2d at 813. *See generally* Joel Andersen, *The Indulgence of Reasonable Presumptions: Federal Court Contractual Civil Jury Trial Waivers*, 102 MICH. L. REV. 104 (2003).

58 *E.g.*, Nat'l Equip. Rental, Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977) (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937)).

59 *K.M.C.*, 757 F.2d at 758 (quoting 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 38.46, at 38-400 (2d ed. 1984)).

60 *See* Minn. & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 217 (1916).

61 *Powell*, 191 F. Supp. 2d at 812 n.4.

In the nineteenth century, state courts, like the U.S. Supreme Court in *Morse*, did not enforce contractual jury waivers unless authorized by statute. For example, the Supreme Court of Massachusetts, in *Nute v. Hamilton Mutual Insurance Co.*, held that a forum selection clause in an insurance policy was unenforceable as a matter of law.[62] The court said, in dicta, that the right to a jury may not be waived by private agreement.[63] The court reasoned that the legislature cannot delegate to courts and parties the power to alter the rules of dispute resolution because they "affect the remedy, and are created and regulated by law."[64] The court also said that private agreements that alter these rules in advance were against public policy by interfering with the convenience of having uniform rules.[65]

In the twentieth century, however, state courts rejected the view in *Nute* and began to enforce contractual jury waivers without legislative authority.[66] As one court stated, these waivers serve the "public policy favoring freedom of contract and the efficient resolution of disputes."[67] The states apply different standards to these waivers. Some states enforce them under contract law, while others apply the knowing and voluntary standard.[68] Contractual jury waivers are unenforceable in Montana by statute and in Oklahoma by constitutional provision.[69] Georgia and California have barred them by judicial decision.[70]

E. The Georgia and California Supreme Courts Bar Contractual Jury Waivers

1. *Bank South, N.A. v. Howard*

In 1994, the Georgia Supreme Court barred contractual jury waivers. In *Bank South, N.A. v. Howard*, a bank lender suing a guarantor on a debt sought to enforce a jury waiver provision in the guaranty.[71] The trial court struck the guarantor's request for a jury trial.[72] The court of appeals

62 *See* 72 Mass. (6 Gray) 174, 176, 185 (1856), *abrogated by* W.R. Grace & Co. v. Hartford Accident & Indem. Co., 555 N.E.2d 214 (Mass. 1990).

63 *Id.* at 181.

64 *See id.* at 180.

65 *Id.* at 184.

66 *See* Zitter, *supra* note 1.

67 L & R Realty v. Conn. Nat'l Bank, 715 A.2d 748, 753 (Conn. 1998).

68 *E.g.*, *compare id.* at 755 (applying ordinary contract law) *with In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 134 (Tex. 2004) (applying the knowing and voluntary standard).

69 *See* MONT. CODE ANN. § 28-2-708 (2007) ("Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals or which limits the time within which he may thus enforce his rights is void."); OKLA. CONST. art. XXIII, § 8 ("Any provision of a contract, express or implied, made by any person, by which any of the benefits of this Constitution is sought to be waived, shall be null and void.").

70 *See* Grafton Partners, L.P. v. Superior Court, 116 P.3d 479, 493 (Cal. 2005) (Chin, J., concurring).

71 Bank S., N.A. v. Howard, 444 S.E.2d 799, 799 (Ga. 1994).

72 *Id.*

reversed, holding that the waiver was unenforceable because it was not knowing and voluntary.[73] The Georgia Supreme Court, affirming, ruled that contractual jury waivers are unenforceable.[74]

Article I, section 1 of the Georgia Constitution provides: "The right to trial by jury shall remain inviolate, except that the court shall render judgment without the verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party."[75] A Georgia statute allows waiver by oral or written stipulation to the court.[76] The *Bank South* court stated that, "[b]y their terms, both the statute and the Constitution plainly contemplate the pendency of litigation at the time of the waiver."[77] Thus, methods of waiver expressly authorized by the legislature are exclusive.[78] The court distinguished contractual jury waivers from arbitration agreements because the latter were expressly authorized by statute.[79] The court compared contractual jury waivers to confessions of judgment, noting that the latter are only allowed during pending litigation.[80] The court also observed "the magnitude of the rights involved and the probability of abuse that exists in both situations."[81]

Justice Sears-Collins, dissenting, argued that contractual jury waivers should be enforceable.[82] She noted that the constitutional and statutory provisions "do not provide that their methods by which the right to a jury trial can be waived are exclusive."[83] She argued that any ambiguity should be resolved in favor of enforceability, because parties may enter into agreements unless the legislature expresses or necessarily implies that the agreement violates law or public policy.[84] She pointed out that these waivers "economize litigation for the parties and for an already overburdened court system."[85] She also argued that the parties that use these clauses are sophisticated enough to understand their consequences.[86] She criticized the majority's analogy to a confession of judgment, because jury waivers forfeit only the right to a jury, but the latter "forfeits a panoply of constitutional and statutory rights, including the right to any trial whatsoever."[87] *Bank South* has generated much criticism.[88]

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73 *Id*.
74 *Id*. at 800.
75 GA. CONST. art. I, § 1, ¶ XI.
76 GA. STAT. § 9-11-39(a) (2008).
77 *Bank South*, 444 S.E.2d at 800.
78 *See id*.
79 *Id*. at n.5.
80 *Id*.
81 *Id*.
82 *Id*. at 801 (Sears-Collins, J., dissenting).
83 *Id*.
84 *Id*.
85 *Id*.
86 *Id*.
87 *Id*.
88 *See* RDO Fin. Servs. Co. v. Powell, 191 F. Supp. 2d 811, 812 n.4 (N.D. Tex. 2002) (collecting

2. *Grafton Partners, L.P. v. Superior Court*

In 2005, the California Supreme Court followed the Georgia Supreme Court and barred contractual jury waivers. In *Grafton Partners, L.P. v. Superior Court*, a partnership sued the accounting firm, Price WaterhouseCoopers, L.L.P., for misrepresentation and other causes of action after the partnership hired the firm to audit its accounts.[89] The trial court enforced a jury waiver provision in the retainer agreement.[90] The California Supreme Court, however, affirmed the court of appeal's ruling that contractual jury waivers are unenforceable.[91]

Article I, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all . . . . In a civil cause a jury may be waived by the consent of the parties expressed *as prescribed by statute*."[92] The corresponding provision in the 1849 constitution read: "[A] jury trial may be waived by the parties in all civil cases in the manner to be *prescribed by law*."[93] In *Exline v. Smith*, the California Supreme Court found that, under this provision only the legislature could determine how a jury may be waived.[94] *Exline* invalidated an 1851 statute that allowed California courts to prescribe their own methods.[95] The *Exline* court pontificated that, "[t]he right of trial by jury is too sacred in its character to be frittered away or committed to the uncontrolled caprice of every judge or magistrate in the State."[96]

In *Grafton*, the California Supreme Court found that the present constitution supported *Exline*'s interpretation of the former one.[97] The constitutional convention of 1878-1879 considered proposals that deleted the "prescribed by law" language and simply allowed parties to waive a trial by jury.[98] These proposals were voted down without explanation.[99] The *Grafton* court reasoned that the convention, by reenacting this phrase in substantially similar language, incorporated *Exline*'s interpretation.[100] Thus, the court concluded, the California Constitution provides that only the legislature may determine how a jury may be waived.[101]

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sources).

89 Grafton Partners, L.P. v. Superior Court, 116 P.3d 479, 479 (Cal. 2005).

90 *Id*. at 481.

91 *Id*. at 492.

92 CAL. CONST. art. I, § 16 (emphasis added).

93 CAL. CONST. of 1849, art. I, § 3 (emphasis added).

94 5 Cal. 112, 112–13 (1855).

95 *Id*. at 112 (citing California Civil Practice Act, ch. 5, § 179, Stat. 1851, 78).

96 *Id*. at 113.

97 Grafton Partners, L.P. v. Superior Court, 116 P.3d 479, 483 (Cal. 2005).

98 1 E.B. WILLIS & P.K. STOCKTON, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA, 1878–1879, 253, 255, 303–05 (1880–1881). The members lauded these proposals as "safe for the ends of justice and the preservation of private rights and the public interest" and a way of reducing expensive jury trials. *See id*.

99 *See id*.

100 *Grafton*, 116 P.3d at 479.

101 *Id*. at 482.

The court found that Code of Civil Procedure section 631 supported this conclusion.[102] The statute reads: "In civil cases, a jury may *only* be waived" in six specified ways, all of which occur during litigation.[103] The court conceded that the statute was "ambiguous concerning the validity of waivers entered into prior to the emergence of a legal dispute."[104] But the court interpreted the statute strictly to preserve the right to a jury trial.[105] The court opined that this provision "strongly suggests that waiver of the right to jury trial must occur subsequent to the initiation of a civil lawsuit."[106] Thus, the court concluded, "it is for the Legislature, not this court, to determine whether, and under what circumstances, a pre-dispute waiver of jury trial will be enforceable in this state."[107]

The court conceded that contractual jury waivers support public policies by conserving judicial resources and promoting freedom of contract.[108] The court also acknowledged that other states offer extraordinary protections for the right to a jury.[109] But the court was "reluctant" to substitute its own judgment for the legislature's as to whether and in what circumstances these waivers should be enforceable.[110] The court defended the legislature's decision to allow arbitration agreements but to bar express jury waivers.[111] The court explained that public policy supports preserving jury trials only once litigation has begun.[112] The court also suggested that arbitration agreements conserve more judicial resources.[113] The court blithely dismissed the idea that its decision would increase the number of arbitrations or jury trials.[114]

Justice Chin, concurring "reluctantly," urged the California Legislature to make contractual jury waivers enforceable.[115] He found "little sense" for the legislature to allow waiver by arbitration agreements but to bar contractual waivers.[116] The majority's decision "should not sound the death knell" for these waivers because, "[w]hile the public policy favoring jury trials subjects jury waiver agreements to strict construction, the application of that policy will not void every such agreement."[117] He observed that other states enforce these waivers because there is "no

102 *Id*. at 485.
103 CAL. CIV. PROC. CODE § 631(a) & (d) (West 2008) (emphasis added).
104 *Grafton*, 116 P.3d at 486.
105 *Id*. at 485.
106 *Id*.
107 *Id*. at 492.
108 *Id*. at 490–91.
109 *Id*. at 491.
110 *Id*. at 491–92.
111 *Id*. at 490.
112 *Id*.
113 *Id*.
114 *Id*.
115 *Id*. at 493 (Chin, J., concurring).
116 *Id*.
117 *Id*.

abstract public policy against [them]."[118] He noted that these waivers are an "attractive middle ground" between a jury trial and arbitration by minimizing excessive jury awards while better protecting the parties' rights.[119] *Grafton* has, like *Bank South*, generated much criticism.[120]

F. The Georgia and California Constitutions and Statutes do not Necessarily Prohibit Contractual Jury Waivers

The U.S. Supreme Court set forth the principle, which Justice Sears-Collins recognized in her dissent in *Bank South*, that pre-dispute agreements are enforceable unless they clearly violate law or public policy.[121] Thus, contractual jury waivers are enforceable in Georgia and California unless the relevant constitutional and statutory provisions clearly express or necessarily imply otherwise. Any ambiguity must be interpreted in favor of enforceability to uphold freedom of contract.

The Georgia constitutional and statutory provisions merely state methods to waive a jury. Thus, these provisions do not expressly state or necessarily imply that they prescribe the only methods.

The California constitutional provision states that a jury may be waived as provided by statute. This provision, however, does not mean that a jury may *only* be waived by statute. Similarly, a provision of the Texas Constitution reads: "The Legislature shall pass such laws as may be needed to regulate [the right to a jury]."[122] But the Texas Supreme Court, *In re Prudential Insurance Co. of America* held that a contractual jury trial waiver was enforceable because "[n]othing in the constitutional provisions themselves suggests that parties are powerless to waive trial by jury under any other circumstances, before or after suit is filed."[123]

California's constitutional history does not clearly indicate that the means of waiver are reserved to the legislature alone. The earlier constitutional provision did not expressly state or necessarily imply that a jury may *only* be waived as "prescribed by law." The debates shed no light on whether the framers rejected proposals to delete this language to reserve the methods of waiver to the legislature or whether they intended to incorporate the rule from *Exline*. At best, this history merely *suggests* that only the California Legislature may determine methods of waiver.

118 *Id*. at 493–94 (quoting Okura & Co. v. Careau Group, 783 F. Supp. 482, 488 (C.D. Cal. 1991)).

119 *Id*. at 493 (internal quotations omitted).

120 Julia B. Strickland & Stephen J. Newman, *Shock Waives*, 29 LOS ANGELES LAWYER, Mar. 2006, at 22 (arguing that Grafton is a "paternalistic" decision that will reduce certainty in the marketplace); Carl Grumer & *Thomas* McMorrow, *A Call for Contractual Jury Waivers in California*, 28 LOS ANGELES LAWYER, Dec. 2005, at 44 (arguing that Justice Chin's call "deserves strong and widespread support" because *Grafton* will harm the state's economy by increasing litigation costs).

121 *See supra* Part I.B.

122 TEX. CONST. art. I, § 15.

123 148 S.W.3d 124, 130 (Tex. 2004).

California Code of Civil Procedure section 631, while stating that a jury may be waived "only" as provided therein, is inapplicable to contractual jury waivers. In *Madden v. Kaiser Foundation Hospitals*, the California Supreme Court found arbitration agreements enforceable under this provision because it "presupposes a pending action" and thus does not apply to pre-dispute jury trial waivers.[124] In *Grafton*, the court clarified that Section 631 applies *only once parties have submitted their dispute to a court of law*.[125] Thus, because other statutes have not made arbitration the only method of pre-dispute waiver, contractual jury waivers are enforceable, despite this provision.

The Georgia and California supreme courts, unlike the U.S. Supreme Court, saw legislative ambiguity as a complete bar on contractual jury waivers. This drastic approach harks back to the outmoded views in *Morse* and *Nute* rather than a sensible, modern view of pre-dispute agreements. As the dissents in *Bank South* and *Grafton* pointed out, public policy that supports arbitration agreements surely supports contractual jury waivers. Further, as Justice Chin argued in *Grafton*, Georgia and California may protect the right to a jury by applying strict standards of waiver.

II. COMPARISON OF FEDERAL INTERESTS WITH GEORGIA'S AND CALIFORNIA'S INTERESTS

A. Federal Courts have an Interest in Enforcing Agreements that Reduce the Expense and Delay of Litigation

Federal courts have a paramount interest in enforcing private agreements. Congress has declared a strong public policy in favor of freedom of contract, reflected in the primary purpose of the FAA, "to enforce private agreements into which parties had entered, a concern which requires that [federal courts] rigorously enforce agreements to arbitrate."[126] The U.S. Supreme Court has stated that freedom of contract is a "sacred" liberty of the citizen and it is "paramount" that courts take care "not lightly to interfere with [it]."[127] The Court also said that the "usual and most important function of courts" is to protect the parties' legitimate expectations where the agreement does not violate law or public policy.[128]

Federal courts have an even stronger interest in promoting freedom to enter into agreements that resolve disputes efficiently. Federal procedure is designed "to secure the just, speedy, and inexpensive determination of

124 552 P.2d 1178, 1186–87 (Cal. 1976).

125 Grafton Partners, L.P. v. Superior Court, 116 P.3d 479, 486 (Cal. 2005).

126 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625–26 (1985) (internal quotations omitted).

127 Baltimore & Oh. Sw. Ry. Co. v. Voigt, 176 U.S. 498, 505 (1900) (internal quotations omitted).

128 *See id*. (internal quotations omitted).

every action."[129] Congress supported arbitration agreements because they save the time and expense of litigating in a judicial forum.[130] Jury trials cost much more for courts and litigants than bench trials. Eliminating the jury has been shown to reduce trial time by fifty percent.[131] Thus, contractual jury waivers, like arbitration agreements, serve one of the main purposes of the justice system by making litigation more efficient.[132]

By resolving disputes efficiently, contractual jury waivers also help the larger economy. Parties that have more control over their disputes have a deeper satisfaction with the judicial process.[133] Thus, they are more likely to enter into and rely on their agreements. Courts that enforce parties' legitimate expectations thus promote reliance and certainty in the marketplace.[134] Further, the waivers avoid the costs of grossly excessive verdicts granted by 'runaway juries.'[135] Lastly, businesses that avoid these costs can reduce the charges that they pass on to consumers.[136]

B. Georgia's and California's Interests in Barring Contractual Jury Waivers

Georgia and California have an interest in barring contractual jury waivers. Both of these states' constitutions require that the right to a jury be preserved "inviolate," and both *Bank South* and *Grafton* emphasized its importance.[137] The right to a jury is firmly rooted in American history and jurisprudence.[138] But, despite its importance, the Seventh Amendment has never been essential enough to the justice system to be incorporated into the Fourteenth Amendment and applied to the states.[139]

Georgia and California also have an interest in protecting the right to a jury.[140] But contractual jury waivers are most often used between

129 FED. R. CIV. P. 1.

130 S. REP. NO. 68-536, at 3 (1924); H.R. REP. NO. 68-96 (1924), at 1–2 ("Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement[,] . . . reducing technicality, delay and expense to a minimum and at the same time safeguarding the rights of the parties.").

131 *See* Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 57–58 (2001).

132 *See* Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 481–85 (2007).

133 *See id*. at 479–81.

134 *Cf*. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13–14 (1972).

135 *See* Lilly, *supra* note 131, at 56–57 n.12.

136 *Cf*. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594 (1991).

137 *See supra* Part I.F.

138 Dimick v. Schiedt, 293 U.S. 474, 485–86 (1935). *See generally* Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181, 183–84 (discussing the importance and purposes of the civil jury in American history).

139 Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17, 21–22 (2003).

140 *See supra* Part I.E.

sophisticated parties, such as in equipment leases and commercial loans.[141] These waivers are sometimes used in franchise or employee agreements, where there may be an imbalance of bargaining power.[142] But courts have discretion to police agreements to prevent unfair bargaining, thus obviating the need for a complete bar on all contractual jury waivers. Further, the knowing and voluntary standard applicable to such waivers is so strict that there is a "far greater likelihood that the waiver was agreed to as part of a mutually beneficial contractual arrangement and far less danger of overreaching and duress by the party seeking to enforce the waiver."[143]

III. THE ERIE DOCTRINE: THE 'UNGUIDED' AND 'GUIDED' TESTS

A. The 'Unguided' *Erie* Test

The *Erie* doctrine comes from the seminal U.S. Supreme Court decision, *Erie Railroad Co. v. Tompkins*.[144] In *Erie*, the plaintiff sued a railroad in a federal diversity action for negligence after he was struck and injured by a train.[145] The railroad defended that it owed him no duty of care as a trespasser under Pennsylvania common law.[146] The court of appeals, however, affirmed the trial court's ruling that the railroad owed him a duty of care under *federal* common law.[147] The U.S. Supreme Court reversed and held that no duty existed because a federal court exercising its diversity jurisdiction must apply the substantive law of the state.[148]

The Court looked to the Rules of Decision Act (RDA), which states: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[149] In *Swift v. Tyson*, the Court held that "the laws of the several States" referred only to legislation, and thus federal courts were free to develop their own common law.[150] *Erie* overruled this interpretation and made federal courts bound by state common law as well as legislation.[151] The Court said that the coexistence of federal and state common law after *Swift* caused litigants' substantive rights to be enforced

141 *See* Zitter, *supra* note 1, at 53.

142 *See* Smith-Johnson Motor Corp. v. Hoffman Motors Corp., 411 F. Supp. 670 (E.D. Va. 1975) (franchise agreement); Beach v. Burns Int'l Sec. Servs., 593 A.2d 1285, 1286 (Pa. Super. Ct. 1991) (employment agreement).

143 L & R Realty v. Conn. Nat'l Bank, 715 A.2d 748, 754–55 (Conn. 1998).

144 304 U.S. 64 (1938).

145 *Id*. at 69.

146 *Id*. at 69–70.

147 *Id*. at 70.

148 *Id*. at 72–73.

149 *Id*. at 71; 28 U.S.C. § 1652 (2000).

150 41 U.S. (16 Pet.) 1, 18–19 (1842).

151 *Erie*, 304 U.S. at 78–79.

differently in state and federal court.[152] This difference violated the Equal Protection Clause by encouraging non-citizens—who alone may remove a lawsuit to federal court—to 'forum-shop' for the most favorable law.[153]

Under *Erie*, federal courts sitting in diversity must apply the substantive law of the state.[154] But these courts are independent and sovereign, having "strong inherent power" over matters of procedure[155] and an "interest in the integrity of their own processes."[156] The distinction between substance and procedure is "one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems."[157] But the line between the two shifts, depending on the context.[158] Federal courts must, therefore, carefully draw the line to avoid infringing on state sovereignty over substance or federal sovereignty over procedure.

The unguided *Erie* test has three prongs. First, a federal court is not required to follow state law that is 'procedural.'[159] 'Procedural' rights are defined as "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[160] 'Substantive' rights, in contrast, are defined as those rights that, together with their corresponding duties, control citizens' "primary private activity" in everyday life.[161]

Second, even state law that is 'procedural' must be applied if it would substantially affect the result of litigation.[162] *In Guaranty Trust Co. of New York v. York*, the district court granted summary judgment for the defendant pursuant to the New York statute of limitations.[163] The court of appeals reversed pursuant to a federal equitable practice of ignoring the state statute.[164] The U.S. Supreme Court, reversing, held that the federal court must apply the state rule.[165] The Court conceded that a statute of limitations may be classified as 'procedural,' but opined that *Erie* still requires that the outcome of litigation be substantially the same in both

152 *Id*. at 74–75.
153 *See id*.
154 Hanna v. Plumer, 380 U.S. 460, 474–75 (1965) (Harlan, J., concurring).
155 *See id*. at 472–73 ("*Erie* and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules."); *see also Erie*, 304 U.S. at 92 (Reed, J., concurring) ("[N]o one doubts federal power over procedure.").
156 Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 509 (2001).
157 *See Hanna*, 380 U.S. at 474 (Harlan, J., concurring).
158 *See id*. at 471–72 (majority opinion).
159 *See* Guar. Trust Co. of N.Y. v. York, 326 U.S. 99, 108 (1945).
160 Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).
161 *See Hanna*, 380 U.S. at 474–75 (Harlan, J., concurring).
162 *York*, 326 U.S. at 109.
163 *Id*. at 100.
164 *Id*. at 100–01.
165 *Id*. at 110.

state and federal court.[166] A federal court that enforced a state statute of limitations would, by barring recovery, "vitally" affect the enforcement of the parties' substantive rights in violation of *Erie*.[167]

The Court gave unprecedented deference to state 'procedural' rules in the aftermath of *York*.[168] The Court in *Hanna v. Plumer*, conceding that its deference in this period was too liberal, noted that, because even the most minor procedural difference can ultimately affect the outcome of a case, the *York* standard is not meant to be used as a "talisman."[169] The other 'aim' of *Erie*, the Court explained, was to prevent forum-shopping.[170] Thus, a court must consider *both* whether a difference between federal and state law would be outcome-determinative and whether this difference would substantially influence a litigant's choice of forum.[171]

Third, state law, even if outcome-determinative, must not be applied if federal interests outweigh the state's interests. In *Byrd v. Blue Ridge Rural Electrical Cooperative, Inc.*, an injured electrical lineman sued his employer for negligence.[172] The employer raised the affirmative defense that the plaintiff's remedy was limited to the worker's compensation statute.[173] The South Carolina Supreme Court said that this statute required a judge to decide whether the plaintiff was a statutory 'employee.'[174] But the U.S. Supreme Court held that a jury must decide this factual issue.[175] The Court reasoned that the South Carolina court's rule was not "bound up with" the plaintiff's substantive right to recover under the statute, but was only a "form and mode" of enforcing that right.[176] The Court also said that, under the *York* standard, there was no "certainty" or "strong possibility" of a different outcome if a jury decided the defense.[177]

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166 *Id*. at 109.

167 *Id*. at 110.

168 *See* Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 534 (1949) (holding that state law controlled when an action is commenced for purposes of satisfying the statute of limitations); Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 205 (1956) (holding that state law determined whether an arbitration agreement was enforceable).

169 380 U.S. 460, 466–67 (1965).

170 *Id*. at 467.

171 *Id*. at 468.

172 356 U.S. 525, 526 (1958).

173 *Id*. at 527.

174 Adams v. Davison-Paxon Co., 96 S.E.2d 566, 571 (S.C. 1957).

175 *Byrd*, 356 U.S. at 538.

176 *Id*. at 536.

177 *Id*. at 539–40. The Court said:

> We have discussed the problem upon the assumption that the outcome of the litigation may be substantially affected by whether the issue of immunity is decided by a judge or a jury. But clearly there is not present here the certainty that a different result would follow . . . or even the strong possibility that this would be the case . . . . We do not think the likelihood of a different result is so strong as to require the federal practice of jury determination of disputed factual issues to yield to the state rule in the interest of uniformity of outcome.

Id.

But the Court, retracting its post-*York* deference to state law, said that it would not apply the state rule even if it were outcome-determinative.[178] The Court reasoned that the Seventh Amendment commanded—or at least influenced—the federal custom of having a jury decide disputed issues of fact.[179] The interest in preserving this practice, the Court said, was an "affirmative countervailing consideration" that outweighed the state's interest in ensuring substantial uniformity of outcome.[180]

B. The 'Guided' *Erie* Test

The alternative, 'guided' *Erie* test comes from *Hanna v. Plumer*.[181] In *Hanna*, the court of appeals affirmed the district court's dismissal of a personal injury suit on grounds that the manner of service of process was insufficient.[182] Massachusetts law required personal service of process, but service was instead made to an individual at the defendant's residence, pursuant to Federal Rule of Civil Procedure 4(d)(1).[183] The U.S. Supreme Court reversed and held that service was adequate.[184] The Court said, in dicta, that the *York* outcome-determinative test would probably not require application of the state rule governing service of process.[185]

The Court went on to say, however, that an 'unguided' *Erie* test is inappropriate for a Federal Rule.[186] The Court observed that the U.S. Constitution grants Congress the power to fashion rules of procedure for the federal courts.[187] Congress, by the Rules Enabling Act (REA), delegated authority to the Court to promulgate rules of "practice and procedure" for the federal courts that do not "abridge, enlarge, or modify any substantive right."[188] Thus, a Federal Rule controls if it satisfies the requirements of the REA and the U.S. Constitution.[189] A Federal Rule passes muster under the REA as long as it is "rationally capable of classification"[190] as procedural and does not "abridge, enlarge, or modify any substantive right."[191] The Court found that Rule 4(d)(1) satisfied these requirements and thus controlled the manner of service of process.[192]

178 *Id*. at 537–38.
179 *Id*. at 537.
180 *Id*. at 537–38.
181 *See* 380 U.S. 460, 471 (1965).
182 *Id*. at 462–63.
183 *Id*. at 461–62.
184 *Id*. at 474.
185 *Id*. at 466.
186 *Id*. at 471.
187 *Id*. at 472.
188 28 U.S.C. § 2072 (1958).
189 *See Hanna*, 380 U.S. at 471.
190 *Id*. at 472.
191 *Id*. at 464 (quoting Rules Enabling Act, 28 U.S.C. § 2072 (1958)).
192 *Id*. at 474.

IV. THE ERIE DOCTRINE REQUIRES FEDERAL COURTS TO APPLY FEDERAL LAW ON CONTRACTUAL JURY WAIVERS

A. The Erie Doctrine Applies because there is a Federal-State Conflict

As a preliminary matter, there is a conflict between Georgia and California law on contractual jury waivers and federal law. In *Stewart Organization*, *Inc*. *v*. *Ricoh Corp*., a copy machine dealer filed suit against a manufacturer under a dealership agreement.[193] The defendant moved to transfer the case under 28 U.S.C. section 1404, pursuant to a forum selection clause in the agreement.[194] The motion was denied because Alabama law barred such clauses.[195] The U.S. Supreme Court, reversing, found that there was a direct *Erie* conflict between federal and state law.[196] The Court reasoned that the statute allows a federal court to consider a forum selection clause as a factor in deciding whether to transfer the case, but the Alabama rule did not allow the court to consider the clause at all.[197]

Under the reasoning in *Ricoh*, federal law on contractual jury waivers is in direct conflict with Georgia and California law. As the venue statute at issue in *Ricoh* allows a court to consider various factors in determining whether to transfer the case, federal law on contractual jury waivers allows a federal court to consider various factors in determining whether the parties are entitled to a jury. In contrast, as the Alabama rule prohibited consideration of the forum selection clause in *Ricoh*, Georgia and California law prohibit any consideration of the contractual waiver.

B. The Supreme Court's *Erie* Decision, *Simler v*. *Conner*, Controls

In *Simler v*. *Conner*, the Supreme Court commanded that, in an *Erie* context, "the right to a jury trial in the federal courts is to be determined as a matter of federal law."[198] The command is clear that federal law governs *all* Seventh Amendment issues in federal courts. Therefore, *Simler* requires a federal court sitting in diversity to apply federal law to determine whether the Seventh Amendment right may be waived. Thus, federal courts routinely rely on the *Simler* rule in applying the knowing and voluntary standard rather than conflicting state law.[199]

One federal court in Texas refused to follow Georgia law under *Bank South* in determining whether a contractual jury waiver is enforceable. In

193 487 U.S. 22, 24 (1988).
194 *Id*.
195 *Id*.
196 *Id*. at 29–30.
197 *Id*.
198 372 U.S. 221, 222 (1963).
199 *E*.*g*., Med. Air Tech. Corp. v. Marwan Inv., Inc., 303 F.3d 11, 18 (1st Cir. 2002) ("In a diversity jurisdiction suit, the enforcement of a jury waiver is a question of federal, not state, law.").

RDO Financial Services v. Powell, the plaintiff sought to enforce a jury trial waiver in a guaranty agreement.[200] The defendant argued that, under the persuasive authority of *Bank South*, the waiver was unconstitutional.[201] But the court applied federal law in holding that the waiver was not knowing and voluntary.[202] The court reasoned that, although *Simler*'s precise holding concerned whether a claim is characterized as legal or equitable, federal courts have "routinely" applied the knowing and voluntary standard to contractual jury waivers.[203]

The same court later refused to follow California law under *Grafton* in determining whether a contractual jury waiver is enforceable. In *TransFirst Holdings, Inc. v. Phillips*, the defendant employees argued that, under *Grafton*, the plaintiff employer could not enforce a jury waiver provision in an employment agreement providing that California law governed.[204] The court disagreed and held that the waiver was knowing and voluntary under federal law.[205] The court reasoned that, under *Simler* and its earlier decision in *Powell*, "[t]he right to a jury trial in a federal court is clearly a question of federal law."[206]

Only one federal court has followed state law in determining whether a contractual jury waiver is enforceable. In *IFC Credit Corp. v. United Business and Industrial Federal Credit Union*, the Seventh Circuit held that Illinois law controlled the enforceability of a contractual jury waiver in an equipment lease.[207] The court reasoned:

> *Simler* holds that the classification of a dispute as "legal" or "equitable" must be made under federal norms . . . . It does not follow that national law also controls the validity of a contractual agreement to a bench trial. There is no general federal law of contracts after *Erie R.R. v. Tompkins*; if 'federal law' did control, the best it could do would be to use state law as the rule of decision.[208]

This reasoning is unsound for three reasons. First, the court's reading of *Simler* is too narrow. Federal law must also control the enforceability of contractual jury waivers because the exercise of the Seventh Amendment must, under *Simler*, be uniform. Second, while federal courts cannot make generally applicable contract law, they may fashion rules to determine whether rights under federal statutes may be waived.[209] Thus, the knowing and voluntary standard may determine whether the Seventh Amendment right to a jury trial may be waived. Third, "state law may be incorporated

200 RDO Fin. Servs. Co. v. Powell, 191 F. Supp. 2d 811, 812 (N.D. Tex. 2002).
201 *Id*.
202 *Id*. at 812–14.
203 *Id*. at 813 n.5.
204 2007 U.S. Dist. LEXIS 20483, at *6 (N.D. Tex. Mar. 22, 2007).
205 *Id*. at *10.
206 *Id*. at *7 (internal quotations omitted).
207 512 F.3d 989, 991 (7th Cir. 2008).
208 *Id*. at 991–92 (internal citation omitted).
209 *See* Kendall v. City of Chesapeake, 174 F.3d 437, 441 n.1 (4th Cir. 1999).

as the federal rule of decision" only "when there is little need for a nationally uniform body of law."[210] The need to ensure uniformity in Seventh Amendment law, therefore, precludes incorporation of state law.

C. Even if *Simler* did not Control, the Federal Arbitration Act would Control under a 'Guided' *Erie* Test

Under a 'guided *Erie* test, federal courts must apply a federal statute that is broad enough to cover the issue and that is a valid exercise of Congress's power under the U.S. Constitution to regulate procedure for the federal courts.[211] The FAA satisfies both prongs of this test and thus requires federal courts to enforce contractual jury waivers.

First, the FAA is broad enough to cover the issue. A contractual jury waiver is an implicit part of an arbitration agreement.[212] State laws that bar contractual jury waivers would, therefore, bar arbitration agreements as well.[213] Thus, the U.S. Supreme Court has used the FAA to preempt state laws restricting contractual jury waivers. For example, in *Southland Corp. v. Keating*, the California Supreme Court held that an arbitration clause in a franchise agreement was unenforceable under the California Franchise Investment Law, which prohibited waiver of the rights therein.[214] The court reasoned that the arbitration agreement waived the statutory right to a jury.[215] The U.S. Supreme Court reversed, holding that the California law was void under the Supremacy Clause.[216] If the FAA preempts state laws that bar contractual jury waivers in state courts, it surely must control over state laws that bar these waivers in federal court.

Second, the FAA is a valid exercise of congressional power to regulate procedure. Although *Southland* and its progeny gave the FAA a substantive dimension, Congress enacted the FAA pursuant to its constitutional power to regulate federal procedure.[217] The FAA also does not abridge, enlarge or modify any substantive rights.[218]

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210 *See* United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979).

211 Stewart Org. v. Ricoh Corp., 487 U.S. 22, 26–27 (1988).

212 *See supra* Part I.A.

213 *See* Long v. DeGeer, 753 P.2d 1327, 1330 (Okla. 1987) (Opala, J., concurring) (citing OKLA. CONST. art. XXIII, § 8, under which "express or implied *contractual* waivers of a *constitutional right* appear to be unenforceable[,]" and surmising that this provision would similarly bar an arbitration agreement "as an implicit waiver of [the] fundamental right to a trial by jury").

214 *See* 465 U.S. 1, 10 (1984); CAL. CORP. CODE § 31512 (West 2008) ("Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void.").

215 *Southland*, 465 U.S. at 10.

216 *See id*. at 16. After *Southland*, the Court routinely used the FAA to preempt state laws that restricted arbitration agreements. *See* David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541, 546–54 (2004).

217 *See* H.R. REP. NO. 68-96 (1924), at 1 ("Whether an agreement for arbitration shall be enforced or not is a question of procedure . . . .").

218 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate . . . a party does not forgo the substantive rights . . . it only submits to their

D. Even if the Federal Arbitration Act did not Control, the 'Unguided' *Erie* Test would still Require Application of Federal Law

1. Federal Law on Contractual Jury Waivers is Procedural

The U.S. Supreme Court in *Byrd v. Blue Ridge Rural Electrical Cooperative* said that whether a judge or a jury decided factual issues relevant to an affirmative defense in a negligence case was not "bound up" with the parties' substantive rights but only a "form and mode" of enforcing them.[219] Thus, under *Byrd*, whether a judge or jury decides factual issues relevant to claims in a contract dispute is not "bound up" with the parties' substantive rights under the agreement but is only a "form and mode" of enforcing them.

The Court's definition of 'procedure' supports this conclusion. Substantive rights govern the parties' primary activity under a contract, including mutual promises, performances, and remedies for breach. Procedural rights, on the other hand, govern the judicial process by which those rights are enforced.[220] The right to a jury is procedural because it concerns who determines which party is entitled to a remedy. This right does not become substantive simply because it is part of the agreement—"a contract about procedure remains a matter of procedure."[221]

A 'procedural' rule is "bound up" with substantive rights only when a state declares an "integral" relationship between the two.[222] Georgia and California have not, by judicial decision or statute, suggested that the parties' rights under an agreement would be affected if a judge, rather than a jury, determined the factual issues under an agreement. Thus, there is no integral relationship between Georgia and California law on contractual jury waivers and the parties' rights under substantive law.

2. Federal Law on Contractual Jury Waivers is not Outcome-Determinative

The U.S. Supreme Court held in *Byrd v. Blue Ridge Rural Electrical Cooperative* that whether a judge or jury decides factual issues relevant to claims in a negligence case would not substantially affect the outcome of the litigation.[223] Whether a judge or jury decides factual issues relevant to the parties' claims in a contract dispute will also, therefore, not substantially affect the outcome of the litigation. The Court's *Erie* jurisprudence on arbitration agreements supports this conclusion.

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resolution in an arbitral, rather than a judicial, forum.").

219 356 U.S. 525, 535–36 (1958).

220 *See* Schwartz, *supra* note 216, at 615–20.

221 *Id*. at 618.

222 *See Byrd*, 356 U.S. at 536.

223 *Id*. at 539–40.

In *Wilko v. Swan*, a purchaser of securities brought suit for misrepresentation under the Securities Act of 1933.[224] The district court held that an arbitration agreement was unenforceable because the Securities Act provided a special right of recovery in a judicial forum.[225] The Court agreed, holding that the arbitration agreement would deprive the plaintiff of its remedy under the Act.[226] The Court reasoned that the choice of forum was a substantial right under the Act, because its protections applied much less in an arbitral forum.[227] The Court noted that arbitrators are not instructed in the law, and review of their decisions is limited.[228]

The Court maintained this view in its post-*York* period of deference to state law. In *Bernhardt v. Polygraphic Co. of America*, the district court denied the employer's motion to enforce an arbitration clause in the employment agreement because Vermont law made arbitration agreements revocable.[229] The court of appeals reversed, reasoning that "[a]rbitration is merely a form of trial," and thus enforcing the arbitration agreement would not infringe on the parties' substantive rights.[230] The U.S. Supreme Court reversed because New York law may have governed it instead.[231] But the Court also disagreed with the court of appeals' classification of an arbitration agreement as a mere procedural matter:

> If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where the suit is brought. For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result.[232]

The Court explained that arbitration offers fewer procedural protections than trial.[233] For example, arbitration offers no right to trial by jury under the Seventh Amendment; arbitrators are not instructed in the law; the record of their proceedings is not as complete; and judicial review of their decisions is limited.[234]

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[235] the Court abrogated its previous view in *Wilko* and *Bernhardt*. *Mitsubishi*

224 346 U.S. 427, 428 (1953), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).
225 *Id.* at 430–31.
226 *See id.* at 435.
227 *Id.*
228 *Id.* at 436.
229 350 U.S. 198, 199–200 (1956).
230 *See id.* at 200, 202 (internal quotations omitted).
231 *Id.* at 205.
232 *Id.* at 203.
233 *Id.*
234 *Id.* (citing Wilko v. Swan, 346 U.S. 427, 435–38 (1953)).
235 473 U.S. 614 (1985).

involved an antitrust dispute over an international contract between an automobile manufacturer and distributor.[236] The Court affirmed the district court's grant of Mitsubishi's motion to enforce an arbitration agreement and ruled that claims under federal antitrust statutes are arbitrable.[237] The Court reasoned: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[238]

In *Rodriguez de Quijas v. Shearson/American Express, Inc.*, the Court squarely rejected its view in *Wilko* and *Bernhardt*.[239] In *Rodriguez*, securities investors brought suit against a brokerage firm for violations of the Securities Act of 1933 and the Exchange Act of 1934.[240] The district court held that, under *Wilko*, the investors' claims under the Securities Act were not arbitrable.[241] The court of appeals reversed.[242] The U.S. Supreme Court affirmed.[243] The Court admitted that its view that arbitration would substantially affect the outcome of litigation was outmoded and pervaded by "the old judicial hostility to arbitration."[244]

According to *Wilko* and *Bernhardt*, arbitration has many differences from a bench trial, including the right to trial by jury. But under *Mitsubishi* and *Rodriquez*, these differences do not substantially affect the outcome of litigation. A jury trial, on the other hand, has only one procedural difference from a bench trial, the right to a jury. Under these decisions, therefore, federal law on contractual jury waivers is even less outcome-determinative than federal law on arbitration agreements.

One may argue that federal law on contractual jury waivers, even if not outcome-determinative, will influence litigants to remove to federal court to enforce them. But a rule that does not substantially influence the outcome is unlikely to substantially influence the choice of forum.[245] And even a rule that causes forum-shopping does not violate *Erie* if it is not outcome-determinative. Justice Harlan, concurring in *Hanna v. Plumer*, explains why too much reliance on either 'aim' of *Erie* is wrong:

> The Court is quite right in stating that the "outcome-determinative" test of *Guaranty Trust Co. v. York*, if taken literally, proves too much, for any rule, no matter how clearly "procedural," can affect the outcome of litigation if it is not obeyed. In turning from the "outcome" test of York back to the unadorned forum-shopping rationale of *Erie*, however, the Court falls prey to like

236 *Id.* at 616–20.
237 *Id.* at 618–20, 629.
238 *Id.* at 628.
239 490 U.S. 477 (1989).
240 *Id.* at 478–79.
241 *Id.* at 479.
242 *Id.*
243 *Id.* at 481.
244 *Id.* at 480 (internal quotations omitted).
245 Hanna v. Plumer, 380 U.S. 460, 468 (1965).

> oversimplification, for a simple-forum shopping rule also proves too much; litigants often choose a federal forum merely to obtain what they consider the advantages of the Federal Rules of Civil Procedure or to try their cases before a supposedly more favorable judge.[246]

Mitsubishi and *Rodriquez* show that federal law on contractual jury waivers is not outcome-determinative. Thus, any risk of forum-shopping caused by such waivers is chimerical. But, even if federal law did cause forum-shopping, it still would not violate *Erie*, under Justice Harlan's reasoning, without creating substantial differences in outcome.

3. Even if Federal Law on Contractual Jury Waivers was Outcome-Determinative, Federal Interests would Control.

The U.S. Supreme Court has consistently said that the federal interest in uniformity of the exercise of the Seventh Amendment is paramount. For example, in *Simler v. Conner*, the Court commanded that federal law govern the right to a jury to ensure its uniform exercise as "demanded by the Seventh Amendment."[247] Also, in *Byrd v. Blue Ridge Rural Electrical Cooperative*, the Court said that the federal interest in whether a judge or jury determined factual issues was "countervailing" because of "the influence—if not the command—of the Seventh Amendment."[248] Thus, federal law governs whether the Seventh Amendment may be waived to ensure uniformity in its exercise.

Federal courts follow this reasoning in enforcing contractual jury waivers. For example, in *Phoenix Leasing v. Sure Broadcasting, Inc.*, the plaintiff lender moved to enforce a jury waiver in a loan agreement against the borrower.[249] The defendant argued that the waiver was unconscionable under California law, while the plaintiff argued that the knowing and voluntary standard controlled the waiver's validity.[250] The court avoided the *Erie* question by finding no direct conflict between federal and state law.[251] But the court said, in dicta, that, if there were a conflict, "the validity of contractual waivers of . . . [t]he right to a jury trial in federal court is governed by federal law" under *Simler*[252] because of "[t]he need to ensure the uniformity of exercise of the Seventh Amendment right."[253]

Federal interests in enforcing agreements that allow parties to resolve their disputes efficiently are also paramount. In *Stewart Organization v. Ricoh Corp.*, the U.S. Supreme Court held that federal law determined

246 *Id.* at 475 (Harlan, J., concurring) (internal citation omitted).
247 372 U.S. 221, 222 (1963).
248 356 U.S. 525, 537 (1958).
249 843 F. Supp. 1379, 1382 (D. Nev. 1994).
250 *Id.* at 1383.
251 *See id.* at 1386.
252 *Id.* at 1384.
253 *Id.* at 1386.

whether a forum selection clause was enforceable in federal court.[254] Justice Kennedy, concurring, stated:

> The federal judicial system has a strong interest . . . not only to spare litigants unnecessary costs but also to relieve courts of time-consuming pretrial motions. Courts should announce and encourage rules that support private parties who negotiate such clauses. Though state policies should be weighed in the balance, the authority and prerogative of the federal courts to determine the issue . . . should be exercised so that a valid forum-selection clause is given controlling weight in all but the most exceptional cases.[255]

Contractual jury waivers support the same interests as forum selection clauses because both agreements reduce the expense and delay of litigation. Thus, under Justice Kennedy's reasoning, federal interests in enforcing contractual jury waivers control over Georgia's and California's interests in barring them, unless the most exceptional case applies.

This is not an exceptional case, for three reasons. First, federal law provides extraordinary protection for the right to a jury. The knowing and voluntary standard is so much stricter than the contract law applied to other pre-dispute agreements that a criminal defendant may waive his or her most basic constitutional rights under it.[256] Even the *Grafton* court admired the extraordinary protection that this standard provides and seemed to suggest that the California Legislature adopt it.[257] This standard's extraordinary strictness virtually guarantees that a waiver is fairly bargained for.[258]

Second, the protection that federal law provides for the right to a jury is more than adequate. As Congress stated in the legislative history to the FAA, "The constitutional right to a jury trial is adequately safeguarded" by arbitration agreements.[259] If ordinary contract law applicable to such agreements provides adequate protection when the parties may not even realize that they are waiving the right to a jury, the knowing and voluntary standard must provide *more than* adequate protection when the waiver is conspicuous and freely bargained for.

Third, federal law provides *better* protection for the right to a jury than Georgia and California law. Georgia and California law encourage parties that wish to waive the right to a jury to turn to arbitration agreements instead. The contract law applicable to such agreements provides minimal protection for this right. The knowing and voluntary standard, on the other hand, stems the tide to arbitration and more than adequately protects this right. Thus, federal courts can best protect the right to a jury by continuing to enforce contractual jury waivers under federal law.

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254 487 U.S. 22, 28 (1988).
255 *Id*. at 33 (Kennedy, J., concurring).
256 *See supra* note 52.
257 *See* Grafton Partners, L.P. v. Superior Court, 116 P.3d 479, 491 (Cal. 2005).
258 *See supra* note 143.
259 S. REP. NO. 68-536, at 3 (1924).

CONCLUSION

This Comment proposes that the *Erie* doctrine requires federal courts sitting in diversity in Georgia and California to continue to enforce contractual jury waivers under federal law. The *Erie* doctrine applies because federal courts enforce these waivers, while the supreme courts of Georgia and California have barred them. In *Simler v. Conner*, the U.S. Supreme Court commanded that federal law governs the Seventh Amendment right to a jury trial. Thus, federal courts must continue to enforce contractual jury waivers if they were knowing and voluntary.

Alternatively, this Comment proposes that the FAA also requires federal courts to enforce these waivers, because it satisfies both prongs of the 'guided' *Erie* test. First, the FAA is broad enough to cover the issue by making arbitration agreements enforceable, because contractual jury waivers are implicit parts of such agreements. The FAA must conflict with state laws restricting contractual jury waivers in federal court because it preempts such laws in state courts. Second, the FAA is a valid exercise of congressional power to regulate procedure in the federal courts.

This Comment further proposes that federal common law controls because, under the Court's *Erie* jurisprudence, it satisfies the three prongs of the 'unguided' *Erie* test. First, whether a judge or jury determines a dispute is a matter of procedure. Second, federal law would not substantially affect the outcome of the litigation, especially if arbitration agreements do not. Third, even if federal law were outcome-determinative, federal interests in enforcing agreements that resolve disputes efficiently outweigh state interests, absent the most exceptional case. This is not an exceptional case where Georgia's and California's interests in protecting the right to a jury control, because the 'knowing and voluntary' standard more than adequately protects those interests.

Two legal developments must occur as a result of this thesis. First, the Ninth Circuit has granted review to a California district court's ruling that contractual jury waivers are enforceable under federal law, despite *Grafton*.[260] If the Ninth Circuit reverses, the U.S. Supreme Court should grant certiorari and reverse the Ninth Circuit decision. Second, the Georgia and California legislatures should overturn *Bank South* and *Grafton* by making these enforceable with appropriate safeguards. Georgia and California must not curtail the freedom to enter into agreements that serve important public interests. In an era of customized litigation, the view that some rights are too sacred to be bargained for is a thing of the past.

260 Applied Elastomerics, Inc. v. Z-Man Fishing Prods., Inc., 521 F. Supp. 2d 1031, 1044 (N.D. Cal. 2007) ("The right to a jury trial in federal court is governed by federal law and, under federal law, parties may contractually waive their right to a jury trial."), *appeal docketed*, No. 07-17170 (9th Cir. Nov. 29, 2007).

Life, Liberty, *or Your Children*: California Parents' Fifth Amendment Quandary between Self-Incrimination and Family Preservation

Kendra Weber[*]

INTRODUCTION

> "For years, the courts have been the unseen partners in child welfare—yet they are vested with enormous responsibility."[1]

At any given time in the United States, more than half a million children are in government custody.[2] One out of every twenty children will enter such custody.[3] Child protective agencies responding to allegations of child abuse and neglect routinely violate the constitutional rights of children and their parents.[4] Juvenile dependency courts must step in to formally determine whether the alleged abuse or neglect occurred and whether a child should be returned to the home.[5] These specialized courts are charged with protecting the rights of *all* parties involved, including parents.[6] However, dependency courts frequently compound the problem when they overlook and, at times, blatantly deny parents their Fifth Amendment privilege against compelled self-incrimination.[7]

Depending upon the allegations, some parents may face not only the possibility of losing their child, but also the threat of criminal prosecution.[8]

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1 THE PEW COMMISSION ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE 13 (2004) [hereinafter THE PEW COMMISSION].

2 *Id*. at 9.

3 *State Efforts to Comply with Federal Child Welfare Reviews: Hearing Before the Subcomm. on Human Res. of H. Comm. Ways & Means*, 108th Cong. 54 (2004) (statement of Rep. Baca from California), *available at* http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/28/07/29.pdf [hereinafter *State Efforts*].

4 *Id*. ("[T]he unwarranted seizure of children from non-neglectful homes has become a national problem of staggering proportions.").

5 THE PEW COMMISSION, *supra* note 1, at 13.

6 *See* NAT'L COUNCIL ON CRIME AND DELINQUENCY, JUVENILE JUSTICE POLICY STATEMENT 3 (Apr. 1991).

7 *E.g.*, *In re* Mark A., 68 Cal. Rptr. 3d 106, 108 (Ct. App. 2007); *In re* Joanna Y., 10 Cal. Rptr. 2d 422, 426 (Ct. App. 1992).

8 For example, when a dependency petition alleges domestic violence against a spouse or part-

These parents are forced into the Hobson's choice[9] between cooperating with the dependency court at the expense of their Fifth Amendment privilege or preserving the privilege and losing their child. The paramount concern of the dependency system is the best interest of the child, and it is in the best interest of the child that the parent testifies.[10] However, "[t]he mere existence of a civil regulatory system may not trump the essence of the Fifth Amendment."[11] Furthermore, without a guarantee that their testimony will not be used against them in a criminal case, many parents will decline to testify.[12] Thus, courts must be able to compel parents to testify without violating the Fifth Amendment.

Part I of this comment discusses parents' Fifth Amendment privilege and its application in dependency proceedings. Part II presents an overview of California's dependency system and exposes its true punitive nature—the focus on the alleged wrongdoing of the parent and the threat of losing his or her child. Part II further demonstrates how two fundamental rights collide when parents are essentially forced to waive their Fifth Amendment privilege or forfeit their parental rights. Part II argues that parents must be able to safely testify in dependency proceedings to ensure the disclosure of all relevant information in each child's case.

Part III analyzes how dependency courts may compel parents to testify despite their assertion of the Fifth Amendment privilege. Under California law, the only constitutional method available is to grant immunity that shields the testimony, and any evidence derived from it, from use against the parent in a subsequent criminal case. However, dependency courts may not grant such immunity on their own motion, but must instead cooperate with the very agency that may wish to prosecute the parent for a crime.[13]

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ner, a child may be removed from the home, and the allegedly offending parent may also be guilty of a felony. *In re* Heather A., 60 Cal. Rptr. 2d 315, 321 (Ct. App. 1996) (finding that domestic violence in the household where a child lives is grounds to remove the child); CAL. PENAL CODE § 243(e)(1) (West 2008) (providing increased criminal sanctions "[w]hen battery is committed against a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant's child, former spouse, fiancé, or fiancée, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship"); *id*. § 273.5(a) (making it a felony to inflict corporal injury resulting in a traumatic condition upon one's spouse, former spouse, cohabitant, former cohabitant, or the parent of one's child).

9 A "Hobson's choice" refers to a choice where there really is no choice at all, because both options are unacceptable. Its use arose from the tale of Tobias Hobson, an English stable keeper who offered riders the "choice" between the horse closest to the door or no horse at all. JOHN BARTLETT, FAMILIAR QUOTATIONS: A COLLECTION OF PASSAGES, PHRASES, AND PROVERBS TRACED TO THEIR SOURCES IN ANCIENT AND MODERN LITERATURE 857 (Little, Brown & Co. 9th ed. 1903).

10 *See* Collins v. Superior Court, 141 Cal. Rptr. 273, 277 (Ct. App. 1977) (noting the "clear legislative policy . . . that all relevant evidence should be disclosed in proceedings of this nature in order to protect the paramount interest of the safety and welfare of the child.").

11 *In re* Ariel G., 858 A.2d 1007, 1014 (Md. 2004); *see also In re* Welfare of J.W., 415 N.W.2d 879, 883–84 (Minn. 1987) (holding that the ability to assert a constitutional right does not yield to the best interests of a child).

12 *E.g*., *In re Mark A*., 68 Cal. Rptr. 3d at 110–11 (involving a father who refused to testify despite a court order).

13 The current procedure calls for the involvement of the criminal prosecutor in the decision to grant use and derivative use immunity. CAL. CT. R. 5.548.

When the prosecuting agency prefers that such immunity not be granted, the court may be left without evidence that is crucial to an informed decision in the case.[14]

Because there is currently no avenue available that allows parents to voluntarily testify in their child's case without risking their Fifth Amendment privilege, Part IV argues for a legislative grant of blanket use and derivative use immunity for all parents in all dependency matters without involving the criminal prosecutor. This part further argues that, for such immunity to be fully effective, and to alleviate any resulting prosecutorial burden,[15] criminal prosecuting agencies must be excluded from dependency proceedings. Such protection will dissolve the unacceptable choice facing parents who wish to cooperate with the court and reunite with their children without forfeiting their Fifth Amendment privilege.

I. THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION DIRECTLY APPLIES TO PARENTS IN JUVENILE DEPENDENCY PROCEEDINGS

In some circumstances, the alleged conduct that brings a child within the jurisdiction of the juvenile dependency court may also constitute a crime.[16] The Fifth Amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself."[17] When parents face not only the possibility of losing their child, but the additional threat of criminal prosecution, they are afforded the same Fifth Amendment protections as a criminal defendant and may properly refuse to testify in their child's dependency case.[18]

In order to successfully invoke Fifth Amendment protection, an individual's statement must be compelled and self-incriminating.[19] The self-incrimination element is met whenever a witness's answers would merely "furnish a link in the chain of evidence needed to prosecute the [witness]" for a criminal offense.[20] The United States Supreme Court has not limited

14 The prosecutor is permitted to show cause why such immunity should not be granted. *Id*.

15 *See* Kastigar v. United States, 406 U.S. 441, 460 (1972) (affirming that a grant of immunity "imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.").

16 *See supra* note 8.

17 U.S. CONST. amend. V. The Fifth Amendment applies to the states via the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 6 (1964). Similar protections are guaranteed by the California Constitution and state statutes. CAL. CONST., art. I, § 15 ("Persons may not . . . be compelled in a criminal cause to be a witness against themselves."); *e.g*., CAL. EVID. CODE § 940 (West 2007) ("To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him.").

18 *In re* Mark A., 68 Cal. Rptr. 3d 106, 120 (Ct. App. 2007); s*ee also* McCarthy v. Arndstein, 266 U.S. 34, 40 (1924) (affirming that the Fifth Amendment privilege "applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it.").

19 Fisher v. United States, 425 U.S. 391, 408 (1976).

20 Hoffman v. United States, 341 U.S. 479, 486 (1951); s*ee also* People v. Mincey, 827 P.2d 388, 408 (Cal. 1992) (acknowledging that a person may invoke the constitutional privilege against self-

the Fifth Amendment privilege to a defendant testifying during a criminal trial, but has broadened its scope to "any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."[21] Furthermore, the California Legislature recognizes the overlap in certain classes of criminal and dependency statutes[22] and expressly acknowledges the application of the Fifth Amendment privilege in juvenile dependency proceedings.[23] Given the broad scope of the privilege and its clear implications in certain dependency matters, a parent in a juvenile dependency proceeding is entitled to the full protections afforded by the Fifth Amendment, regardless of whether criminal charges have been filed.[24]

II. CALIFORNIA DEPENDENCY PROCEEDINGS IMPROPERLY COMPEL PARENTS TO WAIVE THEIR FIFTH AMENDMENT PRIVILEGE TO PROTECT THEIR PARENTAL RIGHTS

Dependency cases are among the most difficult to manage.[25] They involve numerous participants, multiple parties with potentially conflicting interests, and a complex, ongoing court process.[26] A dependency court should "function on a socio-legal basis where the constitutional rights of children and parents are not abridged, and where the purpose of the court is therapeutic and preventive, rather than retributive and punitive."[27] Thus, not only are parents entitled to the protections afforded by the Fifth Amendment, they must also be allowed to fully participate in their child's case. However, under California dependency law, parents who face the risk of criminal prosecution are forced to choose between the two.[28] This Hobson's choice violates the fundamental rights of parents and their children and renders dependency courts ineffective.

A. Juvenile Dependency Proceedings are Quasi-Criminal in Nature

Juvenile dependency proceedings are considered civil rather than criminal, because their primary purpose is not to punish parents, but to pro-

incrimination for reasons other than guilt).

21 Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

22 *See supra* note 8.

23 *See* CAL. WELF. & INST. CODE § 311(b) (West 2007) ("In the hearing the minor, parents or guardians, have a privilege against self-incrimination."); CAL. CT. R. 5.674(d) ("At the detention hearing, the child, the parent, and the guardian have the right to assert the privilege against self-incrimination."); *id*. 5.534(k)(1)(A) & 5.682(b)(2) (2008) (both providing that the court must advise the parent in dependency cases of the right to assert the privilege against self-incrimination).

24 *Turley*, 414 U.S. at 77 (providing that the Fifth Amendment applies in "*any* other proceeding" where the testimony "*might* incriminate [the witness] in *future* criminal proceedings") (emphasis added).

25 NAT'L CENTER FOR STATE COURTS, CALIFORNIA JUVENILE COURT IMPROVEMENT PROJECT (1997), *available at* http://www.abanet.org/ftp/pub/child/carpt.txt (last visited June 3, 2008).

26 *Id*.

27 *See* NAT'L COUNCIL ON CRIME AND DELINQUENCY, *supra* note 6.

28 *See* discussion *infra* Part II.B.

tect the child's health and safety.[29] However, physically removing a child from the home interferes with the child's personal liberty and the right to remain with his or her family of origin.[30] In turn, parents face significant state interference with the fundamental right to raise their children and, ultimately, the termination of their parental rights.[31] Thus, dependency proceedings are more accurately referred to as "quasi-criminal."[32] In fact, most of the rules governing civil proceedings do not apply,[33] and the children and parents involved are endowed with rights similar to those of a criminal defendant.[34]

A dependency case typically begins when the county welfare department receives a report alleging child abuse or neglect. If the assigned social worker finds the allegations substantiated, he or she may immediately remove the child from the home.[35] Within two days after the child is removed, the worker must file a dependency petition requesting that the child be declared a dependent of the juvenile court.[36] After the petition is filed,

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29 *In re* Mary S., 230 Cal. Rptr. 726, 728 (Ct. App. 1986) ("Dependency proceedings are civil in nature, designed not to prosecute a parent, but to protect the child."); Lois R. v. Superior Court, 97 Cal. Rptr. 158, 162 (Ct. App. 1971) ("[D]ependency proceedings are civil and have been conducted without strict adherence to all the formalities of a criminal trial.").

30 *See* Santosky v. Kramer, 455 U.S. 745, 754 n.7, 760 n.11 (1982) (noting that "important liberty interests of the child . . . may also be affected by a [dependency] proceeding").

> Witnesses stated that only about three percent of the children who are seized or taken into custody were physically abused. What is even worse they said, is that the children who are taken into state custody have an eight to eleven times greater chance of being abused than those who remain in their own homes.

State Efforts, *supra* note 3, at 54.

31 *Kramer*, 455 U.S. at 753 (finding that parents have a "fundamental liberty interest . . . in the care, custody, and management of their child," which is protected by the Fourteenth Amendment). Terminating parental rights permanently deprives parents of this fundamental interest. *See* CAL. WELF. & INST. CODE § 366.26 (Deering 2008).

32 GARY C. SEISER & KURT KUMLI, CALIFORNIA JUVENILE COURTS PRACTICE AND PROCEDURE § 2.10[2] (2003) (noting that courts have characterized the dependency system inconsistently—some have viewed it as "civil in nature" while others have viewed it as "quasi-criminal"); *see also In re* Kristin H., 54 Cal. Rptr. 2d 722, 737 (Ct. App. 1996) ("While the parent in modern day dependency proceedings may not stand in the same shoes as a criminal defendant facing a loss of personal liberty . . . to say simply that dependency proceedings are civil in nature fails to acknowledge the fundamental difference between these proceedings and the ordinary civil action.").

> In most dependency matters the focus is against the parent and the prospect faced is the drastic result of loss of his child. Although legal scholars may deemphasize the adversary nature of dependency proceedings and characterize the removal of the child from parental custody as nonpunitive action in the best interests of the child, most parents would view the loss of custody as dire punishment.

Lois R. v. Superior Court, 97 Cal. Rptr. 158, 162 (Ct. App. 1971).

33 *In re* Jennifer R., 17 Cal. Rptr. 2d 759, 764 (Ct. App. 1993) ("Dependency proceedings in the juvenile court are special proceedings governed by their own rules and statutes. Unless otherwise specified, the requirements of the Civil Code and the Code of Civil Procedure do not apply.") (internal citations omitted).

34 For instance, "the parents' right not to be separated from their child entitles them to appointment of counsel [under Welfare and Institutions Code section 317], and the same degree of review of the case on appeal as criminal defendants." *In re Mary S*., 230 Cal. Rptr. at 728 n.3.

35 CAL. WELF. & INST. CODE § 306 (West 2006).

36 *Id*. § 313(a); CAL. CT. R. 5.520(b)(1).

the court holds a "detention hearing" to approve the child's removal.[37] Next, there is a "jurisdictional hearing" to determine whether the alleged abuse or neglect occurred.[38] The California Welfare and Institutions Code requires the court to release the child unless there is a prima facie showing of abuse or neglect.[39] However, it also provides that evidence of an injury alone can be sufficient to declare the child a dependent of the court.[40]

When the court makes a finding of abuse or neglect, a "dispositional hearing" is held to determine the appropriate course of action.[41] The court may allow the child to return home but require the family to participate in family maintenance services, thus subjecting the family to future hearings and investigations by the social worker.[42] Generally, if the court orders that the child is to remain out of the home, the family must participate in "reunification services" to resolve the issues determined by the court before the child is returned.[43] If the parent does not successfully reunify with the child within the statutory time limit,[44] the court must terminate these services and select long-term foster care, guardianship, or adoption as a permanent plan for the child.[45] At this stage, parents may be forever deprived of the care and custody of their child.[46] These intrusions into private family life, and the potential for permanent destruction of the family unit, make it imperative that dependency courts ensure that the fundamental rights of children and their parents are not trammeled in the process of resolving sensitive family issues.

B. When Parents Cannot Safely Testify in their Child's' Dependency Case, they are Forced to Choose between Conflicting Fundamental Rights

The privilege against self-incrimination is designed to avoid the "cruel trilemma of self-accusation, perjury or contempt."[47] A parent in a depen-

37 CAL. WELF. & INST. CODE § 315 (West 2006).

38 *Id*. §§ 355, 356.

39 *Id*. § 319.

40 *Id*. §§ 355.1(a), 360(d).

41 *Id*. § 358.

42 *Id*. §§ 360(b), 362. "Family Maintenance provides support services to prevent abuse/neglect while the child remains in his or her home. Generally, these services include counseling, parent training, respite care, and temporary in-home care." Child Abuse and Neglect in California (Part I), Legislative Analyst's Office (Jan. 1996), http://www.lao.ca.gov/1996/010596_child_abuse/cw11096a.html (last visited Sept. 14, 2008) [hereinafter LAO].

43 CAL. WELF. & INST. CODE § 361.5 (West 2006). "Family Reunification provides support services to the family while the child is in temporary foster care. Typically, these services include counseling, emergency shelter care, parent training, and teaching homemaking skills." LAO, *supra* note 42.

44 CAL. WELF. & INST. CODE § 361.5 (West 2006) (providing a statutory time limit of twelve months for a child who was three years of age or older on the date of removal, and six months for a child under three years of age, but allowing for an extension up to eighteen months under specified circumstances).

45 *Id*. §§ 361.5, 366.26.

46 *Id*. § 366.26.

47 Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

dency case also faces the potential loss of the care and custody of his or her child. To expedite dependency matters, California law creates a presumption that the alleged abuse occurred if the parent does not present evidence to the contrary.[48] Thus, while the burden of proof in a *criminal* trial is on the prosecution, the initial burden in a dependency case essentially falls on the parent.[49] Because a parent's decision not to testify may be equated with a failure to present evidence,[50] which will likely result in the child being adjudged a dependent of the court,[51] parents are currently compelled to testify by the threat of losing their child. Once the court establishes jurisdiction, parents generally must admit to the problem that led to removal before the child will be returned, further compelling them to disclose potentially incriminating information.[52]

The court may also order a parent to participate in therapy as part of a family reunification plan.[53] While disclosures made in court-ordered therapy are confidential,[54] mandatory reporting laws require therapists to report incidents of child abuse to the proper authorities.[55] This leads parents to suppress potentially incriminating admissions in court-ordered therapy as well.[56] Less than full participation in therapy is contrary to the child's best interest because it renders the therapeutic process ineffective.[57] In addition, the therapist may conclude that a parent who does not admit the alleged conduct during treatment, or who appears evasive, is not meaningfully participating, and the court may refuse to return the child.[58]

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48 CAL. WELF. & INST. CODE § 355.1(a) (West 2007) ("Where the court finds that an injury, injuries, or detrimental condition sustained by a minor is of a nature as would ordinarily not be sustained except as the result of the unreasonable or neglectful acts or omissions of either parent, . . . that finding shall be prima facie evidence).

49 While the burden of *proof* at the initial stages of a dependency matter rests with the agency seeking jurisdiction over the child, the presumption of abuse created by Section 355.1(a) shifts the burden of *production* to the caretaker. CAL. WELF. & INST. CODE § 355.1(c) (West 2007) ("The presumption created by subdivision (a) constitutes a presumption affecting the burden of producing evidence.") Thus, the agency need not present any evidence other than the fact that an injury occurred.

50 *See In re* Mark A., 68 Cal. Rptr. 3d 106, 119 (Ct. App. 2007).

51 *See* CAL. WELF. & INST. CODE § 355.1(a) (West 2007).

52 *In re* Jessica B., 254 Cal. Rptr. 883, 890 (Ct. App. 1989) ("[R]eunification cannot occur until [the parent] admits abuse and works through appropriate remorseful feelings.").

53 CAL. WELF. & INST. CODE § 361.5(a) (West 2007).

54 CAL. EVID. CODE § 1012 (West 2008).

55 A therapist must report child abuse when he or she "has knowledge of or observes a child whom [the therapist] knows or reasonably suspects has been the victim of child abuse or neglect." CAL. PENAL CODE § 11166(a) (West 2008).

56 *E.g.*, *In re* Joanna Y., 10 Cal. Rptr. 2d 422, 425 (Ct. App. 1992) (involving a father who refused to undergo a psychological evaluation or participate in counseling due to his pending criminal case, despite the fact that he felt it "would have been helpful").

57 ELIANA GIL, CAL. HEALTH & WELFARE AGENCY, THE CALIFORNIA CHILD ABUSE REPORTING LAW: ISSUES AND ANSWERS FOR PROFESSIONALS 19 (1986) ("Some clients will never admit to the abuse, and therefore make the possibility of obtaining therapeutic help minimal.").

58 *In re* Mark A., 68 Cal. Rptr. 3d 106, 119 (Ct. App. 2007) ("[T]he law may legitimately require a parent to admit responsibility for wrongful acts as a condition to be fulfilled in therapy . . . [and] the parent's decision not to acknowledge his or her wrongdoing" may result in "consequences occasioned by the lack of cooperation in the reunification process"). Lack of cooperation in the reunification process is likely to lead to termination of parental rights. *See* CAL. WELF. & INST. CODE §§ 366.21(e),

Because asserting the Fifth Amendment privilege, whether in the initial stages of a dependency matter, or later in the reunification process, can interfere with parents' chances of reuniting with their children, parents must choose between the fundamental liberty interest in raising their children[59] *or* their Fifth Amendment privilege against self-incrimination. Thus, even parents who are not ordered to testify are still effectively "compelled" to do so in violation of the Fifth Amendment by the threat of losing their child.[60]

C. Allowing *All* Parents to Safely Testify in their Child's Case will Improve California's Dependency Courts

In 1997, California's Administrative Office of the Courts (AOC) released the California Juvenile Court Improvement Project Report, the culmination of a statewide analysis of the juvenile dependency court system.[61] The recommendations of the 1997 report were general in nature and designed simply to highlight areas for improvement.[62] Following the implementation phase of the initial improvement project, the AOC's Center for Families, Children and the Courts performed a reassessment in 2005.[63] Although California made substantial progress since the 1997 assessment, the 2005 reassessment found that many of the originally identified issues remained[64] and specified six guiding principles to further improve California's dependency system:

> [1] The judicial branch should take a leadership role, and partner with other stakeholders at the state and local levels, to improve the experiences of and out-

366.22(a) (West 2007) ("The failure of the parent or legal guardian to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental."); *id*. § 366.26(c)(1) ("A finding . . . under Section 366.21 or 366.22, that the court has continued to remove the child from the custody of the parent or guardian and has terminated reunification services, shall constitute a sufficient basis for termination of parental rights.").

59 *See* Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.").

60 *See In re* M.C.P., 571 A.2d 627, 640 (Vt. 1989) (finding that "the State may not impose a penalty or sanctions against an individual for invoking the [Fifth Amendment] privilege," and "[t]here is no question that deprivation of custody of a child is a sanction for purposes of the Fifth Amendment."); *cf*. Lefkowitz v. Turley, 414 U.S. 70, 85 (1973) (holding that "answers elicited upon the threat of the *loss of employment* are compelled" and entitled to Fifth Amendment protection) (emphasis added). Surely, testimony obtained upon the threat of losing one's child is likewise "compelled."

61 NATIONAL CENTER FOR STATE COURTS, CALIFORNIA JUVENILE COURT IMPROVEMENT PROJECT REPORT (1997), *available at* http://www.abanet.org/ftp/pub/child/carpt.txt (last visited June 2, 2008). California's initial assessment took place from 1995 to 1996 and included a comprehensive review of dependency laws, procedures, and practices, as well as public hearings, focus groups, and roundtable discussions. *Id*.

62 *Id*.

63 ADMINISTRATIVE OFFICE OF THE COURTS, CENTER FOR FAMILIES, CHILDREN & THE COURTS, CALIFORNIA JUVENILE DEPENDENCY COURT IMPROVEMENT PROGRAM REASSESSMENT 1 (2005), *available at* http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/CIPReassessmentReport.pdf. The reassessment included a progress report on the original recommendations, a detailed review of dependency courts, and new recommendations for court improvement. *Id*.

64 *Id*. at 2–3.

> comes for children and families in the dependency system, increase permanency, and reduce the number of children in the system.
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> [2] Dependency hearings must be timely and must provide each party with meaningful notice and an opportunity to be heard. Sufficient information must be accessible and available for informed judicial decision making.
>
> [3] Courthouse procedures must ensure accountability, efficiency, open communication, safety, and respect for each party's rights.
>
> [4] The dependency system must be staffed by well-trained judicial officers, attorneys, and other professionals, who are given the resources and reasonable caseloads to do their jobs effectively.
>
> [5] National, state, and local collaborative efforts should be increased.
>
> [6] California courts must ensure their compliance with all relevant state and federal laws.[65]

Consistent with these principles, parents must have a fair opportunity to communicate openly with the court and fully participate in reunification efforts without forfeiting their fundamental rights. When parents fear criminal prosecution, they are unlikely to testify in their child's case or to participate in court-ordered therapy.[66] Essentially, they hand their children over to the mercy of the court. However, the children who fall into the arms of California's dependency system deserve to have their fate decided based upon *all* relevant information, including that which may only be available from their parents' testimony. Thus, allowing all parents to safely testify in dependency matters not only protects the constitutional rights of parents; it also serves the best interests of the child and furthers the goals of the dependency system.

III. A GRANT OF USE AND DERIVATIVE USE IMMUNITY CAN SUPPLANT A PARENT'S FIFTH AMENDMENT PRIVILEGE

A court may lawfully force a witness to testify over a valid assertion of the Fifth Amendment privilege only by granting immunity that protects against the use of the testimony, and any evidence derived from it, in a subsequent criminal prosecution.[67] The limited form of testimonial immunity provided by California Welfare and Institutions Code section 355.1(f) is not enough to override an assertion of the Fifth Amendment privilege.[68] However, dependency courts frequently misinterpret the law and improperly compel parents to testify without following proper statutory procedures to immunize their testimony.[69]

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65 *Id*. at 1–2.

66 *See*, *e.g*., *In re* Mark A., 68 Cal. Rptr. 3d 106, 108 (Ct. App. 2007) (involving a father who refused to testify at a combined jurisdiction and disposition hearing); *In re* Joanna Y., 10 Cal. Rptr. 2d 422, 425 (Ct. App. 1992) (involving a father who refused to undergo psychological evaluation or counseling).

67 Kastigar v. United States, 406 U.S. 441, 444–46 (1972).

68 *See* discussion *infra* Part III.B.

69 *E.g*., *In re Mark A*., 68 Cal. Rptr. 3d at 108 (footnote omitted); *In re* Brenda M., 72 Cal. Rptr.

Under current law, dependency courts may not unilaterally grant the constitutionally required level of immunity, nor interpret the statute to expand the limited immunity originally contemplated by the legislature.[70] Even the exclusionary rule, which makes unconstitutionally obtained evidence inadmissible in a criminal case,[71] does not authorize dependency courts to compel parents' testimony merely because it would produce the same result as a grant of immunity.[72] The exclusionary rule was developed to *deter* constitutional violations, not to justify them.[73]

A. Use and Derivative Use Immunity Commensurate with the Fifth Amendment Privilege is Required Before a Dependency Court Can Compel a Parent's Testimony

The Fifth Amendment privilege is not absolute—a witness may be compelled in certain circumstances to testify even after invoking the protections of the privilege. The Supreme Court has recognized "the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime."[74] This rings painfully true in dependency matters. There is a compelling state interest in coercing parental testimony, such that all relevant information will be disclosed to ensure an informed disposition of the child's case.[75]

Immunizing parental testimony simultaneously allows dependency courts to compel a parent to testify and protects that testimony from being used against the parent in a criminal proceeding.[76] However, the Supreme

3d 686, 687 (Ct. App. 2008).

70 *See* discussion *infra* Part III.C.

71 Mapp v. Ohio, 367 U.S. 643, 655–57 (1961).

> [A] witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers *and evidence derived therefrom* in any subsequent criminal case in which he is a defendant. Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution.

Lefkowitz v. Turley, 414 U.S. 70, 78 (1973) (internal citations omitted) (emphasis added).

72 Some California courts fail to distinguish the exclusionary rule from an official grant of immunity and erroneously rely on the possibility of future exclusion to compel a witness to testify over a valid assertion of the Fifth Amendment. Spielbauer v. County of Santa Clara, 53 Cal. Rptr. 3d 357 (Ct. App. 2007), *review granted, depublished by* 159 P.3d 29 (Cal. 2007). As noted in *Spielbauer*, this faulty assumption stems from California Supreme Court dicta in *Lybarger v. City of Los Angeles*, 710 P.2d 329, 331 (Cal. 1985) ("As a matter of constitutional law, it is well established that . . . self-incrimination rights are deemed adequately protected by precluding any use of [compelled] statements at a subsequent criminal proceeding." (citing Lefkowitz v. Turley, 414 U.S. 70, 77–79 (1973)). *Spielbauer*, 53 Cal. Rptr. 3d at 373–74.

73 Elkins v. United States, 364 U.S. 206, 217 (1960) (describing the purpose of the exclusionary rule "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.").

74 Kastigar v. United States, 406 U.S. 441, 446 (1972).

75 Collins v. Superior Court, 141 Cal. Rptr. 273, 277 (Ct. App. 1977) ("The clear legislative policy underlying [current California Welfare and Institutions Code section 355.1] is that all relevant evidence should be disclosed in proceedings of this nature in order to protect the paramount interest of the safety and welfare of the child.").

76 Peter Lushing, *Testimonial Immunity and the Privilege against Self-Incrimination: A Study in*

Court long ago declared that immunity which "does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard . . . is not a full substitute for that prohibition."[77] As such, the power to compel testimony is not absolute and must be accompanied by a *minimum level* of immunity so as not to offend the Fifth Amendment.[78] To be coextensive with the Fifth Amendment privilege, the protection afforded compelled testimony must leave both the parent and the prosecutor in a subsequent criminal case in the same position as if the parent had never testified.[79]

In 1892, the Supreme Court found that granting a witness total "transactional immunity" from prosecution satisfies the Fifth Amendment.[80] Under a grant of transactional immunity, a witness is absolutely immune from being prosecuted for any criminal offense related to the compelled testimony.[81] However, because the prosecutor's hands become permanently tied against bringing any related charge—even if the information is garnered from a wholly independent source—a witness who is granted transactional immunity is better off than if the testimony had never existed. Thus, the Supreme Court later held that transactional immunity provides more protection than the Fifth Amendment requires.[82]

In 1972, the Court shaped a narrower rule of "use and derivative use immunity," whereby a person compelled to testify may still be prosecuted, but neither the compelled statement, *nor any evidence derived from it*, can be introduced in a criminal trial.[83] The Court distinguished the requisite "use and derivative use immunity" from mere "testimonial immunity"—immunity that protects the testimony itself (but not its fruits) from being used against a witness in a criminal proceeding.[84] The Court reaffirmed that testimonial immunity alone is not coextensive with the Fifth Amendment and, therefore, testimony cannot be compelled with such a minimal grant of protection.[85] For testimony to be adequately protected, such that a dependency court may compel a parent to testify, the testimony must not be used in any manner in a subsequent criminal case—as if it never existed.[86]

Isomorphism, 73 J. CRIM. L. & CRIMINOLOGY 1690, 1691–92 (1982).

77 Counselman v. Hitchcock, 142 U.S. 547, 585–86 (1892).

78 Kastigar v. United States, 406 U.S. 441, 444–46 (1972).

79 Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964).

80 *Counselman*, 142 U.S. at 585–86.

81 AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 57 (Yale Univ. Press 1997).

82 *Kastigar*, 406 U.S. at 462 (finding "no justification in reason or policy for holding that the Constitution requires an amnesty grant").

83 *Id*. at 453 (holding that "immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege.").

84 *See* AMAR, *supra* note 81, at 47 (explaining that under a "testimonial immunity" rule, "the compelled words will never be introduced over the defendant's objection in a criminal trial . . . but the fruits of these compelled pretrial words will generally be admissible.").

85 *Kastigar*, 406 U.S. at 453–54.

86 *Id*. at 462 (concluding that use and derivative use immunity "leaves the witness and the prose-

B. California Welfare & Institutions Code Section 355.1 Does Not Provide Immunity Commensurate with the Fifth Amendment

The California Legislature encourages parents to participate in dependency matters by providing limited testimonial immunity.[87] California Welfare and Institutions Code section 355.1(f) provides: "*Testimony* by a parent, guardian, or other person who has the care or custody of the minor made the subject of a [juvenile dependency proceeding] shall not be admissible as evidence in any other action or proceeding."[88] But Section 355.1(f) fails to provide "protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party."[89]

While the testimony itself may not be admissible as evidence in a subsequent criminal prosecution under Section 355.1(f) (mere testimonial immunity), nothing prohibits the use of information gained directly or indirectly from the testimony (as would use and derivative use immunity). For example, law enforcement officers could interview potential witnesses disclosed by parents to gather information for use against the parents in a criminal proceeding. Because the statutory prohibition against the admissibility of a parent's *testimony* does not supplant their Fifth Amendment privilege, a parent's testimony cannot currently be compelled without guaranteeing that neither it nor its fruits will be used in a subsequent criminal prosecution.[90] In addition, while courts have decided that a parent's disclo-

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cutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege . . . [and] therefore is coextensive with the privilege and suffices to supplant it.").

87 CAL. WELF. & INST. CODE § 355.1(f) (West 2007). William Wesley Patton, a leading authority on California dependency law, provides a detailed and informative analysis of the legislative history of Section 355.1, explaining the addition of subsection (f) and its purpose to *encourage*, *not compel*, parental testimony. *Rethinking the Privilege Against Self-Incrimination in Child Abuse Dependency Proceedings: Might Parents Be Their Own Worst Witnesses?*, 11 UC DAVIS J. JUV. L. & POL'Y 101, 125–27 (2007).

88 CAL. WELF. & INST. CODE § 355.1(f) (West 2007) (emphasis added).

89 *See Kastigar*, 406 U.S. at 454 (internal quotes and citations omitted); *In re* Mark A., 68 Cal. Rptr. 3d 106, 108 (Ct. App. 2007).

90 *See Kastigar*, 406 U.S. at 449–54. In *Kastigar*, the Supreme Court upheld a federal immunity statute that provided use and derivative use immunity to witnesses whose testimony was compelled. *Id*. at 453. The Court also reanalyzed the Immunity Act of 1868 ("Act") that it previously criticized in *Counselman v. Hitchcock*, 142 U.S. 547 (1892). *Id*. at 453–54. The Act was similar in scope to Section 355.1(f), providing that "no evidence obtained from a party or witness by means of a judicial proceeding . . . shall be given in evidence, or in any manner used against him . . . in any court of the United States . . . ." *Id*. at 449–50 (internal quotations omitted). In *Kastigar*, the Court asserted that the Act would still be

> plainly deficient in its failure to prohibit the use against the immunized witness of evidence derived from his compelled testimony . . . because the immunity granted was incomplete, in that it merely forbade the use of the testimony given and failed to protect a witness from future prosecution *based on knowledge and sources of information obtained from the compelled testimony*.

Id. at 453–54 (internal quotations omitted).

sures in therapy are also protected by Section 355.1(f),[91] the statute does not provide the necessary level of immunity to compel parents to make such disclosures.

C. California Dependency Courts Cannot Unilaterally Grant the Necessary Immunity to Compel a Parent's Testimony

A dependency court that unilaterally grants a parent use and derivative use immunity inappropriately overrides the intent of the legislature and possibly the will of the executive.[92] For nearly twenty years, dependency courts have incorrectly assumed that a parent's Fifth Amendment privilege is sufficiently protected by Section 355.1(f) and have compelled parents to testify over a valid assertion of their Fifth Amendment privilege.[93] A California dependency case recently reached the appellate level where it was finally confirmed that Section 355.1(f) *does not* provide immunity commensurate with the Fifth Amendment.[94] The appellate court also correctly decided that a dependency court cannot unilaterally grant the necessary level of immunity to compel parents to testify[95] absent a clearly expressed grant of such authority by the legislature.[96]

The power to write laws rests with the legislature, and the courts must adhere to the express intent of the legislature when it grants mere testimonial immunity.[97] A dependency statute that does not attempt to provide

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91 *In re* Jessica B., 254 Cal. Rptr. 883, 893 (Ct. App. 1989).

92 *See* CAL. CONST. art. III, § 3 (2007) ("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."); *In re* Weber, 523 P.2d 229, 240 (Cal. 1974) (finding that "the power to provide for the exercise of a grant of immunity [is] essentially a legislative function" and "the decision to seek immunity is an integral part of the *charging* process," left to the prosecuting attorneys); People v. Honig, 55 Cal. Rptr. 2d 555, 595 (Ct. App. 1996) (noting that "the separation of powers doctrine . . . precludes courts from interfering with the executive decisions of prosecutorial authorities.").

93 *E.g.*, *In re Jessica B.*, 254 Cal. Rptr. at 893–94; *In re* Mark A., 68 Cal. Rptr. 3d 106, 108 (Ct. App. 2007).

94 *In re Mark A.*, 68 Cal. Rptr. 3d at 108 (finding that the "statutory immunity provided by section 355.1(f) is more limited than the Fifth Amendment privilege the statute purports to replace").

95 *Id.* at 113 ("[I]f immunity were to be requested by [the social services agency] under [California Rule of Court] 5.548(d), the court must require notice to be given to the district attorney, particularly where, as here, there is a pending criminal prosecution.")

96 *See id.* at 112 ("We are not prepared to *infer* that section 355.1(f) provides full use and derivative use immunity for compelled testimony, contrary to the explicit language of the statute.") (internal quotations omitted); People v. Campbell, 187 Cal. Rptr. 340, 345 (Ct. App. 1982) (finding that the court is bound by the conditions and scope of immunity as provided in the statute). Even *Kastigar* does not authorize a judicial grant of immunity absent statutory authority.

> [*Kastigar*] held only that, pursuant to statutory authority to confer such immunity, the *Government* may constitutionally compel incriminating testimony in exchange for immunity from use or derivative use of that testimony. *Kastigar* does not hold that a trial judge, acting without statutory authority to grant immunity, may . . . overrule an otherwise valid assertion of the Fifth Amendment privilege.

Pillsbury Co. v. Conboy, 459 U.S. 248, 267 (1983) (Marshall, J. concurring) (citing Kastigar v. United States, 406 U.S. 441, 462 (1972)).

97 *Campbell*, 187 Cal. Rptr. at 345; CAL. CIV. PROC. CODE § 1858 (West 2007) ("In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms

the court with authority to compel testimony need not grant use and derivative use immunity.[98] Thus, if the legislature intended to compel testimony, the statute would expressly say so and would provide for the requisite use and derivative use immunity.[99] Because Section 355.1(f) says nothing about compelling testimony and only grants limited testimonial immunity, it is reasonable to infer that the legislature did not intend to grant the court authority to compel parents to testify.[100] A dependency court must not read such broad immunity into the statute, but "should stay its hand and let the legislature decide whether the statute needs to be amended."[101]

Similarly, a unilateral judicial grant of immunity may encroach upon the discretion of the executive branch.[102] A prosecutor, like the legislature, may have legitimate reasons for granting limited testimonial immunity, even though the scope of that immunity is insufficient to compel a witness's testimony.[103] If a witness is compelled to testify under a grant of use and derivative use immunity, the prosecution in a subsequent criminal proceeding has an "affirmative duty to prove that the evidence . . . is derived from a legitimate source wholly independent of the compelled testimony,"[104] thereby increasing the prosecutorial burden.[105] Thus, a prosecutor may wish to forgo a grant of such immunity. Furthermore, the criminal prosecutor is often not a party to the dependency matter and may have little interest, if any, in granting immunity to parents in dependency proceedings.[106] As such, it makes sense that current California law involves the prosecutor in the decision to grant immunity.[107]

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or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted").

98 *See* Fisher v. United States, 425 U.S. 391, 408 (1976) (acknowledging that the Fifth Amendment is not implicated unless testimony is compelled).

99 *E.g.*, CAL. CT. R. 5.548(b) (*expressly* granting a judge the authority to compel a witness's testimony by following specified procedures and providing the necessary use and derivative use immunity therefor).

100 *See* Patton, *supra* note 87, at 122–27 (demonstrating that the California legislature was not attempting to *compel* parents to testify, but was merely trying to ease the harsh presumption of abuse that a parent must overcome under the statute).

101 *In re* Elan E., 102 Cal. Rptr. 2d 528, 532 (Ct. App. 2000).

102 *See supra* note 92; s*ee also In re* Mark A., 68 Cal. Rptr.3d 106, 113 (Ct. App. 2007) (confirming that "law enforcement and the prosecution of crimes is part of the executive branch of government").

103 *See*, *e.g.*, United States v. Pielago, 135 F.3d 703, 710 (11th Cir. 1998) (regarding a valid proffer agreement which permitted the government to pursue investigative leads derived from a witness's testimony and to use the evidence derived from those leads against the witness in a subsequent criminal proceeding).

104 Kastigar v. United States, 406 U.S. 441, 460 (1972).

105 *See* United States v. Turkish, 623 F.2d 769, 775 (2d Cir. 1980) (indicating that "while the prosecution remains theoretically free under *Kastigar* to prosecute a witness granted use immunity, the obstacles to a successful prosecution can be substantial").

106 *In re Mark A.*, 68 Cal. Rptr. 3d at 113 n.4 ("The appearance of the district attorney in a juvenile dependency case is rare, at least in Orange County.").

107 CAL. CT. R. 5.548(d) (requiring the dependency court to give the prosecution notice and an opportunity to be heard before granting immunity to a parent).

Just as the criminal prosecutor is often not a party to dependency matters, dependency judges act within a specialized court system entirely distinct from the adult criminal system.[108] Dependency judges may be more interested in the resolution of the dependency matter and less interested or familiar with criminal prosecution. When this is the case, a unilateral decision to immunize or compel a parent's testimony may not account for the increased burden imposed on the criminal prosecution or the statutory plan approved by the citizenry. Rather, the decision may focus primarily upon the preferences and interests of the parties involved in the dependency matter (e.g., the minor or guardian ad litem acting on behalf of the minor, the social services agency, another parent or guardian, potential foster or adoptive parents, or prospective placements for the child) and the judicial officer's interest in hearing all available evidence necessary to make an informed disposition of the case.[109] Thus, a dependency court should not endeavor to immunize or compel a parent's testimony on its own motion and without statutory authority.

D. The Exclusionary Rule is meant to Deter Constitutional Violations, Not to Supplant a Parent's Fifth Amendment Privilege

When parents are improperly compelled to testify absent a grant of the proper level of immunity, their Fifth Amendment privilege may be protected by the exclusionary rule. Under this rule, when a witness is compelled to answer in violation of the right to remain silent, he or she may object to the admission of the compelled answers, and any evidence derived from them, in a subsequent criminal action.[110] Thus, a parent who is ordered to testify against a valid claim of Fifth Amendment privilege may be automatically vested with protection coextensive with the Fifth Amendment.[111] However, reliance on the exclusionary rule as a tool to compel self-incrimination contradicts the Fifth Amendment mandate. The fact that the Fifth Amendment may be violated in a case that never reaches trial demonstrates that the privilege is more than a constitutional rule of evidentiary admissibility or exclusion.[112] Furthermore, the exclusionary rule is

108 *See supra* note 29; *cf*. *In re* Noel N., 465 N.Y.S.2d 1008, 1008 (N.Y. Fam. Ct. 1983) (finding that a family court has limited jurisdiction and a family court judge may not grant immunity to a witness in a delinquency proceeding).

109 *E.g*., *In re* Joanna Y., 10 Cal. Rptr. 2d 422, 426 (Ct. App. 1992) (improperly stating that "the privilege against self-incrimination is inapplicable in child welfare proceedings because all relevant evidence should be disclosed to protect the paramount interest of the safety and welfare of the child."). *But see In re Mark A*., 68 Cal. Rptr. 3d at 118 (finding that the above statement in *Joanna Y*. was "clearly wrong.").

110 Lefkowitz v. Turley, 414 U.S. 70, 78 (1973) (noting that where a witness is not granted use and derivative use immunity, but "he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution.").

111 Adams v. Maryland, 347 U.S. 179, 181 (1954) ("A witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute.").

112 *See* Lefkowitz v. Cunningham, 431 U.S. 801, 805 (1977) (finding that, when the government compels testimony by threatening to inflict sanctions and does not guarantee immunity, "that testimony

meant to *deter unlawful violations* of the Fifth Amendment,[113] and is in no way a substitute for a guaranteed grant of immunity sufficient to compel a parent's testimony.[114] As such, a dependency court cannot rely on the exclusionary rule to support its own violation of the Constitution.

E. California Dependency Courts may Currently Compel a Parent's Testimony by Following the Procedure Set Forth in California Rules of Court 5.548

California Rule of Court 5.548 sets forth the procedure to grant parents use and derivative use immunity and authorizes the dependency court to compel their testimony.[115] Although this procedure has been on the books for over a decade, parents have not been consistently afforded its protection.[116] This may be due to the false assumption that Section 355.1(f) of the California Welfare & Institutions Code provides the necessary level of immunity,[117] or simply because dependency courts have erroneously found the Fifth Amendment privilege inapplicable.[118] In addition, the Social Services Agency and the criminal prosecution essentially control the initiation of the immunity statute,[119] and both are more likely to benefit where the parent remains silent.[120]

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is *obtained* in violation of the Fifth Amendment") (emphasis added); *see also Turley*, 414 U.S. at 83 (holding that disqualification from public contracting as a penalty for asserting the privilege, without a guarantee of immunity, violates the Fifth Amendment).

113 Elkins v. United States, 364 U.S. 206, 217 (1960).

114 As the Supreme Court eloquently stated in *Maness v. Meyers*: "[R]eliance upon a later objection or motion to suppress would 'let the cat out' with no assurance whatever of putting it back." 419 U.S. 449, 463 (1975). In *Pillsbury Co. v. Conboy*, the Supreme Court elaborated that a civil trial court lacks the power to grant immunity (except as authorized by statute), and a "[c]ourt's compulsion order . . . cannot not be justified by the subsequent exclusion of the compelled testimony." 459 U.S. 248, 261–62 (1983). In *In re Mark A.*, the California court of appeal agreed:

> [R]ules of evidence—applicable in a subsequent criminal proceeding—do not constitute an automatic grant of use and derivative use immunity sufficient to *compel* testimony over a Fifth Amendment objection; they do not represent the decision of the executive to request immunized testimony; and they do not give absolute assurance to the witness that another court on a later date will agree that information arguably derived from that testimony will be excluded.

68 Cal. Rptr. 3d 106, 117 (Ct. App. 2007).

115 CAL. CT. R. 5.548(d).

116 Prior to January 1, 2007, California Rule of Court 1421 provided a similar procedure. Originally effective beginning January 1, 1990, the statute was amended in 1998 to clarify that "no testimony or other information compelled under the order [to testify] or information directly or indirectly derived from the testimony or other information, may be used against the witness in any criminal case." CAL. CT. R. 5.548.

117 *See, e.g., In re Mark A.*, 68 Cal. Rptr. 3d at 108; *In re* Brenda M., 72 Cal. Rptr. 3d 686, 688 (Ct. App. 2008); *In re* Jessica B., 254 Cal. Rptr. 883, 892 (Ct. App. 1989).

118 *See, e.g., In re* Joanna Y., 10 Cal. Rptr. 2d 422, 426 (Ct. App. 1992).

119 CAL. CT. R. 5.548(c).

120 *See* CAL. WELF. & INST. CODE § 355.1(a) (West 2007) (providing for a presumption of abuse against a parent who does not present evidence to the contrary); Turkish v. United States, 623 F.2d 769, 775 (2d Cir. 1980) (noting that, under a grant of immunity, "the obstacles to a successful prosecution can be substantial.").

Pursuant to Rule 5.548, the Social Services Agency or the prosecuting attorney may request that the court order a parent to testify or to present evidence.[121] If the Social Services Agency *and* the prosecuting attorney jointly make the request, the judge must generally grant it.[122] Rule 5.548 further provides that, "any answer given, evidence produced, or information derived there from must not be used against the witness in a . . . criminal proceeding,"[123] thus granting "protection commensurate with that afforded by the [Fifth Amendment] privilege."[124] However, if the request is made solely by Social Services, the criminal prosecutor "must be given the opportunity to show why immunity is not to be granted."[125] The current procedure ensures that the criminal prosecutor has notice and an opportunity to be heard before the dependency court can compel a parent's testimony and grant the requisite immunity. If immunity is granted, the increased burden on the criminal prosecution attaches, serving as a disincentive for the prosecutor to seek such immunity.[126] In addition, the Social Services Agency benefits from the presumption of abuse against a parent where the parent is unable to present evidence to the contrary.[127] Thus, it is not surprising that this procedure is under-utilized.

IV. GRANTING USE AND DERIVATIVE USE IMMUNITY TO *ALL* PARENTS WHILE EXCLUDING PROSECUTORS FROM DEPENDENCY MATTERS WILL ALLOW DEPENDENCY COURTS TO LAWFULLY ACCESS ALL RELEVANT INFORMATION WITHOUT INTERFERING WITH THE PROSECUTION OF CRIMES

Parents are currently unable to *voluntarily* testify in their child's case without risking their Fifth Amendment privilege.[128] In addition, dependency courts may not *compel* parents' testimony without involving the criminal prosecutor.[129] Because the interests of dependency courts, prosecutors, and parents often conflict, it is unlikely that immunity will be granted in exchange for parental testimony under the current statutory scheme.[130] To ensure that dependency courts can routinely hear such testimony, California Welfare and Institutions Code section 355.1 should be amended to provide *all* parents blanket use and derivative use immunity.

121 CAL. CT. R. 5.548(c).
122 *Id*. at 5.548(d).
123 *Id*. at 5.548(d)(3).
124 Kastigar v. United States, 406 U.S. 441, 453 (1972).
125 CAL. CT. R. 5.548(d)(1).
126 *Kastigar*, 406 U.S. at 460.
127 *See* CAL. WELF. & INST. CODE § 355.1(a) (West 2007).
128 *Compare id*. § 355.1(f) (providing mere testimonial immunity to a parent who *voluntarily* testifies), *with* CAL. CT. R. 5.548(d)(3) (providing use and derivative use immunity when a parent is *compelled* to testify).
129 CAL. CT. R. 5.548(d).
130 *See supra* notes 120–120, 126–127 and accompanying text.

For such immunity to be effective, prosecuting agencies should be completely excluded from dependency proceedings to ensure they cannot access a parent's testimony. While such agencies currently have a strong interest in the decision to immunize a parent's testimony, their exclusion will alleviate the accompanying prosecutorial burden.[131] A prosecuting agency that receives notice of a parent's alleged abuse or neglect from law enforcement or the social worker, but is denied access to the child's dependency case file, remains free to base its investigation solely on independent sources without question as to how the information was discovered.

California law allows prosecuting agencies to be immensely involved in dependency matters. When a parent is charged with criminal acts against a child, the prosecuting attorney may step in to represent the minor on behalf of the state in the dependency matter.[132] The prosecutor may also represent both the child in the dependency proceeding and the state in a criminal proceeding against the parent, based on the same set of facts.[133] Even if the prosecutor is not involved in the dependency matter, the prosecutor and law enforcement have statutory rights to access the minor's case file, including the parent's testimony.[134] This creates a risk that the testimony will be used against the parent in a criminal proceeding, regardless of whether the parent accepts mere testimonial immunity or is compelled to testify under a grant of use and derivative use immunity. The legislative intent to *encourage* parental testimony is thus undermined if parents refuse to testify out of fear that their testimony may be used against them.[135] Furthermore, parents who are unaware that their testimony has been accessed will also be unaware if any information derived from it is admitted in their criminal case. Consequently, even the exclusionary rule will not protect parents if they do not know to object.[136]

Parental testimony and psychological reports should not be discoverable by prosecutors. However, the prosecutor should be allowed to petition the dependency court for access to the parents' dependency-related disclosures for impeachment purposes[137] or, if the parent chooses to testify in the criminal matter, for purposes of prosecution for perjury.[138] The juvenile

131 Kastigar v. United States, 406 U.S. 441, 461–62 (1972) (establishing that the prosecution has a "heavy burden" to prove that its evidence has not been obtained as a result of a defendant's immunized testimony). If the trier of fact finds that the prosecution had no means to access immunized testimony, such a burden could easily be lifted.

132 CAL. WELF. & INST. CODE § 681(b) (West 2007).

133 *Id*. § 317(c) (providing that such an arrangement "is not in and of itself a conflict of interest.").

134 *Id*. § 827(a)(1)(B), (E).

135 *E.g*., *In r*e Mark A., 68 Cal. Rptr. 3d 106, 110–11 (Ct. App. 2007) (involving a father who refused to testify despite a court order).

136 *See* cases cited *supra* note 114.

137 *See* People v. Hathcock, 95 Cal. Rptr. 221, 223. (Ct. App. 1971) ("[A] witness who testifies at a trial waives his privilege against self-incrimination as to any question which is thereafter asked to test the credulity of his testimony").

138 *See* Mackey v. United States, 401 U.S. 667, 705 (1971) ("[E]ven when the privilege against self-incrimination permits an individual to refuse to answer questions asked by the Government, if false answers are given the individual may be prosecuted for making false statements."); CAL. PENAL CODE §

court should confidentially determine whether the parent's testimony in the dependency and criminal proceedings truly conflict and limit access to the relevant portions of the testimony. This method will shelter the testimony from prosecutorial misuse, lessen the burden on prosecutors to prove that the evidence came from an independent source, and prevent abuse by perjuring parents.

A statutory scheme limiting mandated disclosure requirements will also foster parents' openness in court-ordered therapy. Statements relating to the children in the dependency matter should be disclosed to the dependency court, rather than to law enforcement or the district attorney. This will allow the dependency court to protect the children while preventing the unconstitutional use of the compelled incriminating statements against a parent in a subsequent trial. Furthermore, parents will more fully participate in rehabilitative services when they trust that their disclosures will remain confidential, and they will provide the dependency court with the information it needs to resolve the case in the best interests of the child.

CONCLUSION

California's dependency law currently compels parents to testify upon the threat of losing their children. Parents who face both the possibility of losing their child and the threat of criminal prosecution are forced to choose between cooperating with the dependency court to preserve their parental rights *or* risking the loss of their child to preserve their Fifth Amendment privilege. When parents invoke the Fifth Amendment privilege in their child's dependency case, California dependency courts currently have only two options: (1) proceed without the testimony to resolve the child's case; or (2) involve the prosecutor and grant parents the necessary use and derivative use immunity to compel them to testify.

Failure to provide parents with use and derivative use immunity violates their Fifth Amendment privilege and runs contrary to the best interests of the child, who deserves to have his or her case decided based upon all relevant information. Thus, *all* parents should be granted statutory use and derivative use immunity so that they may fully participate in dependency proceedings and court-ordered therapy. For such immunity to be effective, and to alleviate any potential prosecutorial burden, prosecutors must be excluded from dependency matters. The dependency court will have increased access to all relevant information to protect California's most vulnerable children; and prosecutors will be as free to prosecute as if the testimony never existed.

14 (West 2007); CAL. CT. R. 5.548(e) (expressly stating that where parents are granted immunity and compelled to testify in a dependency matter, they still "may be subject to proceedings under the juvenile court law or to criminal prosecution for perjury"); *In re* Joanna Y., 10 Cal. Rptr. 2d 422, 426 n.10 (Ct. App. 1992) ("[T]he purpose of use immunity is to secure truthful testimony, not to license perjury").