Comparing Philosophies and Practices of Family Law Between the United States and Other Nations: The Flintstones* vs. The Jetsons**

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Legal pundits, practitioners, judges, psychiatrists, psychologists, social workers and virtually anyone who has dealt with families in distress due to divorce or related issues have agreed for years that the family law legal system is broken.[1] Parties remain angry years after the initial hurt, relationships crack under stress, and most difficult of all, children are unable to maintain meaningful and positive associations with their family members.[2] While everyone involved in litigious family law proceedings, most especially the parents, likely believe, or at least convince themselves, that they are acting in the children's best interests, the reality is that this system creates unnecessary turmoil in everyone, particularly the children, separate and apart from the difficulties inherent in the initial breakup itself.[3]

In recent years, there has been a trend in a number of states towards using non-litigious methods for resolving family matters, including negotiation, mediation, and, more recently, collaboration.[4] The ideals of collaborative law, better known and

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1 *See generally* Janet Weinstein, *And Never the Twain Shall Meet: The Best Interest of the Children and the Adversarial System*, 52 U. MIAMI L. REV. 79 (1997).

2 *See id. See generally* Judith S. Wallerstein & Julia Lewis, *The Long-Term Impact of Divorce on Children: A First Report from a 25-Year Study*, 36 FAM. & CONCILIATION CTS. REV. 368 (1998); Marsha B. Freeman, *Love Means Always Having to Say You're Sorry: Applying the Realities of Therapeutic Jurisprudence to Family Law*, 17 UCLA WOMEN'S L.J. 215 (2008) [hereinafter Freeman, *Applying the Realities of Therapeutic Jurisprudence*].

3 *See* Wallerstein & Lewis, *supra* note 2; Freeman, *Applying the Realities of Therapeutic Jurisprudence, supra* note 2, at 217.

4 *See generally* Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement,"* 6 PEPP. DISP. RESOL. L.J. 1 (2006).

used in other areas of law,[5] have been promoted by practitioners and commentators alike.[6] Collaborative law, according to them, creates a new and, many believe, better methodology for dealing with family matters, especially dissolution and its integrated issues. This is especially true when collaborative law moves from a merely behavior-controlling paradigm,[7] to one encompassing the precepts of therapeutic jurisprudence.[8] Therapeutic jurisprudence recognizes the need not only to address specific conduct, but the underlying issues that have led to it.[9] Yet, for all the agreement among legal practitioners, the Bench, and mental health experts that such processes are far better for family members, particularly children,[10] there remains reluctance in many states, and even great fluctuations within states,[11] against requiring a switch to such methods. While there are legitimate concerns among those involved in family law matters, relating to the specifics of the collaborative method,[12]

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5 *See* David B. Wexler & Bruce J. Winick, *Putting Therapeutic Jurisprudence to Work*, 89 A.B.A. J. 54, 54–56 (2003) [hereinafter Wexler & Winick, *Putting Therapeutic Jurisprudence to Work*].

6 *See* Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 322–24 (2004) (criticizing the costly and conflict-engendering process of traditional family law); Freeman, *Applying the Realities of Therapeutic Jurisprudence*, *supra* note 2, at 217 n.6. *See also* Daicoff, *supra* note 4, at 3 (describing the new forms of resolution as a "comprehensive law movement").

7 *See* Freeman, *Applying the Realities of Therapeutic Jurisprudence*, *supra* note 2, at 223, 229.

8 *See* Wexler & Winick, *Putting Therapeutic Jurisprudence to Work*, *supra* note 8, for insight and examples of using the philosophies of therapeutic jurisprudence in multiple areas of law to achieve not just momentary legal resolve but lasting emotional changes to carry the parties forward.

9 *See* Freeman, *Applying the Realities of Therapeutic Jurisprudence*, *supra* note 2, at 223–28.

10 *Id.*; Forrest S. Mosten, Lawyer as Peacemaker: Building a Successful Law Practice Without Ever Going To Court, 43 FAM. L.Q. 489, 496 (2009). *See also* Tesler, *supra* note 6, at 321–22; Weinstein, *supra* note 1, at 83; Daicoff, *supra* note 4, at 7–8.

11 In New York, for instance, the Courts appear to remain reluctant to even promote, let alone require, non-litigious methods of resolution such as mediation. In Florida, by contrast, the Courts have long required mediation before the parties may get before a judge. *See* FLA. STAT. ANN. § 44.102 (West 2003). Nevertheless, despite a long history of supporting such methods statewide, only a handful of judicial circuits have thus far adopted Administrative Orders requiring collaborative methods in the dissolution case. *See* Marsha B. Freeman, *Florida Collaborative Family Law: The Good, The Bad, And Getting Better*, (forthcoming 2010) (citing Administrative Order 07-08: Authorizing the Collaborative Process Dispute Resolution Model in the 11th Judicial Circuit) [hereinafter Freeman, *Florida Collaborative Family Law*].

12 Freeman, *Florida Collaborative Family Law*, *supra* note 11, at 5 n.13:

> *See generally* Model Code of Prof'l Responsibility (1980), and Code of Judicial Conduct (1990, 2008), which are adopted in some form in every state. The Codes guide lawyers and judges in their roles and conduct in the legal system. There are serious concerns about some of the practices of collaborative law. The Colorado Bar Association issued a ruling saying the non-disclosure requirement of collaborative agreements violated the Rules of Professional Responsibility, leaving lawyers in that state at a loss as to how to proceed in these cases. *See* Colo. Bar Ass'n Ethics Op. 115 (Feb. 24, 2007). The ABA felt

the overriding opinion among most legal and virtually all mental health professionals is that such methods, especially since they encompass the philosophies of therapeutic jurisprudence,[13] are so superior to the litigation system in resolving the original issues and in allowing all parties to proceed forward in a healthier manner that they must be promoted and adopted on a widespread basis.

It is often hard to remember that the United States is a comparatively young nation, only an official two hundred and thirty-three years old. Many times, this national youth allows us to find newer and better methods of operating, unhindered by hundreds, perhaps thousands of years of historical perspective and reluctance to change. Other times, it can become mired in its own sense of youthful righteousness, unwilling to admire or bend to older nations' experiences and expertise. Many of these older nations, far longer accustomed to dramatic changes, have an easier and swifter time adopting and implementing new ideas and formats.[14]

History allows that law has not always been a litigious activity. Many early efforts at resolution involved both theological and civil roles.[15] The Talmud of the first and second centuries addressed the goal of peaceful settlement in the Sanhedrin, stating: "What is that kind of justice within which peace abides? We must say, arbitration."[16] Early leaders of the Greek city-states similarly used arbitration to solve disputes.[17]

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that collaborative law is so important to the practice of family law that it responded with an advisory opinion finding that the clause did not violate the rules. *See* American Bar Association Standing Committee On Ethics and Professional Responsibility, Formal Opinion 07-447: Ethical Considerations in Collaborative Law Practice (August 9, 2007). The ABA opinion notes that Colorado was the only State Bar to find a conflict arose from this collaborative law requirement. *Id.* at n.7.

13 While focusing on mental health and justice issues of juveniles, the paradigms of therapeutic jurisprudence are clear in their ability to help children and parties in other areas of the law, especially divorce procedures. Scott Nolen, *Adolescent Mental Health and Justice for Juveniles*, 7 WHITTIER J. CHILD & FAM. ADVOC. 189, 190 (2008).

14 The United States is in the minority on such major issues as the death penalty, for example, which has long been abandoned in most of the Western world. It is truly remarkable to contemplate the ability of European nations, for instance, to join together in a European Union and even give up their own monetary systems in some cases and the right of final judicial review. It is frankly difficult to think that this nation would be willing, let alone capable, of acceding to any other jurisdiction's superiority. Indeed, we have steadfastly refused to join other nations in allowing criminal sanctions over our citizens. Paul W. Kahn, *Why the United States is So Opposed*, THE CRIMES OF WAR PROJECT MAGAZINE, Dec. 2003, http://www.crimesofwar.org/icc_magazine/icc-kahn.html.

15 JEROME S. LEVY & ROBERT C. PRATHER, SR., TEXAS PRACTICE GUIDE: ALTERNATIVE DISP. RESOLUTION § 1:2 (West 2004).

16 *Id.*

17 *Id.*

The Spanish Admiral Balboa of the Great South Sea Expedition was apparently so concerned with formal legal actions that in 1513 he wrote to his monarch, King Ferdinand of Spain: "One thing I supplicate, your majesty: that you will give orders, under a great penalty, that no bachelors of law should be allowed to come here (to the New World); for not only are they bad themselves, but they also make and contrive a thousand iniquities."[18] Perhaps Shakespeare was not, after all, the first to suggest we "kill all the lawyers."[19]

Although such drastic results are not the goal, even our ancestors sought better results outside of formal legal systems, partly due to apprehension that such systems were a threat to the harmony of their new and small communities.[20] They instead utilized private resolutions to foster accord and to protect their communities.[21] The colonists also brought a distrust for the legal system, fostered by religious leaders who compared lawyers to the "biblical serpent" responsible for mankind's fall from grace in the Garden of Eden.[22] Some of the colonies, including Virginia, actually barred lawyers from practicing, while others denounced them officially.[23] In Massachusetts, arbitration was required before progressing to a formal suit, while the Quakers practiced an early form of third-party dispute resolution.[24] Native Americans had a similarly advanced outlook, using what was known as the "sentencing circle" with the concurrent objectives of dealing with the offense and simultaneously returning the offender to the community in a healing way,[25] very similar to today's goals of restorative justice.[26] It was only at the end of the eighteenth century that American jurisdictions began to follow a more formal legal system for adjudication of disputes,[27] one from which they have seldom looked back.

Be it a civil or a criminal matter, resolution is even today handled differently in different nations.

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18 VARDIS FISHER & OPAL LAUREL HOLMES, GOLD RUSHES AND MINING CAMPS OF THE EARLY AMERICAN WEST 296 (Caxton Printers, 1990).

19 WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2.

20 LEVY & PRATHER, SR., *supra* note 15, at § 1:2.

21 *See id.*

22 *See id.*

23 *Id.*

24 *See id.*

25 *See* Leena Kurki, *Restorative and Community Justice in the United States*, 27 CRIME & JUST. 235, 281 (2000).

26 *See* Wexler & Winick, *Putting Therapeutic Jurisprudence to Work*, *supra* note 5, at 56.

27 LEVY & PRATHER, SR., *supra* note 15, at § 1:2.

International criminal issues handled by the International Criminal Court (ICC) often arise from political unrest and involve large-scale atrocities.[28] The Court recognizes the need to restore belief in judicial systems while at the same time promoting widespread healing, and it utilizes the concepts of restorative justice to do so.[29]

Although the ICC is a more extreme example of other nations' legal resolution systems and goals, other issues, such as resolution of family law matters, are similarly handled differently in many nations of the world. Some are incrementally distinct from the United States, and some are a sea change in attitude and practice. This article will examine how other exemplar nations handle domestic relations matters, and it will compare them to the still mainly litigious and nascent rise of non-litigious methods, including collaborative family law and therapeutic jurisprudence practices in the United States.

Recalcitrant Followers:

Some commentators believe the United States has already succeeded in moving family courts from the concept of adjudicators to conflict managers.[30] While, certainly, there have been numerous instances of such change, family courts in the United States remain widely disparate as to the processes used to resolve disputes.[31] Practitioners and educators alike have been promoting the idea of collaborative and even therapeutic methods of family law resolution[32] for a number of years, arguing

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28 *See* Stephanos Bibas & William W. Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 DUKE L.J. 637, 652 (2010).

29 *Id.*

30 *See generally* Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363 (2009), *available at* http://www3.interscience.wiley.com/cgi-bin/fulltext/122407917/PDFSTART.

31 *See* Freeman, *Florida Collaborative Family Law*, *supra* note 11.

32 The term "collaborative law" generally refers to a number of methods of attaining a litigation-free divorce settlement, and is usually attributed to Stuart Webb, J.D. Freeman, *Florida Collaborative Family Law*, *supra* note 11, at n.4. Mr. Webb promoted a formal methodology for collaborative practice, including contractual agreements among the parties and attorneys not to litigate the action. *Id.* This author refers to this as collaborative with a capital "C," as it promotes the formal behavior model of collaborative law. In essence, there are both formal and informal forms of collaborative practice which can encompass both behavioral and emotional strides. *See id.* While Winick & Wexler were the first to promote and formalize the application of therapeutic jurisprudence to courts and practice, others have followed, applying it specifically to family law; Professor Babb was likely the first scholar to use the term "therapeutic jurisprudence" as applied to resolution of family law issues. *See generally* Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775, 798–801 (1997). Winick and Wexler have further advanced the ideals of therapeutic jurisprudence even in the traditional courtroom setting, advocating a "therapeutic justice" framework. *See* Bruce J. Winick & David B. Wexler, *Introduction* to JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE

that the law can and should be used as a therapeutic agent, not merely for legal resolution but for the emotional betterment of the parties to the action.[33] Despite the acknowledged attributes and benefits of collaborative processes and therapeutic paradigms, many American States, and even more of the judicial circuits within States, continue to practice more reluctance than implementation.[34]

There is no dearth of voices in the United States today advocating the use of collaborative and therapeutic jurisprudential philosophies and methodologies in a multitude of family law issues. Commentators have long promoted such uses in dependency courts, domestic violence cases and even the child welfare system.[35] Judicial conferences recognize the benefits to both participants and the Bench.[36] Legal and mental experts alike recognize the benefits, even for families in high-conflict situations.[37] Nevertheless, there continues to be a disconnect

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COURTS 3, 3–7 (Bruce J. Winick & David B. Wexler eds., 2003). Linda Elrod similarly examines the concepts of collaborative family law and therapeutic jurisprudence, which aims to recognize all the consequences, intended or not, in legal decision-making processes. *See* LINDA D. ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE § 1:15 (West 2003–2004).

33 *See* Nolan, *supra* note 10, at 211–13.

34 *See* Wexler & Winick, *Putting Therapeutic Jurisprudence to Work*, *supra* note 5, at 56. The author is involved in a number of organizations supporting and promoting both collaborative and therapeutic ideals in family law resolution. Nevertheless, it is not uncommon to find that many of the practitioners espousing such support have never actually done a collaborative case, no doubt for a multitude of reasons. Unfortunately, many of these reasons remain significant blocks to the actual widespread implementation of such programs. *See generally* Freeman, *Florida Collaborative Family Law*, *supra* note 11.

35 *See generally* Susan L. Brooks, *Therapeutic Jurisprudence and Preventive Law in Child Welfare Proceedings: A Family Systems Approach*, 5 PSYCHOL. PUB. POL'Y & L. 951, 953 (1999); Jaclyn Jean Jenkins, *Listen to Me!: Empowering Youth and Courts Through Increased Youth Participation in Dependency Hearings*, 46 FAM. CT. REV. 163, 165–66, 171–73 (2008), *available at* http://www3.interscience.wiley.com/cgi-bin/fulltext/119422412/PDFSTART; Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. 33, 33–34 (2000). To be sure, there are legitimate concerns regarding the use of these methodologies in certain areas of the law, such as when the accountability of an abuser may be unsuitably reduced in an effort to move the proceedings to a larger overall settlement. *See, e.g.*, Julia Weber, *Domestic Violence Courts*, 2 J. CTR. FOR FAM., CHILD. & CTS. 23 (2000), *available at* http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/023weber.pdf.

36 *See* Conference of Chief Justices & Conference of State Court Administrators, *CCJ/COSCA Joint Resolution in Support of Problem-Solving Courts*, 2 J. CTR. FOR FAM., CHILD. & CTS. 2 (2000), *available at* http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/cover.pdf.

37 *See generally* Lyn R. Greenberg et al., *Effective Intervention With High-Conflict Families: How Judges Can Promote and Recognize Competent Treatment in Family Court*, 4 J. CTR. FOR FAM., CHILD. & CTS. 49 (2003), *available at* http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/049Greenberg.pdf; Jessica Pearson, *Court Services: Meeting the Needs of Twenty-First Century Families*, 33 FAM. L.Q. 617, 618 (1999). *See also* Mary E. O'Connell & J. Herbie DiFonzo, *The Family Law Education Reform Project Final Report*, 44 FAM. CT. REV. 524, 529 (2006), *available at*

between the ideal and the application in American courts and there is a practice that does not exist elsewhere in the world, particularly in Western nations.

The question is, why are other nations able to forge past the problems and reluctance that continues to plague many of States, and accomplish what most practitioners, judges and mental health experts worldwide agree is the best alternative for resolution of family issues?

Other nations, perhaps because of their age, their perspective of right and wrong, their experiences with what we as a young nation are still learning, or maybe it is simple humility are better able to recognize the benefits of collaborative law and therapeutic jurisprudence on a far wider scale. While some have described these processes as having a huge impact in both the United States and Canada, observation shows that it is far more accepted and widely used by our northern neighbor than in the United States. The Canadian Department of Justice in 2001 commissioned a long-term study of what was described as a "rapidly growing phenomena" that had achieved a "meteoric rise" in Canada.[38] The study, conducted by Professor Julie Macfarlane and concluded in 2005, found that collaborative law was found in "'virtually every state and province in' the United States and Canada" and used extensively in family law.[39] While technically true in the United States, the sheer fact is that the vast majority of American family law attorneys, even in areas where it is more accepted,[40] have still never had a collaborative law case.[41] The opposite appears to be true in Canada, a nation where traditional trial and sentencing techniques are generally replaced by

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http://www3.interscience.wiley.com/cgi-bin/fulltext/118591816/PDFSTART (advocating encompassing the therapeutic jurisprudential paradigms in law school teaching). The author was a signatory to this report. *See id.* at n.3 (citation omitted).

38 Susan Daicoff, *Collaborative Law: A New Tool for the Lawyer's Toolkit*, 20 U. FLA. J.L. & PUB. POL'Y 113, 116–18 (2009).

39 *Id.* at 118 n.34.

40 A number of Florida judicial circuits have Administrative Orders requiring the use of Collaborative methods in family law cases. Administrative Order granting Mediation Of Family Law Cases, S-2008-163 (2008), *available at* http://www.fljud13.org/AO/DOCS/2008-163.pdf ("The Family Diversion Program has been established as a court program under Mediation and Diversion Services to implement an equitable and expeditious alternative dispute resolution process for family law cases."). *See also* Administrative Order *In re:* Authorizing the Collaborative Process Dispute Resolution Model in the Eleventh Judicial Circuit of Florida, No. 07-08 (2007), *available at* http://reports.jud11.flcourts.org/Administrative_Orders/1-07-08-Collaborative%20Processs.pdf.

41 Based on conversations with family law attorneys involved in collaborative law groups, as well as a teleconference with the Broward county Florida Family Law Committee, many attorneys still have no actual experience utilizing collaborative law, although Broward county is generally regarded as being a leader in collaborative family law.

collaborative family conferencing in an effort to effectuate results that take into account the needs of all and attempts to best arrive at a satisfactory solution.[42] While the United States is still very much in the debate and promotes collaborative family law, Canada can be considered a model for family law resolution.[43] Part of this process includes assessments to determine the best interests and results in post-divorce situations involving parenting issues.[44] Assessments are frequently made by social workers, not psychologists, in order to create a more factual than theoretical framework within which to work; and those who do the assessments often do only a few a year, focusing the rest of the time on therapeutically-oriented practices.[45] By contrast, American states, like Florida, which has long supported non-litigious family law,[46] require psychologists or psychiatrists to do parenting plan evaluations.[47]

Although therapeutic processes, including restorative justice,[48] are used widely in the United States in cases involving juvenile offenders,[49] they are used far more widely by other nations, including Canada, in juvenile and in many adult offender cases.[50] While therapeutic jurisprudence has been widely accepted in theory in both the United States and Canada,[51] it is far more widely practiced in Canada, including in family law. In many cases, family "circles," or conferences,

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42 Daicoff, *supra* note 4, at 30.

43 *See id.*

44 *See* Nicholas Bala, *Assessments for Postseparation Parenting Disputes in Canada*, 42 FAM. CT. REV. 485, 485, 495 (2004), *available at* http://www3.interscience.wiley.com/cgi-bin/fulltext/118817162/PDFSTART.

45 *Id.* at 487–89.

46 The Florida Supreme Court, in a 2000 decision, held that family courts should be unified and one judge would preferably hear all issues involving the family members. The goal was not only to centralize for practicality and efficiency all actions that might affect the members, but also to draw in outside resources to help the family members in more than just a legal resolution. *See generally In re* Report of Family Court Steering Committee, 794 So. 2d 518 (Fla. 2001).

47 FLA. FAM. LAW R. P. 12.360, 12.363.

48 Restorative justice generally refers to the idea of making all the parties whole, not just the victim, in legal and societal settings. Elmar G.M. Weitekamp, *The History of Restorative Justice*, *in* RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME 75 (Gordon Bazemore & Lode Walgrave eds., 1999). The term has also been used extensively by Bruce Winick and David Wexler in their numerous writings on therapeutic jurisprudence. *See, e.g.*, Bruce J. Winick, Symposium, *Using Therapeutic Jurisprudence in Teaching Lawyering Skills: Meeting the Challenge of the New ABA Standards*, 17 ST. THOMAS L. REV. 429, 433, 438 (2005).

49 Daicoff, *supra* note 4, at 30. *See also* Paula A. Nessel, *Youth Court: A National Movement*, 17 A.B.A DIV. FOR PUB. EDUC. TECHNICAL ASSISTANCE BULL. 1, 8 (2000) (detailing information on teen courts in different states as well as rates of recidivism).

50 Daicoff, *supra* note 4, at 30.

51 *Id.*

replace court procedures entirely to resolve the family law issues at hand in a far more collaborative method.[52]

Restorative justice has become normative in Canada, while it is still in the developmental stage in the United States.[53] Stu Webb, the originator of formalized collaborative family practice in the United States, spotlights the success of such methods in a small area of Canada, noting that in a community of about 50,000, sixteen of the seventeen family practitioners attended collaborative trainings.[54] Within a year, the family court docket had dwindled to almost nothing, and one family court judge was actually reassigned to a different court.[55] The point is not that collaborative law works better in Canada than in the United States, but simply that it works when accepted and practiced in a far more widespread manner. Indeed, collaborative law had already become so widespread in Canada that authorities authorized a study on its work and effectiveness in 2001.[56] By contrast, this author has spoken to attorneys in jurisdictions where there are widely known collaborative family law organizations, and has been told that most of the attorneys they communicate with do not even know anyone who has done a collaborative case.[57] So, while many commentators continue to suggest that collaborative law, especially collaborative family law, is as widespread and accepted in the United States as it is in nations like Canada, the opposite is unfortunately true.[58] It may be that it is *theoretically* accepted as the better alternative, but the practice of it, except in small enclaves, has yet to successfully compete with litigation or even other forms of alternative dispute resolution such as mediation.

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52 *Id.*

53 *See id.* (stating that other countries have extended the restorative justice model to adult offenders, whereas the United States mainly uses it for juvenile offenders).

54 Stu Webb, *Collaborative Law: A Practitioner's Perspective on Its History and Current Practice*, 21 J. AM. ACAD. MATRIMONIAL LAW. 155, 164 (2008) (observing Medicine Hat, Alberta, Canada).

55 *Id.*

56 JULIE MACFARLANE, DEP'T OF JUSTICE CANADA, THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES (2005), *available at* http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2005_1/pdf/2005_1.pdf. *See also* Gary L. Voegele et al., *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 WM. MITCHELL L. REV. 971, 975 (2007).

57 Conversation with an attorney from Brevard County, Florida, where there is at least a perception of widespread collaborative law practice.

58 Elizabeth K. Strickland, *Putting "Counselors" Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. REV. 979, 994–95 (2006) ("Because collaborative law is new and exists apart from the court system, no cases to date deal directly with collaborative law as a distinct issue. Only a few cases, the majority of which are recent Texas cases, even mention collaboration law as it pertains to divorce.").

Another nation far advanced from the United States in terms of its use of and reliance on collaborative and therapeutic jurisprudential avenues of settlement is Australia. Australia is a land of widely varying geographic, social and cultural influences.[59] Yet the whole nation has made significant efforts and progress toward building a court system encompassing therapeutic jurisprudence.[60] Some of the commentary intentionally separates the overview of this system between those courts serving the larger urban cities, and those serving the regional areas of Western Australia with both smaller cities and far more remote towns and villages.[61] Judicial officers are labeled as either specialists (magistrates in the larger cities, exercising jurisdiction over specific functions such as Children's Court, family law, adult criminal cases and even mining cases) and generalists (more likely found in the regional areas, and presiding over all of these functions throughout a week or even a day).[62] Regional magistrates in the Western part of the continent still have a circuit, as in long-ago America or Canada, where they visit outlying towns on a rotating basis.[63]

Although they likely have fewer resources available to them, the regional magistrates have the benefit of being less bound by the traditional rules and practices of the larger city courts, and have more room to respond to the needs of their constituents.[64] It is here where drug courts and domestic violence courts found early growth.[65] In the cities, such specialist courts are developed at the magistrate levels, rather than as an overall methodology for dealing with cases.[66] It is more difficult for a philosophy of law, such as therapeutic jurisprudence, to gain wide-scale acceptance when a large number of judicial officers are presiding than it is where one magistrate presides over a wide array of cases.[67] Just as importantly, because resources are fewer in the regional areas, it has been even more important to establish

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59 Michael S. King, *Applying Therapeutic Jurisprudence in Regional Areas—The Western Australian Experience*, MURDOCH U. ELEC. J.L., June 2003, http://www.murdoch.edu.au/elaw/issues/v10n2/king102.html.

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.* Although this is not common in the United States today, there are still regions where one judge may sit on virtually all types of cases due to geographical and demographic needs. Such a case still exists in South Florida, in a more undeveloped area near Miami-Dade counties.

64 *Id.*

65 *Id.*

66 *Id.*

67 *See id.* Conversely, it would be similarly as easy for it to not be tolerated at all where the one magistrate does not perceive its benefits. *Id.*

judicial processes that promote therapeutic results while relying on fewer multidisciplinary specialists.[68]

In Australia, as elsewhere, the introduction to therapeutic and collaborative methodologies was not without incidence. Aside from the normal concerns over workloads and such, there was also skepticism about whether these philosophies and processes would truly enhance, rather than hurt, the judicial system.[69] Despite these initial concerns, the use of such methods proved not just successful, but led to specific expectations by some Australian communities.[70] While the United States remains pensive about the very value and implementation of such schemes, Australia has taken it to the "extreme"—where problem-solving courts are expected to address not just the legal result needed, but to promote the self-confidence and esteem of participants in numerous kinds of cases.[71] For example, certain criminal and drug cases include behavioral contracts, graduation ceremonies and interaction with the magistrate to acknowledge their offenses and discuss strategies to avoid recidivism.[72] Even re-entry courts—those that supervise released offenders—strive to act from a "strength-based" concept of rehabilitation rather than a focus on at-risk behavior for recidivism.[73] Although extreme, certainly by American standards, many offenders are even offered Transcendental Meditation as a means of relieving stress and refocusing their lives.[74] While many of these

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68 *See id.*

69 *Id.*

70 *Id.* ("In advertisements [in Western Australia] for the position of stipendiary magistrate . . . the necessity for qualities such as the 'capacity to introduce and manage change' . . . were emphasized.").

71 *See* King, *supra* note 59.

72 *See id.* (citing David Wexler, *Robes and Rehabilitation: How Judges Can Help Offenders 'Make Good,'* 38 COURT REV. 18 (2001)). To be fair, there are some comparable programs in the United States, such as Drug Courts for more minor offenses, where offenders are similarly encouraged and rewarded, but there doesn't seem to be the same widespread community expectation of such processes. *See* Daicoff, *supra* note 4, at 34. However, the United States Federal Courts have mandated non-rehabilitation sentencing guidelines, which foreclose even the idea of offender rehabilitation and re-acclimation to society. *See, e.g.*, United States v. Ochoa-Heredia, 125 F. Supp. 2d 892 (N.D. Iowa 2001) (imposing a mandatory minimum sentence of five years on a defendant that possessed methamphetamine with intent to distribute).

73 King, *supra* note 59. In contrast, the United States parole system is focused on keeping track of offenders and preventing recidivism rather than in "promoting happy and constructive lives" that King discusses. James Wootton, *Truth in Sentencing—Why States Should Make Violent Criminals Do Their Time*, 20 DAYTON L. R. 779, 782–84 (1995) (discussing the failure of the U.S. Parole Board in preventing recidivism). The major difference appears to be that in Australia they feel they can successfully do both. *See id.*

74 *Id.* (explaining that Transcendental Meditation "is a simple, natural mental technique practiced sitting down with the eyes closed" which in practice, causes mind activity to settle down and produce "a state of inner alertness where the body is deeply rested" and "requires no change in lifestyle or beliefs").

programs are designed for criminal offenders, Australia offers the same philosophies and practices in its Children's Courts and Family Courts, with an expectation that such programs are needed to help the participants both in the court system and beyond.[75]

While many therapeutically designed programs are aimed at divorcing or separated families, Australia has taken the philosophy further yet. While even the most ardent collaborative law proponents in the United States shy away from using it and other Alternative Dispute Resolution (ADR) methods in domestic violence situations,[76] Western Australia has jumped what might be called light-years ahead in tackling the subject directly within the collaborative law methodology called the Columbus Pilot Program (Columbus Program).[77] In 2001, the Columbus Program was begun in an effort to identify, assist and encourage divorced or separated parents to recognize the devastating effects of continuing high conflict between the parents, and to get parents to acknowledge the effects of actual abusive behavior or violence towards their children.[78] The program was designed as an early intervention stratagem for highly conflicted cases—ones involving multiple allegations of abuse and violence as well as ones with the potential of lengthy litigation.[79] This program followed an even earlier one, the Magellan project, that sought to case-manage high conflict, abusive relationships—especially those involving child abuse and child sexual abuse—within therapeutic, yet well-defined boundaries.[80] The Columbus Program broadened this spectrum, motivated by the extensive publications in Australia advocating multidisciplinary approaches to these types of families, as well as the official government responses to their therapeutic methods of case handling.[81] The Columbus Program was designed to encompass a multidisciplinary, holistic approach to allegations of child abuse and domestic violence,[82] concepts still considered radical in the United States.[83] Clearly, the thought was that by

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75 *See id.*

76 Freeman, *Applying the Realities of Therapeutic Jurisprudence*, *supra* note 2, at 222.

77 Lisbeth T. Pike, *The Columbus Pilot in the Family Court of Western Australia*, 44 FAM. CT. REV. 270, 270 (2006), *available at* http://www3.interscience.wiley.com/cgi-bin/fulltext/118591792/PDFSTART.

78 *Id.*

79 *Id.* at 270.

80 *Id.* at 270–71.

81 *Id.* at 270–72.

82 *Id.* at 271.

83 The results appear not to focus as much on whether the specific behaviors changed, but on how the participants saw the process. It is not clear from the results

encompassing all the professionals with a stake in the process as early as possible, far more progress could be made in a more manageable framework.[84]

Whether or not the specific goals of the Columbus Program were met, or even the best methods to apply to such families, it is clear that other nations, among them Australia, have taken therapeutic case management to a level rarely found in the United States. One commentator notes that the Columbus Program shows that Australia is in the forefront of using therapeutic jurisprudence in far more innovative ways than others.[85] Dealing with such a victimized population will undoubtedly require far more evaluation to determine its overall long-term success, but the very fact that other nations are willing to take this step shows how far ahead of the curve they are in the practice of therapeutic jurisprudence.

Another nation dedicated to the concept of restorative justice is Japan.[86] There, even criminal prosecutions are looked at in the light of rehabilitation for the offender and restorative justice for the victim.[87]

England has also joined the growing bandwagon of incorporating broader and better results for different kinds of actions, including criminal ones.[88] New regulations seek to ensure better resolution for both victims and offenders, (although not without criticisms of some of the methodology).[89] Indeed, as one commentator puts it, even decades ago, while the United States continued to advocate for harsher punishments for criminal offenders, most of Europe debated how to better return the offender back into society with more and better life skills.[90]

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whether the use of therapeutic methods within this population is effective as a deterrent to specific behaviors or even assessed correctly whether children who were the victims in these situations felt empowered by the process. *See id.* at 282–83.

84 *See id.*

85 Andrew Schepard, *Editorial Notes*, 44 FAM. CT. REV. 186, 188 (2006), *available at* http://www3.interscience.wiley.com/cgi-bin/fulltext/118591784/PDFSTART.

86 Richard S. Frase, *David T. Johnson, The Japanese Way of Justice: Prosecuting Crime in Japan*, New York, Oxford University Press 2002, 39 CRIM. LAW BULL. 488, 488 (2003) (book review).

87 *Id.*

88 Adam Crawford, *Governing Through Anti-Social Behaviour: Regulatory Challenges to Criminal Justice*, 49 BRIT. J. CRIMINOLOGY 810, 810, 814 (2009), *available at* http://bjc.oxfordjournals.org/cgi/reprint/49/6/810.

89 *See id.* at 810.

90 *See* Robert B. Goldmann, *Impressions of Correctional Trends in Europe*, 60 A.B.A. J. 947, 947 (1974). Compare this method to the U.S. Sentencing Guidelines of 1984, which virtually eliminates the idea of rehabilitation in Federal prisons. *See, e.g.*, United States v. Hubel, 625 F. Supp. 2d 845 (D. Neb. 2008) (noting the act in question carries a statutory mandatory minimum sentence).

There are more than one thousand documented restorative justice programs encompassing the nations of North America, and many more in Europe, Australia and New Zealand, with many under creation in South and Central America, Asia and Africa.[91] Yet, while the literature purports to show the United States as being in the mainstream of both collaborative law and therapeutic jurisprudence, especially in family law, the reality is that we are very much behind in the practical aspects of these philosophies.[92]

Even with a history of support for collaborative family law and therapeutic methodologies in the United States, there are few positive results that can echo the experience of other nations as exemplified by Canada and Australia. In Florida, for example, nine years after the Supreme Court called for a change to a therapeutically focused unified family court system,[93] a "Collaborative Process Act" has yet to pass the Legislature, the latest failure coming in 2009.[94] On a positive note, the American Bar Association responded to concerns by the Colorado Supreme Court regarding specific requirements of collaborative

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91 *See generally* Paul McCold, *Restorative Justice Practice—The State of the Field 1999*, INTERNATIONAL INSTITUTE ON RESTORATIVE PRACTICES (1999), http://www.iirp.org/library/vt/vt_mccold.html (last visited Feb. 8, 2010) (listing a chronological expansion of restorative justice programs in North America); Restorative Justice Online, *Europe*, http://www.restorativejustice.org/university-classroom/02world/europe1 (last visited Feb. 8, 2010) (confirming the long standing presence of restorative justice in the European Union); Restorative Justice Online, *Australia*, http://www.restorativejustice.org/university-classroom/02world/pacific1/alldocs/index_html/Australia1 (last visited Feb. 8, 2010) (discussing various forms of restorative justice programs in Australia); Restorative Justice Online, *New Zealand*, http://www.restorativejustice.org/university-classroom/02world/pacific1/alldocs/index_html/newzealand (last visited Feb. 8, 2010) (discussing developments in the restorative justice field in New Zealand); Restorative Justice Online, *Latin America*, http://www.restorativejustice.org/university-classroom/02world/latam (last visited Feb. 8, 2010) (discussing the exploration Latin American countries have done in an effort to incorporate restorative justice into their justice systems); Restorative Justice Online, *Asia*, http://www.restorativejustice.org/university-classroom/02world/asia1 (last visited Feb. 8, 2010) (illustrating the emergence of restorative justice programs, primarily in juvenile cases, in Asia); Restorative Justice Online, *Africa*, http://www.restorativejustice.org/university-classroom/02world/africa3 (last visited Feb. 8, 2010) (discussing the emergence of restorative justice programs throughout Africa).

92 *See generally* Heather E. Williams, Comment, *Social Justice and Comprehensive Law Practices: Three Washington Examples*, 5 SEATTLE J. FOR SOC. JUST. 411 (2006) (discussing the need for comprehensive law to become more accepted in the United States).

93 *In re: Steering Committee on Families and Children in the Court*, No. AOSC02–31 at 1 (Fla. 2000). The Florida Supreme Court, in a 2000 decision, held that family courts should be unified, in that preferably one judge would hear all issues involving the family members. *Id.* at 1. The goal was to centralize for practicality and efficiency all of the actions that might affect the members, but also to be able to draw in outside resources to help the family members in more than just a legal resolution. *Id.* at 2.

94 *See* H.R. 0395, 2009 Leg., Reg. Sess. (Fla. 2009) (relating to the collaborative process). The bill is supported by the Florida Family Law Section and will presumably be resubmitted in the next legislative session.

agreements by issuing an opinion supporting collaborative law in spite of its departure from some of the traditional legal methods of resolution.[95] And recently, in what many see as a true move towards a national collaborative law mindset, the National Conference of Commissioners on Uniform State Laws passed a Uniform Collaborative Law Act in 2009.[96] It is hoped that this long anticipated Act will hasten the collaborative and therapeutic law movements by giving direction and support for uniform standards.

Many lawyers and judges in the United States are finally listening to what the people want, not what those in the system believe is best for them.[97] But this nation has a long way to go to begin to catch up to those for whom therapeutic goals and collaborative practices are commonplace. With more listening by everyone, including the legislatures, we may yet match the ideal to the reality.

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95 *See generally* Colo. Bar Ass'n Eth. Op. 115 (2007). The ABA felt that collaborative law was so important to the practice of family law that it responded with an advisory opinion finding that the clause did not violate the rules. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-447 (2007) (discussing ethical considerations in collaborative law practice). The ABA opinion notes that Colorado was the only State Bar to find that a conflict arose from this collaborative law requirement. *Id.* at n.7.

96 *See* Uniform Collaborative Law Act §§ 4, 6, American Bar Association, National Conference of Commissioners on Uniform State Laws (2009), http://www.law.upenn.edu/bll/archives/ulc/ucla/2009am_approved.htm (last visited Feb. 4, 2010) (establishing minimum terms and conditions for collaborative law participation agreements designed to help ensure that parties considering participating in collaborative law enter into the process with informed consent; describes the appropriate relationship of collaborative law with the justice system; and describes the reasonable expectations of parties and counsel for confidentiality of communications during the collaborative law process by incorporating evidentiary privilege provisions based on those provided for mediation communications in the Uniform Mediation Act).

97 *See, e.g.*, Williams, *supra* note 91, at 413.

A Catastrophic Conundrum, But Not a Nuisance: Why the Judicial Branch is Ill-Suited to Set Emissions Restrictions on Domestic Energy Producers Through the Common Law Nuisance Doctrine

Matthew Hall[*]

Touted as a landmark decision reviving a legal theory once essentially left for dead, the Second Circuit Court of Appeals recently reversed a district court order dismissing a lawsuit brought by eight states, New York City and several private land trusts against six major energy producers, alleging that the energy producers' carbon dioxide emissions constituted an actionable nuisance.[1] *In its opinion, the court suggested that the judicial branch can set limits on carbon dioxide emissions of such producers without legislative action under the federal common law nuisance doctrine.*[2]

The harmful nature of greenhouse gases is approaching a point of being scientifically beyond dispute and dramatic action needs to be taken to prevent calamitous consequences. However, this article will argue that any determination of precisely how such harmful pollutants should be regulated is beyond the reach of the judicial branch through the common law doctrine of nuisance, and must come instead from the elected officials of the coordinate branches of government.

This is not to suggest, however, that the Second Circuit's decision cannot be of use in the battle against global warming. The threat of emissions caps created by the judiciary through piecemeal litigation could be precisely the motivation that Congress—and the energy lobby—needs to enact uniform, widespread emissions reduction policies.

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* Riggs, Abney, Neal, Turpen, Orbison & Lewis, Denver, CO. J.D. (2007), Loyola Law School, Los Angeles.

1 Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009).

2 *Id.* at 315.

INTRODUCTION

Persistent Congressional and Executive inaction in regulating harmful carbon dioxide emissions, particularly from energy producers, has forced the hand of the judicial branch. Many countries agree that something needs to be done soon, in order to mitigate the potentially calamitous consequences of global climate change.[3] However, widespread regulation of harmful emissions requires the setting of policy—specifically, a determination of how the United States should value global environmental interests relative to its own economic interests. The courts of this country are not the appropriate forum in which to resolve these complex policy issues.

In an attempt to achieve what Congress and the President have not been able to, the concept of suing large emitters of carbon dioxide under the common law nuisance doctrine was contemplated several years ago.[4] After an outright defeat of this strategy at the district court level in the Second Circuit in 2005 on grounds that the political question doctrine prohibited the courts from intervening in the global warming debate at this juncture,[5] the nuisance route seemed untenable. However, with a single decision, the Second Circuit revived the nuisance doctrine as a potentially viable means for addressing climate change.[6]

In *Connecticut v. American Electric Power Co.*, the Second Circuit held that courts are not precluded by the political question doctrine from granting injunctive relief, including potentially setting specific emissions restrictions on domestic emitters of carbon dioxide, to plaintiffs claiming damages caused by global warming.[7] The court reasoned that, because its holding was limited to the six energy producing entities identified as defendants in the lawsuit, it was not engaged in setting any sort of national policy on emissions reductions.[8]

While reasonable minds agree that action must be taken on climate change, taking such action via the common law nuisance doctrine presents serious problems, both under Article III standing and the political question doctrine.

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3 Richard Black, *55 countries send UN their carbon-curbing plans*, BBC NEWS, Feb. 1, 2010, http://news.bbc.co.uk/2/hi/science/nature/8492450.stm.

4 *See* Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

5 *Id.* at 265, 267.

6 *Am. Elec. Power Co.*, 582 F.3d at 315.

7 *Id.*

8 *Id.* at 325.

In order to have standing, a plaintiff must bring grievances before a court which could be redressed through an order of that court.[9] Unlike previous environmental disputes adjudicated by the courts involving pollution from a specific source damaging a particular river or airspace,[10] global warming is a worldwide issue with countless contributors.[11] Simply limiting the emissions of six domestic energy companies, as the Second Circuit has seemingly allowed for,[12] is extremely unlikely to redress any harm caused by global warming. Instead, a comprehensive, international policy is needed to curb the tide of human-induced climate change.

However, the judicial branch cannot be the body which sets any sort of broad based policy on global warming. To begin with, it can be argued that Congress has already spoken on the appropriate timing for the implementation of any emissions restrictions on domestic energy producers.[13] Both houses of Congress separately urged that no emissions restrictions be agreed to absent a comprehensive global agreement by which other nations, including developing countries, agree to reduce their own emissions accordingly.[14] The theory behind such a policy would be that enacting domestic restrictions prior to completing negotiations on a global agreement would reduce the President's bargaining power in seeking emission reduction concessions from other nations. Congress likewise enacted legislation prohibiting domestic enforcement of the Kyoto Protocol on the grounds that it does not require developing nations to reduce their emissions.[15] If Congress has announced a policy of refraining from restricting domestic emissions absent a global agreement, any decision from the judiciary in contravention of this policy would be prohibited by the political question doctrine.[16]

Even if Congress has yet to announce an official policy stance, the judicial branch would run afoul of the political

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9 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

10 *See, e.g.*, Missouri v. Illinois, 200 U.S. 496 (1906); Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907).

11 *See* U.S. ENERGY INFORMATION ADMINISTRATION, INTERNATIONAL ENERGY STATISTICS, 2006 TOTAL CARBON DIOXIDE EMISSIONS FROM THE CONSUMPTION OF ENERGY (2006), http://tonto.eia.doe.gov/cfapps/ipdbproject/IEDIndex3.cfm?tid=90&pid=44&aid=8 (last visited Mar. 2, 2010) (showing carbon dioxide emissions from recognized nations throughout the world).

12 *Am. Elec. Power Co.*, 582 F.3d at 314–15.

13 *See* H.R. REP. NO. 102-474 (I), Purpose and Summary (1992); S. Res. 98, 105th Cong. (1997).

14 *Id.*

15 Connecticut v. Am. Elec. Power Co., 406 F. Supp.2d 265, 269 (S.D.N.Y. 2005).

16 Baker v. Carr, 369 U.S. 186, 217 (1962). *See also* discussion *infra* Part II.B.1.

question doctrine should it attempt to set a broad based emissions reduction policy. The political question doctrine prohibits the judicial branch from issuing decisions which would require an "initial policy determination" of a kind not ordinarily made by the courts.[17] In order to create carbon dioxide emission restrictions, the judicial branch would be charged with making numerous value-based policy decisions.[18] These policy decisions would include whether the United States, as a nation, should commit to emissions restrictions for energy producers before a global accord is reached, and if so, the court would be required to weigh domestic economic interests against the need for emissions reductions to determine the appropriate schedule and degree of the required reductions.[19] In fact, the inordinate policy setting that would be required by a court in this context would exceed even those decisions made by courts widely accused of demonstrating unrestrained judicial activism—the New Deal era court and the Warren Court.[20] Through comparison to the "activist" decisions of these courts, it becomes apparent that judicial creation and implementation of emissions restrictions for domestic energy producers would be extraordinary action for the judicial branch to undertake.

In short, the judicial branch is faced with a conundrum in its attempts to set emission standards: if it attempts to set widespread policy, it runs afoul of the political question doctrine, but it if tries to narrowly tailor emissions restrictions to a given defendant, the impact of the decision would be so slight on the consequences of global warming that the redressability prong of traditional Article III standing analysis cannot be met. As such, the only appropriate means by which to regulate carbon dioxide or other greenhouse gas emissions is through the other coordinate branches of government.

However, despite the fact that cases using the nuisance doctrine to set emissions policies may not be legally sound and may not survive the scrutiny of the Supreme Court, they can still serve a useful role in encouraging the legislative and executive branches to take action in order to prevent piecemeal carbon dioxide emission regulations at the hands of the judicial branch. In fact, this may have been the subtle intention of the Second Circuit in issuing its recent decision in *Connecticut v. American Electric Power Co.*[21]

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17 *Baker*, 369 U.S. at 217.

18 *Am. Elec. Power Co.*, 406 F. Supp. 2d at 272–73. *See also infra* Part II.B.2.

19 *See* discussion *infra* Part II.B.2.

20 *See* PETER WOLL, PUBLIC POLICY 223–29 (1974).

21 Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009).

Part I of this article sets forth the Second Circuit's reasoning in reaching its decision, specifically focusing on the types of environmental disputes that the court cites as evidence that nuisance is an appropriate means for resolving this case. The majority of the authorities cited by the court involve specific acts of pollution contained in a finite geographical area which, on their own, provably caused or were sufficiently likely to cause harm to the plaintiff.

Part II discusses the critical differences between the nature of the previous environmental disputes successfully resolved by courts and cited by the *American Electric Power Co.* Court and the present dispute involving carbon dioxide emissions which place carbon dioxide emission standards in the realm of non-justiciable political questions. Rather than specific and geographically finite acts of pollution that result in readily attributable harm subject to redressability, harmful carbon dioxide emissions are a worldwide problem requiring a global (or at least national) solution. This posits an unsolvable conundrum for the courts. The political question doctrine precludes the judicial branch from imposing emission restrictions that are sufficiently widespread to result in meaningful reductions or postponements of the consequences of global warming, but anything short of meaningful reductions or postponements prevents litigants claiming injuries under nuisance laws from having standing to assert their claims.

Part III argues that even though the reasoning in this opinion should not withstand further scrutiny, it can still serve an important purpose in encouraging the legislative branch to act in setting emission restriction policies. Perhaps this was in fact the primary intent of the Second Circuit in issuing its decision after acknowledging that global warming is a serious problem that requires prompt and unified action.

I. THE REVIVAL OF THE COMMON LAW NUISANCE DOCTRINE IN THE GLOBAL WARMING DEBATE: *CONNECTICUT V. AMERICAN ELECTRIC POWER CO.*

On September 21, 2009, more than three years after argument, the Second Circuit issued its decision in *Connecticut v. American Electric Power Co.*[22] Plaintiffs—eight states, New York

22 582 F.3d 309. Interestingly, a rare two-judge panel of the Second Circuit issued the decision. The case was originally assigned to the two deciding judges, along with Justice (then Judge) Sonia Sotomayor. Justice Sotomayor was promoted to the United States Supreme Court before this case was decided, making her unable to participate in the decision. Since the two remaining judges agreed on the result, the decision was issued by the two remaining judges rather than be reassigned to a new panel. *Id.* at 314.

City and three private land trusts—sued six major electric power companies which operate fossil-fuel-fire power plants in twenty states, alleging that the defendants' carbon dioxide emissions constituted a nuisance in that they contributed to global warming and its harmful effects.[23] Plaintiffs' objective in bringing the suit was to force the defendants to "cap and then reduce their carbon dioxide emissions," which Plaintiffs alleged were causing damages to their interests.[24] Plaintiffs identified both present and future harms attributable to global warming, including the reduction of snow mass in California (and corresponding reduction in water for the State), respiratory problems for residents, beach erosion and coastal flooding.[25] The Court of Appeals reversed the District Court's determination that the political question doctrine serves as a bar to judicial resolution of the lawsuit, and further held that Plaintiffs had sufficiently demonstrated standing to pursue their nuisance claims.[26]

A. The Second Circuit's Political Question Doctrine Analysis

In analyzing the application of the political question doctrine to this case, the Second Circuit turned to the six factors set forth in *Baker v. Carr*:

> [(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[27]

Some pundits have speculated that the case, which was decided by the District Court in 2005, was purposefully delayed until after Sotomayor's promotion to the Supreme Court to make her confirmation an easier process. *See, e.g.*, Marcia Coyle, *Questions Arise About Long Delay by Sotomayor-Led Panel in Climate Case*, THE NATIONAL LAW JOURNAL, May 29, 2009, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202431051311.

23 *Am. Elec. Power Co.*, 582 F.3d at 310, 314.

24 *Id.*

25 *Id.* at 317–18.

26 *Id.* at 315. The court further held that Plaintiffs' claims were not displaced by existing federal law. *Id.* While this holding may present its own issues, they are outside the scope of this article.

27 Baker v. Carr, 369 U.S. 186, 217 (1962).

After noting that *Baker* "set a high bar for nonjusticiability," the court explained why each *Baker* factor is inapplicable to the issues presented.[28]

The first factor, a textual constitutional commitment to a coordinate political department, was quickly dismissed as an untenable argument by the court.[29] Defendants argued that the first factor was applicable based on the commerce clause and executive powers.[30] As to the commerce clause, the court declined to consider the argument as it was "insufficiently argued" and thereby waived.[31] As to executive powers, defendants argued that judicial intervention would usurp the executive's authority to "resolve fundamental [global] policy questions," thereby impermissibly interfering with the executive's right to manage foreign relations.[32] The court rejected this argument, holding that Plaintiffs sought only to limit the emissions from six energy producers, not set global policy on climate change.[33]

The second factor, a lack of judicially-discoverable and manageable standards for resolving the case, was likewise clearly rejected by the court.[34] Defendants argued that the uncertainties surrounding the impact of greenhouse gases render judicial intervention, particularly in the form of setting emission standards, unmanageable.[35] The court responded to this argument by noting that "federal courts have successfully adjudicated complex common law nuisance cases for over a century."[36] For instance, the court cited cases in which courts reached the merits: Missouri sued to prevent Illinois from dumping sewage into a channel that emptied into the Missouri River above St. Louis;[37] Georgia sued to stop a Tennessee company's "noxious emissions" from continuing to harm Georgian forests and crops;[38] and New Jersey sued to prevent New York City from dumping trash into the ocean, causing New Jersey waters and beaches to become polluted.[39] These disputes, the court reasoned, required judicial determinations of complex scientific issues as to the harm or prospective harm caused by

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28 *Am. Elec. Power Co.*, 582 F.3d at 321–32.
29 *Id.* at 324–25.
30 *Id.* at 324.
31 *Id.*
32 *Id.*
33 *Id.* at 325.
34 *Id.* at 326–29.
35 *Id.* at 326.
36 *Id.*
37 *Id.* (citing Missouri v. Illinois, 200 U.S. 496 (1906)).
38 *Id.* at 327 (citing Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907); Georgia v. Tenn. Copper Co., 237 U.S. 474 (1915)).
39 *Id.* (citing New Jersey v. City of New York, 283 U.S. 473 (1931)).

purported environmental pollutants.[40] Just as those courts were able to wade through the complexities to make reasoned decisions, so too, concluded the court, could it do with respect to carbon dioxide emissions.[41]

As to the third *Baker* factor, the impossibility of deciding the case without an "initial policy determination of a kind clearly for nonjudicial discretion," defendants argued, and the District Court agreed, that the "very nature of [global warming] requires a comprehensive response" which specifically requires the decision of whether to adopt a policy limiting greenhouse gas emissions.[42] Defendants further argued that Congress has contemplated such limits, calling for further study of the propriety of such action, but to date has refrained from enacting any specific policy.[43] According to defendants and the District Court, the judicial branch cannot act without this initial policy determination from the legislative branch.[44] The court minimized the importance of Congress' "refusal to legislate," citing *Illinois v. City of Milwaukee* (Milwaukee I)[45] for the proposition that, where a gap exists in a federal regulatory scheme, common law exists to fill those gaps.[46]

Milwaukee I specifically dealt with a water pollution abatement remedy sought by the State of Illinois not expressly covered by the Federal Water Pollution Control Act or any other federal environmental statutes.[47] The *Milwaukee I* Court, like Plaintiffs in this case, turned to federal common law nuisance to authorize the remedy sought.[48] The court further noted that a plaintiff should not be required to wait until comprehensive legislation has been enacted covering the specific grievance alleged.[49] Further, the court stated that ordinary tort suits do not require any initial policy determination that would be problematic under *Baker*, and that this nuisance action was consistent with an ordinary tort suit.[50]

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40 *Id.* at 327.

41 *Id.* at 328–29.

42 *Id.* at 330; Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 272–73 (S.D.N.Y. 2005).

43 *Am. Elec. Power Co.*, 582 F.3d at 330.

44 *Id.* at 331.

45 406 U.S. 91 (1972).

46 *Am. Elec. Power Co.*, 582 F.3d at 330.

47 *Milwaukee I*, 406 U.S. at 103–04.

48 *Id.* at 107.

49 *Id.* at 101–04; *Am. Elec. Power Co.*, 582 F.3d at 331.

50 *Am. Elec. Power Co.*, 582 F.3d at 331 (citing McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1365 (11th Cir. 2007)).

Finally, the court lumped the discussion of the fourth, fifth and sixth *Baker* factors together, deciding that all three factors are premised on some existing policy which might lead to uncertainty or inconsistent results.[51] The court held that there is no unified United States policy on greenhouse gas emissions.[52] While recognizing the "political overtones" of issues concerning global warming, because there is no identifiable policy that would be violated or contradicted by a decision from the judicial branch, the court ultimately concluded that these *Baker* factors likewise were not implicated.[53]

B. The Second Circuit's Standing Analysis

Despite the fact that the court held that its decision was not creating any national or global policy and was limited solely to the twelve plaintiffs and six defendants, the court nonetheless found that the plaintiffs had sufficiently demonstrated standing to pursue their nuisance claims.[54]

The court began its standing analysis by questioning whether the 2007 Supreme Court decision in *Massachusetts v. EPA*[55] eliminated the need for traditional Article III standing requirements (injury in fact, causation and redressability) when a State sues as *parens patriae*—that is, on behalf of its injured citizens.[56] Concluding that the matter was an open question, the court proceeded to analyze standing in this case under both the *parens patriae* approach and the standard Article III formulations.[57] Of particular interest to this article is the traditional Article III standing issue, and most importantly, the issue of redressability.[58]

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51 *Id.* at 331–32.

52 *Id.*

53 *Id.* at 332.

54 *Id.* at 314–15.

55 127 S. Ct. 1438 (2007).

56 *Am. Elec. Power Co.*, 582 F.3d at 336–37.

57 *Id.* at 338–39.

58 While the Second Circuit described the state of the law regarding whether traditional Article III standing analysis is required for states suing as parens patriae as an open question, the Supreme Court in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), found it necessary to apply the traditional elements of injury in fact, causation and redressability in spite of any analysis under a *parens patriae* theory. Moreover, the article cited by the *Am. Electric Power Co.* Court in its opinion, Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?:* Massachusetts v. EPA's *New Standing Test for States*, 49 WM. & MARY L. REV. 1701 (2008), concludes that the *parens patriae* analysis provides for a slackened application of the traditional elements, but applies them nonetheless. Although outside the subject of this paper, this author would posit that the *parens patriae* analysis takes the place of the "injury in fact" prong of the traditional analysis, leaving the remainder of the traditional analysis in tact. In any event, the Second Circuit held that the private land trust plaintiffs, who do not fit under

As the court noted, a showing of redressability requires "a substantial likelihood that the requested relief will remedy the alleged injury in fact."[59] Defendants essentially argued that because they contribute such a small amount on a global scale to the causes of global warming, alleged to be "2.5% of man-made carbon dioxide emissions," capping their emissions would not prevent or reduce the harm and future harm alleged by Plaintiffs.[60] The Court summarily rejected this argument, stating that *Massachusetts v. EPA* foreclosed this argument by holding that the EPA's failure to regulate United States automobile emissions which contribute to global warning was redressable because even of the remedy sought would not "by itself reverse global warming," but would "slow or reduce it."[61] Likewise, the court reasoned, reducing upwards of 2.5 percent of total man-made carbon dioxide emissions would slow or reduce the effects of global warming, and concluded the injury claimed was redressable through the remedy sought, reduction of defendants' emissions.[62]

II. JUDICIAL CREATION OF EMISSIONS STANDARDS IS EITHER TOO INSUBSTANTIAL TO CONFER ARTICLE III STANDING OR SO PERVASIVE AS TO RUN AFOUL OF THE POLITICAL QUESTION DOCTRINE

The Second Circuit in *American Electric Power Co.* found itself in an impossible position. The court was forced to try and delicately avoid the political question doctrine by attempting to describe its holding as narrow and independent of any initial policy determination regarding balancing environmental and economic interests of United States carbon dioxide emitters, while at the same time making clear that its decision would redress the claimed injuries and future injuries caused by global warming. As is apparent from the court's decision, this balance cannot adequately be struck.

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the *parens patriae* analysis, also had standing, making the traditional standing analysis relevant regardless of the final answer on *parens patriae* standing requirements.

59 *Am. Elec. Power Co.*, 582 F.3d at 347 (quoting Jana-Rock Const., Inc. v. N.Y. State Dep't of Econ. Dev., 438 F.3d 195, 204 (2d Cir. 2006)).

60 *Am. Elec. Power Co.*, 582 F.3d at 347.

61 *Id.* at 348 (quoting Massachusetts v. EPA, 127 S. Ct. 1438 (2007)).

62 *Id.* at 349.

A. In Order to Meaningfully Redress Injuries Caused by Global Warming, a Unified, Widespread Emissions Reduction Policy is Needed.

In order for a litigant to have standing to pursue a claim, that litigant must show that she suffered an injury in fact caused by the complained of conduct that would be redressable by the relief requested from the court.[63] There must be "a substantial likelihood that the requested relief will remedy the alleged injury in fact."[64] "[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury."[65]

Global warming and its consequences are an environmental problem different than any the judicial branch has previously dealt with.[66] As noted above, the Second Circuit justified its conclusion that the judicial branch was suited to adjudicate this kind of dispute and could redress the injuries claimed in this case in large part on the fact that courts had previously resolved "complex" environmental problems, including various cases involving the effects of pollution.[67] These pollution cases include the dumping of sewage into a river,[68] noxious fumes from a factory damaging nearby crops and forests,[69] and the dumping of garbage into the ocean, which washed up on the shores of a neighboring state.[70]

However, these examples all involved a specific act of pollution directly damaging a protectable interest. If sewage going into a river is damaging interests downstream, it seems simple enough to conclude that stopping the dumping will prevent the damage. Global warming is unique in that it does not fit this model.

Global warming is a global problem. While an individual emitter of carbon dioxide is undoubtedly contributing to the problem on some level, any individual contribution is likely so minimal as to have no measurable effect in terms of the injury causing consequences such as warming and sea level rise. The

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63 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

64 Jana-Rock Const. v. N.Y. State Dep't of Econ. Dev., 438 F.3d 195, 204 (2d Cir. 2006).

65 Larson v. Valente, 456 U.S. 228, 244 n.15 (1982).

66 *See, e.g.*, *infra* note 71.

67 *Am. Elec. Power Co.*, 582 F.3d at 326–27.

68 Missouri v. Illinois, 200 U.S. 496 (1906).

69 Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907); Georgia v. Tenn. Copper Co., 237 U.S. 474 (1915).

70 New Jersey v. City of New York, 283 U.S. 473 (1931).

Intergovernmental Panel on Climate Change concluded in its Climate Change 2001: Synthesis Report that even if every developed nation in the world reduced its emissions by 2 percent per year from 2000 through 2010, global warming and sea level rise would only be diminished by a "small amount" by the year 2030.[71] Moreover, the 2007 Synthesis Report anticipates greenhouse gas increases of 25–90 percent between 2000 and 2030 absent mitigation efforts.[72] As further evidence of recognition of the insufficiency of a one-time 2.5 percent (or less) reduction, it should be noted that the American Clean Energy and Security Act of 2009 (commonly referred to as the Waxman-Markey bill) recently passed by the House of Representatives with a competing bill expected sometime in the near future from the Senate, calls for an 83 percent reduction from 2005 levels in all domestic carbon dioxide emissions by 2050.[73]

Imagine, then, reducing not the emissions of every developed nation in the world, but instead allowing the emissions of all developed and developing nations to go unchecked and continue to grow while reducing only the emissions from six discrete companies within the United States. Clearly, some greater scheme than this is required to have any measurable impact on global warming or sea level rise, the factors causing the injuries complained of in *American Electric Power Co.*

In attempting to avoid this problem, the court in *American Electric Power Co.* brushed aside the issue of redressability, holding that *Massachusetts v. EPA* foreclosed the argument that the impact of emissions regulations could be too insignificant to redress injuries stemming from those emissions.[74] However, the facts in *Massachusetts* are substantially different than the issue facing the court in *American Electric Power Co.*

To begin with, *Massachusetts* concerned not the judicial branch imposing specific limitations on select energy producers, but rather whether the EPA had an obligation to regulate emissions from motor vehicles across the entire United States.[75] It has been estimated that United States motor vehicle emissions constitute upwards of 6 percent of the world's carbon dioxide

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71 THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, 2001 SYNTHESIS REPORT, EXECUTIVE SUMMARY QUESTION 6 98 (2001), *available at* http://www.grida.no/climate/ipcc_tar/vol4/english/pdf/q1to9.pdf.

72 THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, 2007 SYNTHESIS REPORT, EXECUTIVE SUMMARY 7 (2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf.

73 H.R. 2454, 111th Cong. § 702 (2009).

74 Connecticut v. Am. Elec. Power Co., 582 F.3d 309 349 (2d Cir. 2009).

75 Massachusetts v. EPA, 127 S. Ct. 1438 (2007).

emissions contributing to global warming.[76] Not only is this close to three times the amount of emissions directly at stake in the litigation in *American Electric Power Co.*, but also the fact that the EPA was the defendant in *Massachusetts* rather than individual emitters is a critical distinction. As the Supreme Court noted in *Massachusetts*: "Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. They instead whittle away over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed."[77]

In other words, the Supreme Court was acknowledging that even the impact of regulating all new automobiles in the United States was likely insufficient on its own to have a meaningful impact on the injuries caused by global warming, but recognized that the EPA, as the agency charged with implementing the Clean Air Act and regulating various emissions standards could, over time, design a comprehensive policy that would be substantial enough to make a dent in the effects of global warming. It is in this context that the remaining language in the court's opinion must be read.

The court in *American Electric Power Co.* relied heavily (indeed, almost exclusively) on the Supreme Court's language in *Massachusetts* that redressability was not defeated merely because the regulation of emission standards for new automobiles could not "by itself reverse global warming" because it could "slow or reduce it."[78] The *American Electric Power Co.* court found the emissions of the six energy producers analogous to the emissions of new motor vehicles across the United States.[79] However, the analogy does not hold when the *Massachusetts* language is taken in context.

Where the EPA is the defendant rather than individual emitters, it follows that an initial step in creating a comprehensive policy might be sufficient to meet the Article III standing requirement of redressability. The EPA was directed by Congress to create and implement climate change initiatives in

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76 *Id.* at 1457–58. *See also* U.S. ENERGY INFORMATION ADMINISTRATION, 2006 TOTAL CARBON DIOXIDE EMISSIONS FROM THE CONSUMPTION OF ENERGY, *supra* note 11 (showing that the United States produced approximately 20.3 percent of the world's carbon dioxide emissions). *See also* U.S. ENVIRONMENTAL PROTECTION AGENCY, 2006 U.S. EMISSIONS INVENTORY, EXECUTIVE SUMMARY 8 (2006), *available at* http://www.epa.gov/climatechange/emissions/downloads/08_ES.pdf (noting that 33 percent of U.S. man-made carbon dioxide emissions come from transportation activities, with 60 percent of transportation emissions coming from personal car use).

77 *Massachusetts*, 127 S. Ct. at 1457.

78 *Id.* at 1458.

79 *Am. Elec. Power Co.*, 582 F.3d at 378.

order to successfully reduce the impact of global warming.[80] In this manner, regulating new motor vehicle emissions would not completely alleviate the consequences of global warming, but it begins to "whittle away" at the overarching global problem.[81] Given that Congress directed the EPA to take action, it is perfectly conceivable that new motor vehicle emissions restrictions were just the first phase of a broader policy envisioned by Congress to be enacted over time, as the legislature "develop[s] a more nuanced understanding of how best to proceed" in tackling the imposing problem of global warming.[82]

Judicial imposition of emission restrictions on individual emitters, by contrast, cannot be said to be the initial step in some larger comprehensive scheme. Unlike the EPA, courts are not charged with creating an emissions reduction scheme. While a single court decision directed toward individual emitters would reduce the amount of global emissions by some insignificant amount, that court cannot on its own take any future steps in order to continue to whittle away at the massive problem that is global warming.[83]

Without the scenario presented in *Massachusetts*, where an agency is compelled by Congress to take the first step in creating a presumably broader emissions reduction policy, the independently insignificant act of requiring six individual emitters to reduce their emissions is insufficient to satisfy the redressability prong of the standing analysis. Gone is the justification of "whittling away" at a larger problem by taking a small initial step. All that remains is a single, independent remedy devoid of any practical significance that fails to redress the complained of injuries.

Therefore, in order for the judicial branch to sufficiently redress an injury caused by global warming, that court (or multiple courts through piecemeal litigation directed at specific individual emitters) would have to enact a broad based emissions scheme sufficient to make some measureable impact on the ramifications of global warming. There are two means by which this might be accomplished: (1) a single court (perhaps the Supreme Court) setting forth a uniform policy of emission

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80 42 U.S.C. § 7521(a)(1) (2006).

81 *See id. See also supra* notes 77 and 78.

82 *See supra* notes 77 and 78.

83 That is to say, courts are at the mercy of plaintiffs who bring disputes before them pursuant to the case or controversy requirement, and cannot independently pursue any sort of larger agenda, as could a legislative or authorized administrative body. U.S. CONST. art. III, § 2.

reductions for energy producers; or (2) gradual piecemeal litigation directed toward specific energy producers in multiple courts which eventually impose specific restrictions on all (or virtually all) major energy producers. However, both of these methods are problematic, due to the political question doctrine, as discussed below.

B. In Order to Enact a Sufficiently Widespread Emissions Reduction Scheme to Redress Injuries Caused by Global Warming, Courts Would Have to Resolve a Non-Justiciable Political Question

"The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed to the halls of Congress or the confines of the Executive Branch."[84] The doctrine is "designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government."[85] In 1962, the Supreme Court set forth six categories of non-justiciable political questions (the *Baker* factors):

> [(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[86]

Should a court (or multiple courts, though a series of piecemeal litigation directed at specific energy producers) decide to create a uniform, across the board policy to avoid the redressability problem discussed above, it would run afoul of the political question doctrine under either the third[87] or the fourth, fifth and sixth *Baker* factors[88] depending on whether Congress has sufficiently expressed a policy on regulating energy producer

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84 Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986).
85 United States v. Munoz-Flores, 495 U.S. 385, 394 (1990).
86 Baker v. Carr, 369 U.S. 186, 217 (1962).
87 *See infra* Part II.B.2.
88 *See infra* Part II.B.1.

emissions to date. Notably, the creation of such a policy likely would not contravene the first *Baker* factor.[89]

Arguably, Congress has already made an initial policy determination inconsistent with the judicial branch setting emission restrictions on domestic energy producers prior to a global agreement being reached.[90] If this is the case, the judicial branch is precluded from setting emissions limitations before such an agreement is reached. If, on the other hand, Congress has not sufficiently expressed such a policy on domestic energy producers, then an initial policy determination must be made. Courts are prohibited from making such a determination by the third *Baker* factor.[91] In either case, the judiciary runs afoul of the political question doctrine under either the third or the fourth, fifth and sixth *Baker* factors, but not under the first *Baker* factor.[92]

1. If Congress Has Sufficiently Expressed a Policy on Regulating Emissions of Domestic Energy Producers, Judicial Intervention Establishing Such Standards Conflicts with that Policy in Violation of the Fourth, Fifth and Sixth Baker Factors

The fourth, fifth and sixth *Baker* factors depend on the existence of a policy expressed by a coequal branch of government which would be contradicted by a court's decision in a particular case.[93] If such a policy is in existence, and the court's decision would in some way undermine that policy, the court may be presented with a non-justiciable political question and be forced to refrain from issuing an opinion on the merits.[94]

Arguably, Congress has already set forth a policy on regulating domestic emissions. Congress is no stranger to the debate over global climate change policy. In 1987, Congress enacted the Global Climate Act of 1987, which compelled the Secretary of State to engage in global negotiations on climate change on behalf of the United States.[95] In 1992, the House of Representatives weighed whether to enact domestic emissions restrictions and specifically found that domestic emissions reduction action should only be taken "in the context of concerted

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89 *See infra* Part II.B.2.

90 H.R. REP. NO. 102-474 (I), Purpose and Summary (1992); S. Res. 98, 105th Cong. (1997). *See also infra* Part II.A.1.

91 *See infra* Part II.B.2.

92 *See infra* Parts II.B.1 and II.B.2.

93 Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 331 (2d Cir. 2009).

94 Baker v. Carr, 369 U.S. 186, 217 (1962).

95 15 U.S.C. § 2901 (2006).

international action."[96] Through the negotiations authorized under the Global Climate Act of 1987, the United States entered, with ratification by the Senate, the United Nations Framework Convention on Climate Change (UNFCCC), which was designed to achieve a global accord as to how to best handle climate change.[97] The fruit of the UNFCCC was the Kyoto Protocol, which President Clinton signed in 1997, but was never presented to the Senate for ratification.[98] Had the Kyoto Protocol been presented to the Senate, the evidence overwhelmingly suggests it would not have been ratified; also in 1997, the Senate passed a resolution with a 95-0 vote urging President Clinton not to sign any agreement that did not include emissions restrictions on developing nations, as the Kyoto Protocol failed to contain.[99] Moreover, Congress subsequently "passed a series of bills that affirmatively barred the EPA from enforcing the [Kyoto] Protocol."[100] Based on the resolutions passed separately by each house of Congress, it appears reasonable to conclude that the primary objection to the Kyoto Protocol is that it failed to include a truly global agreement—that is, one that would include restrictions on both developed and developing nations.

The reasoning that supports the United States refraining from enacting domestic emissions reductions prior to entering a true global agreement requiring other nations, including developing nations, to likewise reduce their emissions is centered around the United States' bargaining power in negotiating such an agreement.[101] Presumably, if the United States already had domestic restrictions on emissions in place, there would remain less to bargain with in convincing other nations to restrict their emissions.

This rationale is particularly apt with respect to domestic energy production. As of 2006, it was estimated that approximately 41 percent of the United States' man-made carbon dioxide emissions come from energy production.[102] Moreover, global energy has been projected to increase 60 percent from 2002 levels by 2030,[103] underscoring the importance of energy production emissions to any global agreement. If these

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96 H.R. REP. NO. 102-474 (I), Purpose and Summary (1992).

97 Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 269. (S.D.N.Y. 2005).

98 *Id.*

99 S. RES. 98, 105th Cong. (1997).

100 *Am. Elec. Power Co.*, 406 F. Supp. 2d at 269.

101 S. RES. 98, 105th Cong. (1997).

102 U.S. ENVIRONMENTAL PROTECTION AGENCY, 2006 U.S. EMISSIONS INVENTORY, EXECUTIVE SUMMARY, *supra* note 76, at 8.

103 INTERNATIONAL ENERGY AGENCY, WORLD OUTLOOK 2004, EXECUTIVE SUMMARY 31 (2004), http://www.iea.org/Textbase/npsum/WEO2004SUM.pdf.

emissions, bound to be a major component of any comprehensive agreement, are restricted before the President sits down with the international community to negotiate a global solution, the concessions available for the President to offer (and hence, the concessions the President can seek in return) would be severely limited. This is of particular concern with respect to India and China, who are rapidly ascending the list of largest global polluters[104] as well as assuming the role of major economic competitors with the United States.[105]

If the 1992 House Report, 1997 Senate Resolution, and subsequent legislation by both houses of Congress preventing domestic enforcement of the Kyoto Protocol are sufficient to establish a policy that no comprehensive emission reduction scheme be enacted absent a global agreement requiring developing nations to likewise reduce their emissions, any court opinion or series of court opinions imposing mandatory emissions reductions would conflict with this policy. Certainly, a court decision that directly contradicts an existing policy of the legislative branch would implicate the fourth, fifth, and sixth *Baker* factors and therefore contravene the political question doctrine.[106]

However, the issue of whether Congress has expressed an official policy on global warming is far from settled. Two major clouds hover, preventing clarity on this issue. Specifically, (1) both houses of Congress have never come together to pass legislation explicitly setting forth this policy; and (2) Congress has passed other legislation authorizing emissions restrictions on certain industries.[107]

The best evidence to date of Congress' intention not to pass comprehensive domestic emissions restrictions until a global agreement is reached appears through a House Report and a Senate Resolution.[108] However, as the Report and Resolution express only a non-binding opinion of one house of Congress and are not subject to a vote in the other house or any action by the President, it is difficult to conclude that any official policy has been set forth. It seems the only information available confirms

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104 U.S. ENERGY INFORMATION ADMINISTRATION, 2006 TOTAL CARBON DIOXIDE EMISSIONS FROM THE CONSUMPTION OF ENERGY, *supra* note 11 (reporting that as of 2006, China and India were the first and fourth largest emitters, respectively).

105 James G. Neuger, *G-8's Dominance Faces Challenges from China, India*, Bloomberg.com, July 10, 2009, http://www.bloomberg.com/apps/news?pid=20601068&sid=aQlvD4kX5bE8.

106 Baker v. Carr, 369 U.S. 186, 217 (1962).

107 *See, e.g.*, 42 U.S.C. § 7521(a)(1) (2006).

108 H.R. REP. NO. 102-474 (I), Purpose and Summary (1992); S. RES. 98, 105th Cong. (1997).

nothing more than that, as of 1992, the House of Representatives thought it unwise to enact comprehensive emissions reduction legislation absent a global agreement compelling developing nations to likewise reduce emissions to minimize the impact of global warming, and as of 1997 the Senate reached a similar consensus.[109]

The court seized upon this absence of formal legislation setting forth a policy on emissions reduction in *American Electric. Power Co.* As the court noted, "Congress's mere refusal to legislate . . . falls far short of an expression of legislative intent to supplant the existing common law in that area."[110] The court went on to construe the common law doctrine of nuisance as the "existing common law" that Congress failed to supplant through legislative action.[111] As the court eventually concluded, it seems that the fairest interpretation of the dual independent Resolutions is that they are insufficient to establish a national policy on emissions restrictions.[112]

Moreover, Congress has passed legislation authorizing emissions regulation on other industries, specifically the auto industry.[113] The Clean Air Act instructed the Environmental Protection Agency to implement restrictions on new motor vehicles to make them more environmentally friendly.[114] In 2007, the Supreme Court interpreted the Clean Air Act as giving Congressional authorization to the E.P.A. to regulate carbon dioxide emissions from such new vehicles.[115] Thus, Congress has in fact authorized the restriction of a major source of emissions[116] in some form without any qualification regarding a global agreement being reached first. This cuts sharply against any contention that Congress has expressed a national policy to refrain from restricting emissions until a global agreement has been reached. However, the Clean Air Act does not completely foreclose the argument that a policy exists favoring abstention from restrictions on the emissions of domestic energy producers, which account for a larger percentage of U.S. man made carbon

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109 *See supra* note 108 and accompanying text.

110 Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 330 (2d Cir. 2009) (citing United States v. Texas, 507 U.S. 529, 535 (1993)).

111 *See id.* at 331.

112 *Id.* at 331–32.

113 42 U.S.C. § 7521(a)(1) (2006).

114 *Id.*

115 Massachusetts v. EPA, 127 S. Ct. 1438, 1463 (2007).

116 *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, 2006 U.S. EMISSIONS INVENTORY, EXECUTIVE SUMMARY, *supra* note 76, at 8 (noting that 33 percent of U.S. man-made carbon dioxide emissions come from transportation activities).

dioxide than do motor vehicles,[117] as the Clean Air Act does not mandate emissions restrictions of energy producers.[118]

Notably, although a clear expression of a national policy in favor of refraining from enacting mandatory domestic emissions restrictions prior to a global agreement would simplify the analysis, judicial imposition of such restrictions would violate the political question doctrine regardless of the existence of such a policy, as discussed below.

2. If Congress Has Not Sufficiently Expressed a Policy on Regulating Emissions of Domestic Energy Producers, Judicial Intervention Establishing Such Standards Requires an Initial Policy Determination in Violation of the Third *Baker* Factor

Even if the court in *American Electric Power Co.* was correct in deciding that no policy determination was made by Congress, judicial regulation of emissions violates the political question doctrine. If no such policy was established by Congress, a court deciding to impose emissions restrictions would be required to make an "initial policy determination" in violation of the third *Baker* factor.[119]

a. Unlike Previous "Direct Pollution" Cases, Global Warming Requires the Balancing of Numerous Factors with Far Reaching Global Policy Implications

In the context of water pollution, the Supreme Court held in 1972 that, where existing laws and regulation did not encompass the specific environmental nuisance alleged by a plaintiff, that plaintiff was not required to wait for comprehensive legislation to be enacted specifically outlawing that nuisance in order to bring a suit for injunctive relief.[120] Instead, the plaintiff could proceed with a common law nuisance action designed to halt the injurious conduct, despite the fact that future legislation may preempt the common law with respect to the particular nuisance.[121] The court gave no suggestion of the need to make an initial policy determination in such a scenario.

However, as referenced above, global climate change occupies a different realm than direct pollution cases.[122] Global

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117 *Id.* (noting that energy production accounts for more than 40 percent of U.S. man made carbon dioxide emissions, as compared with 33 percent created by transportation).

118 *See generally* 42 U.S.C. § 7401 (2006).

119 Baker v. Carr, 369 U.S. 186, 217 (1962).

120 Illinois v. Milwaukee (*Milwaukee I*), 406 U.S. 91, 104 (1972).

121 *Id.* at 107.

122 *See supra* Part II.A.

climate change is not nearly as cut and dry as water pollution, which involves a direct injury attributable to a particular source and would not ordinarily require the weighing of many complex factors in constructing a remedy. Any relief sufficient to redress injuries and future injuries caused by global warming would require extended consideration of numerous incredibly complex factors. As the District Court put it in its opinion in *Connecticut v. American Electric Power Co.*:

> Such relief would, at a minimum, require this Court to: (1) determine the appropriate level at which to cap the carbon dioxide emissions of these Defendants; (2) determine the appropriate percentage reduction to impose upon Defendants; (3) create a schedule to implement those reductions; (4) determine and balance the implications of such relief on the United States' ongoing negotiations with other nations concerning global climate change; (5) assess and measure available alternative energy resources; and (6) determine and balance the implications of such relief on the United States' energy sufficiency and thus its national security—all without an "initial policy determination" having been made by the elected branches.[123]

Certainly, as spelled out by the District Court, many complex decisions need to be made in order to set emissions restrictions. As an initial matter, a court would need to determine whether domestic emissions should be capped at all, or whether the economic detriment caused by setting such limits, especially before any global agreement has been reached, would be too great to warrant restricting emissions of domestic energy producers.

The Second Circuit attempted to adjudicate around having to make an initial policy determination by casting the case before it as a simple nuisance action that required no policy considerations.[124] Perhaps, in a vacuum, a court determining that six energy producers' emissions contributed to damaging the interests of the plaintiffs could simply apply the common law doctrine of nuisance to determine whether injunctive relief was appropriate without any concern for overarching policy. However, as discussed above,[125] in order for a court to be able to redress the grievances of such plaintiffs for purposes of Article III standing where the complained of conduct is a contribution to global warming, some broader-reaching decision (or series of decisions) is necessary to confer any meaningful relief on the

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123 Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 272–73 (S.D.N.Y. 2005), *rev'd* 582 F.3d 309 (2d Cir. 2009).

124 Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 331 (2d Cir. 2009) (describing the lawsuit as "an ordinary tort suit").

125 *See supra* Parts I and II for further discussion.

plaintiffs.[126] Any broader decision seems to require consideration of, at a minimum, the necessary policy determinations set forth by the District Court in *Connecticut* v. *American Electric Power Co.*[127] As the District Court emphatically and convincingly established, absent some initial policy determination from the executive or legislative branches, the judicial branch would be required to determine whether it is in the best interests of the United States to restrict emissions of its largest energy producers before other nations have agreed to respond in kind.[128]

The wisdom of this far-reaching action would hinge on the delicate consideration of numerous complex global and domestic factors that are beyond the scope of question typically reserved for the judicial branch. Such action would require the judicial branch to balance concerns including the need for global action in combating climate change and the degree to which restricting emissions on domestic energy producers without corresponding restrictions on foreign energy producers would handicap domestic economic interests. This plainly goes far beyond routine application of longstanding nuisance principles that the Second Circuit asserted was all that it would be undertaking.

b. While Courts Have Previously Intervened in Politically Charged Issues, Even Those Courts Accused of Undertaking Judicial Activism Rarely, If Ever, Engage in Initial Policy Creation and Implementation

It is beyond dispute that courts often weigh in, either explicitly or as a consequence of the decisions that they make, on certain policy issues. However, the manner in which policy issues are influenced by the judiciary has historically largely been limited to decisions upholding, striking down or interpreting acts of the legislature. For instance, examine the most significant cases of the courts that commentators often point to in identifying judicial activism. Two periods of the Supreme Court's history are continually identified as particularly "activist" periods in which the Court ventured into the realm of determining policy issues: The New Deal era and the Warren Court.[129]

Before the New Deal era, the Supreme Court repeatedly declared legislative attempts to regulate worker rights, including

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126 *See supra* Part II.A for further discussion.
127 *Am. Elec. Power Co.*, 406 F. Supp. 2d at 272–73.
128 *Id.* at 274.
129 *See* WOLL, *supra* note 20, at 220–29.

setting wage and hour requirements, unconstitutional, holding that such laws would impermissibly restrict the right to freedom of contract.[130] Following the famed "Switch in Time that Saved Nine," the Court suddenly began to uphold regulations setting maximum hours and minimum wages, overruling its previous precedents holding the opposite.[131] The Court decided that freedom of contract was not absolute and could permissibly be restricted where the restriction would improve health and safety or protect vulnerable groups.[132] In other words, the Court made a clear policy determination that freedom of contract should yield to worker protections where health and safety or vulnerable groups were concerned. However, it should be noted that the legislature had already made this policy choice in enacting the health and safety oriented laws in the first place, and so there was nothing "initial" about any policy determination made by the Court in these instances.

The Warren Court is likewise frequently cited as being an "activist" Court for its decisions striking down numerous laws harmful to minorities and other historically vulnerable groups.[133] The Warren Court is perhaps best known for striking down the "separate but equal" doctrine in schools through *Brown v. Board of Education*,[134] predicated on the Court's determination that separate educational facilities based on race were inherently unequal, and thus ran afoul of equal protection. But even this decision was not setting any sort of initial policy. Instead, it was a determination that the policy previously set forth via the equal protection guaranteed by the 14th Amendment was not being advanced through segregated education. The Warren Court also recognized a constitutional right to privacy, which it held outweighed a state's interest in prohibiting its citizens from using contraceptives in striking down such a law enacted by the State of Connecticut.[135] While this could be considered a policy determination of sorts in some respects, the real policy being advanced by that decision is the Supremacy Clause—the Court in

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130 *E.g.*, Lochner v. New York, 198 U.S. 45 (1905) (striking down New York's attempt to cap bakery workers' hours at a maximum of 60 per week and 10 per day on grounds that such a law would impermissibly interfere with the right to freedom of contract).

131 *E.g.*, West Coast Hotel Co. v. Parish, 300 U.S. 379, 391 (1937) (overruling Adkins v. Children's Hospital, 261 U.S. 525 (1923), and holding that freedom of contract was not absolute, and that the right to contract could be permissibly restricted where the restriction related to health and safety or protection of vulnerable groups).

132 *See id.* at 394.

133 Rebecca E. Zietlow, *The Judicial Restraint of the Warren Court (and Why it Matters)*, 69 OHIO ST. L.J. 255, 255 (2008) (noting that the Warren Court is "virtually synonymous with the term 'judicial activism'").

134 Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

135 Griswold v. Connecticut, 381 U.S. 479 (1965).

effect prohibited a state from enacting a law that, in the Court's view, conflicted with the Constitution. Advancement of such a policy did not require any "initial" policy determination by the Court, as the Supremacy Clause is of course written into the Constitution.

Some of the Court's brightest and most important moments have come amid accusations of judicial policy setting, including cases like *Brown*.[136] By the same token, some of the Court's lowest points, such as *Korematsu v. United States*, resulted from the Court's failure to inject itself into politically charged issues.[137] However, should the judicial branch be permitted to set far reaching emissions restriction policy, it would be taking a step beyond the purportedly "activist" decisions of The New Deal era or the Warren Court.

As the District Court in *Connecticut v. American Electric Power Co.* correctly noted, the relief sought by the plaintiffs in that case would require the court to unilaterally set an appropriate level of emissions reduction as well as setting a schedule by which those reductions were to occur.[138] Moreover, any policy sufficient to redress the injuries claimed by the plaintiffs would require, at a minimum, a broad-based decision (or series of decisions) setting restrictions on many (or all) domestic energy producers in order to make any measurable dent on the consequences of global warming complained of by the plaintiffs.[139] In other words, contrary to the vehicles used by the Warren Court in eliminating "separate but equal" education, the judicial branch would not be simply evaluating actions taken by the elected officials of the legislative branch and making a decision to uphold or declare unconstitutional those actions. Instead, the judicial branch would be required to set forth, in the first instance, the policy options that should prevail in the ongoing debate on global warming and the mechanisms which should be implemented to achieve those policy goals.

Consider an analogy to what the Warren Court would have had to undertake in *Brown* to match the largely legislative function that the judicial branch would have to assume in the global warming debate to determine the guiding policies for

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136 *Brown*, 347 U.S. 483. *See generally* Frank J. Macchiarola, Dorothy Kerzner Lipsky, & Alan Gartner, *The Judicial System & Equality in Schooling*, 23 FORDHAM URB. L.J. 567 (1996).

137 323 U.S. 214 (1944) (upholding the executive order mandating Japanese internment during World War II, specifically deferring to the determination made by Congress and the President that such measures were warranted).

138 Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 272–73 (S.D.N.Y. 2005).

139 *See supra* Part II.A.

emissions restrictions and implement the necessary changes in one fell swoop. First, allowing the judiciary to determine that domestic energy producers should be subject to emissions restrictions without any legislative action setting forth this policy would be akin to the Warren Court creating the concept of equal protection on its own, rather than extracting it from the 14th Amendment. There is no provision of legislatively enacted law to support such a decree from the judiciary at this point in time. Further, allowing the judiciary to set specific emissions restrictions on specific domestic energy producers to combat global warming would be the equivalent of the Supreme Court in *Brown* requiring that "Topeka High School A is to consist of no more than 70 percent white students, whereas Topeka High School B is to consist of no more than 60 percent white students, and Topeka High School C is to consist of no more than 65 percent white students."

These, of course, were not the tactics taken by the Supreme Court in *Brown*. Rather, after initially striking down segregated education as unconstitutional under the equal protection clause of the 14th Amendment, the Court set further hearing on the matter of how to implement the necessary changes.[140] The following year, the case came back to the Supreme Court in *Brown II*.[141] In that case, the Court recognized that the judicial branch should not be charged with creating the programs to implement desegregation.[142] Rather, the Court held that "[f]ull implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."[143]

The *Brown* and *Brown II* Courts followed a traditional pattern of legislation and jurisprudence in the context of major policy change.[144] First, a legislative body enacts a law. Second, a plaintiff damaged by the law challenges its validity before the courts. Third, the courts are charged with evaluating the validity of the law. Fourth, the courts either uphold or invalidate the law. Fifth, if the courts invalidate the law, they allow for the legislative branch (or if the legislative branch has delegated

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140 *Brown*, 347 U.S. at 495–96.

141 Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).

142 *See id.* at 299–301.

143 *Id.* at 299.

144 All of the New Deal and Warren Court decisions cited previously likewise conform to this same traditional pattern.

rulemaking to an agency, that agency) to amend the scheme to bring it into compliance with the previously existing law, namely in *Brown*, the 14th Amendment.

By contrast, judicial intervention into the global warming debate steps far outside this framework. To date, no legislative body has acted to set emissions restrictions for domestic energy producers. Rather, through cases like *Connecticut v. American Electric Power Co.*, plaintiffs are attempting to fit an issue requiring widespread legislation into common law doctrines such as nuisance.[145] As such, rather than being charged with evaluating the validity of a law enacted by the elected officials of the legislature, the judicial branch, should it intervene, is instead left to create not only its own policies, but also the mechanisms for enforcing those policies.

In sum, the actions that would necessarily be undertaken by the judiciary should it intervene in the global warming debate and attempt to create its own set of emissions restrictions without allowing for the other coordinate branches of government to act would exceed the actions of even those courts long accused of "judicial activism." The courts would need to determine whether emissions restrictions should be imposed on domestic energy producers at all, and if so, such restrictions should be imposed prior to the creation of a global emissions reduction agreement and how the emissions restriction scheme should be structured. These far reaching initial policy determinations that would be required of the judiciary are precisely what the third *Baker* factor is aimed to prevent, and so the political question doctrine precludes judicial intervention in this debate absent action by at least one of the other two branches of government.

3. Although Setting Emissions Restrictions Through the Judiciary Would Contravene the Political Question Doctrine as Set Forth Above, Judicial Branch Intervention in Setting Broad-Based Emissions Restrictions Would Not Directly Conflict with the Executive's Constitutional Authority to Manage Foreign Relations, and So Would Not Violate the First *Baker* Factor

The first *Baker* factor precludes a court from intervening in a dispute where the court's decision would intrude on the constitutional authority of a coordinate political branch to act.[146] In the context of global warming, and the roundly recognized

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145 Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 314 (2d Cir. 2009).
146 Baker v. Carr, 369 U.S. 186, 217 (1962).

need for a global agreement, the Constitution commits the right to negotiate and reach a global accord to the executive branch.[147] However, because judicial intervention in setting emissions restrictions would not directly interfere with the executive's ability to negotiate and enter such an agreement, it would not contravene the first *Baker* factor despite arguments to the contrary from the plaintiffs in *American Electric Power Co.*[148]

While the Second Circuit ultimately reached the correct conclusion in *American Electric Power Co.*, holding that the first *Baker* factor would not be contravened by the court's intervention in the global warming debate,[149] its reasoning is unpersuasive. The court continually leaned upon the fact that courts have been adjudicating environmental disputes for over a century.[150] This logic is insufficient to satisfy the real issues involving executive authority to manage foreign relations in the context of entering the dispute over global warming, as the issues presented by global warming are distinguishable from the direct pollution cases previously adjudicated by the courts.

As noted above, the environmental disputes previously adjudicated by the judiciary involved discrete acts of pollution in well defined geographical areas—and not just any well defined geographical areas, but always *domestic* geographic areas.[151] When a factory in Tennessee was emitting noxious fumes into Georgia causing damage to orchards and forests, the solution involved resolving only a single dispute between two domestic entities.[152] Global warming and its consequences are different monsters altogether. Analysis of injuries directly and immediately caused by actors and actions contained entirely within the United States shed little light on the propriety of judicial intervention in the worldwide problem of global warming.[153]

Rather, global warming needs to be considered in the context in which it is agreed it must be addressed in order to be effective. Global change, not merely domestic change, is required. It has long been the concern of Congress that enacting domestic

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147 U.S. CONST. art. II, § 2; Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918).

148 *Am. Elec. Power Co.*, 582 F.3d at 325.

149 *Id.* at 325–26.

150 *See, e.g., id.* at 326–27.

151 *E.g.*, Missouri v. Illinois, 200 U.S. 496 (1906); Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907); Georgia v. Tenn. Copper Co., 237 U.S. 474 (1915); New Jersey v. City of New York, 283 U.S. 473 (1931).

152 *Tenn. Copper Co.*, 206 U.S. 230.

153 U.S. Environmental Protection Agency, *Climate Change-Health and Environmental Effects: International Impacts*, http://www.epa.gov/climatechange/effects/international.html (last visited Feb. 5, 2010).

restrictions before a global agreement is reached could weaken United States bargaining power, especially with respect to the developing nations that are likely to see dramatic growth in the level of harmful emissions generated.[154] Of particular concern are India and China, who are rapidly ascending the list of largest global polluters.[155] In 1992, the House of Representatives specifically found that domestic emissions reduction requires should only be taken "in the context of concerted international action."[156]

However, as the court in *American Electric Power Co.* correctly noted, this is not the type of "direct challenge" to an action committed to another branch of government to which the first *Baker* factor applies.[157] In the cases leading up to and cited by *Baker* as well as the cases decided in the four plus decades since *Baker*, courts finding the existence of a non-justiciable political question based on the first *Baker* factor have typically done so only where resolution of the case would preclude another branch of the government from undertaking an action constitutionally committed to it, such as a court decision recognizing a sovereign to the exclusion of the executive's authority to do so or precluding the executive from dispatching troops overseas.[158] Contrary to these examples, judicial regulation of emissions created by domestic energy producers would not usurp the President's authority to enter a global agreement. While it would seem likely to reduce the President's bargaining power in negotiating such an agreement, this is distinct from assigning to the courts a function constitutionally committed to one of the other branches of government.

Because reduction in bargaining power in negotiating an international agreement is not sufficient to be considered a "direct challenge" to a function textually committed by the Constitution to another branch of government, the first *Baker* factor is not an impediment to judicial determination of

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154 *See* H.R. REP. NO. 102-474 (I), Greenhouse Warming–Energy Implications (1992).

155 U.S. ENERGY INFORMATION ADMINISTRATION, 2006 TOTAL CARBON DIOXIDE EMISSIONS FROM THE CONSUMPTION OF ENERGY, *supra* note 11 (reporting that, as of 2006, China and India were the first and fourth largest emitters, respectively).

156 H.R. REP. NO. 102-474 (I), Greenhouse Warming—Energy Implications (1992).

157 Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 325 n.3 (2d Cir. 2009).

158 *E.g.*, Jones v. United States, 137 U.S. 202, 212 (1890) (demonstrating a plaintiff's attempt to challenge President's determination that the Guano Islands were a territory of the United States presented a non-justiciable political question); Johnson v. Eisentrager, 339 U.S. 763, 789 (1950) (stating that the attempted challenge to the President's decision to deploy troops in a foreign nation was non-justiciable political question); Can v. United States, 14 F.3d 160, 162–63 (2d Cir. 1994) (stating that the court could not make determination of title to blocked South Vietnamese assets because it would preclude President's authority to recognize foreign governments).

emissions restrictions, despite the argument to the contrary by the energy producer defendants in *American Electric Power Co.*[159] Rather, the problematic *Baker* factors are three, four, five and six, as set forth above.[160]

C. The Solution is to Allow the Executive and/or Legislative Branches to Act Before the Judicial Branch Becomes Involved

The above analysis concluding that the judicial branch should not be setting emissions restrictions on domestic energy producers is not to suggest that emissions from domestic energy producers cannot or should not be restricted, as certainly the vast majority of scientific evidence points to climate change as a real and serious problem with potentially devastating consequences. However, instead of the judicial branch setting emission standards either in one fell swoop or over time through piecemeal litigation against specific contributing entities, courts should refrain from entering the dispute until the executive reaches a global accord ratified by the legislature which the legislature passes laws or delegates the authority to enforce, or until the legislature makes clear that a national policy of emissions restrictions on domestic energy producers should be put in place even prior to a global agreement.

Legislative action is precisely what occurred in *Massachusetts v. EPA*.[161] In that case, multiple states relied on action taken by the legislative branch to attempt to compel the EPA to regulate new motor vehicle carbon dioxide emissions.[162] Congress enacted the Clean Air Act and charged the EPA with designing mechanisms for its enforcement.[163] The court was then left to assume its traditional role of interpreting the laws enacted by the legislature.

However, as noted above, the Clean Air Act does not mandate restricting the carbon dioxide emissions of domestic energy producers.[164] While there is a strong push for a global agreement emerging from the international community, few would say that a comprehensive global agreement to which the United States and other major emitters are likely to join is

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159 *Am. Elec. Power Co.*, 582 F.3d 309 at 324–25.
160 *See* Part II.B.
161 127 S. Ct. 1438 (2007).
162 *Id.*
163 42 U.S.C. § 7521(a)(1) (2006).
164 *See* 42 U.S.C. § 7401 (2006).

imminent.[165] Unless and until some global agreement is reached, Congress would do well to make a determination as to which policy course to take: either pass legislation preventing further emissions restrictions until a global agreement is reached, or press forward with domestic regulation despite the lack of an international agreement.

III. HOW THE SECOND CIRCUIT'S DECISION IN *CONNECTICUT V. AMERICAN ELECTRIC POWER CO.* REMAINS USEFUL

Although the Second Circuit's opinion holding that the political question doctrine does not preclude courts from setting emissions restrictions on defendant energy producers under the common law nuisance doctrine should not withstand further scrutiny, it remains a useful opinion in the race to mitigate the consequences of global warming. This is because, as the law currently stands (at least in the Second Circuit), the judicial branch can now seemingly unilaterally impose emissions restrictions on emitters of carbon dioxide without the influence of either of the other two branches of government.[166] This is an undesirable scenario for many important players in the global climate change debate, and may help spur long awaited action by the executive and legislative branches.

The energy lobby has long been accused of attempting to prevent, delay or at a minimum, assure the energy industry favorable terms in any comprehensive policy on climate change.[167] Energy companies have committed large sums of money to these causes. For instance, The American Coalition for Clean Coal Electricity, an advocacy group consisting of 48 energy producers, mining companies, and railroads, had committed $9.95 million to those ends as of March 2009.[168] Energy producers routinely make large campaign contributions to high-ranking members of Congressional committees charged with energy regulation and environmental action. For example, one of the largest contributors during the 2009–2010 campaign cycle to Rep. Joe Barton, Chairman of the House Committee on Energy &

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165 *See* Bryan Walsh, *Climate Accord Suggests a Global Will, if Not a Way*, Feb. 2, 2010, TIME.COM, http://www.time.com/time/health/article/0,8599,1958234,00.html.

166 *See* Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009).

167 *Public Health and Natural Resources: A Review of the Implementation of Our Environmental Laws: Hearing Before S. Comm. on Governmental Affairs*, 107th Cong., 2nd Sess., (2002) (testimony of Eric Shaeffer). Shaeffer, the former director of the Office of Regulatory Enforcement at the EPA, testified that the "energy lobbyists . . . are working furiously to weaken" regulation of emissions created by energy producers. *Id.*

168 Wayne Berman, *Energy Reform: Heavy Hitters Seek to Sway Cap and Trade Debate*, FOXNEWS.COM, Mar. 12, 2009, http://www.foxnews.com/politics/2009/03/12/heavy-hitters-sway-cap-and-trade/.

Commerce, is none other than American Electric Power Co., the lead defendant in *Connecticut v. American Electric Power Co.*[169] The industries making the two largest contributions to Rep. Barton are the lectric utilities and oil & gas industries.[170]

Given the aggressive attempts to influence climate change legislation that the energy lobby has demonstrated, an event causing energy producers to support emissions reduction legislation would be significant in making progress in this area. A decision authorizing piecemeal judicial regulation of emissions could be such an event.

While the energy lobby has long resisted comprehensive emissions reduction policies, if such policies are to be initiated, it follows that energy producers would prefer they come from a source over which influence can be asserted to assure favorable terms. A judicially created emissions restriction seems to be a worst case scenario for energy producers. Unlike the political branches of government, the judiciary is intended to be beyond reproach by lobbyists. Without the need for (or the ability to accept) political contributions, the influence that can be asserted over the judiciary should be markedly less than that over the legislative process in Congress. The executive can be influenced in a similar manner, especially a first-term President needing cooperation on other major policy initiatives, including health care reform.

However, with the potential for increased efforts by the energy lobby to assert legislative or executive driven policies on emissions reductions comes the increased risk that any such policy will be too favorable to energy producers, and correspondingly too lenient on emissions. This has already proven to be an area for concern, as several notable pundits have criticized the Waxman-Markey bill on this basis.[171] An increased focus from energy producers in achieving favorable terms could exacerbate this issue.

While only time will tell the nature of the impact the Second Circuit's decision in *American Electric Power Co.*, the decision seems likely to shift the incentives for the energy industry toward encouraging some action by the legislature and/or the executive. The optimal scenario would seem to be a global

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169 *Joe Barton*, OpenSecrets.org, http://www.opensecrets.org/politicians/summary.php?cid=N00005656&cycle=2010# (last visited Mar. 9, 2010).

170 *Id.*

171 *E.g.*, Press Release, Rep. Dennis Kucinich, Passing a Weak Bill Today Gives Us Weak Environmental Policy Tomorrow, (June 25, 2009), *available at* http://kucinich.house.gov/News/DocumentSingle.aspx?DocumentID=134813.

accord, followed by legislative action to enforce the terms of that accord domestically. The courts would then be restored to their customary role of adjudicating disputes over the meaning of the global accord and the subsequent legislation passed by Congress, rather than attempting to create policy in the first instance.

CONCLUSION

The time for significant new policy on climate change is now. Widespread, dramatic reductions are required in order to reduce the looming and potentially devastating consequences of global warming. The judicial branch, along with the public, is rightfully growing frustrated with the lack of action both internationally and domestically. The Second Circuit has boldly asserted itself as a decision-maker where Congress has been unwilling.

However, despite the fact that the world can no longer afford to wait, the judicial branch is simply not the appropriate body to set forth the policies that will govern the global warming crisis going forward. While the Second Circuit's decision should not withstand further legal scrutiny, it may turn out to be an underappreciated hero on climate change.

Crying Over the Inferred Existence of Spilled Milk: The Demonstrable Illogic of *Ortega v. Kmart*

Paul K. Hoffman and Norman L. Geisler***

> If it was so, it might be; and if it were so, it would be; but as it isn't, it ain't. That's logic.
>
> —Tweedledee, Alice in Wonderland

Richard Ortega was not an observant fellow. Ordinarily, this shortcoming works against a litigant, but not in his case. Perhaps he was simply lucky enough to hire a very good lawyer or clever enough to actually trick the California Supreme Court. Either way, he more than made up for a lack of perceptive skills by securing a stunning change in the law of storekeeper liability. Stunning, because basic rules of logic were violated by the court when crafting its decision in *Ortega v. Kmart*.[1]

While shopping at Kmart, Mr. Ortega was injured when he slipped and fell.[2] Apparently he did not see the puddle of milk directly in his path.[3] Worse still, he made no inspection or assessment of the milk as he lay there on the floor. Was it cold and fresh? Was it old and stinky? Had it dried around the edges of the puddle or turned into cottage cheese? He didn't notice. Consequently, when Mr. Ortega sued Kmart and brought the claim to trial, no one could say how long the milk had been on the floor.[4] Because Kmart had failed to inspect the store before the accident, the spill, in theory, could have been there a couple hours. But it was equally possible that the milk appeared just seconds before Mr. Ortega fell. Simply put, the length of time the dangerous condition existed was a mystery, and still is.

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1 Ortega v. Kmart, 36 P.3d 11 (Cal. 2001).

2 *Id.* at 14.

3 *Id.*

4 *Id.*

To the dismay of retailers everywhere, Mr. Ortega's inability to establish the amount of time that the dangerous condition actually existed set the stage for a change in the law of storekeeper liability that literally defies logic. Before *Ortega*, the applicable law was both reasonable and straightforward. Storekeepers were held liable for injuries caused by dangerous conditions only if they had actual knowledge of the condition and failed to clean it up.[5] And if the storekeeper claimed ignorance, the injured customer could satisfy the required element of knowledge by proving that the dangerous condition had existed long enough for a reasonable storekeeper to have discovered and corrected it. This principle of law is known as "constructive knowledge,"[6] and it is eminently sensible. If it is known that a reasonable storekeeper would have discovered and corrected a longstanding dangerous condition, it is certainly reasonable to impute knowledge of the longstanding condition to the storekeeper. So, for example, had Mr. Ortega demonstrated that the puddle of milk had begun to dry and turn to cottage cheese, he would have proven its longstanding existence and thereby imputed knowledge of the condition to Kmart.

But such was not the case. As noted, no one knew how long the milk had been there.[7] Consequently, Kmart had no actual or constructive knowledge that the puddle even existed. And naturally, one must know a spill exists before one can be obligated by law to clean it up. In short, a thing must actually exist before it can be known to exist. And so, under the old rule, Kmart could not be held liable.

We may surmise from the high court's opinion that Mr. Ortega's lawyer responded with an argument along these lines:

> But hold on, we clearly know that the spill actually existed, otherwise my client would not have been injured. The only question is how long the spill was there. And it's Kmart's fault that no one knows since it failed to properly inspect the store. Had it made regular inspections, who knows, it might have found the spill, cleaned it up, and prevented my client's injury.

Arguments of the *woulda-coulda-shoulda* variety ordinarily carry little weight in the courtroom. But not in this case. The California Supreme Court was impressed, so impressed, in fact, that it constructed a rule of law shared by no other state.[8]

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5 RESTATEMENT (SECOND) OF TORTS § 343 (1981).

6 *See, e.g.*, Hatfield v. Levy Bros., 117 P.2d 841, 845–46 (Cal. 1941); Louie v. Hagstrom's Food Stores, 184 P.2d 708, 711 (Cal. Ct. App. 1947).

7 *See supra* note 4 and accompanying text.

8 The *Ortega* court's reasoning, and the rule it yielded, were undeniably unique, though the decision in *Glover v. Montgomery Ward & Co.*, 536 P.2d 401 (Okla. Civ. App.

Ortega v. Kmart was, undoubtedly, an effort by the high court to remedy the perceived inequity of the storekeeper always benefiting—and the customer always suffering—from the parties' lack of information. Surely, some customers may have been injured by long-standing dangerous conditions but were precluded from recovery simply because no one could demonstrate how long the condition had existed. Moreover, storekeepers are often the only source of such information. The specter of storekeepers suppressing such evidence was always a realistic concern.

But the California Court leveled the playing field by ruling that evidence of the lack of an inspection could be used to fill the gap in the customer's case.[9] The gap to be filled was the storekeeper's knowledge of the dangerous condition. Obviously, a storekeeper who is remiss in making safety inspections will have no knowledge of existing dangerous conditions. In one sense, it actually worked to the storekeeper's benefit to refrain from making inspections. Ignorance, it would seem, was not only bliss, but legally advantageous. Addressing the perceived injustice that may befall Mr. Ortega and those similarly situated, the court framed the issue and announced its ruling as follows:

> The question here is: If the plaintiff has no evidence of the source of the dangerous condition or the length of time it existed, may the plaintiff rely solely on the owner's failure to inspect the premises within a reasonable period of time in order to establish an inference that the defective condition existed long enough for a reasonable person exercising ordinary care to have discovered it? We conclude that the evidence of the owner's failure to inspect the premises within a reasonable period of time is sufficient to allow an inference that the condition was on the floor long enough to give the owner the opportunity to discover and remedy it.[10]

1974), was arguably similar in some respects. Like the *Ortega* court, the *Glover* court ruled that constructive notice may be imputed in the absence of evidence establishing the length of time the condition existed. *Id.* at 408–09. But it did so for reasons that are not clearly stated. Moreover, it did not contend that the absence of an inspection permits an inference regarding the actual amount of time the condition existed. *Ortega* is also plainly distinguishable from decisions in a handful of states where, for public policy reasons, the courts shift the burden of proof to the storekeeper regarding the amount of time the condition existed once the plaintiff establishes that the dangerous condition was reasonably predictable or of a type that commonly occurred in the defendant's premises. For example, in both *Bozza v. Vornado*, 200 A.2d 777, 779–81 (N.J. 1964) and *Jasko v. F.W. Woolworth*, 494 P.2d 839, 840–41 (Colo. 1972), the courts held that it was appropriate to require the defendants to come forward with proof that the dangerous condition would occur. The *Ortega* court did not purport to adopt a new burden-shifting policy.

9 *Id.* at 13.

10 *Id.*

Now, under *Ortega*, the undisciplined storekeeper has no hiding place. The lack of an inspection may be presented to a jury as evidence from which they may, by 9-to-12 votes, collectively "infer" a period of time that the dangerous condition is deemed to have actually existed. For example, if there is no evidence of how long the condition actually existed, but there is evidence that no inspection was done for a two-hour period before the accident, the jury may infer that the dangerous condition actually existed the full two hours. Two hours' time is more than enough to impute constructive knowledge of the condition to the storekeeper, and thus the element of notice is satisfied; the gap in the customer's case is filled.

It is important to note that *Ortega* created new law not by modifying the rules of evidence, but by adopting a novel legal fiction. The court did not deem the absence of an inspection to be relevant evidence of the storekeeper's knowledge of the dangerous condition, for it clearly is not. Instead, the Court ruled that where there is no evidence of the length of time the dangerous condition existed, the absence of an inspection may then be used by the jury to "infer" an actual period of time the condition existed and so impute knowledge to the storekeeper.[11] This is a legal fiction, and it precisely fits the definition offered by Black's Law Dictionary:

> An assumption that something is true even though it may be untrue, made esp. in judicial reasoning to alter how a legal rule operates.[12]

Most legal fictions have a rational connection to some established legal principle,[13] but the fiction embraced by the *Ortega* court does not. It is plainly false—and, in that sense, irrational to suggest—that the absence of an inspection constitutes probative evidence from which one can infer the amount of time the uninspected condition actually existed. For what it's worth, it is true that one may logically infer a *range* of time in which the condition could have existed. The inferred range of time will always run from (a) the time of the last known inspection to (b) the moment before the accident occurred. But it is quite impossible to reasonably infer from the absence of an inspection the actual amount of time the dangerous condition in fact existed. To arbitrarily posit its actual existence for two hours simply because it *could* have existed two hours is not a rational inference.

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11 *Ortega*, 36 P.3d at 13.

12 BLACK'S LAW DICTIONARY 913 (8th ed. 2004).

13 For example, the legal fiction of constructive trust is imposed where a wrongdoer has acquired bare legal title to property. The fiction of a trust is rational since the only element missing from an ordinary trust is the amicable intent of the parties. *Id.* at 1547.

The illogic of *Ortega* is all the more troubling when viewed in its full context of constructing a theory for imputing knowledge to a storekeeper. Recall, a storekeeper cannot be held liable in tort without knowledge of the dangerous condition. He is deemed to have knowledge of the condition if it has actually existed for a sufficient period of time.[14] But with *Ortega* we are asked to accept the bootstrapping notion that the dangerous condition is *deemed* to have *actually existed* long enough to *impute* knowledge.[15] Playing with epistemology—what we can know—is a common practice of the judiciary. But monkeying with metaphysics—what really exists—opens up a whole new universe of problems.

I. PUTTING *ORTEGA* TO THE TEST

The rule in *Ortega* is demonstrably illogical in two respects. First, the rule cannot be applied to real-world facts in a coherent and valid series of truth functional propositions (*e.g.*, *If P then Q; If Q then R; P; therefore R*). Second, when stated as a categorical syllogism, the *Ortega* inference violates what is traditionally identified as the fourth rule of categorical syllogisms: an affirmative conclusion cannot follow from a negative premise.[16] *All men are Mortal; Socrates is a Man; Therefore, Socrates is Mortal*, is a classic example of a sound categorical syllogism. But the rule in *Ortega* is akin to mangling this argument by declaring, *All men are mortal; Angels are not mortal; Socrates is* ***Not*** *an angel; therefore, Socrates is a man.* The conclusion, though true, does not follow from the premises. Given the truth of the first three premises, Socrates could just as well be a puddle of spilled milk. Let us then learn from Mr. Ortega and be careful where we step as we first examine the rule's coherence.

A. The *Ortega* rule is incoherent

Unlike the rule in *Ortega*, the old rule—imputing constructive knowledge of longstanding dangerous conditions—can be stated as a coherent series of truth functional propositions. First, the key terms must be defined:

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

15 *Ortega*, 36 P.3d at 18 (allowing the plaintiff to use circumstantial evidence to prove that the dangerous condition existed for an unreasonable time by providing evidence that an inspection had not been made within a particular period of time prior to the accident, which warranted the inference that the defective condition existed long enough so that a store employee would have discovered it with reasonable care, thereby establishing the constructive knowledge standard).

16 PATRICK J. HURLEY, A CONCISE INTRODUCTION TO LOGIC 268–69 (5th ed. 1994); MORRIS R. COHEN & ERNEST NAGEL, AN INTRODUCTION TO LOGIC 78–79 (1962).

Let "C" stand for the actual existence of a longstanding dangerous condition

Let "K" stand for the storekeeper's knowledge of the dangerous condition

Let "L" stand for the storekeeper being liable to the injured party.

Having defined these terms, the old rule, presented in symbolic logic, is as follows:

If C then K	or	$C \supset K$
If K then L		$K \supset L$
C, therefore L		$C \therefore L$

The rule is valid since the conclusion follows from the premises. And, arguably, it is also sound (*i.e.*, true) since the premises (given the appropriate facts) are actually true.

By contrast, there is simply no way to coherently state the rule in *Ortega*, since to arrive at the conclusion of an affirmative "C" one must, at some point in the argument, interpose an arbitrary reversal of the initial necessary condition of "not K" (~K). The initial condition of ~K is necessary since it is stated by the Court as the very reason for implementing the rule in *Ortega*. In other words, since we do not know how long the dangerous condition existed we cannot say that the storekeeper had any knowledge of the dangerous condition and, consequently, cannot hold the storekeeper liable for the customer's injuries under the old rule. Remember, the very purpose of the rule in *Ortega* is to arrive at the conclusion that the dangerous condition *actually existed long enough* to impute constructive knowledge.[17] Thus, the beginning point of the analysis is the presumed fact that the storekeeper has no actual or constructive knowledge of the dangerous condition. Accordingly, we must begin to state the rule in *Ortega* by first asserting that "~ K" is true. We must also introduce a new term, the storekeeper's inspection of the premises. So, we will let "I" stand for the storekeeper conducting reasonable inspections of the store. The other terms are as stated in the old rule. Here then is *Ortega*'s formulation of the presumed conditions that lead to the rule:

$$\sim K \supset (\sim I \supset C)$$

$$\sim K$$

$$\therefore \sim I \supset C$$

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

In narrative form, the argument for the rule is the following:

> If the storekeeper has no knowledge of the dangerous condition (~K), then, if he did not conduct a reasonable inspection (~I) we may reasonably infer that the dangerous condition actually existed long enough to impute knowledge of its existence (C). We know that the storekeeper had no knowledge (~K); therefore, if the storekeeper did not perform a proper inspection (~I) we may then infer the actual existence of the dangerous condition for a period of time sufficient to impute constructive knowledge (C).

Thus the rule in *Ortega*, simply put, is $\sim I \supset C$, and it is based on the initial condition of ~K.

The problem arises when the rule is applied to real facts. Here is how the rule was applied to the real facts of the *Ortega* case:

$$\sim I \supset C \quad \{\text{the } \textit{Ortega} \text{ rule}\}$$
$$C \supset K \quad \{\text{the old rule}\}$$
$$K \supset L$$
$$\sim I \quad \{\text{the facts}\}$$
$$\therefore L$$

Notice that in applying the *Ortega* rule one must interpose a reversal of the presumed initial condition of ~K. Through slight of hand, the acknowledged ~K becomes K. Reversing a presumed fact is, of course, logically incoherent. Thus, the rule cannot be coherently applied in the real world.

B. The *Ortega* rule is invalid

Moreover, as noted above, there is no way to apply the rule in *Ortega* under a categorical syllogism without improperly drawing an affirmative conclusion from a negative premise. The legal conclusion of any application of the rule will always be: "Therefore, the dangerous condition actually existed long enough to impute constructive knowledge." This type of statement is known as a universal affirmative proposition, or a Type A categorical statement. But one of the premises in any syllogism intended to support this conclusion will always be: "The storekeeper did *not* conduct proper inspections." This is a universal negative proposition, or Type E statement. And the fourth rule of categorical syllogisms provides that no affirmative conclusion can follow from a negative premise. That is, one simply cannot formulate a valid syllogistic argument incorporating a negative premise while drawing a positive

conclusion.[18] And yet, there is no other way of attempting to apply the rule in *Ortega*. Of necessity, one must always assert that the storekeeper did not conduct a safety inspection and, as a result, the jury is then free to conclude that the dangerous condition did actually exist long enough to impute constructive knowledge. Consequently, the rule in *Ortega* is both functionally and inherently illogical.

II. LESSONS FROM *ORTEGA*

There are two lessons to be learned here. The first is that due consideration should be given to incorporating the study of logic in standard law school curricula. Lawyers and law students tend to be natural rhetoricians who instinctively emphasize pathos over logos. But litigating with logos is essential for the stability of the law if not our entire culture. And it is an acquired skill. Accordingly, thinking correctly should be emphasized in the education of lawyers and judges at least as much as arguing effectively.

The second lesson is not a new one: judicial candor is the best policy. It appears that the California Supreme Court was not entirely candid in the way it approached this case and, predictably, got caught in a web of non-sequiturs. The members of the court surely recognized the falsity of their key assertion, "the evidence of defendant's failure to inspect the premises within a reasonable period of time prior to the accident . . . creates a reasonable inference that the dangerous condition existed long enough for it to be discovered by the owner."[19] Though useful in constructing a rule that favors shoppers and encourages storekeepers' diligence, the proposition is plainly false.

Employing an obviously false premise in an argument is not rational. But declaring a desired change in public policy is. Instead of constructing a novel legal argument to support a desired outcome, a straightforward declaration by the court that it wished to join those states that shift the burden of proof to undisciplined storekeepers would have been plainly rational. Anti-business, some might say, but nonetheless rational.

Perhaps the justices embraced the illogic of their new rule for fear of being labeled liberal activists, a moniker imposed, with some justification, upon courts that presumptuously circumvent

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18 HURLEY, *supra* note 16, at 268–69; COHEN & NAGEL, *supra* note 16, at 78–79.
19 *Ortega*, 36 P.3d at 18.

the legislative process.[20] But the price they paid was dear. In an ostensible effort to clarify existing law and so avoid the appearance of implementing radical change, the high court damaged its integrity by positing as true something that is not true.[21]

Let us then be certain of this fact. The existence of anything, including spilled milk, cannot be inferred from the absence of an inspection meant to discover that thing. On the other hand, as the aging Justice Holmes once suggested, "the law is what judges say it is."[22] Jurisprudential theories aside, a state supreme court undeniably has the power of judicial fiat. Accordingly, if it does not like the social consequences of a given law—such as the rule that allows storekeepers to escape liability when no one knows how long the dangerous condition actually existed—it should plainly say so and, if so inclined, forthrightly implement the desired change. In other words, either show some backbone or leave social engineering to the legislature. And naturally, in our democratic society, the latter is preferable if not morally obligatory.

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20 *See, e.g.*, George W. Bush, Governor of Texas, The First Gore-Bush Presidential Debate (Oct. 3, 2000) (transcript available at http://www.debates.org/index.php?page=october-3-2000-transcript).

21 Using the categorical syllogism argument above, the *Ortega* court created a rule that is against logic. The Court essentially created a legal fiction that "alter[s] how a legal rule operates." *See supra* notes 12, 16 and accompanying text.

22 Brian East, *Struggling to Fulfill Its Promise: The ADA at 15*, 68 TEX. BAR J. 614, 617 (2005).

Time to Bury the Shocks the Conscience Test

Rosalie Berger Levinson[*]

The Supreme Court has acknowledged that "the Due Process Clause, like its forebear in the Magna Carta, was 'intended to secure the individual from the arbitrary exercise of the powers of government' . . . to prevent governmental power from being 'used for purposes of oppression.'"[1] *Historically, Magna Carta was aimed at limiting the power of the king. Today, substantive due process is invoked to challenge arbitrary deprivations of life, liberty, and property by officials, such as police officers, jail guards, public-school educators, public employers, and members of zoning boards. However, the Supreme Court has emasculated its efficacy as a limitation on executive power. In 1998, in* County of Sacramento v. Lewis, *it held that the "criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue."*[2] *Whereas legislative enactments are subject to varying levels of scrutiny depending on the nature of the rights at stake, the Court asserted that only the most egregious executive misconduct, that which "shocks the conscience," will be actionable.*[3]

Since 1998, Lewis *has created significant confusion and division in the appellate courts, severely restricting the ability of detainees, students, government employees, and landowners, to bring substantive due process challenges to the arbitrary exercise of power. Some circuits have required that litigants prove that executive misconduct both infringe on a fundamental right and shock the conscience. Because neither employment nor property are regarded as fundamental rights, most allegations of arbitrary treatment brought by government employees and landowners are dismissed. Other appellate courts allow substantive due process challenges to the deprivation of non-fundamental property or liberty interests only where the litigant demonstrates the inadequacy of state law remedies, thereby permitting the vagaries of state tort law to determine the fate of constitutional claims.*

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1 Daniels v. Williams, 474 U.S. 327, 331 (1986) (citations omitted).

2 County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998).

3 *Id.*

Further, the appellate courts have interpreted the "shocks the conscience" test to impose a draconian standard, mandating, for example, that detainees demonstrate unnecessary and wanton infliction of pain or that students prove intentional malice or sadism in order to challenge excessive, unwarranted corporal punishment.

The thesis of this Article is that the "shocks the conscience" test, which is founded on a false dichotomy between substantive due process challenges to executive and legislative action, should be rejected. First, it is historically untenable. The core concern of Magna Carta, the source of substantive due process, was to limit executive abuse of power. This was the understanding of those who framed and ratified the Due Process Clause. Thus, it is counterintuitive to make it more difficult for plaintiffs to challenge executive misconduct. Second, Lewis *rests on shaky precedent and has not been consistently adhered to by the Supreme Court in subsequent cases. Third, the concern cited by the Court to justify a more stringent standard for executive action—fear of converting § 1983 substantive due process claims into a "font of tort law"—is unfounded and exaggerated. Section 1983 should not drive constitutional interpretation, and immunity defenses already significantly insulate government officials and entities sued for § 1983 damages. Fourth, the numerous circuit conflicts demonstrate that the test has proven to be an unworkable analytical tool.*

To restore substantive due process as a meaningful safeguard against arbitrary abuse of government power, Lewis *should be overturned. Recognizing, however, the concerns of subjectivity and unbridled discretion that have surrounded the substantive due process conundrum, this Article proposes a new test with specific criteria, extrapolated from various Supreme Court and appellate court decisions, to guide courts in determining when government misconduct should be viewed as an unconstitutional abuse of power.*

INTRODUCTION

The Supreme Court has recognized substantive due process as a limitation on all three branches of government—legislative, executive, and judicial. In the nineteenth century, substantive due process was invoked to strike down laws that interfered with economic liberty.[4] Although the Supreme Court subsequently

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[4] In *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897), the Court held that a state statute restricting property owners from obtaining insurance from companies that failed to comply with state law interfered with the liberty of the individual "to earn his

repudiated the close scrutiny to which the *Lochner* Court subjected economic legislation, the concept that substantive due process protects against arbitrary legislation remains intact. Under economic substantive due process, laws need only be "rationally related to a legitimate state interest."[5] The challenger has the burden to prove that the legislature "acted in an arbitrary and irrational way."[6] However, when a statute interferes with certain personal rights heightened scrutiny is used. Under the classic formulation, when a right is classified as fundamental, the state carries the burden of proving that infringement of the right is narrowly tailored to meet a compelling government interest.[7] Further, the Court has at times invalidated laws that interfere with non-fundamental, but core, liberty interests by imposing an undue burden test[8] or a balancing test.[9]

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livelihood by any lawful calling." *Allgeyer* was the forerunner of *Lochner v. New York*, 198 U.S. 45 (1905), which invalidated on substantive due process grounds a New York law prohibiting the employment of bakers for more than ten hours per day or sixty hours per week. *Id.* at 52. The historic source for substantive due process is discussed, *infra* Part II.A.

5 City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) (explaining the deferential standard that applies to economic legislation).

6 Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976).

7 Washington v. Glucksberg, 521 U.S. 702, 721 (1997). In his concurring opinion, Justice Souter cites Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting), as providing the basis for the modern doctrine of substantive due process and unenumerated personal rights. *Glucksberg*, 521 U.S. at 762–63 (Souter, J., concurring).

8 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992) (holding that substantive due process prohibits state regulation that unduly burdens the abortion decision).

9 Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that public morality alone could not justify a state sodomy statute targeting only same-sex conduct, which intruded "into the personal and private life of the individual"). *Lawrence* has created a circuit split as to the appropriate standard of review to apply when a liberty interest in sexual intimacy is implicated. It has also created conflicting opinions as to whether public morality may justify laws that intrude on this personal liberty interest. *See, e.g.*, Seegmiller v. LaVerkin City, 528 F.3d 762, 771–72 (10th Cir. 2008) (holding that *Lawrence* did not recognize a broad-based fundamental right to engage in sexual conduct, but rather applied only rational basis analysis and, under this standard, private reprimand of female officer for off-duty private sexual conduct with another officer at a training conference does not violate substantive due process); Cook v. Gates, 528 F.3d 42, 56 (1st Cir. 2008) (acknowledging that some courts have read *Lawrence* to apply a rational basis test while others see the case as mandating strict scrutiny, but then interpreting *Lawrence* as having recognized a protected liberty interest for adults to engage in private, consensual sexual intimacy, which triggered a balancing test that cannot fit neatly under either strict or rational basis analysis); Witt v. Dep't of Air Force, 527 F.3d 806, 819, 821 (9th Cir. 2008) (holding that *Lawrence* mandates application of a heightened level of scrutiny to the claim of Air Force nurse alleging that defendants violated her substantive due process rights by suspending her from duty because of her sexual relationship with a civilian woman; although rejecting a facial challenge to the military's "Don't Ask, Don't Tell" policy, the court remanded for heightened scrutiny of the policy "as applied" to the plaintiff); Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 743–45 (5th Cir. 2008) (holding that, after *Lawrence*, an interest in public morality is

In addition, the Supreme Court has invoked substantive due process to limit "grossly excessive" punitive damage awards imposed by the judicial branch of government.[10] Despite the fact that property, not fundamental liberty, is at stake, such awards have been deemed to violate a defendant's substantive due process right not to be arbitrarily deprived of one's property.[11] The Court established a three-prong test for arbitrariness, looking to the reprehensibility of the defendant's conduct (the most important consideration), the ratio between compensatory and punitive damages (which rarely should exceed single digits), and fines/punishments for the same conduct under state law.[12]

As to the executive branch, the Supreme Court in 1952 recognized that substantive due process protects against wrongdoing by government officials. In *Rochin v. California*,[13] the Court invoked substantive due process defensively in a criminal proceeding to exclude evidence that was obtained by pumping the defendant's stomach.[14] The Court stated that substantive due process is violated by conduct that "shocks the conscience" or constitutes force that is "brutal" and "offend[s] even hardened sensibilities."[15] The shocks the conscience standard appeared to emerge as the test for determining whether misconduct by government officials was so egregious as to violate substantive due process.[16]

In 1998, the Supreme Court, in *County of Sacramento v. Lewis*,[17] invoked *Rochin*'s shocks the conscience test to limit the availability of a § 1983 damage action brought against a deputy

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insufficient to justify laws that regulate private sexual conduct, unless it relates to prostitution, the potential for injury or coercion or public conduct; thus, state ban on the promotion or commercial sale of sex toys is invalid "[b]ecause the asserted governmental interests for the law does not meet the applicable constitutional standard announced in *Lawrence v. Texas*"); Williams v. Morgan, 478 F.3d 1316, 1320 (11th Cir. 2007) (holding, contrary to the Fifth Circuit, that Alabama's interest in public morality is a rational constitutional justification for the state's sexual devices statute, which prohibits commercial distribution of any device primarily used for stimulation of human genitals); Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 817 (11th Cir. 2004) (holding that *Lawrence* mandates only application of a rational basis standard of review, and, under this standard, Florida statute prohibiting adoptions by homosexuals does not violate substantive due process).

10 BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–75 (1996).

11 *Id.* *See also* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 412, 418 (2003) (holding that a $145 million punitive damage award was grossly excessive in a case where the jury awarded only $1 million in compensatory damages).

12 *State Farm*, 538 U.S. at 418. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 596–99 (3d ed. 2006) (discussing the procedural and substantive due process limits the Court has imposed on punitive damages awards).

13 342 U.S. 165 (1952).

14 *Id.* at 173–74.

15 *Id.* at 172–73.

16 *See infra* Part I.B.

17 523 U.S. 833 (1998).

sheriff who conducted a deadly high-speed chase of two young boys riding a motorcycle after they failed to obey an officer's command to stop.[18] The Court asserted that, although substantive due process may be used to challenge abuses of executive power, the criteria for such challenges are different from challenges to legislation—they must be limited to the most egregious official conduct.[19] To guard against converting substantive due process into a "font of tort law," only an abuse of power that shocks the conscience is actionable.[20]

Lewis has led to significant confusion in the appellate courts. Because the Court imposed a unique test for abuses of executive power, some appellate courts have rejected substantive due process challenges, even where fundamental rights are implicated, unless the plaintiff can further prove that the government action was "conscience-shocking."[21] Thus, those injured by egregious government wrongdoing must prove both a fundamental right *and* conscience-shocking behavior in order to state a cause of action. This restriction has eliminated substantive due process in many circuits as a source of protection from arbitrary employment decisions or land use decisions that implicate only non-fundamental property or liberty interests.[22] Further, even with regard to fundamental rights, the shocks the conscience standard has been interpreted to limit claims to only the most egregious misconduct "inspired by malice or sadism."[23]

This Article contends that the Supreme Court took a wrong turn in *Lewis* when it held that substantive due process claims brought against the executive branch must be subjected to a different, more rigorous standard than challenges to legislative or judicial abuses of power. Part I of this Article describes the birth of the shocks the conscience test and its history from *Rochin* in 1952 until *Lewis* in 1998, as well as the appellate courts' conflicting interpretations of *Lewis*, which demonstrate that the test has proved to be an unworkable analytic tool. Part II critiques *Lewis* and explains how the case created a false dichotomy between challenges to legislative versus executive action and imposed an unwarranted standard on those challenging executive misconduct. It describes how the dichotomy is contrary to public originalism and to Supreme Court precedent, both before and after *Lewis*. Further, it

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18 *Id.* at 836–37, 854.
19 *Id.* at 846.
20 *Id.* at 846–48.
21 *See infra* Part I.D.
22 *See infra* Part I.D.
23 *See infra* Part I.D.

challenges the underlying rationale for the test. Part III proposes a new test for analyzing challenges to executive power that draws on the Supreme Court's treatment of substantive due process challenges to legislation and punitive damage awards, as well as the appellate courts' interpretation of the shocks the conscience test.

I. THE BIRTH AND DEVELOPMENT OF THE SHOCKS THE CONSCIENCE TEST

A. Stomach Pumping to Secure Evidence Shocks the Conscience

The Supreme Court first utilized the shocks the conscience language in a 1952 decision holding that a conviction based on the use of morphine capsules, which were obtained by pumping the defendant's stomach to induce vomiting, violated the Due Process Clause of the Fourteenth Amendment.[24] The Court did not draw a distinction between using substantive due process to challenge legislative as compared to executive action. Nor did the Court state that only executive misconduct that shocks the conscience violates substantive due process. Rather, the case must be understood in the context in which it was decided.

In 1952, the Supreme Court Justices were engaged in a battle as to whether the provisions in the Bill of Rights, more specifically the criminal procedural safeguards in the Fourth, Fifth, and Sixth Amendments, applied to the states through the Fourteenth Amendment.[25] Justice Frankfurter, who authored the *Rochin* opinion, did not believe that the framers of the Amendment intended for it to incorporate these specific guarantees. Rather, he argued that substantive due process protected against any practices that "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."[26] Justices Black and Douglas concurred in the judgment that the evidence so obtained must be excluded, but they relied instead on the explicit Fifth Amendment Self-Incrimination Clause, which they believed applied equally to the states.[27] Justice Black attacked Justice Frankfurter's use of

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24 Rochin v. California, 342 U.S. 165, 174 (1952).

25 In *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), the Supreme Court held that the provision in the Bill of Rights applied only to the federal government and not to state or local governments. For a history regarding the debate as to whether the Fourteenth Amendment Privileges and Immunities Clause or the Due Process Clause was intended to incorporate the first eight amendments, see CHEMERINSKY, *supra* note 12, at 491–503.

26 *Rochin*, 342 U.S. at 169 (citing Malinski v. New York, 324 U.S. 401, 416–17 (1945)).

27 *Id.* at 174–79 (Black, J., and Douglas, J., concurring).

substantive due process as lacking fixed content, thereby permitting the Justices to impose their own personal predilections of what offends "a sense of justice" or what runs counter to the "decencies of civilized conduct."[28] He challenged "the evanescent standards of the majority's philosophy" as no different from that used during the *Lochner* period to nullify state laws enacted to suppress evil economic practices.[29]

To justify his use of substantive due process, rather than an "incorporated" Fifth Amendment, Justice Frankfurter conceded that substantive due process lacked specificity, but he protested that "[t]he vague contours of the Due Process Clause do not leave judges at large."[30] He believed that judges would be guided by "considerations deeply rooted in reason and in the compelling traditions of the legal profession."[31] It is in this context that he stated that conduct that "shocks the conscience" or "is bound to offend even hardened sensibilities" clearly violates the due process requirement that states "respect certain decencies of civilized conduct."[32] Justice Frankfurter used the shocks the conscience language, among many other descriptive clauses, to establish that judges may legitimately invoke substantive due process to reach practices that "offend the community's sense of fair play and decency."[33]

Significantly, the Justices did not treat Rochin's claim as a substantive due process challenge to *executive* action. Rochin challenged the "state rule" that permitted evidence to be introduced despite the fact that it was obtained through coercive means. Indeed, Justice Douglas, in his concurring opinion, questioned how a "rule" that the majority of states followed, which permitted evidence to be used to convict even if it was forcibly extracted, could be viewed as contrary to established tradition.[34] Although Justice Frankfurter focused on the conduct at issue in rejecting the state's evidentiary rule, his opinion did not draw a distinction between substantive due process challenges to executive as compared to legislative action. As the

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28 *Id.* at 175 (Black, J., concurring). Justice Douglas similarly opined that inquiry into "decencies of civilized conduct" permits determinations to turn "on the idiosyncrasies of the judges who sit here." *Id.* at 179 (Douglas, J., concurring).

29 *Id.* at 177.

30 *Id.* at 170.

31 *Id.* at 171. He also asserted that the judicial exercise of judgment should not be avoided by "freezing 'due process of law' at some fixed stage of time or thought"; rather, judges must reconcile the needs "both of continuity and of change in a progressive society." *Id.* at 171–72.

32 *Id.* at 172–73.

33 *Id.* at 173.

34 *Id.* at 177–78 (Douglas, J., concurring) (noting that evidence so obtained would be excluded in only four states).

concurrence noted: "What the majority hold is that the Due Process Clause empowers this Court to nullify any *state law* if its application 'shocks the conscience,' offends 'a sense of justice' or runs counter to the 'decencies of civilized conduct.'"[35] The majority gave no citation to its use of shocks the conscience language, nor did it state that this is *the* test that must be used. Rather, this was merely descriptive language, explaining why admitting the ill-begotten morphine capsules to obtain a conviction violated due process.

B. Shocks the Conscience from 1952 through 1998

Over the next forty-six years, from 1952 until the *Lewis* decision in 1998, the shocks the conscience language from *Rochin* was utilized in only a handful of majority opinions. The Supreme Court did not distinguish legislative from executive misconduct, nor did it consistently invoke the shocks the conscience test. The three key cases that *Lewis* relied upon did not support its analysis. The first, *Breithaupt v. Abram*, applied the shocks the conscience standard in rejecting a habeas petition challenging a police mandate that a physician collect an evidentiary blood sample of an unconscious arrestee.[36] In rejecting the substantive due process claim, the Court explained that numerous states had laws permitting this practice.[37] The Court focused on a legislative rule, which it found did not violate substantive due process.

A second case, *United States v. Salerno*, considered a substantive due process challenge to the pretrial provisions of the Bail Reform Act of 1984.[38] The Court cited both *Rochin*'s shocks the conscience standard and fundamental rights analysis: "substantive due process prevents the government from engaging in conduct that shocks the conscience, or interferes with rights implicit in the concept of ordered liberty."[39] The case clearly involved a challenge to legislative action, not executive misconduct. *Rochin* was simply invoked as an alternative way to prove a substantive due process violation where fundamental rights were not implicated.

The third case cited to support the *Lewis* analysis, *Youngberg v. Romeo*, more clearly involved a challenge to executive action. However, the Supreme Court in *Youngberg* did not even mention *Rochin*, nor did it use the shocks the conscience

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35 *Id.* at 175 (Black, J., concurring) (emphasis added).
36 Breithaupt v. Abram, 352 U.S. 432, 436–37 (1957).
37 *Id.* at 436, 437 nn.3–4.
38 United States v. Salerno, 481 U.S. 739, 741 (1987).
39 *Id.* at 746 (internal quotation marks and citations omitted).

standard.[40] The case raised the substantive due process rights of those who have been involuntarily committed to state institutions.[41] Although recognizing that the decisions of qualified professionals regarding the treatment and conditions of confinement should be deemed presumptively valid, the Court acknowledged that the liberty interest required the state "to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint."[42] Balancing the competing concerns, the Court held that substantive due process is violated if professional decisions constitute "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."[43] The Court did not mandate that arbitrary professional decisions shock the conscience in order to be actionable.

An analysis of every Supreme Court citation to *Rochin* from 1952 to 1998 demonstrates that, outside the context of the evidentiary exclusionary rule,[44] the shocks the conscience test was cited much more frequently in dissenting opinions,[45] often rejected,[46] and strongly criticized.[47] It was never considered to be

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40 Youngberg v. Romeo, 457 U.S. 307, 315 (1982).

41 *Id.* at 309.

42 *Id.* at 318–19.

43 *Id.* at 323.

44 *See* Linkletter v. Walker, 381 U.S. 618, 631–32 (1965) (stating that the "shocks the conscience" test is used to determine whether evidence must be excluded). *See also* Illinois v. Gates, 462 U.S. 213, 259 n.14 (1983) (White, J., concurring) (reasoning that evidence obtained as part of a search that "shocks the conscience" must be excluded based on due process).

45 *See* Herrera v. Collins, 506 U.S. 390, 435–37 (1993) (Blackmun, J., dissenting) (opining that the majority's explanation for failing to address the substantive due process "shocks the conscience" argument was "fatuous" and arguing that substantive due process permits defendants to make a claim of actual innocence); Bell v. Wolfish, 441 U.S. 520, 578 (1979) (Marshall, J., dissenting) (arguing that the Court should have found that requiring pretrial detainees to submit to a visual body cavity search after a contact visit "shocks the conscience"); Shotwell Mfg. Co. v. United States, 371 U.S. 341, 378–79 (1963) (Black, J., dissenting) (reasoning, in dissent, that allowing a highly ranked government actor to induce confessions "shocks the conscience"). *Cf.* Fikes v. Alabama, 352 U.S. 191, 193, 201 (1957) (Harlan, J., dissenting) (arguing for application of the "shocks the conscience" test to the confession of an African-American defendant of below-average intelligence after several days of questioning, but ultimately determining that the conduct in question did not shock the conscience).

46 *See* Albright v. Oliver, 510 U.S. 266, 271, 275 (1994) (holding that arrestee's malicious prosecution claim must be judged under the Fourth Amendment, not substantive due process with its "scarce and open-ended" "guideposts"); Graham v. Connor, 490 U.S. 386, 393–94 (1989) (rejecting use of the "shocks the conscience" substantive due process test where a more explicit constitutional right was at stake); Whitley v. Albers, 475 U.S. 312, 327 (1986) (relying on the Eighth Amendment, rather than substantive due process, in a challenge to conditions of confinement, although mentioning that conduct which "shocks the conscience" would likely violate both provisions); Mapp v. Ohio, 367 U.S. 643, 663–66 (1961) (Black, J., concurring) (explicitly

the only standard for challenging executive misconduct,[48] nor was it viewed as supplanting fundamental rights analysis.[49]

C. Lewis Adopts "Shocks the Conscience" as the Exclusive Test to Assess Substantive Due Process Challenges to Executive Misconduct

In 1998, the Supreme Court, in *County of Sacramento v. Lewis*, addressed a substantive due process challenge in the context of a § 1983 damages action.[50] At issue was the alleged reckless conduct of a deputy sheriff who conducted a deadly high-speed chase of two boys riding a motorcycle after they failed to obey an officer's command to stop.[51] Phillip Lewis, the

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rejecting the "shocks the conscience" test in favor of a "liberally construed" reading of the Fourth and Fifth Amendments).

47 *Herrera*, 506 U.S. at 428 (Scalia, J., concurring) (opining that if convicting a defendant using proper procedures "shocks the conscience" of the dissenting Justices, they may want to reconsider the usefulness of the "shocks the conscience" test); Carlson v. Green, 446 U.S. 14, 46 n.12 (1980) (Rehnquist, J., dissenting) (lamenting that the "shocks the conscience" test imposes a constitutional standard "sufficiently general that it is difficult to predict in advance whether a particular set of facts amounts to a constitutional violation"); McGautha v. California, 402 U.S. 183, 225–26 (1971) (Black, J., concurring) (reasoning that conviction should be reversed if rights written in the Constitution are violated, not if members of the Court believe the procedures were "shocking to [their] conscience"); *In re* Winship, 397 U.S. 358, 381–82 (1970) (Black, J., dissenting) (discussing how the "shocks the conscience" test gives the judiciary wide latitude to declare laws unconstitutional and disregards the concept of a government of limited power); Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337, 350–51 (1969) (Black, J., dissenting) (citing the "shocks the conscience" test as an example of a "natural law" test that the Court uses to set its own subjective standards); Foster v. California, 394 U.S. 440, 450 (1969) (Black, J., dissenting) (arguing that the "shocks the conscience" test invites the Court to make its own rules based on personal opinions of individual Justices); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 519–20 (1969) (Black, J., dissenting) (citing the "shocks the conscience" test as an example of a flexible standard that gives the Court no guidance as to when it should find a law unconstitutional); Griswold v. Connecticut, 381 U.S. 479, 511 n.4, 512 (1965) (Black, J., dissenting) (citing the "shocks the conscience" test as an example of the phrase used to decide cases based on judicial "appraisal of what laws are unwise or unnecessary"); Jackson v. Denno, 378 U.S. 368, 407 (1964) (Black, J., dissenting in part and concurring in part) (citing the "shocks the conscience" test as one that impermissibly gives the Justices wide discretion to strike down laws).

48 In addition to the *Youngberg* decision, discussed, *supra* notes 40–43 and accompanying text, see Moran v. Burbine, 475 U.S. 412, 417–18, 433–34 (1986), where the majority used the language "shocks the sensibilities of civilized society" to determine that the police behavior in not making defendant aware that an attorney had been retained on his behalf prior to questioning did not violate this standard. The dissent found that, even if the conduct was not deemed to be conscience-shocking, the circumstances surrounding the defendant's confession were not fair and thus violated due process. *Id.* at 466–68 (Stevens, J., dissenting). *See also* United States v. Russell, 411 U.S. 423, 432 (1973) (using a standard, which it referred to as "shocking to the universal sense of justice," but concluding that it did not shock this universal sense of justice for a police officer to infiltrate a drug ring to obtain evidence).

49 *See supra* notes 38–39 and accompanying text (discussing *Salerno*).

50 County of Sacramento v. Lewis, 523 U.S. 833, 836 (1998).

51 *Id.* at 836–37.

passenger, was struck and killed.[52] The Court confirmed that substantive due process could be used to challenge abuses of executive power: "Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action . . . ."[53] The majority cautioned, however, that the "criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue."[54] With regard to the latter, only "the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'"[55] The Court then invoked *Rochin* to rule that only an abuse of power that "shocks the conscience" will be actionable.[56]

In *Lewis*, the Court further refined the *Rochin* test. It reasoned that government officials who act with "deliberate indifference" to constitutional rights "shock the conscience"—citing, for example, prison guards who are deliberately indifferent to the medical needs of pretrial detainees.[57] However, because deliberate indifference implies the opportunity for actual deliberation, the Court determined that the standard could not reasonably apply to police officers who face a situation calling for fast action. Thus, the Court held that injuries resulting from "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment."[58] Because the deceased's family members did not allege that the deputy acted with intent to harm, they failed to meet the shocks the conscience test.[59]

Of key concern to this discussion is the Court's assertion that substantive due process challenges to executive misconduct must be treated differently than challenges to legislation. As noted, when laws allegedly violate due process, the standard of review depends on the threshold determination of whether the legislative enactment infringes on a fundamental right.[60] In *Washington v. Glucksberg*,[61] the Court stated that this inquiry must be made "before requiring more than a reasonable relation to a legitimate state interest to justify the action."[62] Only

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52 *Id.* at 837.
53 *Id.* at 845–46.
54 *Id.* at 846.
55 *Id.* (quoting Collins v. City of Harker Heights, 503 U.S. 115, 129 (1992)).
56 *Id.*
57 *Id.* at 851–52.
58 *Id.* at 854.
59 *Id.* at 855.
60 *See supra* note 7 and accompanying text.
61 521 U.S. 702 (1997).
62 *Id.* at 722.

fundamental rights or liberty interests "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" will trigger strict scrutiny analysis.[63]

With regard to claims of executive misconduct, the Supreme Court has never clearly articulated how this fundamental rights inquiry affects the analysis.[64] Obviously, the importance of the right will inform the shocks the conscience judgment because deprivation of a fundamental liberty interest will be more likely to upset our sensibilities. However, the Court has never ruled that without a fundamental right all judicial inquiry must cease.[65]

In *Lewis*, Justice Souter recognized the inherent conflict between *Glucksberg*, which begins its analysis by asking whether a fundamental right is implicated, and the analysis in *Lewis*, which asks whether executive misconduct shocks the conscience.[66] Specifically, he explained in a footnote:

> [E]xecutive action challenges raise a particular need to preserve the constitutional proportions of constitutional claims, lest the Constitution be demoted to what we have called a font of tort law. Thus, in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience. That judgment may be informed by a history of liberty protection, but it necessarily reflects an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them. Only if the necessary condition of egregious behavior were satisfied would there be a possibility of recognizing a substantive due process right to be free of such executive action, and only then might there be

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63 *Id.* at 720–21 (internal citations and quotations omitted).

64 In *Rochin*, the Court invoked the shocks the conscience test without first identifying a fundamental right. *See supra* Part I.A.

65 In *Glucksberg*, 521 U.S. at 722, the Court described the "threshold requirement—that a challenged state action implicate a fundamental right—before requiring more than a reasonable relation to a legitimate state interest to justify the action." The Court did not rule that the absence of a fundamental right ends the constitutional inquiry. Rather, this simply means that the government action will be tested by a lower level of scrutiny. *Id.* Even Justice Scalia, an outspoken critic of substantive due process, acknowledged that laws not implicating a fundamental right are subject to "the ordinary 'rational relationship' test." *See* Michael H. v. Gerald D., 491 U.S. 110, 131 (1989). Further, the text of the Fourteenth Amendment does not say that government cannot deprive persons of a "fundamental right;" rather, it prohibits all deprivations of "life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Court has acknowledged that the scope of "liberty" is broad: "[A] rational continuum which . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ." Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

66 County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998).

> a debate about the sufficiency of historical examples of enforcement of the right claimed, or its recognition in other ways.[67]

Under Justice Souter's approach, the question whether particular behavior shocks the conscience would depend in part on a historical review of traditional executive practices. However, this analysis does not appear to mandate further inquiry into the fundamental nature of the right. As held in *Rochin*, which Justice Souter affirmed as binding precedent, conscience-shocking behavior that deprives a person of liberty itself violates substantive due process.[68]

Several Justices in *Lewis* questioned the new dichotomy between executive and legislative action. Justice Kennedy, in a concurring opinion, acknowledged that the challenged action—conducting a reckless high-speed chase—implicated an explicit fundamental liberty interest because a life was lost.[69] He asserted that the shocks the conscience test "can be used to mark the beginning point in asking whether or not the objective character of certain conduct is consistent with our traditions, precedents, and historical understanding of the Constitution and its meaning."[70] His major concern was that, regardless of whether a plaintiff challenges legislative or executive action, "objective considerations, including history and precedent, are the controlling principle."[71]

Justice Scalia questioned why substantive due process "protects some liberties against executive officers but not against legislatures."[72] He opined that Justice Souter's approach would result in greater, not lesser, substantive due process protection against the actions of executive officers than against the actions of legislatures, apparently because he believed the "threshold question" of egregiousness would overwhelm any consideration of the historical inquiry, thus abandoning the strict fundamental-rights approach articulated in *Glucksberg*.[73]

The various opinions in *Lewis* have led the appellate courts to disagree about whether the shocks the conscience standard *replaces* the fundamental rights analysis set forth in *Glucksberg*, or whether the standard *supplements* the historical inquiry into the nature of the asserted liberty interest, as Justice Kennedy's

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67 *Id.* at 848 n.8.

68 *See* Rochin v. California, 342 U.S. 165, 172–74 (1952); *Lewis*, 523 U.S. at 846–47.

69 *Lewis*, 523 U.S. at 856 (Kennedy, J., concurring). Justice O'Connor joined this opinion.

70 *Id.* at 857.

71 *Id.* at 858.

72 *Id.* at 861 n.2 (Scalia, J., concurring). Justice Thomas joined this opinion.

73 *Id.* at 860–61 (Scalia, J., concurring).

concurrence suggests.[74] Several different perspectives have emerged in the appellate courts.

D. Appellate Courts' Conflicting Interpretations of Lewis

Lewis' shocks the conscience test has proven to be an unworkable analytical tool. It has led to circuit splits on several issues. The appellate courts are divided as to whether only violations of fundamental rights, as opposed to non-fundamental liberty or property interests, are actionable. They also disagree as to whether the existence of state tort remedies defeats the federal cause of action. Further, there are disputes as to what constitutes conscience-shocking behavior, including what "state-of-mind" requirement should be imposed. Finally, there is uncertainty as to whether the conscience-shocking determination is a judge or jury question. The following sections explicate these circuit splits.

1. Conduct Must Infringe on a Fundamental Right *and* Shock the Conscience

The appellate courts have taken various approaches in seeking to reconcile the *Glucksberg* analysis, which first examines whether a fundamental right is implicated to determine the appropriate standard of review,[75] with *Lewis*, which focuses on the egregiousness of the government misconduct. Some appellate courts have ruled that absent a fundamental right, no substantive due process claim challenging executive action may be brought. For example, in *Christensen v. County of Boone*, the Seventh Circuit rejected a substantive due process claim brought by a couple who complained that they were stalked and trailed by an officer in his squad car as a result of a personal vendetta.[76] Because the couple could not identify a fundamental right that was directly and substantially interfered with by the officer's conduct, their substantive due process claim failed.[77] Similarly, in *Flowers v. City of Minneapolis*,[78] the Eighth Circuit rejected claims brought against a police lieutenant who directed his officers to conduct a month-long patrol of a private residence because he did not like the occupants, who had a previous encounter with the police, moving into his neighborhood.[79] The court held that absent a showing that the

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74 *Id.* at 857–58 (Kennedy, J., concurring).

75 *See supra* notes 61–63 and accompanying text.

76 Christensen v. County of Boone, 483 F.3d 454, 461–65 (7th Cir. 2007).

77 *Id.* at 465.

78 478 F.3d 869 (8th Cir. 2007).

79 *Id.* at 871–72. The lieutenant offered a steak dinner for any officer who made an arrest leading to the conviction or eviction of anyone living at the residence. *Id.*

misconduct violated a fundamental constitutional right *and* shocked the "contemporary conscience," no substantive due process violation could be asserted.[80]

The requirement that conduct infringe on a fundamental right has led the majority of appellate courts to reject all claims brought by government employees alleging arbitrary demotions, suspensions, or terminations. Government employees who allege constructive discharge or injury to future ability to earn a living fail to state a substantive due process claim because they cannot identify a fundamental property or liberty interest.[81] A few courts have recognized a very limited right to substantive due process review of employment decisions where, for example, the government totally prohibits someone from engaging in a calling,[82] but such claims generally are dismissed.[83]

In sharp contrast, the appellate courts, as well as the Supreme Court, have permitted substantive due process challenges to land use regulation (both legislative and executive),

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80 *Id.* at 872–74. *See also* Martin v. St. Mary's Dep't Soc. Servs., 346 F.3d 502, 511–12 (4th Cir. 2003) (Traxler, C.J., dissenting) (reasoning that when courts assess whether action shocks the conscience they should evaluate whether the action violates a right that is rooted in history and tradition; however, because defendants allegedly violated parents' right to custody of their children, a fundamental right was at issue, and the alleged conduct would shock the conscience); Nicholas v. Pa. State Univ., 227 F.3d 133, 139–40 (3d Cir. 2000) (holding that substantive due process is violated only if executive action violates a fundamental right *and* is arbitrary or "shocks the conscience").

81 *See* Hill v. Borough of Kutztown, 455 F.3d 225, 234 n.12 (3d Cir. 2006). *See also* Young v. Twp. of Green Oak, 471 F.3d 674, 684–86 (6th Cir. 2006) ("[a]bsent the infringement of some 'fundamental right', however, this court has held that 'the termination of public employment does not constitute a denial of substantive due process.'"); Silva v. Bieluch, 351 F.3d 1045, 1047 (11th Cir. 2003) (stating that employment rights are state-created and not "fundamental" rights protected by the Constitution); *Nicholas*, 227 F.3d at 142–43 (observing that the great majority of appellate courts have concluded that a public employee's interest in continued employment is not so "fundamental" as to be protected by substantive due process; thus, professor's property interest in his tenured professorship was not entitled to substantive due process protection). *Cf.* Seegmiller v. LaVerkin City, 528 F.3d 762, 767–72 (10th Cir. 2008) (holding that a female officer who was given a private reprimand for off-duty sexual conduct with another officer could establish a substantive due process violation either by showing that the reprimand violated a fundamental right or by showing that the decision was so arbitrary as to shock the conscience; however, the court concluded that *Lawrence* did not recognize a broad-based fundamental right to engage in private sexual conduct, and that the decision was not so arbitrary as to violate substantive due process).

82 *See, e.g.*, Engquist v. Or. Dep't of Agric., 478 F.3d 985, 996 (9th Cir. 2007), *aff'd on other grounds*, 128 S. Ct. 2146 (2008) (holding that employee "stated a valid claim . . . under substantive due process by alleging that Defendants' actions prevented her from pursuing her profession").

83 *See* Flowers v. City of Minneapolis, 478 F.3d 869, 874 (8th Cir. 2007) (acknowledging a "fundamental right to engage in one's chosen occupation," and cautioning that the right does not encompass a brief interruption of work in a desired occupation, but only the "complete prohibition of the right to engage in a calling;" because plaintiffs only alleged that the officers' action caused some loss of business, their substantive due process claim was not actionable).

even though property has not been designated a fundamental right.[84] Further, the Supreme Court's recognition of substantive due process as a limitation on punitive damages awards[85]—again a property interest—draws into question any notion that substantive due process reaches only the infringement of a fundamental right.

2. Substantive Due Process Claims Are Actionable Only Where No State Remedies Are Available

Other appellate courts require that litigants challenging executive misconduct demonstrate the inadequacy of state remedies in order to maintain a substantive due process claim. These courts have focused on the Supreme Court's concern expressed in *Lewis* that substantive due process not become a "font of tort law," supplanting state law.[86] Thus, the Fourth Circuit held that "where a claim sounds both in state tort law and substantive due process, state tort law is the rule and due process the distinct exception."[87] Accordingly, judges should recognize a strong presumption against § 1983 substantive due process claims that overlap state tort law.[88] For example, the Fourth Circuit threw out claims brought by parents alleging that county fire department personnel violated their trainee son's substantive due process right by conducting a strenuous training session outside in extreme heat without bringing water or medical supplies, thereby causing the young man's death.[89]

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84 In *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542 (2005), the Court ruled that substantive due process prohibits land regulation that does not rationally advance a government interest: "a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause." *See also* Maldonado v. Fontanes, 568 F.3d 263, 272–73 (1st Cir. 2009) (rejecting the argument that substantive due process claims are not actionable where only deprivation of property is at stake, because "[i]t is the *effect* on the person from the deprivation of the interest in life, liberty, or property which may be shocking to the conscience"); A Helping Hand, L.L.C. v. Baltimore County, 515 F.3d 356, 371–73 (4th Cir. 2008) (finding that a methadone clinic operator whose facility was shut down pursuant to a county zoning ordinance stated a valid substantive due process claim since he had a vested property interest); United Artist Theatre Circuit, Inc. v. Twp. of Warrington, 316 F.3d 392, 397 & 400–02 (3d Cir. 2003) (joining the majority of circuits in holding that landowners who challenge executive action must establish that the official's actions shock the conscience, but, then-Judge Alito held that denial of a permit to a theater that refused to pay a very high impact fee stated a cause of action under the "shocks the conscience" standard). *Cf.* Clark v. Bosher, 514 F.3d 107, 112–13 (1st Cir. 2008) (recognizing substantive due process challenge to the denial of permits or licenses, the court held that run-of-the-mill land-use decisions generally will not rise to the level of behavior that shocks the conscience).

85 *See supra* note 11.

86 *See supra* notes 20 and 67 and accompanying text.

87 Waybright v. Frederick County, 528 F.3d 199, 204–06 (4th Cir. 2008).

88 *Id.*

89 *Id.* at 201–03.

Because their constitutional claim overlapped with state tort law, it was not actionable.[90]

Similarly, the Seventh Circuit has ruled that whenever substantive due process challenges involve only property, the plaintiff must show "either the inadequacy of state law remedies or an independent constitutional violation."[91] Thus, government employees alleging arbitrary employment decisions[92] or landowners claiming arbitrary deprivation of their property[93] will have their claims dismissed unless they can prove that state law does not provide them relief.[94]

Finally, many courts have rejected substantive due process claims brought by students alleging excessive corporal punishment where the state provides an adequate remedy. For example, the Fifth Circuit has asserted that so long as the state affords an adequate remedy, public students cannot claim denial of substantive due process, irrespective of the severity of their injuries.[95] The Eleventh Circuit has similarly suggested that if a remedy may be pursued under state tort law, the federal

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90 *Id.* at 205–06.

91 Lee v. City of Chicago, 330 F.3d 456, 467 (7th Cir. 2003). *See also* Ali v. Ramsdell, 423 F.3d 810, 814 (8th Cir. 2005) (holding that because state conversion law provided an adequate remedy, the claim that officers seized and stole $4,920 while executing a search warrant did not state a substantive due process claim).

92 *See* Montgomery v. Stefaniak, 410 F.3d 933, 939 (7th Cir. 2005) (holding that absent a violation of another constitutional right or the inadequacy of available state remedies, a wrongful termination claim could not be brought under a substantive due process theory); Galdikas v. Fagan, 342 F.3d 684, 691 (7th Cir. 2003) (reasoning that even if officials acted arbitrarily and irrationally, because state law provided an adequate remedy for the violation of state-created contract rights, no substantive due process violation may be found). *See also* Habhab v. Hon, 536 F.3d 963, 968 (8th Cir. 2008) (holding that the plaintiff could not "avail himself of federal constitutional principles of substantive due process" to pursue a state law claim for tortious interference with contracts).

93 *See* Taake v. County of Monroe, 530 F.3d 538, 541–42 (7th Cir. 2008) (holding that land purchaser who alleged a substantive due process violation based on the county vendor's breach of contract failed to state a claim because the prospective land purchaser could not show violation of a fundamental right or that available state remedies were inadequate); Gen. Auto Serv. Station v. City of Chicago, 526 F.3d 991, 1008 (7th Cir. 2008) (holding that in order to bring a substantive due process claim, property owner must show both a property right and the inadequacy of state remedies to address the deprivation before a judge should consider whether the interference with property was arbitrary or irrational).

94 *See Montgomery*, 410 F.3d at 939; *Taake*, 530 F.3d at 541–42.

95 *See* Moore v. Willis Indep. Sch. Dist., 233 F.3d 871, 874–75 (5th Cir. 2000) (stating that injuries resulting from corporal punishment do not give rise to substantive due process claims if there are adequate state remedies to redress the harm inflicted); Fee v. Herndon, 900 F.2d 804, 807–08 (5th Cir. 1990) (acknowledging that corporal punishment caused child to spend six months in a psychiatric ward at a cost of $90,000, but holding that "injuries sustained incidentally to corporal punishment, irrespective of the severity of these injuries or the sensitivity of the student, do not implicate the due process clause *if* the forum state affords adequate post-punishment civil or criminal remedies for the student to vindicate legal transgressions").

courthouse door should be closed to substantive due process claims.[96]

Courts that have dismissed claims based on the existence of an adequate state remedy have confused substantive with procedural due process. The Supreme Court, in *Parratt v. Taylor*,[97] held that the existence of state tort remedies defeats a *procedural* due process claim where the deprivation is random and unauthorized.[98] The Court reasoned that in cases involving random, unauthorized official misconduct, the state provides all the process that is feasible if it affords the individual a post-deprivation remedy.[99] Procedural due process often presents a timing question—whether pre- or post-deprivation process is necessary—and the impossibility of providing pre-deprivation process then defeats the federal claim. Substantive due process, however, does not focus on the state's failure to provide sufficient process. Rather, it is the raw abuse of power that violates the Constitution, and such abuse is unaffected by the existence of state remedies.

Recognizing this distinction, the Supreme Court, in *Zinermon v. Burch*,[100] reiterated that substantive due process "bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'"[101] Acknowledging that the constitutional violation is complete when the wrongful act occurs, the Court stated that state tort remedies were irrelevant.[102] Nothing in *Lewis* suggested that *Zinermon* was wrong, nor can *Lewis* be read to impose this restriction.

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96 Dacosta v. Nwachukwa, 304 F.3d 1045, 1048–49 (11th Cir. 2002) (finding that a battery perpetrated by an instructor upon a college student did not shock the conscience and concluding that remedies for this type of battery should be pursued under state tort law).

97 451 U.S. 527 (1981).

98 *Id.* at 541, 543–44.

99 *Id.* at 543–44.

100 494 U.S. 113 (1990).

101 *Id.* at 125 (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).

102 *Id.* at 124–25. *See also* Mark R. Brown, *De-Federalizing Common Law Torts: Empathy for* Parratt, Hudson *and* Daniels, 28 B.C. L. REV. 813, 819 (1987) ("[s]ubstantive due process, in contrast [to procedural due process], assesses the propriety of a state's substantive decision. . . . The rationale . . . is that there are certain normative decisions the state simply cannot make regardless of the majority's wishes and regardless of any process."); Irene Merker Rosenberg, *A Study in Irrationality: Refusal to Grant Substantive Due Process Protection Against Excessive Corporal Punishment in the Public Schools*, 27 HOUS. L. REV. 399, 424–37 (1990) (reasoning that state remedies are no more relevant to substantive due process claims involving corporal punishment than they are to the racially discriminatory application of corporal punishment: "[I]n *Ingraham* the state criminal and tort remedies were legally relevant only to plaintiffs' argument that they were entitled to a hearing prior to the infliction of appreciable physical pain").

3. Only Intent to Harm, Malice, or Wantonness Will Shock the Conscience

A third restriction on substantive due process claims imposed by the appellate courts deals with the state-of-mind requirement. As explained in *County of Sacramento v. Lewis*, the shocks the conscience standard may sometimes be met when government officials act with deliberate indifference to constitutional rights.[103] The Court cited as examples prison guards who were deliberately indifferent to the medical needs of pretrial detainees and personnel at a state mental institution who failed to provide minimally adequate rehabilitation to those who were involuntarily committed.[104] However, because deliberate indifference implies the opportunity for actual deliberation, the Court determined that the standard could not reasonably apply to police officers who face a situation calling for fast action. Thus, the Court held that injuries resulting from "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment."[105]

Relying on *Lewis*, most appellate courts initially applied a deliberate indifference test in non-emergency situations.[106] Recently, however, many courts have held that even where there is time to deliberate, if the government official must balance competing legitimate interests, the shocks the conscience standard must be ratcheted up a notch. These courts have relied on the assertion in *Lewis* that "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another."[107] Thus, courts must carefully analyze the specific circumstances before condemning an abuse of power as

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103 County of Sacramento v. Lewis, 523 U.S. 833, 850–53 (1998).

104 *Id.* at 849–50 & 852 n.12.

105 *Id.* at 854. Because the decedent's family members did not allege that the deputy acted with "intent to harm," they failed to meet the shocks the conscience test. *Id.*

106 *See, e.g.*, Estate of Owensby v. City of Cincinnati, 414 F.3d 596, 602–03 (6th Cir. 2005) (affirming the application of the deliberate indifference test to a pretrial detainee's claim that he was denied adequate medical treatment; although only six minutes passed between the time detainee was taken into custody and the time medical care was provided, the officers had adequate time to fully consider the potential consequences of their conduct); Bradich v. City of Chicago, 413 F.3d 688, 691–92 (7th Cir. 2005) (reversing the district court's grant of summary judgment to defendants regarding claims that members of jail staff acted with deliberate indifference in failing to seek outside assistance for ten minutes after finding an arrestee hanging in a jail cell); Hernandez v. Tex. Dep't of Protective & Regulatory Servs., 380 F.3d 872, 880–81 (5th Cir. 2004) (holding that although only the most egregious misconduct will violate substantive due process, deliberate indifference standard is met even if the government actor does not know of a specific risk to the victim's health or safety).

107 *Lewis*, 523 U.S. at 850.

"conscience shocking."[108] The Court in *Lewis* characterized the situation facing the officers pursuing juveniles on a motorcycle as not only one that "call[ed] for fast action," but also one where the deputy faced "obligations that tend[ed] to tug against each other."[109] However, it justified the use of an "intent to harm" standard based on the unfairness of imposing liability under a "deliberate indifference" test in situations where the officials truly had no time to deliberate.[110] Nonetheless, many courts have seized upon this language in *Lewis* to reject substantive due process claims absent evidence of intent to harm.

For example, in *Matican v. City of New York*,[111] the appellate court conceded that "officers had ample opportunity to plan the [drug] sting in advance."[112] However, the officers were subject to the "pull of competing obligations," because harm was likely to occur no matter what the government officials did.[113] Thus, the officers' disclosure to a drug dealer of the confidential informant who had set him up could not be said to "shock the contemporary conscience."[114] Similarly, although the EPA administrator who falsely assured residents that it was safe to return to their homes after 9/11 may not have been subject to the same weighty concerns that justified the initial decision encouraging workers to promptly return to the site,[115] she still faced an array of competing obligations that precluded a substantive due process claim "in the absence of an allegation that the Government official acted with *intent to harm*."[116]

Other appellate courts have similarly rejected the rule that "time to deliberate" is the "determining factor" in deciding

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108 *Id.*

109 *Id.* at 853.

110 *Id.*

111 524 F.3d 151 (2d Cir. 2008).

112 *Id.* at 158.

113 *Id.* at 159 (citing County of Sacramento v. Lewis, 523 U.S. 833, 834 (1998)).

114 *Id.* at 158–59. *Cf.* Okin v. Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 431–32 (2d Cir. 2009) (applying the deliberate indifference standard to determine whether police officers' conduct shocked the conscience because "[t]he serious and unique risks and concerns of a domestic violence situation are well known and well documented" and the officers had "ample time for reflection and for deciding what course of action to take in response to domestic violence." Further, a reasonable trier of fact could conclude that the officers' conduct demonstrated deliberate indifference to plaintiff's rights because of "the serious implications of [plaintiff's] complaints over a fifteen-month period," the officers' "failure to appreciate the gravity of the situation," and the officers' conduct could not "be explained away by the pull of competing obligations").

115 Benzman v. Whitman, 523 F.3d 119, 127–28 (2d Cir. 2008).

116 *Id.* (emphasis added). *See also* Lombardi v. Whitman, 485 F.3d 73, 74–75, 84–85 (2d Cir. 2007) ("[W]hen agency officials decide how to reconcile competing governmental obligations in the face of disaster, only an intent to cause harm arbitrarily can shock the conscience in a way that justifies constitutional liability.").

whether deliberate indifference shocks the conscience.[117] Several courts have held that a higher culpability standard must apply both where a state actor must respond in haste and under pressure *and* where the state actor must make a "judgment between competing, legitimate interests."[118] Although the need to weigh difficult competing concerns may defeat a finding of deliberate indifference, a flat rule mandating "intent to harm" is contrary to the admonition in *Lewis* that courts carefully analyze specific circumstances in assessing whether "deliberate indifference" may be proved.[119]

In addition, appellate courts have ratcheted up the intent to harm standard to impose an almost impenetrable obstacle. For example, although the Supreme Court has recognized a liberty interest on behalf of students to be free from "appreciable physical pain,"[120] most appellate courts demand some showing of intentional malice or sadism to impose liability. Thus, the Sixth Circuit has explained that corporal punishment does not violate substantive due process unless the student proves that "'the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.'"[121] Similarly, the Eleventh Circuit

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117 Waybright v. Frederick County, 528 F.3d 199, 206 (4th Cir. 2008). *See also* 77 U.S.L.W. 1207 (U.S. Oct. 7, 2008) (No. 13) (noting the circuit split on this issue).

118 Schieber v. City of Philadelphia, 320 F.3d 409, 419 (3d Cir. 2003). *See also* Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ., 542 F.3d 529, 542–43 (6th Cir. 2008) ("even where the governmental actor is subjectively aware of a substantial risk of serious harm" to the plaintiff, and he has time to deliberate about his decision, where "some countervailing, mandatory governmental duty motivated that action" and the police face agonizing choices, the action will not "shock the conscience" except in "extreme cases"; in addition to time to deliberate, courts should examine whether the government actor was pursuing a legitimate government purpose that justified taking the risk).

119 *See* County of Sacramento v. Lewis, 523 U.S. 833, 850 (1998) ("Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking.").

120 Ingraham *ex rel.* Ingraham v. Wright, 430 U.S. 651, 674 (1977). The Court recognized this liberty interest; however, the plaintiffs pled only procedural, not substantive, due process. *Id.* at 653.

121 Ellis *ex rel.* Pendergrass v. Cleveland Mun. Sch. Dist., 455 F.3d 690, 700 (6th Cir. 2006) (quoting Webb v. McCullough, 828 F.2d 1151, 1158 (6th Cir. 1987)). Note, however, that the court ruled that a student whose head was slammed against the board, thrown on the ground and choked for approximately one minute, resulting in contusions on the neck and post-traumatic stress disorder, stated a substantive due process claim against her teacher where this action was taken simply because the student forgot to bring a pencil to class. *Id.* *See also* Smith v. Half Hollow Hills Cent. Sch. Dist., 298 F.3d 168, 172–73 (2d Cir. 2002) (emphasizing that not all wrongs perpetrated by school officials violate due process and holding that teacher's slapping of a student could not be fairly viewed as so brutal or offensive to human dignity as to shock the conscience); Harris *ex*

requires proof of willful, malicious intent to injure a student, regardless of whether there is time to deliberate or whether competing interests must be balanced.[122]

The imposition of an unnecessarily high threshold in corporal punishment cases is unfounded. It is particularly inexplicable when compared to the appellate courts' treatment of substantive due process claims brought by pretrial detainees. Many appellate courts permit detainees, unlike students, to bring substantive due process claims based on a deliberate indifference standard, except in cases involving prison riots where there is no time to deliberate.[123] The Supreme Court in *Lewis* cited to the detainee cases to support its adoption of the intent to harm standard where quick action is required.[124] It recognized, however, that a deliberate indifference standard applies to cases in which detainees challenge the conditions of confinement or the failure to protect them from other inmates.[125] Indeed, even convicted felons who bring claims under the Eighth Amendment may recover under a deliberate indifference standard, albeit one that requires both objective and subjective deliberate indifference.[126]

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rel. Harris v. Robinson, 273 F.3d 927, 930–31 (10th Cir. 2001) (holding that a teacher's disciplinary action was not inspired by malice or sadism so as to demonstrate that degree of "outrageousness and a magnitude of potential or actual harm that is truly conscience shocking"); Costello v. Mitchell Pub. Sch. Dist. 79, 266 F.3d 916, 919–21 (8th Cir. 2001) (holding that student's allegations that she was called "retarded" and "stupid" in front of her classmates and was struck in the face with a notebook by her teacher failed to establish that the conduct was sufficiently shocking to state a substantive due process claim); Saylor v. Bd. of Educ., 118 F.3d 507, 514–15 (6th Cir. 1997) (holding that teacher's beating of a student, which involved five licks of the paddle on the student's buttocks, causing bruising, was not severe or so inspired by malice or sadism as to shock the conscience).

122 Davis v. Carter, 555 F.3d 979, 980–81, 984 (11th Cir. 2009) (holding that coach's conduct in depriving student of water after he exhibited signs of overheating and not summoning immediate medical care after he collapsed on the football field did not state a cause of action under substantive due process because the complaint could not support a finding that the coach acted willfully or maliciously with an intent to injure the student; deliberate indifference, without more, does not rise to the conscience-shocking level required for a constitutional violation).

123 *See infra* note 130.

124 *Lewis*, 523 U.S. at 852–53.

125 *Id.* at 850. The Court noted:

> Since it may suffice for Eighth Amendment liability that prison officials were deliberately indifferent to the medical needs of their prisoners, it follows that such deliberately indifferent conduct must also be enough to satisfy the fault requirement for due process claims based on the medical needs of someone jailed while awaiting trial.

Id. (citations omitted).

126 Farmer v. Brennan, 511 U.S. 825, 837–38 (1994) (holding that inmate must prove guard's actual knowledge that inmate faced a substantial risk of serious harm and yet acted with deliberate indifference to this risk). *See also* Whitley v. Albers, 475 U.S. 312, 327 (1986) (holding that convicted inmates who allege excessive force must prove "unnecessary and wanton infliction of pain").

On the other hand, detainees bringing substantive due process claims have faced other obstacles. Most appellate courts have ignored the Supreme Court's admonition that a less rigorous Due Process, rather than the Eighth Amendment, standard applies to pretrial detainees. Unlike convicted felons, who are protected only from "cruel and unusual punishment," the Court has held that pretrial detainees cannot be constitutionally subjected to punishment in any manner.[127] Further, "if a restriction or condition [of pretrial detention] is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees."[128]

Despite the distinction between pretrial detainees and convicted felons drawn by the Supreme Court, most appellate courts have required detainees alleging excessive force, deliberate indifference to serious medical needs, or unconstitutional conditions of confinement, to meet the same standard that convicted felons must meet under the Eighth Amendment. Thus, detainees must prove that the deprivation be objectively serious, that the prison official be subjectively aware of facts from which an inference of substantial risk could be drawn, and that the official have a culpable state of mind in the sense of subjective criminal recklessness.[129] Only a handful of

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127 Bell v. Wolfish, 441 U.S. 520, 535 (1979). The Court stated: "if a restriction or condition is not reasonably related to a legitimate goal-if it is arbitrary or purposeless-a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees." *Id.* at 539. *See also* Graham v. Connor, 490 U.S. 386, 395 n.10 (1989) (acknowledging "that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment"); City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983) (reasoning that where there has been no "formal adjudication of guilt . . . the Eighth Amendment has no application").

128 *Wolfish*, 441 U.S. at 539.

129 *See, e.g.*, Krout v. Goemmer, 583 F.3d 557, 567–68 (8th Cir. 2009) (holding that although the Due Process Clause, not the Eighth Amendment, governs the treatment of pretrial detainees, the standard is the same and thus detainee must show he suffered from objectively serious medical needs and that correctional officers actually knew of and deliberately disregarded those needs); Lewis v. Downey, 581 F.3d 467, 473 (7th Cir. 2009) (holding that although pretrial detainees cannot be punished "in any way," claims of deliberate indifference to medical needs are treated the same as Eighth Amendment claims brought by convicted inmates); Caiozzo v. Koreman, 581 F.3d 63, 71 n.4 (2d Cir. 2009) (citing decisions from several circuits holding that the rights of pretrial detainees are coextensive with those of convicted inmates and, therefore, the *Farmer* test governs); Martinez v. Beggs, 563 F.3d 1082, 1088–89 (10th Cir. 2009) (holding that pretrial detainees challenging the denial of medical attention must meet Eight Amendment standards, and even obvious risks may not justify an inference that officials subjectively knew of the specific risk of harm and were deliberately indifferent to that risk); Fennell v. Gilstrap, 559 F.3d 1212, 1217–20 (11th Cir. 2009) (holding that deputy's conduct in kicking pretrial detainee in the face, which resulted in severe fractures and the necessity for surgery, did not constitute excessive force because there was no evidence that deputy acted maliciously and sadistically, as required under the Eighth Amendment);

decisions recognize the need to distinguish claims brought by pretrial detainees who, because they have not yet had a "guilt" adjudication, cannot be subject to conditions of confinement that are imposed for the purpose of punishment, and who should not be required to prove "wanton infliction of pain" in order to

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Klebanowski v. Sheahan, 540 F.3d 633, 639–40 (7th Cir. 2008) (holding that jail officials who ignored plaintiff's request for a transfer after he was beaten and after he pleaded that he feared for his life could not be held liable for deliberate indifference to the risk of housing gang members with non-gang members because plaintiff could not show officers were actually aware of a substantial risk of harm to plaintiff's safety and yet acted with the equivalent of criminal recklessness; detainee never told officials that the attack was inflicted by gang members because of his non-gang status, and thus nothing would have led officers to believe plaintiff faced this specific threat); Grieveson v. Anderson, 538 F.3d 763, 771–72, 775, 779 (7th Cir. 2008) (reasoning that although detainee's claim should be analyzed under the Due Process Clause, the inquiry is essentially the same as that under the Eighth Amendment, namely, plaintiff must show that jail officials knew the detainee faced substantial risk of serious harm and yet they disregarded that risk by failing to take reasonable measures to abate it); Phillips v. Roane County, 534 F.3d 531, 539–40 (6th Cir. 2008) (holding that pretrial detainees asserting a claim of deliberate indifference to serious medical needs must meet the Eighth Amendment standard, which requires proof that officials actually drew the inference that inmate faced a serious medical risk and then disregarded that risk); Burnette v. Taylor, 533 F.3d 1325, 1331–32 (11th Cir. 2008) (requiring that plaintiff demonstrate both an awareness of facts from which an inference of serious risk could be drawn and evidence that the official actually drew this inference; although arresting officers were warned by detainee's step-father that detainee was strung out on drugs, jailer was not deliberately indifferent to serious medical needs of pretrial detainee who died after ingesting a lethal combination of drugs while in custody in the county jail because, although jailer found the bottle of prescription pills and observed that detainee was intoxicated, no one told the jailer that detainee needed medical help or observation); Gish v. Thomas, 516 F.3d 952, 954–55 (11th Cir. 2008) (holding that to establish liability for pretrial detainee's suicide while in a police car, plaintiff must meet Eighth Amendment standard, which defines deliberate indifference as subjective knowledge of the strong likelihood that serious harm will ensue and disregard for this risk; although evidence demonstrated that official was aware of detainee's suicidal tendencies, plaintiff produced no evidence that official was aware that the security screen in his car might have been unlocked, enabling handcuffed detainee in the rear seat to access loaded firearm in the front seat); Butler v. Fletcher, 465 F.3d 340, 344–45 (8th Cir. 2006) (holding that although the Due Process Clause protects detainees prior to an adjudication of guilt, the same Eighth Amendment deliberate indifference standard applies to "claims that prison officials unconstitutionally ignored a serious medical need or failed to protect [a] detainee from a serious risk of harm"); Gray v. City of Detroit, 399 F.3d 612, 616 (6th Cir. 2005) (holding that pretrial detainee's right to adequate medical treatment is the same as that afforded prisoners under the Eighth Amendment, and thus plaintiff must show that defendants acted with deliberate indifference to his suicidal behavior and that defendant actually knew detainee was at risk of committing suicide); Burrell v. Hampshire County, 307 F.3d 1, 7–8 (1st Cir. 2002) (asserting that although pretrial detainees are protected under the Due Process Clause, rather than the Eighth Amendment, the standard is the same—namely, a pretrial detainee must demonstrate that he was incarcerated under conditions imposing a substantial risk of serious harm and that prison officials were deliberately indifferent in that they were subjectively aware of facts from which an inference of substantial risk could be drawn and they actually drew such an inference); Brown v. Harris, 240 F.3d 383, 388–89 (4th Cir. 2001) (acknowledging that regardless of whether plaintiff is a pretrial detainee or convicted felon, the standard is the same in assessing deliberate indifference to serious medical needs—the deprivation must be objectively sufficiently serious, and the official must have a culpable state of mind in the sense of subjective recklessness).

establish excessive force.[130] Because the *Lewis* Court adopted the loaded shocks the conscience language, it is not surprising that the majority of appellate courts have ratcheted up the due process standard to parallel that used in adjudicating claims brought by convicted inmates.[131]

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130 *See* Lewis v. Downey, 581 F.3d 467, 473–74 (7th Cir. 2009) (holding that the standard for excessive force claims brought by detainees is different "because the Due Process Clause, which prohibits all 'punishment,' affords broader protection than the Eighth Amendment's protection against only punishment that is 'cruel and unusual'"); Hubbard v. Taylor, 538 F.3d 229, 231–32 (3d Cir. 2008) (asserting that pretrial detainee's due process rights are violated where detainees are punished prior to an adjudication of guilt, and thus court must determine whether conditions are imposed for the purpose of punishment or whether such are but an incident of a legitimate government purpose); *Phillips*, 534 F.3d at 539–42 (finding that district court erred in applying stringent Eighth Amendment standard that requires plaintiff to show the existence of a sufficiently serious medical need and that defendant actually perceived facts from which to infer a substantial risk to the inmate); Iqbal v. Hasty, 490 F.3d 143, 169 (2d Cir. 2007), *rev'd on other grounds*, Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) ("We explicitly rejected analogies to the Eighth Amendment that would require a showing of wantonness on the part of the prison official, or a showing that the alleged conditions were so inhumane as to constitute cruel and unusual punishment.") (citations omitted); Jones v. Blanas, 393 F.3d 918, 931 (9th Cir. 2004) (holding that district court erred in using the Eighth Amendment, rather than the substantive due process standard, in judging a claim brought by an individual detained while awaiting civil commitment proceedings: "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed").

131 There is also a circuit conflict at the other end of the spectrum, *i.e.*, as to when the Fourth Amendment guarantees end for arrestees and detainees, and the less protective substantive due process standard begins. The majority of circuits hold that, at least in cases where an arrest is made without a probable cause hearing, the Fourth Amendment standard continues to apply. *See* Drogosch v. Metcalf, 557 F.3d 372, 378 (6th Cir. 2009) (holding that arrestees are protected by the Fourth Amendment until a probable cause hearing occurs and only thereafter does due process apply); Williams v. Rodriguez, 509 F.3d 392, 402–03 (7th Cir. 2007) (holding that claims regarding conditions of confinement for pretrial detainees who have not yet had a judicial determination of probable cause are governed by the Fourth Amendment's "objectively unreasonable" standard, which is less difficult than the deliberate indifference standard imposed by the Eighth and Fourteenth Amendments); Lopez v. City of Chicago, 464 F.3d 711, 719 (7th Cir. 2006) ("the Fourth Amendment governs the period of confinement between arrest without a warrant and the preliminary hearing at which a determination of probable cause is made, while due process regulates the period of confinement after the initial determination of probable cause."); Bryant v. City of New York, 404 F.3d 128, 135–39 (2d Cir. 2005) (holding that claims of individuals arrested without a warrant that defendants failed to issue desk appearance tickets, thereby prolonging their detention, was governed by the Fourth Amendment, which the Supreme Court has held requires a prompt judicial determination of probable cause with regard to warrantless arrests; the district court erred in analyzing constitutional claims under the substantive due process conscience-shocking test because it is well established that the Fourth Amendment governs the procedures applied during some period following an arrest); Gibson v. County of Washoe, 290 F.3d 1175, 1197 (9th Cir. 2002) (holding that the Fourth Amendment governs claims of excessive force arising during a pretrial detention); Wilson v. Spain, 209 F.3d 713, 715–16 (8th Cir. 2000) (adopting a "continuing seizure approach," that Justice Ginsburg developed in *Albright v. Oliver*, 510 U.S. 266, 276–81 (1994) (Ginsburg, J., concurring), to hold that a malicious prosecution claim should be based on the Fourth Amendment, rather than substantive due process); Torres v. McLaughlin, 163 F.3d 169, 174 (3d Cir. 1998) ("Although the Supreme Court has repeatedly defined when a Fourth Amendment seizure occurs or begins, it has not determined when that seizure ends and Fourth Amendment protections

4. Whose Conscience Must Be Shocked: Judge or Jury?

Lewis did not settle the question of who makes the determination of what is conscience-shocking behavior, and this has led to conflicting decisions in the appellate courts. For example, within the Eighth Circuit, there are cases asserting both that this is an issue of law for the judge, *and* that the issue is one for the jury.[132] Most appellate courts appear to treat this as a jury question,[133] permitting the case to go to the jury unless no rational jury could find that the conduct was conscience-shocking.[134] Other courts, following the analysis that is used to assess the qualified immunity defense,[135] recognize that if there are questions of fact in need of resolution, these questions should

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no longer apply." Acknowledging that the Supreme Court has left that question open, the Third Circuit stated: "there may be some circumstances during pre-trial detention that implicate Fourth Amendment rights; however we refer to the Fourth Amendment as applying to those actions which occur between arrest and pre-trial detention."); Gaylor v. Does, 105 F.3d 572, 574–75 (10th Cir. 1997) (following the Seventh Circuit holding that the Fourth Amendment applies between arrest and determination of probable cause, while the Fourteenth Amendment controls after probable cause is determined).

On the other hand, the Fourth and Fifth Circuits have determined that claims brought by pretrial detainees, regardless of whether there has been an arrest pursuant to a warrant, are adjudicated under the less protective substantive due process standard. *See* Orem v. Rephann, 523 F.3d 442, 446 (4th Cir. 2008) (holding that the claim of an arrestee not formally charged "require[d] application of the Fourteenth Amendment" rather than the reasonableness standard of the Fourth Amendment); Hill v. Carroll County, 587 F.3d 230, 237 (5th Cir. 2009) (holding that sheriff's failure to monitor suspect who died from positional asphyxiation while being transported in the back of a patrol car is governed by substantive due process, not the Fourth Amendment, because the initial incidence of the seizure had ended); Brothers v. Klevenhagen, 28 F.3d 452, 456 (5th Cir. 1994) (holding that a pretrial detainee receives the protection of substantive due process, not of the Fourth Amendment).

132 *Compare* Terrell v. Larson, 396 F.3d 975, 981 (8th Cir. 2005) (en banc) ("Because the conscience-shocking standard is intended to limit substantive due process liability, it is an issue of law for the judge, not a question of fact for the jury.") *with* Moran v. Clarke, 296 F.3d 638, 643 (8th Cir. 2002) (en banc) ("[W]hether the plaintiff has presented sufficient evidence to support a claimed violation of a substantive due process right is a question for the factfinder, here the jury.").

133 *See, e.g.*, Davis v. Hall, 375 F.3d 703, 719 (8th Cir. 2004) ("[W]hether the defendants' conduct constituted deliberate indifference is a classic issue for the fact finder."); A.M. v. Luzerne County Juvenile Det. Ctr., 372 F.3d 572, 587–88 (3d Cir. 2004) ("[W]e believe the evidence, viewed in the light most favorable to A.M., is sufficient to present a jury question on whether the child-care workers and their immediate supervisor were deliberately indifferent to A.M.'s right to security and well-being."); Walker v. Bain, 257 F.3d 660, 672 (6th Cir. 2001) ("[T]he jury found that . . . the defendants' actions did not constitute an egregious abuse of power or otherwise shock the conscience."); United States v. Walsh, 194 F.3d 37, 53 (2d Cir. 1999) ("Walsh argues that the District Court should have instructed the jury on the 'shocks the conscience' standard applicable to due process claims under the Fourteenth Amendment . . . ."); Boveri v. Town of Saugus, 113 F.3d 4, 6–7 (1st Cir. 1997) ("[T]he question is not whether the officers' decision to dog the Honda was sound—decisions of this sort always involve matters of degree—but, rather, whether a rational jury could say it was conscience shocking.").

134 *See Boveri*, 113 F.3d at 6–7.

135 *See* Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982) ("[q]ualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official.").

initially be sent to the jury with the ultimate question of whether a substantive due process violation has occurred to be determined by the court.[136] This line of cases again demonstrates that the test enunciated in *Lewis* has created much uncertainty and frustration in the lower federal courts.[137]

In short, the test established in *Lewis* has proved to be unworkable. First, there are conflicting views as to how to reconcile the fundamental rights analysis used to contest legislation with the shocks the conscience standard used for challenging executive misconduct.[138] Second, the circuits disagree as to whether the existence of state remedies defeats the federal claim.[139] Third, the circuits are divided as to when deliberate indifference, as opposed to an intent to harm standard, must be met.[140] Fourth, there is confusion as to how the test is satisfied, depending on who the litigant is. With regard to pretrial detainees, most courts use a stringent Eighth Amendment deliberate indifference test.[141] With regard to students alleging excessive corporal punishment, only an intent to harm that demonstrates ill will, malice or sadism is deemed to shock the conscience.[142] With regard to government employees,

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136 See Armstrong v. Squadrito, 152 F.3d 564, 577 (7th Cir. 1998) where the court stated:

> [T]he question of whether the defendants' conduct constituted deliberate indifference is a classic issue for the fact finder. . . . [B]ecause this question is a factual mainstay of actions under § 1983, we do not believe it should receive consideration as a question of law. Any concern about allowing the fact finder to determine a constitutional question is ameliorated by the overlap between this inquiry and the third step in our analysis—an examination of the totality of the circumstances—which is a question of law.

Id. *See also* Luckes v. County of Hennepin, 415 F.3d 936, 940 (8th Cir. 2005) (stating that determining whether conduct "shocks the conscience" is a question of law); Terrell v. Larson, 396 F.3d 975, 981 (8th Cir. 2005) (en banc) ("Because the conscience-shocking standard is intended to limit substantive due process liability, it is an issue of law for the judge, not a question of fact for the jury."); Crowe v. County of San Diego, 359 F. Supp. 2d 994, 1030 (S.D. Cal. 2005) (stating that the determination of whether defendants' conduct "shocks the conscience" is an issue of law for the court); Tun *ex rel* Tun v. Ft. Wayne Cmty. Sch., 326 F. Supp. 2d 932, 945 (N.D. Ind. 2004) (determining whether conduct "shocks the conscience" is a question of law); Mason v. Stock, 955 F. Supp. 1293, 1308–09 (D. Kan. 1997) ("[T]he 'shocks the conscience' determination is not a jury question. . . . Under the rules pertaining to summary judgment, a plaintiff who wishes to assert a *Collins*' claim must, at minimum, point to conduct or policies which would require the court to make a 'conscience shocking' determination.").

137 At a conference on June 9, 2009, sponsored by the Federal Judicial Center, I discussed this substantive due process issue with district court judges and magistrates. Several expressed concern about the judge-jury question, particularly their discomfort in applying their own vision of what is conscience-shocking behavior with few guidelines from the United States Supreme Court or from their individual circuits.

138 *See supra* Part I.D.1.

139 *See supra* Part I.D.2.

140 *See supra* Part I.D.3.

141 *See supra* note 129 and accompanying text.

142 *See supra* notes 121–22 and accompanying text.

most appellate courts will not recognize any substantive due process challenge to a termination or other adverse employment action because of the absence of a fundamental right.[143] Yet, as noted, substantive due process challenges to land use decisions and excessive punitive damage awards have not been subjected to the "fundamental rights" requirement.[144] Finally, there is disagreement as to who should decide whether government misconduct is conscience-shocking.[145]

II. WHY *LEWIS* SHOULD BE OVERTURNED

The *Lewis* Court erred in creating a false dichotomy between challenges to executive and legislative action and in imposing a restrictive and untenable shocks the conscience standard. Although *stare decisis* mandates that Supreme Court decisions not be lightly rejected, it is also clear that "[*s*]*tare decisis* is not an inexorable command."[146] Generally, the Court asks (1) whether reliance interests are involved; (2) whether the reasoning has been questioned by subsequent decisions; and (3) whether the rule has proved to be unworkable.[147] All of these factors weigh in favor of reconsidering the *Lewis* holding.

First, this is not a situation where "reliance" is an issue. Government officials have not "relied" on a promise that they may engage in wrongdoing with impunity provided their behavior is not conscience-shocking. Second, its reasoning has often been challenged. As discussed in Part I, the Justices in *Lewis* were deeply divided. The majority determined *for the first time* in 1998 that substantive due process jurisprudence should depend on whether executive or legislative action is being challenged and that only conscience-shocking behavior rises to the level of a substantive due process violation.[148] Four of the concurring Justices challenged both the dichotomy as well as the new test. Justice Souter, who authored the opinion, conceded that "the measure of what is conscience-shocking is no calibrated yardstick,"[149] and the concurring opinion of Justice Scalia, joined by Justice Thomas, as well as Justice Kennedy's concurrence,

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143 *See supra* notes 81–83 and accompanying text.

144 *See supra* notes 84–85 and accompanying text.

145 *See supra* Part I.D.4.

146 State Oil Co. v. Khan, 522 U.S. 3, 20 (1997).

147 *See, e.g.*, Pearson v. Callahan, 129 S. Ct. 808, 816–17 (2009); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992). *See also* Payne v. Tennessee, 501 U.S. 808, 829–30 (1991) (stating that where a decision has "been questioned by Members of the Court in later decisions and [has] defied consistent application by the lower courts," these factors weigh in favor of reconsideration).

148 County of Sacramento v. Lewis, 523 U.S. 833, 846–48 (1998).

149 *Id.* at 847.

joined by Justice O'Connor, attacked its subjectivity.[150] Further, this section will explore subsequent Supreme Court decisions that have implicitly rejected its analysis. Third, as discussed in Part I.D, the decision has led to considerable confusion and numerous circuit splits in the last decade since its pronouncement. It has clearly proved to be an unworkable test.

In addition to exploring contrary Supreme Court precedent, the next section critiques *Lewis* as contrary to public originalism. Further, the Court's purported justification—a concern for not permitting substantive due process to become a "font of tort law"—is revealed as both ill conceived and exaggerated.

A. The Court's Weakened Protection Against Abuse of Executive Power Is Contrary to the Historical Understanding of the Due Process Clause

Although substantive due process jurisprudence has been subjected to a consistent sharp attack, it is well accepted that it stems from Magna Carta.[151] In a recent article providing an originalist defense of substantive due process as a limitation on legislative power, Professor Frederick Mark Gedicks traces the development of Magna Carta and "higher-law" constitutionalism as the foundation for the widely shared understanding of the Due Process Clause in the late eighteenth century.[152] He explains that although Magna Carta initially may have been intended to reach only the procedures that the king used to deprive citizens of their rights, Sir Edward Coke reinvigorated the provision in the seventeenth century to attack the royal power of the Stuart Kings—a substantive limitation on executive power.[153]

The American colonies relied upon "Coke's reading of substance into due process" to challenge the conduct of the British king during the American Revolution.[154] Further, the

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150 *Id.* at 861 (Scalia, J., concurring) (sarcastically describing the standard as "the *ne plus ultra*, the Napoleon Brandy, the Mahatma Ghandi, the Cellophane of subjectivity") (paraphrasing Cole Porter, *You're the Top* (1934)); *id.* at 857 (Kennedy, J., concurring) (opining that shocks the conscience "has the unfortunate connotation of a standard laden with subjective assessments" and, therefore, "must be viewed with considerable skepticism"). *See also supra* notes 69–73 and accompanying text.

151 *See supra* note 1 and accompanying text.

152 Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585 (2009).

153 *Id.* at 598–99.

154 *Id.* at 595. Professor Gedicks explains that "[r]evolutionary Americans adopted these propositions wholesale, and carried them into independence and beyond." *Id.* at 657. Professor Gedicks concedes that "[i]t is less clear whether Coke really thought that the law of the land bound Parliament," but he concludes that revolutionary Americans

ratification controversy over the Constitution's lack of a Bill of Rights reflected this same understanding of "higher-law" constitutionalism. Those who argued against adoption of a Bill of Rights asserted that an enumeration of rights was unnecessary because higher-law constitutionalism already protected "natural and customary rights," thus rendering enumeration in a written constitution superfluous.[155]

Applying either an originalist perspective that focuses on those who framed and ratified the substantive due process guarantee, or a public-meaning originalism that looks to the public meaning at the time it was drafted and ratified, it is clear that the Due Process Clause was understood as a limitation on the arbitrary use of executive power.[156] Coke "equated the law of the land with the due process of law," and "understood both to have imposed substantive limitations on actions of the king."[157] Because the Supreme Court has acknowledged that Magna Carta is the source of modern day substantive due process, and because it is well accepted that, at a minimum, Magna Carta, as originally understood and as developed by Sir Edward Coke in the seventeenth century, was a limitation on executive power,[158] it is counterintuitive to interpret substantive due process as providing less protection for arbitrary executive acts that violate natural or customary rights than for legislative acts.

B. Supreme Court Precedent both Before and After *Lewis* Conflict with Its Analysis

As discussed in Part I, the Supreme Court in *Rochin*, the source of the shocks the conscience test, did not suggest a different treatment of substantive due process challenges to executive action, as opposed to legislative enactments.[159] Further, the shocks the conscience language was merely one of several descriptive phrases used by Justice Frankfurter to explain why the introduction of evidence obtained through

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believed that substantive due process was a limitation on legislative power, as well as executive power. *Id.*

155 *Id.* at 634–38.

156 *Id.* at 656–57.

157 *Id.* at 657.

158 Professor Gedicks contends that Sir Edward Coke's notion of "higher law" constitutionalism was understood as limiting parliamentary lawmaking as well as the Crown's prerogatives. *Id.* at 598–608. Key opponents of this broad interpretation of substantive due process and Magna Carta argue that Magna Carta was intended as a limitation only on the king and his agents, because no parliament or other legislative entity existed in early thirteenth century England. *See* Raoul Berger, *"Law of the Land" Reconsidered*, 74 NW. U. L. REV. 1, 18–20, 24, 30 (1979).

159 *See supra* notes 34–35 and accompanying text.

pumping someone's stomach violated substantive due process.[160] Finally, the sparse citations in *Lewis* did not support its conclusions.[161]

Notably, at the time *Lewis* was decided, the Supreme Court did not follow this legislative/executive dichotomy in assessing violations of other constitutional rights. In fact, in cases involving both "takings" and equal protection claims, the Court acknowledged the need to be more, not less, vigilant of executive/administrative decisions because of the greater risk of arbitrary decision making. For example, in *Allegheny Pittsburgh Coal Co. v. County Commission*,[162] the Court unanimously invalidated a county tax assessor's practice of valuing real property at fifty percent of its most recent sale price.[163] Since property would not be reassessed until it was again sold, properties with identical values would have widely divergent assessments depending on the timing of the sales.[164] Although reiterating the basic principle that the judiciary generally applies a highly deferential equal protection analysis to distinctions drawn in tax laws, the Court found, nonetheless, that the county assessor's practices were arbitrary.[165] Therefore, landowners were denied the equal protection of the law.[166] A few years later, in *Nordlinger v. Hahn*,[167] the Court upheld a California statute that limited property taxes and permitted reassessment only when sold, thereby resulting in the same property tax disparities challenged in *Allegheny*.[168] Nonetheless, the Court held the law was rationally related to a legitimate government purpose.[169] The only difference in the two cases was the Court's greater willingness to review the practices of the tax assessor as opposed to a tax statute enacted by the legislature.

The Supreme Court has recognized this same heightened concern for arbitrary executive decision making in its takings cases. In *Dolan v. City of Tigard*,[170] the Court acknowledged that a land regulation generally must be upheld if it "substantially advances legitimate state interests and does not deny an owner economically viable use of his land."[171] However, it reasoned that

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160 *See supra* notes 32–33 and accompanying text.
161 *See supra* notes 36–43 and accompanying text.
162 488 U.S. 336 (1989).
163 *Id.* at 338.
164 *Id.* at 344.
165 *Id.* at 345.
166 *Id.* at 345–46.
167 505 U.S. 1 (1992).
168 *Id.* at 5, 18.
169 *Id.* at 12.
170 512 U.S. 374 (1994).
171 *Id.* at 385 (citing Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

when city officials make "an adjudicative decision to condition petitioner's application for a building permit on an individual parcel," the deferential approach used to assess legislative determinations "classifying entire areas of the city," is inappropriate.[172] Instead, such decisions are subject to a test that mandates an "essential nexus" between a "legitimate state interest" and the permit condition exacted by the city, and "rough proportionality" between the exaction and the projected impact of the proposed development.[173] Justice Scalia's rationale for this strict test was the greater need for courts to be wary of adjudicative decisions by administrative officials that affect individual landowners, as compared to legislative determinations that classify whole areas of the city, such as zoning laws.[174]

The Court's contrary position with regard to substantive due process confounds the question of a constitutional rights violation with the question of liability. Arguably legislation represents an act of the government, making entity liability more justifiable.[175] In contrast, executive misconduct may be an isolated act that is difficult to control. However, the entire purpose of § 1983 is to hold individuals who act under color of state law accountable for their unconstitutional misconduct. Section 1983 already provides numerous mechanisms that significantly limit entity, as well as individual, liability for damages.[176] The critical question is whether the official has arbitrarily deprived persons of liberty or property. If so, the guarantee of substantive due process has been breached.

The Court's unwillingness to hold executive officials liable for substantive due process violations also stands in sharp contrast to the law of immunity that governs § 1983 litigation. The Court has acknowledged that government officials who engage in legislative conduct enjoy *absolute* immunity from liability, whereas members of the executive branch have only *qualified* immunity.[177] Indeed, the same year that the Court in *Lewis* granted greater protection for executive misconduct, it ruled in *Bogan v. Scott-Harris*,[178] that legislative acts should be

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172 *Id.* at 385.

173 *Id.* at 386, 391.

174 *Id.* at 391 n.8. *See also* Michael L. Wells & Alice E. Snedeker, *State-Created Property and Due Process of Law: Filling the Void Left by* Engquist v. Oregon Department of Agriculture, 44 GA. L. REV. 161, 191–92 (2009) (reasoning that because legislation is enacted by a group, it is less likely to be based on ill motive, and because it usually affects many people in the same way, there is an inherent "check on abusive legislation" and less "need for judicial oversight").

175 *See infra* note 223.

176 *See infra* notes 217–22 and accompanying text.

177 *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

178 523 U.S. 44 (1998).

given greater deference because "the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability."[179] Legislative decisions, even if made by executive officers, *i.e.*, the mayor in *Bogan*, are shielded by absolute immunity, whereas executive decisions trigger only qualified immunity.[180] The Court distinguished decisions that have broad prospective implication, where there is less likelihood of abuse of power, from those that apply only to a particular individual, where the decision may be characterized as "executive," rather than legislative.[181] The Court's interpretation and development of immunity doctrine recognizes the greater need to rein in abuses of executive power.

As to substantive due process claims, the Supreme Court in recent years has neither consistently adhered to the executive/legislative dichotomy nor to the shocks the conscience test. Two opinions from 2003 are illustrative. In *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*,[182] developers sued the city challenging the city engineer's refusal to issue a building permit until a referendum petition—which called for repeal of a municipal housing ordinance authorizing construction of a low-income housing complex—could be submitted.[183] The developer alleged violations of the Fair Housing Act, equal protection, and substantive due process.[184] The latter claim was discussed in a brief paragraph, citing *Lewis* for the proposition that "the city engineer's refusal to issue the permits while the petition was pending in no sense constituted egregious or arbitrary government conduct."[185] Blatantly omitted

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179 *Id.* at 52.

180 *Id.* at 55. *See also* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) ("[F]or executive officials in general, however, our cases make plain that qualified immunity represents the norm.").

181 *Id.* at 55–56. The lower federal courts have recognized this same distinction between broad policymaking decisions that are legislative in character and decisions that apply to a specific party, which are viewed as executive and not shielded by immunity. *See, e.g.*, Thornton v. City of St. Helens, 425 F.3d 1158, 1163–64 (9th Cir. 2005) (holding that a city manager and a city planner did not enjoy legislative immunity from a claim that they improperly delayed processing a wrecking-yard owner's applications for city approval of his license renewal because processing an individual application is not a legislative function); Bryan v. City of Madison, 213 F.3d 267, 273 (5th Cir. 2000) (holding that a mayor's repeated vetoes of a developer's site plans and the use of delay tactics to prevent approval of the plans were not protected by legislative immunity because the decisions did not involve broad policymaking); Corn v. City of Lauderdale Lakes, 997 F.2d 1369, 1392 (11th Cir. 1993) (distinguishing the promulgation of zoning ordinance and general moratoriums on development plans, which trigger absolute immunity for local legislators, from land use decisions that simply apply policy to a specific party and thus are not insulated by legislative immunity).

182 538 U.S. 188 (2003).

183 *Id.* at 191–93.

184 *Id.* at 193.

185 *Id.* at 198.

from the opinion was the shocks the conscience language. Although the Court cited *Lewis* for the proposition that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense,'"[186] the next sentence explained that the challenged mandate to deny the permits while the petition was pending "represented an eminently rational directive,"[187] thereby creating confusion in the appellate courts as to whether land use regulation decisions should be analyzed under the legislative (rational basis) or executive (shocks the conscience) test.[188]

More significantly, in *Chavez v. Martinez*,[189] a three-Justice plurality analyzed a challenge to executive action under *both* the fundamental rights strand *and* the shocks the conscience strand of substantive due process, and six Justices agreed that the fundamental rights strand applied to claims involving executive action.[190] Martinez was being treated for gunshot wounds received during an altercation with police when Chavez, a patrol supervisor, began interrogating him without providing a *Miranda* warning.[191] Because Martinez was never charged with

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186 *Id.* (quoting County of Sacramento v. Lewis, 523 U.S. 823, 846 (1998)).

187 *Id.* at 198–99.

188 *See, e.g.*, Shanks v. Dressel, 540 F.3d 1082, 1088–89 (9th Cir. 2008) (citing *Lewis* and *Cuyahoga Falls* for the principle that when executive action is challenged only "egregious" conduct can be said to be "arbitrary in the constitutional sense"; thus, land decisions that rest on an erroneous legal interpretation or that violate state law do not give rise to a substantive due process violation unless there is evidence that a decision reflects malice, bias, or pretext); Chainey v. Street, 523 F.3d 200, 220 (3d Cir. 2008) (holding that allegations of improper motive are insufficient absent evidence of corruption, self-dealing, or additional facts that suggest "conscience-shocking behavior"); Clark v. Boscher, 514 F.3d 107, 112–13 (1st Cir. 2008) (holding that run-of-the-mill land-use decisions, such as the denial of permits, generally do not rise to the level of behavior that shocks the conscience and such is limited to "truly horrendous situations"); Ferran v. Town of Nassau, 471 F.3d 363, 369–70 (2d Cir. 2006) (holding that although town's use of a landowner's parcel as a turnaround for its snow plows and its paving of a road that encroached on the property was "incorrect and ill-advised," it was not the type of conscience-shocking, outrageous behavior that implicates substantive due process). Other appellate courts have used the shocks the conscience test even in challenges to zoning ordinances. *See* Koscielski v. City of Minneapolis, 435 F.3d 898, 902–03 (8th Cir. 2006) (holding that zoning ordinance that restricted where firearms dealerships could be located did not violate substantive due process since this mandate is not "so egregious or extraordinary as to shock the conscience"). *Cf.* A Helping Hand, L.L.C. v. Baltimore County, 515 F.3d 356, 372–73 (4th Cir. 2008) (upholding jury instruction that stated that a substantive due process violation could be found if the decision to shut down methadone clinic operator based on a county zoning ordinance was "clearly arbitrary and unreasonable, with no substantial relationship to a legitimate governmental purpose"; the court reasoned that this was a valid statement of the law even though other cases articulated a different, more stringent substantive due process test).

189 538 U.S. 760 (2003).

190 Justice Thomas wrote the opinion, joined by Chief Justice Rehnquist and Justice Scalia, which examined whether a fundamental right was implicated. *Id.* at 775. Justice Kennedy, in an opinion joined by Justices Stevens and Ginsburg, argued that the police conduct implicated a fundamental liberty interest. *Id.* at 796, 799.

191 *Id.* at 764.

a crime, the answers elicited during the interrogation were never used against him in any criminal proceeding.[192] As a result, Justice Thomas concluded that the Fifth Amendment's Self-Incrimination Clause did not apply to this situation.[193]

Proceeding to examine the claim under substantive due process, Justice Thomas invoked *Lewis* and *Rochin* for the proposition that "unauthorized police behavior . . . might 'shock the conscience' and give rise to § 1983 liability."[194] After determining that the officer's conduct was not "conscience shocking," the plurality recognized that the Due Process Clause also protects "fundamental liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest."[195] Although holding that freedom from unwanted police questioning was not a fundamental right,[196] the plurality engaged in a fundamental rights analysis despite the fact that the case involved a challenge to executive, not legislative, action.[197] Further, in a concurring opinion, Justice Stevens stated that "[t]he Due Process Clause of the Fourteenth Amendment protects individuals against state action that *either* 'shocks the conscience,' *or* interferes with [fundamental] rights 'implicit in the concept of ordered liberty.'"[198]

The significance of the two-prong analysis in *Chavez* has not been lost on the lower courts. For example, the Tenth Circuit invoked *Chavez* to challenge a district court ruling that improperly "compartmentali[zed]" substantive due process based on whether the government conduct complained of was "executive" or "legislative."[199] Although conceding that *Lewis* appeared to create an executive/legislative distinction, the court explained that "an overly rigid demarcation between the two lines of cases is neither warranted by existing case law nor helpful to the substantive analysis."[200] The court, perhaps somewhat disingenuously, asserted that the Supreme Court in *Lewis* did not "establish an inflexible dichotomy."[201] Further, it

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192 *Id.*

193 *Id.* at 766.

194 *Id.* at 774 (citing County of Sacramento v. Lewis, 523 U.S. 833, 850 (1998)).

195 *Id.* at 774–75.

196 *Id.* at 776.

197 *Id.* at 775–76.

198 *Id.* at 787 (Stevens, J., concurring in part and dissenting in part) (citation omitted) (emphasis added).

199 Seegmiller v. Laverkin City, 528 F.3d 762, 767 (10th Cir. 2008).

200 *Id.*

201 *Id.* at 768. Most appellate courts have interpreted *Lewis* to require different treatment of executive and legislative action. *See* Dias v. City & County of Denver, 567 F.3d 1169, 1182–84 (10th Cir. 2009) (holding that the district court erred in applying a "shocks the conscience" test to plaintiff's challenge to a pit bull ordinance because this

reasoned that rejecting the dichotomy "makes good sense, for the distinction between legislative and executive action is ancillary to the real issue in substantive due process cases: whether the plaintiff suffered from governmental action that either (1) infringes upon a fundamental right, or (2) shocks the conscience."[202] A total of six Justices agreed in *Chavez* that the fundamental rights strand of substantive due process applied to claims involving executive action,[203] thus negating any "hard-and-fast rule requiring lower courts to analyze substantive due process cases under only the fundamental rights or shocks the conscience standards."[204]

In short, the Supreme Court in *Lewis* manufactured a false dichotomy between legislative and executive misconduct that had not been used in prior cases, and it imposed a draconian shocks the conscience test that has led to nothing but mischief in the appellate courts. Further, the Court itself, in *Chavez*, ignored the rigid dichotomy. The next section explores why the Court's

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inquiry is reserved for cases challenging executive, not legislative, action); Martin v. St. Mary's Dep't Soc. Servs., 346 F.3d 502, 511 (4th Cir. 2003) (citing the *Lewis* dichotomy as mandating use of "shocks the conscience" test to evaluate all executive action); Putnam v. Keller, 332 F.3d 541, 547 (8th Cir. 2003) (applying the *Lewis* dichotomy between legislative and executive action to assess whether challenged conduct by campus officials violated substantive due process); Leebaert v. Harrington, 332 F.3d 134, 139 (2d Cir. 2003) (noting that there is a different standard for determining arbitrary action depending upon whether the action is executive or legislative); Hawkins v. Freeman, 195 F.3d 732, 738 (4th Cir. 1999) (commenting that there are different tests for determining whether an executive or legislative act is "fatally arbitrary"; however, because the facts could be interpreted as either an executive or legislative act, the court proceeded to evaluate plaintiff's claim under both standards).

202 *Seegmiller*, 528 F.3d at 768. *See also* United States v. Salerno, 481 U.S. 739, 746 (1987), discussed *supra* notes 38–39 and accompanying text. *Cf.* Bowers v. City of Flint, 325 F.3d 758, 764 (6th Cir. 2003) (Moore, J., concurring) (while agreeing that plaintiff failed to state a viable substantive due process claim, concurring opinion advised that a three-step substantive due process analysis should be used, wherein the court first considers whether the asserted interest constitutes a fundamental right and, if so, strict scrutiny is applied; second, the court determines whether the conduct shocks the conscience; third, if the conduct does not shock the conscience, the court considers whether the conduct is rationally related to a legitimate state interest).

203 A three-Justice plurality analyzed executive conduct under both the fundamental rights strand and the shocks-the-conscience strand of substantive due process. *Chavez*, 530 U.S. at 775. Three additional Justices: Kennedy, Stevens, and Ginsburg, employed a fundamental rights analysis in their concurring opinions. *Id.* at 783, 789, 799.

204 *Seegmiller*, 528 F.3d at 768. In this case, an officer was reprimanded for her off-duty sexual conduct and the court asserted that her substantive due process claim could be established either by identifying a fundamental right or by demonstrating that the conduct shocks the conscience. *Id.* at 764, 767. Ultimately, the court decided that plaintiff failed under both approaches. *Id.* at 769. The Supreme Court similarly rejected the rigid two-tier approach to substantive due process analysis of legislative claims, opting instead for a more nuanced balancing approach. *See* discussion of *Lawrence v. Texas*, *supra* note 9 and accompanying text. Further, the Court in *State Farm Mut. Auto. Ins. Co. v. Campbell* developed a multi-factor test for determining when punitive damage awards are so arbitrary as to violate substantive due process. *See* discussion of *State Farm*, *supra* notes 11–12 and accompanying text.

justification for treating executive misconduct differently, namely a concern for transforming constitutional litigation into a "font of tort law," is ill conceived and exaggerated.

C. Overlap with Tort Law Does Not Justify Restricting the Substantive Due Process Guarantee

The Supreme Court, in *Lewis*, explained its rationale for the executive/legislative distinction and the shocks the conscience test as follows: "[E]xecutive action challenges raise a particular need to preserve the constitutional proportions of constitutional claims, lest the Constitution be demoted to what we have called a font of tort law."[205] Several lower appellate courts have relied on this rationale to demand truly conscience-shocking behavior in order to survive dismissal of a substantive due process claim.[206] Others have barred substantive due process claims unless the litigant establishes the inadequacy of state tort remedies.[207]

The overlap with state tort remedies should not determine the fate of federal constitutional violations. The Supreme Court is clearly driven by a concern that § 1983 not be used to supplant traditional tort law, despite federalism concerns.[208] However, in *Monroe v. Pape*,[209] the Supreme Court held that the federal remedy for vindicating constitutional deprivations under § 1983 supplements state remedies.[210] Indeed, the whole purpose of § 1983 was to interpose the federal courts between the states and the people and to provide greater protection for constitutional

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205 County of Sacramento v. Lewis, 523 U.S. 833, 848 n.8 (1998). The "font of tort law" language first appeared in a Supreme Court decision addressing a procedural due process claim brought by a litigant who was branded an active shoplifter in a flyer circulated by the police chief. Paul v. Davis, 424 U.S. 693, 695–96, 701 (1976). The Court explained that the procedural due process challenge "would appear to state a classical claim for defamation actionable in the courts of virtually every State." *Id.* at 697. The Court opined that permitting a Due Process Clause claim "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.* at 701. *See also* Martinez v. California, 444 U.S. 277, 282 (1980) (observing that each state has a paramount interest "in fashioning its own rules of tort law"); William Burnham, *Separating Constitutional and Common-Law Torts: A Critique and a Proposed Constitutional Theory of Duty*, 73 MINN. L. REV. 515, 544 (1989) (alleging that many due process claims are merely state tort actions "masquerading" as civil rights suits).

206 *See, e.g.*, Christensen v. County of Boone, 483 F.3d 454, 464–65 (7th Cir. 2007) (reasoning that "*Lewis* calls for judicial modesty in implementing a federal program of constitutional torts" and mandates that official misconduct, which may be harmful and unjustified by any legitimate interest, must be left to "ordinary tort litigation" unless it can be characterized as truly conscience-shocking).

207 *See supra* Part I.D.2.

208 Daniels v. Williams, 474 U.S. 327, 332–33 (1986) (quoting *Paul*, 424 U.S. at 701).

209 365 U.S. 167 (1961), *overruled in part on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 664–65 (1978).

210 *Id.* at 183.

rights.[211] Until or unless § 1983 is repealed or amended, it should not be interpreted contrary to its historic purpose. Further, liability for the arbitrary abuse of power by executive branch officials should not be relegated to the vagaries of state tort law. Several constitutional scholars have noted the illogic and danger of limiting the substantive scope of constitutional rights based on the existence of state torts.[212]

A related argument developed by Professor Richard H. Fallon, Jr. contends that substantive due process should serve only as a check on legislative enactments that have a broad impact on society, rather than to correct individual injustices that can be vindicated through individual tort actions.[213] On the other hand, it can be argued that the judicial invalidation of laws raises greater concerns regarding federalism and judicial activism. As Justice Scalia has opined, "'[i]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.'"[214] It is when the judiciary strikes down democratically enacted laws that it "thwarts the will of representatives of the actual people."[215] In

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211 *Id.* at 171–72.

212 *See* Robert Chesney, *Old Wine or New? The Shocks-the-Conscience Standard and the Distinction Between Legislative and Executive Action*, 50 SYRACUSE L. REV. 981 (2000). Chesney noted:

> [I]t makes little sense to define the scope of a constitutional right with reference to the availability of tort remedies . . . merely on the ground that the federal civil damages remedy through which the right might be asserted appears to overlap with tort concepts. . . . [D]efining the range of constitutional protections in the context of alleged executive infringements by reference to the apparently undesirable convergence of tort and constitutional law tailors the remedy poorly to the perceived problem. If convergence with 'mere' tort law is the problem, then a response specific to the federal civil damages action vehicles . . . is appropriate[.]

Id. at 1013–14; Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 94 (2006) (arguing that substantive due process "serves a *nationalizing function*" because "[w]hen the Court recognizes substantive due process rights, they are national rights that every state and locality must honor"); Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI.-KENT L. REV. 661, 661 (1997) (contending that attempts to prevent overlap with state tort law have resulted in decisions that limit the substantive scope of constitutional rights: "[t]he danger posed by focusing on the way in which § 1983 damage actions against state officials . . . are like or unlike tort actions is that problems raised by specific remedies will drive thinking about constitutional substance").

213 Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 327 (1993). *See also The Supreme Court, 1997 Term—Leading Cases*, 112 HARV. L. REV. 122, 199 (1998) ("[S]ubstantive due process analysis is on its firmest footing when applied to systematic governmental action.").

214 Roper v. Simmons, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting) (quoting Gregg v. Georgia, 428 U.S 153, 175 (1976)).

215 *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–18 (1962) (describing judicial review as a "deviant

contrast, when plaintiffs use substantive due process to remedy arbitrary abuses of government power by its officials, no harm befalls democratically enacted laws. When a member of the executive branch violates a constitutional duty and deprives an individual of life, liberty, or property, a judicial remedy does not undermine democracy. When judges and jurors determine that government officials have engaged in arbitrary behavior, no plausible counter-majoritarian difficulty exists. Further, Professor Fallon's distinction ignores the reality that actions of law enforcement officials, government employers, government educators, and other members of the executive branch may have a significant and broad corrosive impact, thereby raising the same systemic concerns triggered by legislative action.[216]

The allegation that recognizing "constitutional torts" will cause a deluge of federal litigation and government liability is also highly exaggerated. The Supreme Court has already made it clear that plaintiffs cannot base a substantive due process claim on mere inaction, *i.e.*, failing to protect individuals from acts of violence or dangerous situations that the government did not create.[217] Further, the Supreme Court has protected against vexatious, frivolous litigation by awarding fees to prevailing defendants pursuant to the Civil Rights Attorney's Fees Awards Act of 1976,[218] as well as by imposing sanctions under Rule 11 of the *Federal Rules of Civil Procedure*.[219] Together with recent

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institution" in American democracy and coining the phrase "counter-majoritarian difficulty" to describe the tension he perceived).

216 *See infra* note 278.

217 DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 197 (1989). The Court reasoned that unless government officials, by an affirmative exercise of power, restrain an individual's liberty, rendering him unable to protect himself, there is no cause of action under the Due Process Clause. *Id.* at 201. This narrow view of substantive due process has been challenged by many constitutional scholars. *See, e.g.*, Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2273 (1990) (arguing that when "conclusory incantation[s]"—such as "[g]overnmental inaction is not actionable"—allow so many harms "to flourish unchecked by the Constitution," then "the language, and the concepts it describes, must be scrutinized with care"). *See also* Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 536–41 (2008) (demonstrating how many lower federal courts have refrained from finding a "custodial relationship," which would trigger a duty to protect, or a state-created danger, thereby rendering *DeShaney* a formidable obstacle).

218 42 U.S.C. § 1988 (2006). The statute provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." § 1988(b). Where the defendant prevails, fees may be awarded where the suit is "vexatious, frivolous, or brought to harass or embarrass the defendant." Hensley v. Eckerhart, 461 U.S. 424, 429 n.2 (1983).

219 Rule 11 of the *Federal Rules of Civil Procedure* requires that an attorney who signs "a pleading, written motion, or other paper" thereby certifies that "the factual contentions have evidentiary support" and that the claims are "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law." FED. R. CIV. P. 11(b).

Supreme Court decisions permitting more effective use of motions to dismiss[220] and summary judgment procedures,[221] weak cases are disposed at the earliest stages of litigation. In addition, the doctrines of absolute and qualified immunity, which safeguard individual officials, significantly mitigate damage liability.[222] Finally, the Supreme Court's rejection of the doctrine of *respondeat superior* in § 1983 litigation insulates government entities from monetary liability unless a policymaker's conduct is challenged or a custom or policy is established.[223]

In light of these significant safeguards and limitations on liability, the concerns raised by the Court in *Lewis* are exaggerated, as well as unfounded. Federal courts should not be reluctant to recognize substantive due process claims where the plaintiff demonstrates arbitrary deprivation of a property or liberty interest. Executive branch officials, no less than legislators and judges imposing punitive damage awards, should be liable for substantive due process violations in order to permit this historic guarantee to play a vital role in remedying abuses of government power.

Another key rationale for constricting the use of substantive due process is the concern, voiced by several Justices, about

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220 In *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009), the Court extended *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), to apply to all civil actions. To survive a motion to dismiss, a plaintiff must now allege sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 129 S. Ct. at 1949. The Court explained that judges should reject "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" and that "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they no more than conclusions, are not entitled to the assumption of truth." *Id.* at 1949–50. In addition, *Iqbal* rejected the supervisory liability theory, which allowed supervisors to be held liable for the constitutional violations of their subordinates if there was evidence of knowledge and acquiescence. The majority stated that "the term 'supervisory liability' is a misnomer . . . each Government official . . . is only liable for his or her own misconduct." *Id.* at 1949. The dissent lamented that the majority eliminated the broader understanding of supervisory liability that governed prior to this ruling. *Id.* at 1957–58 (Souter, J., dissenting).

221 *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986) (holding that to avoid summary judgment an opposing party must show a "genuine issue as to any material fact" that impinges upon a decisive question of law); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 251–52 (1986) (holding that to survive summary judgment, the non-movant must present a "genuine factual dispute"—*i.e.*, one that "presents a sufficient disagreement to require submission to a jury").

222 Harlow v. Fitzgerald, 457 U.S. 800, 806–08 (1982) (stating that absolute immunity extends to judges, legislators, and prosecutors performing their duties as well as executive officials when they engage in legislative, judicial, or prosecutorial functions, whereas qualified immunity shields most executive officials from damage liability unless they violate clearly established law).

223 Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978) ("[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.").

judicial activism in an area where there are few objective guideposts. Opponents complain that allowing substantive due process challenges means that judges, based only on their own subjective preferences, will second-guess executive or administrative decisions.[224] Arguably, the largely undefined labels "arbitrary" and "capricious" can be attached to all sorts of government misconduct, potentially creating an undue strain on federal judicial resources as well as on state-federal relations.[225] However, the Court's adoption of the shocks the conscience test has not eliminated the vagueness or subjectivity problems. Responding to this criticism, Part III proposes a new test to guide lower courts in determining when executive misconduct is sufficiently arbitrary to rise to a constitutional level.

III. PROPOSED STANDARD FOR ASSESSING SUBSTANTIVE DUE PROCESS ABUSE OF POWER CLAIMS

In assessing whether government misconduct violates substantive due process, courts should return to the "essence of substantive due process," which is "protection of the individual from the exercise of governmental power without reasonable justification."[226] Focusing on this core question reveals the fallacy of *Lewis* and its progeny, including the tests the appellate courts have developed to further emasculate the meaning of substantive due process. More specifically, I propose four underlying principles that should govern substantive due process analysis and then explicate a new approach.

First, the legislative/executive dichotomy established in *Lewis* and the imposition of a more restrictive shocks the conscience test for executive misconduct should be rejected. The

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224 *See, e.g.*, Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) ("[G]uideposts for responsible decisionmaking in this uncharted area are scarce and open-ended."); Griswold v. Connecticut, 381 U.S. 479, 507–13 (1965) (Black, J., dissenting) (challenging substantive due process as a mechanism whereby Supreme Court Justices may interject their own predilections and determine what they believe to be fair); Gumz v. Morrissette, 772 F.2d 1395, 1404–06 (7th Cir. 1985) (Easterbrook, J., concurring) (asserting that "[s]ubstantive due process is a shorthand for a judicial privilege to condemn things the judges do not like or cannot understand") *overruled on other grounds by* Lester v. Chicago, 830 F.2d 706 (7th Cir. 1987).

225 *See* Justices Scalia's and Kennedy's descriptions of the shocks the conscience test, *supra* note 150. *But see* the majority opinion in County of Sacramento v. Lewis, 523 U.S. 833, 847 (1998) ("While the measure of what is conscience shocking is no calibrated yard stick, it does, as Judge Friendly put it, 'poin[t] the way.'" (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

226 *See* Christensen v. County of Boone, 483 F.3d 454, 468–69 (7th Cir. 2007) (Ripple, J., concurring in part and dissenting in part) (emphasis omitted) (arguing that the majority erred in failing to recognize that government officials who act unreasonably and who use their positions "not in connection with any official duty but for [their] own purposes" have abused their power contrary to the guarantee of substantive due process).

question of whether government officials abuse their power should not depend on whether they are members of the executive, legislative, or judicial branch of government.[227]

Second, rejection of the shocks the conscience standard should include elimination of a rigid intent to harm, wantonness, malice, or sadism test.[228] Arbitrary abuse of power should not be insulated by imposing draconian burdens of proof on the victims. Although negligent misconduct may not be viewed as an unconstitutional abuse of power, the Supreme Court in *Lewis* recognized that government officials who act with deliberate indifference to the serious harm their actions might cause, have breached the constitutional guarantee of due process.[229] Although the Court opted for an intent to harm standard in emergency situations where there is no time to deliberate,[230] the Court's carefully constructed exception does not justify the broad use of the sadism, wantonness, and malice standards for students and detainees who bring substantive due process claims.[231]

Third, the conclusion reached by some appellate courts that substantive due process protects only fundamental rights should be rejected. As discussed, this fundamental rights restriction has permitted courts to dismiss claims involving significant property and liberty interests.[232] The Fourteenth Amendment does not say that government cannot deprive persons of a "fundamental right"; rather, it prohibits all deprivations of "life, liberty, or property, without due process of law."[233] The Supreme Court has acknowledged that the scope of "liberty" protected by the Due Process Clause is broad: "[A] rational continuum which . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ."[234]

The Supreme Court has never repudiated the broad definition of "liberty" first enunciated in the 1920s as encompassing a wide range of interests "recognized at common law as essential to the orderly pursuit of happiness by free men."[235] The Court's opinion in *Lawrence v. Texas*[236] implicitly

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227 *See supra* Parts II.A and B.

228 *See supra* Part I.D.3.

229 *See supra* note 57 and accompanying text.

230 *See supra* note 58 and accompanying text.

231 *See supra* notes 121–22, 129 and accompanying text.

232 *See supra* Part I.D.1.

233 U.S. CONST. amend. XIV, § 1.

234 Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (quoted in Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion)).

235 Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

236 539 U.S. 558 (2003).

recognized this "continuum approach." The majority failed to follow the strict fundamental-rights analysis that the Court enunciated in *Glucksberg*.[237] *Lawrence* is noteworthy because, under *Glucksberg*, where no fundamental right is implicated, legislative enactments are presumed valid and will be struck down only if totally arbitrary and capricious.[238] Nonetheless, the Court in *Lawrence* invalidated Texas' sodomy law as arbitrarily interfering with the liberty interests of individuals to enter into personal relationships.[239]

Many constitutional scholars have suggested that *Lawrence* marked the demise of *Glucksberg*'s strict two-tier analysis.[240] Although post-*Lawrence* decisions have not demonstrated a sea change,[241] lower courts that have interpreted *Glucksberg* to preclude *any* review of executive misconduct absent a fundamental right are misguided. They ignore the "second tier" of the *Glucksberg* analysis and thereby deprive litigants of the opportunity to show that they have been subjected to "substantial arbitrary impositions and purposeless restraints."[242] Although government interference with property and liberty normally will not trigger strict scrutiny, this should not mean

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237 *Id.* at 586, 588 (Scalia, J., dissenting) (criticizing the majority's failure to articulate *any* standard of review). *See also* Troxel v. Granville, 530 U.S. 57, 68, 72–73 (2000) (plurality opinion) (applying a "combination of several factors" to hold that a state's visitation statute, as applied, unconstitutionally infringed on parents' fundamental right to rear their children); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992) (applying an "undue burden" test, rather than strict scrutiny or rational basis, in assessing the constitutionality of state abortion laws); Russ v. Watts, 414 F.3d 783, 789 (7th Cir. 2005) (noting the confusion between different Supreme Court approaches to substantive due process analysis, including *Glucksberg*'s fundamental rights analysis, the *Lewis* "shocks the conscience" test, and *Troxel's* "combination of factors" test).

238 *See* Washington v. Glucksberg, 521 U.S. 702, 722 (1997).

239 *Lawrence*, 539 U.S. at 567. Justice Kennedy asserted that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." *Id.* at 562. He concluded that the Texas statute furthered "no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* at 578.

240 Conkle, *supra* note 212, at 65 (contending that *Lawrence* "includes untapped insights . . . that might inform a substantial reconceptualization and reformation of substantive due process"); Gregory P. Magarian, *Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech*, 90 MINN. L. REV. 247, 285 (2005) ("*Lawrence* dramatically shifted the tide, reinvigorating substantive due process both by sharpening the doctrine's affirmative rationale and by tightening the restrictions it imposes on government regulation."). *See also* Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, *in* CATO SUPREME COURT REVIEW: 2002–2003 21, 41 (James L. Swanson ed., 2003) (recognizing *Lawrence* as a case adopting a Libertarian interpretation of the Constitution that creates a "presumption of liberty" whereby all laws that restrict "liberty" are presumptively unconstitutional); Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1899 (2004) ("*Lawrence* significantly altered the historical trajectory of substantive due process . . . .").

241 *See supra* note 9.

242 *See* Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

that government officials, including those in the executive branch, may violate "non-fundamental" rights with impunity.

Fourth, a focus on abuse of power demonstrates the irrelevance of the existence of state remedies. Many appellate courts have erroneously rejected claims brought by students, landowners, and government employees based on the availability of state tort remedies.[243] As has been explained, the existence of state remedies has relevance with regard to some procedural due process claims, but not substantive due process claims.[244] Clearly this criterion has nothing to do with the level of arbitrariness of the constitutional deprivation and thus should be rejected.

Once these four principles are understood, the question of what is an unconstitutional abuse of power can be assessed by borrowing from the Supreme Court's analysis of substantive due process challenges to legislative or judicial power, as well as appellate court decisions that have struggled with this question. The following sections set forth a proposed standard.

A. Strict Scrutiny for the Deprivation of Fundamental Rights

Where fundamental rights are implicated, federal courts should follow the Supreme Court's lead in *Chavez*, which analyzed a challenge to executive power under both the fundamental rights strand *and* the shocks the conscience strand.[245] In *Chavez*, the Court ignored the strict dichotomy imposed in *Lewis* and instead recognized that the violation of fundamental rights, whether by legislative or executive action, triggers strict scrutiny.[246] In determining whether a Supreme Court decision should be reversed, one key factor is whether the legal foundations of the decision have been eroded by subsequent rulings. *Lewis* itself was a deeply divided decision, and the dichotomy that it created between legislative and executive decisions was eroded by the *Chavez* opinion.[247]

B. A Nuanced Balance Test for Substantive Due Process Claims Not Implicating Fundamental Rights

Because the Supreme Court has been reluctant to expand the category of fundamental rights and has indeed narrowed the

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243 *See supra* Part I.D.2.

244 *See supra* notes 97–102 and accompanying text.

245 *See supra* notes 189–98 and accompanying text.

246 *See supra* note 195 and accompanying text.

247 *See supra* notes 199–202 and accompanying text (discussing appellate courts that have interpreted *Chavez* as eliminating this rigid dichotomy).

scope of recognized rights,[248] adopting a strict scrutiny analysis for the deprivation of fundamental rights, with no meaningful check on the deprivation of non-fundamental interests, provides insufficient protection against abuses of government power. Further, the Supreme Court has not consistently followed *Glucksberg*'s strict two-tier substantive due process analysis,[249] which ultimately depends on how broadly or narrowly the Justices decide to characterize the liberty or property interest.[250] For example, in *Michael H. v. Gerald D.*,[251] a biological father challenged a California law that created an irrebuttable presumption that a married woman's husband was the father of her child.[252] The Court ruled that a biological father who had established a relationship with the child had no right to a hearing to determine paternity and that he could be denied all parental rights.[253] Justice Scalia, however, asserted that the specific liberty interest implicated was the alleged right of a father to have a relationship with a child who is conceived as a result of an adulterous relationship with a married woman—a right that has not traditionally been recognized and thus cannot be viewed as fundamental.[254] Justice Brennan, in dissent, argued that it was well established that fathers have a

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248 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846, 874 (1992) (describing the right to terminate a pregnancy as a liberty interest, not a fundamental right, and abandoning strict scrutiny in favor of an "undue burden" test, which permits, prior to viability of the fetus, state regulation that does not unduly burden the abortion decision).

249 In addition to *Casey*, see District of Columbia v. Heller, 128 S. Ct. 2783, 2817–22 (2008) (holding that the right to possess a handgun in one's home for self-defense is protected by the Second Amendment, but then reasoning that "[u]nder any of the standards of scrutiny" applied to enumerated rights, the ordinance in question failed to pass constitutional muster; the Court did not define the right as fundamental, nor did it apply strict scrutiny analysis); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (recognizing a liberty interest in intimate homosexual relationships, but neither asserting fundamental-rights status nor the need to apply strict scrutiny); Troxel v. Granville, 530 U.S. 57, 66–67 (2000) (requiring that parental rights be given significant weight in deciding visitation matters, but not using strict scrutiny language); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278–80 & n.7 (1990) (recognizing a liberty interest in refusing unwanted medical treatment but not denominating this interest as a fundamental right that necessarily triggered strict scrutiny and, instead, balancing the competing interests).

250 *See* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990) ("The selection of a level of generality necessarily involves value choices."); Mark Tushnet, *Can You Watch Unenumerated Rights Drift?*, 9 U. PA. J. CONST. L. 209, 216 (2006) (contending that "questions about unenumerated rights are questions about the level of abstraction on which we are to understand constitutional language" and that "there is no *analytic* basis for selecting one rather than another level of generality or specificity").

251 491 U.S. 110, 113 (1989).

252 *Id.* at 113.

253 *Id.* at 124–27.

254 *Id.* at 127 (majority opinion).

fundamental right to have a relationship with their biological children.[255]

The same characterization problem surfaced in *Lewis* where officers killed a youth on a motorcycle during a high-speed chase.[256] The liberty interest could be defined broadly as implicating the fundamental right to life, as Justice Kennedy did,[257] or, more narrowly, as a "right to be free from 'deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender,'" which Justice Scalia found was not rooted in history or tradition and thus not protected under substantive due process.[258]

Borrowing from the Supreme Court's more recent substantive due process decisions, which have eschewed the strict two-tier analysis established in *Glucksberg*,[259] courts should apply a balance test that examines certain key factors that relate directly to whether an abuse of power has occurred. First, courts should assess the nature and significance of the interests at stake and the extent to which these interests have been violated, as the Supreme Court did in *Lawrence*, *Troxel*, and *Heller*.[260] Second, in determining arbitrariness, a critical factor should be whether the government's action is a substantial departure from professional judgment. The Supreme Court adopted this standard to determine whether executive officials violated the substantive due process rights of those involuntarily committed to its mental institutions.[261] There is no reason why public school officials, jailers, and government employers should not be held to a similar standard of "professionalism."

Third, borrowing from the Supreme Court's analysis of arbitrary punitive damage awards, courts should examine the reprehensibility of the government official's misconduct,[262] which the Court has held is "the most important indicium of the

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255 *Id.* at 141–45 (Brennan, J., dissenting).

256 County of Sacramento v. Lewis, 523 U.S. 833, 836 (1998).

257 *Id.* at 856 (Kennedy, J., concurring).

258 *Id.* at 862–63 (Scalia, J., concurring) (quoting *id.* at 836 (majority opinion)). *See also* Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308 (2009). Whereas the majority characterized plaintiff's § 1983 claim as a "freestanding right to access DNA evidence for testing," which is not rooted in history, the dissent called this a "fundamental mischaracterization" of the liberty interest, and instead framed the claim as the "most elemental" liberty right to be "free from physical detention by one's own government." *Id.* at 2322–23, 2331, 2334 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004)).

259 *See supra* note 249. See also cases which have read *Lawrence* to require a balancing test, *supra* note 9.

260 *See supra* note 249.

261 *See supra* note 43 and accompanying text.

262 *See supra* note 11–12 and accompanying text.

reasonableness of a punitive damages award."[263] Reprehensibility measures culpability and callousness, which are directly relevant to whether a constitutional abuse of power has occurred. In *State Farm*, the Court set forth the following considerations regarding reprehensibility:

> Whether . . . the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.[264]

The first consideration suggests that a defendant who causes physical harm, *i.e.*, who deprives a plaintiff of liberty rather than property, often acts more callously than a defendant who causes economic harm. The second mirrors the deliberate indifference or reckless disregard test that generally governs substantive due process claims. The third—financial vulnerability of the victim—may have little relevance in most substantive due process claims, but is highly relevant to culpability when broadened to include an inquiry into whether the defendant targeted especially "vulnerable" victims, such as students or detainees. Finally, the fourth and fifth criteria are clearly indicia of abuse of power since repeated actions or those inspired by malice or deceit indicate the unreasonableness and arbitrariness of the defendant's conduct.[265] This does not mean that evidence of malice or sadism is required to demonstrate a substantive due process violation. Indeed, any categorical "intent to harm" test insufficiently protects individual liberty.[266]

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263 *See supra* note 11; State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996).

264 *State Farm*, 538 U.S. at 419.

265 In a more recent punitive damages case, *Philip Morris U.S.A. v. Williams*, 127 S. Ct. 1057 (2007), the Court held that the trial court improperly rejected a jury instruction regarding the allowable use of evidence of harm to non-parties in assessing punitive damages. The Court reasoned that a jury may not use punitive damages to directly punish the defendant for harm caused to non-parties to the litigation, but it may consider this harm in determining reprehensibility. *Id.* at 1065. The Court cast its decision as a procedural due process case, *id.*, but it can be argued that the Court's focus on amount of harm as an indication of reprehensibility may also have implications for substantive due process challenges. *See* Jeremy T. Adler, Comment, *Losing the Procedural Battle but Winning the Substantive War: How* Philip Morris v. Williams *Reshaped Reprehensibility Analysis in Favor of Mass-Tort Plaintiffs*, 11 U. PA. J. CONST. L. 729, 743 (2009) (arguing that "even though *Philip Morris* was a procedural due process decision, the Court's conception of reprehensibility should be equally applicable to substantive due process challenges to punitive damages judgments"). The Court stated that "conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few." *Phillip Morris*, 127 S. Ct. at 1065. This would be an important criterion in cases such as *Lewis* that involved a high-speed chase, which posed a significant risk of harm to others.

266 *See supra* notes 228–31 and accompanying text.

In assessing reprehensibility, courts should also look to the mitigating factors raised in *Lewis*, such as whether the government officials had to act in haste or whether they had time to deliberate.[267] Further, where government officials are forced to weigh conflicting legitimate interests, this should be taken into account.[268] However, unlike *Lewis* and the appellate courts' interpretation of *Lewis*, these factors should not lead inexorably to imposition of an intent to harm standard. Rather, they should be viewed as just two of several relevant criteria in assessing the reprehensibility of the defendant's conduct.

An example will help illustrate the significance of this new substantive due process analysis. In *Christensen v. County of Boone*,[269] plaintiffs asserted that a police officer, acting out of a personal vendetta, engaged in "a pattern of on-duty conduct designed to harass, annoy, and intimidate" plaintiff and his girlfriend.[270] The couple alleged that the officer repeatedly followed them while they were driving, that he parked his squad car in front of the girlfriend's place of employment, and that he sat in his police car outside of businesses that the plaintiffs were visiting.[271] The Seventh Circuit reasoned that even if a fundamental right to intimate association was at stake, the claim failed because the adverse consequences of the officer's actions were not sufficiently serious: "[o]fficial conduct that represents an abuse of office . . . violates the substantive component of the due process clause only if it 'shocks the conscience.'"[272] The court stressed that "*Lewis* calls for judicial modesty in implementing a federal program of constitutional torts . . . leaving to ordinary tort litigation conduct of the sort in which Deputy Krieger is alleged to have engaged."[273] Even if unjustified by any legitimate government interest, the claim was not actionable.[274]

One dissenting judge recognized that the majority's approach ignored the essence of substantive due process, namely "protection of the individual from the exercise of governmental power without reasonable justification."[275] Relying on Justice Kennedy's concurrence in *Lewis*, Judge Ripple asserted that courts should examine the objective character of the conduct to

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267 *See supra* note 58 and accompanying text.

268 *See supra* notes 107–18 and accompanying text.

269 483 F.3d 454 (7th Cir. 2007).

270 *Id.* at 457.

271 *Id.*

272 *Id.* at 464.

273 *Id.* at 464–65.

274 *Id.* at 465.

275 *Id.* at 468 (Ripple, J., concurring in part and dissenting in part) (emphasis omitted).

determine whether such is consistent with traditions, precedents, and the historical meaning of the Constitution.[276] Judge Ripple explained that this was a situation where the official

> embarked upon a scheme of retaliation against the plaintiffs in which he used the power and authority of his office to injure their relationship. This systematic vendetta had no conceivable legitimate governmental purpose. It amounted to the raw use of the power—power that comes with a badge, a service revolver, and the power to arrest—in order to make it difficult for this couple to maintain a romantic relationship that our constitution protects as a fundamental right.[277]

Judge Ripple believed that a fundamental right was at stake and he concluded that this perverse use of police authority shocked the judicial conscience and sent a dangerous message to law enforcement personnel.[278] Under the approach suggested in this Article, deprivations of fundamental rights would automatically trigger strict scrutiny, as they do for legislative enactments. However, if the court failed to recognize a fundamental right to maintain a romantic relationship or found that the challenged conduct did not infringe on that right, it would then weigh the importance of the right and the extent of the infringement, whether the officer's conduct was a substantial departure from professional judgment, and the reprehensibility of the conduct. Applying these factors, a substantive due process violation is apparent. First, even if the right is not "fundamental," the liberty interest is significant, and "stalking" constitutes a significant impairment of the interest. Second, the officer's conduct was a substantial departure from professional police conduct. Third, the conduct could readily be described as reprehensible. It interfered with personal liberty, it involved repeated actions, and there was evidence of ill will and an intent to harm. Further, the officer was not facing exigent circumstances nor was he forced to weigh competing legitimate government interests. In short, the officer's conduct was a raw

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276 *Id.*

277 *Id.* at 469.

278 *Id.* Judge Ripple opined:

> Today's decision also will have a very practical and harmful effect on municipal governance throughout this circuit. The panel majority's failure to recognize the situation here as a willful abuse of governmental power and its failure to characterize the conduct as conscience shocking will have a direct and immediate effect on efforts to maintain discipline and professionalism in the countless number of small municipal police forces that dot our landscape. . . . Today, the highest federal court in this region of the United States sends a surely unintended, but nevertheless unwelcome, message that minimizes the significance of a raw use of municipal police power.

Id. at 469–70.

abuse of government power unjustified by any government interest and thus a clear violation of substantive due process. The Seventh Circuit's contrary conclusion demonstrates why *Lewis*' shocks the conscience test must be overturned. Although other cases may mandate a more nuanced balance of competing considerations, the criteria identified in this proposal will provide judges with guideposts that are lacking under *Lewis*.

CONCLUSION

Historically, substantive due process has been interpreted as a guarantee against arbitrary deprivations of life, liberty, or property, whether perpetrated through legislative enactments or by the misconduct of government officials. The Supreme Court broadly defined the term "liberty" to deter and punish abuses of government power. In *Lewis*, however, the Court significantly gutted the Due Process Clause by creating a false dichotomy between legislative and executive misconduct and by imposing a draconian shocks the conscience standard. The problem has been compounded by appellate court decisions holding that the judicial conscience will not be shocked absent evidence of malice, sadism, or wantonness. Further, the appellate courts have imposed additional obstacles that have no relevance to the question of whether an abuse of power has occurred, such as the requirement that plaintiffs establish deprivation of a fundamental right or prove there is no state remedy for the injury. *Lewis*' shocks the conscience test and its progeny should be rejected in favor of an approach that restores the Due Process Clause to its historical position as a core guarantor against raw abuse of power by members of all three branches of government.

The "California Effect" & the Future of American Food: How California's Growing Crackdown on Food & Agriculture Harms the State & the Nation

*Baylen J. Linnekin**

> Thank you for your wine, California. Thank you for your sweet and bitter fruits.
>
> —The Rolling Stones, *Sweet Virginia, on Exile on Main Street* (Atlantic Records 1972).

INTRODUCTION

For several decades, California has been the epicenter of the American food scene. While data show that the state produces one-third of the nation's food supply,[1] California is much more than where the food we eat comes from. One in eight American diners lives in the state,[2] which is home to more than 90,000 restaurants.[3] California is also where eating trends are born, and where fast food, Chez Panisse, Mexican salsa, Wolfgang Puck, organic foods, street food, and Napa Valley wines became durable icons of American culinary culture.

The state's place atop the national food chain, though, is in jeopardy. In recent years, California legislators have pursued

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1 *See* U.S.D.A., NATIONAL AGRICULTURAL STATISTICS SERVICE, CALIFORNIA FIELD OFFICE, CALIFORNIA AGRICULTURAL STATISTICS: 2007 CROP YEAR 1 (Oct. 2008), *available at* http://www.nass.usda.gov/Statistics_by_State/California/Publications/California_Ag_Statistics/Reports/2007cas-all.pdf [hereinafter U.S.D.A., CALIFORNIA AGRICULTURAL STATISTICS: 2007 CROP YEAR].

2 *See* U.S. CENSUS BUREAU, GEOGRAPHIC COMPARISON TABLE, 2007 POPULATION ESTIMATES, http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=01000US&-_box_head_nbr=GCT-T1-R&-ds_name=PEP_2007_EST&-redoLog=false&-mt_name=PEP_2005_EST_GCTT1R_US9S&-format=US-9S (last visited Apr. 1, 2010) [hereinafter U.S. CENSUS BUREAU, 2007 POPULATION ESTIMATES].

3 California Restaurant Association, About the CRA, http://www.calrest.org/ (last visited Apr. 1, 2010).

regulations that negatively impact many important agricultural and culinary trends. State and local governments have banned or severely hampered a veritable smorgasbord of foods, including everything from eggs to French fries, foie gras to tacos, raw-milk cheeses to bacon-wrapped hot dogs.[4] Meanwhile, California Proposition 65 requires proprietors of restaurants that serve olives, bread, and chicken to warn customers that they sell cancerous products.[5] The nation's breadbasket now wants us to fear bread.

California's turn against food is worrisome across the country, too, since in addition to its place as the nation's breadbasket and culinary trendsetter, California is the country's cultural and regulatory bellwether. Regulations passed in California often become laws elsewhere, at both the state and federal level.[6] Companies that can no longer market a food in California may be forced to decide whether that product—robbed of twelve percent of its potential market—is still viable.

This article explores the bright past, gloomy present, and cloudy future of food in California, and what this means for food in America. Section I describes the nature and history of California's agricultural and culinary development. Section II explores several of California's state and local food bans and restrictive food regulations. Section III analyzes the "California effect" and the nationwide impact of California's food crackdown, and describes several ways that burdensome California food laws have impacted agriculture or dining on a national scale. Section IV analyzes the likely causes of the state's burgeoning crackdown on food, and explores several arguments over California's food crackdown. Finally, this article concludes that what California and America need in place of what some critics label "food fascism"[7] is *food freedom*: the right of people to grow, buy, sell, cook, and eat the foods they want.

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4 *See infra* notes 55, 63, 90. Daniel Hernandez, *The Bacon-Wrapped Hot Dog: So Good It's Illegal*, LA WEEKLY, Feb. 7, 2008, http://www.laweekly.com/2008-02-07/eat-drink/the-hot-dog-so-good-it-sillegal/.

5 Office of Environmental Health Hazard Assessment, Proposition 65 in Plain Language, http://oehha.ca.gov/prop65/background/p65plain.html (last visited Apr. 1, 2010).

6 *See infra* Part III.C.

7 *See, e.g.*, Peter Ferrara, Op-Ed, *Rise of Food Fascism*, WASH. TIMES, June 1, 2003, at B3 ("[F]ood fascism is a direct assault on our freedom of choice over our own diets.").

I. CALIFORNIA: THE CAPITAL OF MODERN AMERICAN FOOD

California is the nation's third-largest state in terms of area,[8] and it is the largest, by more than one-third, in terms of population.[9] More than twelve percent of Americans call California home.[10] Just as important for the purposes of this article, California is the birthplace of much of what we eat, and how and why we prepare a rich variety of foods.

A. California: America's Agricultural Titan

Indigenous Americans who made their home in pre-colonial times in what is now California subsisted on a variety of wild foods, including acorns, game, and marine mammals.[11] Many crops and animals now raised in the state were brought by the Spaniards and Mexicans who first colonized today's California in the latter half of the eighteenth century.[12]

California currently boasts more than 75,000 farms and ranches.[13] These occupy more than 26 million acres, or 25 percent of the state's total acreage.[14] These farms generate more than $36 billion in sales, which is nearly double that of Texas, California's closest competitor.[15] California's agricultural output is so massive that its value dwarfs that of all but about a half-dozen countries in the world.[16]

California's vast size, fertile soil, and largely temperate climate make the state an ideal location for growing a dizzying array of crops and raising livestock. Nationally, recent data show that the top five agricultural counties in America, in terms of sales, are located in California.[17] Agriculture and crop production rank first and fourth, respectively, on the state's own

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8 *See* U.S. CENSUS BUREAU, UNITED STATES SUMMARY 2000, 2000 CENSUS OF POPULATION AND HOUSING 29 (2004).

9 *See* U.S. CENSUS BUREAU, 2007 POPULATION ESTIMATES, *supra* note 2.

10 *See id.*

11 *See* Andrew F. Smith, *California*, *in* 1 THE OXFORD ENCYCLOPEDIA OF FOOD AND DRINK IN AMERICA 165 (Andrew F. Smith ed., 2004).

12 *See id.* at 166.

13 CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, CALIFORNIA AGRICULTURAL RESOURCE DIRECTORY 2007 19 (2008) [hereinafter CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE].

14 *Id.*

15 *See* U.S.D.A., CALIFORNIA AGRICULTURAL STATISTICS: 2007 CROP YEAR, *supra* note 1, at 1.

16 *See* UNIVERSITY OF CALIFORNIA-DAVIS, AGRICULTURAL ISSUES CENTER, THE MEASURE OF CALIFORNIA AGRICULTURE, 5-1 (2009), *available at* http://aic.ucdavis.edu/publications/moca/moca09/moca09.pdf.

17 U.S.D.A., Data Sets, State Fact Sheets (2009), http://www.ers.usda.gov/StateFacts/US.htm (last visited Apr. 1, 2010).

list of "competitive edge" private industries.[18] Owing to California's place as a wine- and beer-producing state, beverage manufacturing ranks tenth on the list.[19]

The sheer volume and variety of crops grown in California defy overstatement. The state leads the nation in production of almonds and walnuts and seemingly every crop alphabetically in between.[20] In addition to almonds and walnuts, California is America's sole producer—meaning it is home to ninety-nine percent or more of the country's overall production—of figs, raisins, olives, clingstone peaches, persimmons, prunes, pomegranates, sweet rice, and clover seed.[21] The state leads the nation in production of asparagus, avocados, bell peppers, broccoli, carrots, cauliflower, celery, cut flowers, dates, eggplant, garlic, grapes, herbs, kiwi, lemon, lettuce, lima beans, melons, nectarines, onions, pears, pistachios, plums, raspberries, strawberries, turnips, and more than a dozen other crops.[22] All told, California farms account for nearly half of America's domestic production of fruits, nuts, and vegetables.[23] California growers ship the vast majority of these crops to other U.S. states.[24] California also accounts for all of America's nut exports, and three out of five fruit and vegetable exports.[25]

California is also the nation's organics and dairy capital. Today, California leads the nation by a wide margin in both the number of certified organic farms and ranches with 1,916 (Wisconsin, in second place, has just 580 such operations) and organic crop acres with 223,263 (North Dakota, with 143,322, is second).[26] California, also America's leading dairy maker,[27] accounts for twenty-two percent of America's milk production,[28] about half of which is used to make cheese.[29] The state produces

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18 *See* CALIFORNIA ECONOMIC DEVELOPMENT PARTNERSHIP, CALIFORNIA FACTS STATEWIDE (Nov. 2006), *available at* http://www.labor.ca.gov/cedp/pdf/CaliforniaFacts.pdf.

19 *Id.*

20 *See* U.S.D.A., CALIFORNIA AGRICULTURAL STATISTICS: 2007 CROP YEAR, *supra* note 1, at 1.

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.* at 3.

25 Hyunok Lee, *California Horticulture: Current Trade and Policy Issues*, 6 AGRIC. & RESOURCE ECON. UPDATE 3, 3 (2002), *available at* http://www.agecon.ucdavis.edu/extension/update/articles/v6n22.pdf.

26 *See* U.S.D.A., DATA SETS, ORGANIC PRODUCTION (2008), *available at* http://www.ers.usda.gov/Data/Organic.

27 U.S.D.A., CALIFORNIA AGRICULTURAL STATISTICS: 2007 CROP YEAR, *supra* note 1, at 65.

28 *Id.* at 1.

29 *Id.* at 65.

more milk than do its two closest competitors, Wisconsin and New York, combined.[30]

B. California: America's Culinary Titan

While California is undoubtedly America's agricultural giant, the state may be even better known for its place as the epicenter of modern-day American cuisine. In so many different ways, what we eat today reflects California's past and present culinary development.

The story of food in California, like that of most states and nations, mirrors immigration patterns. After Mexico won its independence from Spain a half-century after colonization, Mexican cuisine predominated in the state.[31] The Mexican-American War, and, soon after, the state's Gold Rush, brought an influx of Americans to the state, along with large numbers of immigrants from Europe, Asia, Australia, and the Pacific islands.[32] Each group brought its own culinary traditions, immediately diversifying California's cuisine.[33]

California's population doubled from 1920 to 1940.[34] With the advent of the automobile and freeway travel burgeoning, more Californians had the means to travel in search of different cuisines. Restaurateurs, like Oakland entrepreneur Victor Bergeron, met the demand head on.[35] Bergeron began a quest in the 1930s to bring California's ethnic cuisines to the masses, setting the stage with his Mexican and Polynesian restaurants for today's family-style Mexican and Szechuan dining experiences.[36]

That same decade, California also gave birth to the hamburger chains that became America's fast food icons—perhaps the state's first and most lasting contribution to America's national cuisine. In rapid succession, Bob's Big Boy, In-N-Out Burger, McDonald's, and Jack in the Box sprung up in California as small operations, each expanding quickly from local to state to regional or national operation.[37] The first twenty-four

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30 *See* CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, *supra* note 13, at 96.

31 *See* Smith, *supra* note 11, at 165–67.

32 *Id.* at 166.

33 *Id.*

34 U.S. CENSUS BUREAU, RESIDENT POPULATION AND APPORTIONMENT OF THE U.S. HOUSE OF REPRESENTATIVES, CALIFORNIA (2000), *available at* http://www.census.gov/dmd/www/resapport/states/california.pdf.

35 *See* Smith, *supra* note 11, at 171.

36 *Id.*

37 *Id.*

hour restaurant chain, Denny's, literally opened its doors (which have no locks) in Lakewood, California in 1953.[38]

The first major post-WWII development in California's culinary experience was the state's place as a launching pad for an American revolution in French cooking. In the 1940s, California native Julia Child moved to Paris, where she studied culinary arts under various French masters.[39] Soon after her return to the United States more than a decade later, Child published *Mastering the Art of French Cooking*, the first cookbook to make French recipes and methods accessible to the masses.[40]

In 1971, a decade after Child began to reshape the American culinary landscape for home cooks, Berkeley, California chef Alice Waters, who also trained in France, launched Chez Panisse, the restaurant that gave birth to "California cuisine."[41] The restaurant was the first in the nation explicitly to serve food from a set menu featuring only fresh, seasonal, and local ingredients.[42] Waters was also "the first to put [the word] 'organic' on the menu."[43] Waters and her chefs combined this approach with the variety of cuisines that had been popular in California since the end of the Nineteenth Century to create something truly original, truly Californian.[44] In so doing, she not only gave birth to California cuisine but to the "new American" food movement.[45] This movement, which stresses the Waters ideal of fresh, local, seasonal, and organic cuisine, spread across the country in the 1970s, 1980s, and 1990s due to the influence of Waters, Austrian California transplant Wolfgang Puck, and a host of other groundbreaking chefs.[46]

Wine, for many the perfect complement to a great meal, is also at the center of California's culinary growth. Wine has been produced in the state since the time Spanish missionaries arrived in California.[47] Still, at the dawn of the twentieth century, even food writers were unaware that California produced nearly every

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38 *See* Denny's Restaurants, Denny's Restaurants History, http://dennys.com/en/page.aspx?ID=31&title=History (last visited Feb. 1, 2010).

39 *See* Smith, *supra* note 11, at 171.

40 *Id.*

41 *Id.* at 171–72.

42 *See, e.g.*, Chez Panisse Restaurant, Alice Waters: Executive Chef, Founder and Owner, http://www.chezpanisse.com/about/alice-waters/ (last visited Aug. 12, 2009).

43 JULIE GUTHMAN, AGRARIAN DREAMS: THE PARADOX OF ORGANIC FARMING IN CALIFORNIA 15 (2004).

44 *See generally* JEREMIAH TOWER, CALIFORNIA DISH: WHAT I SAW (AND COOKED) AT THE AMERICAN CULINARY REVOLUTION (2006).

45 *Id.* at 219.

46 *See id.* at 212, 219.

47 *See* Smith, *supra* note 11, at 170.

wine varietal.[48] For more than 100 years, consumers and connoisseurs had considered the state's wines—indeed all American wines—to be second-rate compared to those of the major European producing countries. That changed in 1976 with the "Judgment of Paris," a competition pitting top French and California wines against one another in a double-blind expert tasting.[49] California wines crushed their French counterparts, opening the domestic and world markets to California vintners.[50]

Today, California produces about ninety percent of all U.S. wine[51] and is responsible for more than sixty percent of all wine sold in this country,[52] generating more than $58 billion in annual revenue in the state.[53] The state's success in winemaking led to the subsequent creation of licensed wineries in all fifty U.S. states.[54] California is now the fourth largest producer of wine in the world, trailing only France, Italy, and Spain.[55]

II. CALIFORNIA'S CRACKDOWN ON FOOD

A. California's State and Local Bans

California's unparalleled dual successes in the development of both world-class agriculture and cuisine are at risk today because of the strict food-regulatory climate in the state. The state currently has "some of the toughest food restrictions in the nation."[56] Bans at the state or local level now threaten everything from authentic Hollandaise sauce and Caesar salad,[57]

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48 *See* R.S., Foreign Correspondence, *Food at the Exposition*, N.Y. TIMES, Aug. 12, 1900 (noting with surprise that California "apparently produces every kind of wine").

49 *See generally* GEORGE M. TABER, CALIFORNIA VS. FRANCE AND THE HISTORIC 1976 PARIS TASTING THAT REVOLUTIONIZED WINE (2003).

50 *See id.*

51 Press Release, Wine Institute, California Travel & Tourism Commission and Wine Institute Form Historic Partnership to Promote Culinary Travel (Aug. 21, 2007), *available at* http://www.wineinstitute.org/resources/pressroom/08212007 [hereinafter Press Release, Wine Institute].

52 *See* Press Release, Wine Institute, A Signature California Industry: California Wine (Apr. 3, 2007), *available at* http://www.wineinstitute.org/files/californiawineimpact.pdf.

53 *See* Press Release, Wine Institute, California Wine Has $51.8 Billion Economic Impact on State and $125.3 Billion on the U.S. Economy (Dec. 21, 2006), *available at* http://www.wineinstitute.org/resources/pressroom/120720060.

54 Sharon Kapnick, *America: Land of the Red, White and Rose*, TIME, Mar. 17, 2003, at 83.

55 *See* Press Release, Wine Institute, *supra* note 51.

56 Jennifer Steinhauer, *California Bars Restaurant Use of Trans Fats*, N.Y. TIMES, July 26, 2008, at A1.

57 *See* Joel Rubin, *Making the Right Sick Call*, L.A. TIMES, Nov. 3, 2007, at A1 (discussing the new statewide ban, ostensibly enacted for health reasons, on the popular foods).

to tacos bought from some now-popular mobile stands,[58] to farm-raised salmon,[59] to a host of other cuisines and agricultural products.

Each of California's 480 cities and towns[60] and fifty-eight counties[61] has the power to enact certain laws and regulations under the state Constitution.[62] Many burdensome food regulations and prohibitions are born at the local level and percolate up to the state level, as in the case of menu labeling[63] and restaurant smoking bans.[64] The reason for this is that advocates find it easier and less costly to secure a law's passage at the local level than at the state level.[65]

Still, the bans that burden the greatest number of people are undoubtedly those in force across the state. Perhaps no food impacted by a California ban is more widely consumed than eggs. In 2008, California voters passed Proposition 2 (Prop 2), the Prevention of Farm Animal Cruelty Act.[66] The real regulatory dilemma inherent in Prop 2 lies in its ban of the use of battery cages to house egg-laying hens.[67] The ban means that all such hens will have to be free-roaming by the implementation year.[68] Currently, the state is home to nearly four-dozen large-scale egg producers[69] and more than 20 million hens, which lay close to 5 billion eggs each year.[70] These numbers will plummet with the

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58 *See* Carolyn Marshall, *Proposed Ban on Taco Trucks Stirs Animosity in a California Town*, N.Y. TIMES, Jun. 15, 2007, *available at* http://www.nytimes.com/2007/06/15/us/15taco.html (describing opposition to a proposed ban on food served from taco trucks in Salinas, California).

59 *See* Ann Powers, *Farming the Ocean*, 22 NAT. RES. & ENV. 45, 46 (2007).

60 League of California Cities, Facts at a Glance, http://www.cacities.org/index.jsp?zone=locc&previewStory=53 (last visited Apr. 1, 2010).

61 California State Association of Counties, California's 58 Counties, http://www.csac.counties.org/default.asp?id=6 (last visited Apr. 1, 2010).

62 *See* CAL. CONST. art. XI.

63 *See infra* Part IV.

64 *See* Letter from David E. Garth, President/CEO, San Luis Obispo Chamber of Commerce, to Nebraska Senators (Jan. 29, 2001), *available at* http://www.tobacco.org/News/010129garth.html.

65 *See, e.g.*, Ellen Fried & Michele Simon, *The Competitive Food Conundrum: Can Government Regulations Improve School Food?*, 56 DUKE L.J. 1491, 1535 (2007)

> A general rule of thumb is that it is harder politically to get things done at the federal level, somewhat less hard at the state level, and easiest at the local level. That is why so many public health advocates are fond of touting local policies as a critical strategy.

66 20 CAL. HEALTH & SAFETY CODE §§ 25990–94 (West 2001).

67 *See* Carla Hall & Jerry Hirsch, *Prop 2 Unlikely to Hike Egg Prices*, L.A. TIMES, Nov. 6, 2008, at C1.

68 *Id.*

69 *See* Peter Singer, *The Rights of Animals*, NEWSWEEK, Nov. 19, 2008, http://www.newsweek.com/id/169881.

70 DANIEL A. SUMNER ET AL., UNIVERSITY OF CALIFORNIA AGRICULTURAL ISSUES CENTER, ECONOMIC EFFECT OF PROPOSED RESTRICTIONS ON EGG-LAYING HEN HOUSING IN

ban. Experts predict the number of eggs imported into the state in order to meet consumer demand will swell once the ban takes effect, since out-of-state eggs are not subject to the ban.[71]

Another farm-raised food subject to a statewide ban in California is foie gras, a delicacy made from the engorged liver of a duck or goose.[72] Foie gras has probably existed since the time of the pharaohs, when Jewish slaves first noted that migrating geese tended to gorge themselves prior to their journey.[73] Jews brought their knowledge of foie gras to Europe, where French chefs eventually made the dish a staple part of the country's *haute* cuisine, and exported it around the globe wherever French food became popular.[74] Today, it often appears on French menus in the United States and elsewhere in appetizers, or as an ingredient in dishes like Beef Wellington.[75] Though both duck and goose foie gras are popular in France, duck is the chief variety consumed in the United States.[76] New York State is the chief supplier of foie gras in America, followed by California.[77]

In 2004, California banned foie gras,[78] becoming the first state in the nation to do so.[79] Just as with the egg-crate ban, proponents of the foie gras ban based their opposition to foie gras on animal-rights grounds, claiming that the process of fattening the liver of fowl, which the French call *gavage*, is cruel.[80] The ban, passed by the state legislature and signed into law by Gov. Arnold Schwarzenegger, prohibits the manufacture or sale of foie gras beginning in 2012.[81] The ban will impact Sonoma Artisan Foie Gras, the sole producer in the state;[82] restaurants and grocers who wish to sell foie in California; and consumers there who wish to buy it in an eatery, or to cook and serve it at home.

CALIFORNIA at i, (July 2008), *available at* http://aic.ucdavis.edu/publications/eggs/executivesummaryeggs.pdf.

71 *Id.* at iv.

72 *California Decides to Permanently Pull Foie Gras off the Menu*, HUMANE SOCIETY OF THE U.S., Oct. 8, 2004, http://www.hsus.org/farm/news/ournews/california_bans_foie_gras.html [hereinafter *California Decides*].

73 *See generally* Baylen Linnekin, *The Goose is Nothing: Fighting Chicago's Foie Gras Ban*, DOUBLETHINK, July 8, 2007, http://americasfuture.org/doublethink/2007/07/08/the-goose-is-nothing-fighting-chicago%E2%80%99s-foie-gras-ban/.

74 *See id.*

75 *Id.*

76 *Id.*

77 *Id.*

78 CAL. HEALTH & SAFETY CODE §§ 25980–25984 (West 1999).

79 *See California Decides*, *supra* note 72.

80 *See* Linnekin, *supra* note 73.

81 *See id.*; *California Decides*, *supra* note 72.

82 *See* Sonoma Artisan Foie Gras, Industry Issues, http://www.artisanfoiegras.com/ (last visited Apr. 1, 2010).

The state has also banned agricultural products not on animal-rights grounds but out of fear of an environmental cataclysm caused by genetic engineering. Food producers have turned increasingly to genetically modified food ("GMO"), both crops and animals, in order to help the modified organism combat pests or disease, or to introduce to the food new traits or traits too difficult or costly to introduce through selective breeding alone.[83] However, because of fears by some growers that countries like Japan might reject genetically modified rice from California,[84] the California Rice Certification Act of 2000[85] banned the growing of GMO rice in the state.[86] California also bans genetically modified fish from being introduced into its waters,[87] making it the only state to ban entirely a genetically modified organism.[88] The science behind both bans remains unclear. Referring to the fish ban, California Fish and Game commissioner Sam Schuchat called the ban "a question of values, . . . not a question of science."[89]

While animal rights and environmentalism are key factors behind some California bans, obesity is a driving force behind others, including those pertaining to trans fats, soda, and other foods served in schools. *Trans* fats occur naturally in all ruminant animals but also appear in hydrogenated cooking oils.[90] Critics contend artificial *trans* fats cause obesity, heart disease, and other ills.[91] Los Angeles attempted to ban *trans* fats in 2006, just a week after New York City became the first city in the nation to do so.[92] California's state constitution, however, did not permit the city to enact the ban.[93] Then, in 2008, California

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83 *See, e.g.*, U.S. Dept. Energy, Human Genome Project, What are Genetically Modified (GM) Foods?, http://www.ornl.gov/sci/techresources/Human_Genome/elsi/gmfood.shtml (last visited Apr. 1, 2010).

84 *See* Matt Gnaizda, *California Growers Wary of Genetically Modified Rice*, EPOCH TIMES (Los Angeles), Mar. 13, 2009, http://en.epochtimes.com/news/7-3-13/52763.html.

85 CAL. FOOD & AGRIC. CODE §§ 55003, 55040 (West Supp. 2009).

86 *See* Thomas P. Redick & Donald L. Uchtmann, *Coexistence Through Contracts: Export-Oriented Stewardship in Agricultural Biotechnology vs. California's Precautionary Containment*, 13 DRAKE J. AGRIC. L. 207, 227–28 (2008).

87 *See* Ann Powers, *Farming the Ocean*, 22 NAT. RES. & ENV. 45, 46 (2007).

88 *See* Doug Farquhar & Liz Meyer, *State Authority to Regulate Biotechnology Under the Federal Coordinated Framework*, 12 DRAKE J. AGRIC. L. 439, 459 (2007).

89 Don Thompson, *State Pulls Plug on Glowing Fish*, OAKLAND TRIBUNE, Dec. 4, 2003, at 3.

90 *See, e.g.*, Kim Severson, *Trans Fat Fight Claims Butter as a Victim*, N.Y. TIMES, Mar. 7, 2007, at F1.

91 *See* Press Release, California Office of the Governor, Governor Schwarzenegger Promotes Health and Nutrition by Signing Nation-Leading Trans Fat Bill (July 25, 2008), *available at* http://gov.ca.gov/press-release/10291/ [hereinafter Governor Schwarzenegger Promotes Health and Nutrition].

92 *See* Esther Choi, Comment, Trans *Fat Regulation: A Legislative Remedy for America's Heartache*, 17 S. CAL. INTERDISC. L.J. 507, 534 (2008).

93 *Id.*

became the first state to ban the use of *trans* fats.[94] The ban will come into force in 2010 for restaurants in the state, and will apply to baked goods as of 2011.[95] Critics of *trans* fat bans contend the laws have no impact on obesity, and may instead be counterproductive.[96]

Foods served in public schools are subject to myriad regulations, nowhere more so than in California.[97] In the push to tame childhood obesity, the state was in 2004 the first in the nation to ban soda from being served in grades K-8.[98] On another school front, one pending bill, S.B. 416, would amend the state food and agriculture code in order to banish from school cafeterias any meat or poultry that has been raised with the help of antibiotics.[99] In 2005, also under the guise of combating obesity, California legislators established school nutrition guidelines that went into effect in 2007.[100] These guidelines have had their greatest impact on one of America's most beloved, civic-minded, and benevolent youth-fundraising activities: bake sales. Since there is no way to regulate ingredients used in foods made at home, schools throughout the state have banned cupcakes and brownies and, as one school newspaper put it, turned "birthday cakes into contraband."[101]

B. California's State and Local Regulations

Though less severe than an outright ban, a regulation can have a similar impact on producers and consumers. When a regulation tarnishes a product and makes it substantially less attractive to a consumer, a regulation can function much like a ban.

Los Angeles experimented with a "truth-in-menu" law in the 1970s, in part to combat the problem of area restaurants serving Roquefort dressing made of blue cheese and Maine lobsters that

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94 *See* Patrick McGreevy, *State Bans Trans Fats*, L.A. TIMES, July 26, 2008, at A1.

95 *See* Governor Schwarzenegger Promotes Health and Nutrition, *supra* note 91.

96 *See* Baylen Linnekin, *Solving the Problem of Childhood Obesity*, Reason.com, Mar. 31, 2009, http://reason.com/news/show/132597.html ("[Bans have] either been ineffective or disturbingly counterproductive, [says former USDA nutrition official Brian Wansink, now a Cornell University professor]. All the data we've seen about menu labeling doesn't show a consistent answer at all.") (internal quotations omitted).

97 *See* Fried & Simon, *supra* note 65, at 1520 ("California has been a hotbed of activity over school nutrition for years.").

98 *See id. See also* DAVID HARSANYI, NANNY STATE 51 (2007) (noting California's soda ban has had no impact on obesity rates in the state).

99 *See* S.B. 416, 2009–2010 Sess. (Cal. 2009) (As originally drafted and introduced by Sen. Florez on Feb. 26, 2009).

100 *See* Patricia Leigh Brown, *As School Food Slims Down, Bake Sales are Out*, N.Y. TIMES, Nov. 10, 2008, at A16 ("The old-fashioned school bake sale, once as American as apple pie, is fast becoming obsolete in California.").

101 *See id.*

actually came from Rhode Island.[102] This legitimate effort to combat genuine deceit was a reasonable reaction to a real problem. Three decades later, in 2008, California became the first state to implement a statewide menu-labeling law.[103] The new law is not a "truth-in-menu" law but, rather, requires calorie labeling on restaurant menus for operators that have more than twenty locations in the state.[104] The law did not arise in response to any deception but, instead, came about as a general response to the problem of obesity.[105] The law impacts close to 17,000 restaurants.[106] Critics of the menu-labeling law note that nearly every restaurant required by the law to post calorie information already does so at its website, provides such information on site, or both.[107]

Another restaurant labeling requirement springs from Proposition 65 (Prop 65), the Safe Drinking Water and Toxic Enforcement Act (the "Act"), a statewide ballot initiative passed in 1986 by California voters.[108] Prop 65 requires the state's Office of Environmental Health Hazard Assessment, housed in the California Environmental Protection Agency, to maintain a list of substances that are known by the state to cause cancer or birth defects.[109] The Act does not ban the substances, but instead requires businesses in which any of the substances are present at the minutest levels to post intimidating warning signs in prominent places. No specific manner of warning is required, meaning that warnings "can be given by a variety of means, such as by labeling a consumer product [or] posting signs."[110] In

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102 *See* Mimi Sheraton, *When the Menu Misleads You*, N.Y. TIMES, June 29, 1977, at C1.

103 S.B. 1420, 2007–2008 Sess. (Cal. 2008). *See also* Press Release, Center for Science in the Public Interest, California First State in Nation to Pass Menu Labeling Law (Sept. 30, 2008), *available at* http://www.cspinet.org/new/200809301.html.

104 *See* Press Release, California Office of the Governor, Governor Schwarzenegger Signs Legislation Promoting Nutrition and Healthier Options (Sept. 30, 2008), *available at* http://gov.ca.gov/index.php?/press-release/10682/.

105 *See id.*

106 *See* Patrick McGreevy, *State To Require Calorie Counts*, L.A. TIMES, Sept. 30, 2008, at B1.

107 James Barron, *Restaurants Must Post Calories, Judge Affirms*, N.Y. TIMES, Apr. 17, 2008, at B4.

108 *See* Cal. Office of Environmental Health Hazard Assessment, Proposition 65, http://www.oehha.org/prop65.html (last visited Apr. 1, 2010).

109 *See* CAL. HEALTH & SAFETY CODE § 25249.6, Safe Drinking and Toxic Water Enforcement Act of 1986 (West 2006).

110 *See* Cal. Office of Environmental Health Hazard Assessment, Proposition 65 in Plain Language!, http://oehha.ca.gov/Prop65/background/p65plain.html (last visited Apr. 1, 2010) [hereinafter Proposition 65 in Plain Language!]. *See also* Cal. Office of Environmental Health Hazard Assessment, *Acrylamide and Proposition 65: Questions and Answers*, May 2005, http://www.oehha.org/Prop65/acrylamideqa.html [hereinafter *Acrylamide and Proposition 65*] ("In many cases, the warning appears on a product's label, but warnings can be placed on signs in retail outlets or be provided through any

restaurants and groceries, this often means a sign posted on the establishment's wall. Many individual products sold in groceries also contain warning labels.[111] These postings alert consumers to the presence on that business's premises of a cancer-causing agent, one that could harm pregnant women, or both.[112] The required cancer warning, for example, reads, *WARNING: This product contains a chemical known to the state of California to cause cancer.*[113] While Prop 65 empowers state and local prosecutors to enforce the Act, it also provides a private right of action to any person in the state to bring suit under the Act, and permits the award of money damages for violations.[114]

The Act, as originally envisioned and implemented, did not apply to foods.[115] Over the last decade, though, scientists learned that acrylamide—a chemical known to cause cancer, according to Prop 65—occurs naturally in some foods like olives, and in bread and other starchy foods that are baked or fried.[116] As a result, Prop 65 now requires restaurateurs and grocers who sell healthy foods like bread and olives to warn customers of the presence of cancer-causing substances.

California sued potato chip and french fry sellers over the unwarned presence of acrylamide in their foods.[117] More recently, the Physicians Committee for Responsible Medicine ("PCRM"), a vegetarian-activist group,[118] filed suit under Prop 65

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other form of communication that conveys the warning in a clear and reasonable manner.").

111 *See* Grocery Manufacturers Association, Warning on Product Labels—Proposition 65, http://www.gmabrands.com/publicpolicy/docs/WhitePaper.cfm?docid=271 (last visited Apr. 1, 2010).

112 *Id.*

113 CAL. CODE REGS. tit. 27 § 25601 (2008).

114 CAL. CODE REGS. tit. 11 §§ 3000–3204 (2003).

115 *See, e.g.*, Alexander Volokh, *The Pitfalls of Environmental Right-to-Know*, 2002 UTAH L. REV. 805, 812–13 (2002).

116 *See, e.g.*, FDA Consumer, Final FDA Acrylamide Action Plan, Data, May–June 2004, http://findarticles.com/p/articles/mi_m1370/is_3_38/ai_116734857/

> In April 2002, the Swedish National Food Administration reported finding elevated levels of acrylamide in starch-containing foods cooked at high temperatures, such as potato products and bread . . . . The novel finding in the most recent sampling is the presence of acrylamide in black olives, prune juice, and Postum, a powdered beverage.

117 *See* Lockyer v. Frito-Lay, Case No. BC338956 (L.A. Super. 2005); Bob Egelko, *Lawsuit Over Chips is Settled*, S.F. CHRON., Aug. 2, 2008, at B3. *See also* Press Release, California Office of Attorney General, Attorney General Lockyer Files Lawsuit to Require Consumer Warnings About Cancer-Causing Chemical in Potato Chips and French Fries (Aug. 26, 2005), *available at* http://ag.ca.gov/newsalerts/release.php?id=1207. Several parties to the suit settled, agreeing to pay a fine and reduce acrylamide levels in their food.

118 *See* Center for Consumer Freedom, *7 Things You Didn't Know About PCRM*, Oct. 17, 2008, http://www.consumerfreedom.com/article_detail.cfm/article/168 (describing PCRM as devoted to animal rights and veganism, rather than to medicine).

against McDonald's, Burger King, and others.[119] The suit claimed the chains had failed to warn customers that some of the chains' foods contain heterocyclic amines, a substance that also appears on the Prop 65 warning list and that, like acrylamide in bread, forms naturally in some foods, especially in cooked poultry.[120] At least one defendant, Burger King, settled with PCRM, agreeing to add a Prop 65 warning label to its grilled chicken products.[121]

Prop 65 also applies to alcohol beverages. It mandates that, in addition to cautioning customers not to drink in excess or drive drunk, sellers of alcohol beverages label their products with warnings alerting the consumer that the products can cause cancer and harm developing fetuses.[122] California regulators have also targeted the state's important alcohol beverage industry in a variety of other ways. In 2002, winemakers were forced to adopt more "sustainable," costly practices in order to stave off threatened environmental regulations.[123] Then, in 2008, facing a record budget deficit, California proposed a massive 640 percent tax increase on wine.[124] Under the proposal, the state's wine excise tax would rise from the current $0.20 per gallon to $1.48 per gallon.[125] A report prepared by Stonebridge Research for the Wine Institute, a California wine industry advocacy group, estimates the tax increase could cost more than 11,000 wine-industry jobs in the state.[126]

Also in 2008, California's State Board of Equalization opted to re-categorize flavored beers, known by critics as "alcopops," as

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119 *See* Andrew Grossman, *California's Prop 65: Protecting us from the Evils of Cooked Chicken*, OVERLAWYERED, Dec. 26, 2006, http://overlawyered.com/2006/12/californias-prop-65-protecting-us-from-the-evils-of-cooked-chicken/.

120 *See* Press Release, Physicians Committee for Responsible Medicine, Fast-Food Grilled Chicken Contains Dangerous Carcinogen, Laboratory Tests Reveal (Sept. 28, 2006), *available at* http://www.pcrm.org/news/release060928.html.

121 *See* Physicians Committee for Responsible Medicine, *Burger King Alerts Customers to Cancer-Causing Chemical in Grilled Chicken*, PCRM ONLINE NEWSLETTER, Dec. 2008, http://www.pcrm.org/newsletter/dec08/burger_king.html.

122 *See, e.g.*, HARSANYI, *supra* note 98, at 146.

123 *See California Wine Sector Going Green to Avert Regulation*, GreenBiz.com, Oct. 24, 2002, http://www.greenbiz.com/news/2002/10/24/california-wine-sector-going-green-avert-regulation (noting the California wine industry adopted over 300 pages of voluntary environmental standards "in a bid to head off potentially costly state regulation").

124 *See* Wine Institute, 640% Wine Excise Tax Increase Will Eliminate Jobs, Reduce Sales & Harm Industry, http://wineinstitute.org/files/KeyPointsonProposedTax Increase.pdf.

125 *Id.*

126 *See* STONEBRIDGE RESEARCH, ECONOMIC IMPACT OF PROPOSED EXCISE TAX SURCHARGE ON CALIFORNIA WINE 4 (2009), *available at* http://www.wineinstitute.org/files/StonebridgeReport.pdf.

distilled spirits.[127] The Board couched the reclassification in language indicating it came to its decision in order to "send a signal to youth that alcopops are hard liquor."[128] The change, though, like the proposed wine excise tax increase, is really little more than a spectacular 1,600 percent tax increase.[129] Diageo-Guinness USA, the American arm of the international beverage giant, has filed suit, claiming the Board of Equalization overstepped its authority when it reclassified flavored beer.[130]

Another beverage subject to current scrutiny in California is unpasteurized (raw) milk. Raw milk products are increasingly popular in California and, indeed, across the United States.[131] Raw milk sales often come at the expense of dairy products sold by larger, pasteurized dairy operations.[132] One dairy in the state estimates that 100,000 Californians drink raw milk every week.[133] Proponents believe raw milk products taste better and contain beneficial bacteria that are killed during the pasteurization process.[134]

Still, though it is legal to buy and sell raw milk in California, the regulatory tide against raw milk is growing in the state. The state cracked down on bacteria levels in raw milk in 2007.[135] The crackdown was launched in part in response to the illness of four children who drank raw milk from California's largest raw milk producer, Organic Pastures Dairy.[136] Though the source of the

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127 *See* Press Release, California State Board of Equalization, Judy Chu Announces Flavored Malt Beverages to be Taxed as Distilled Spirits (June 11, 2008), *available at* http://www.boe.ca.gov/news/2008/37-08-C.pdf.

128 *Id.*

129 *See* Press Release, Diageo, Tax Increase on Flavored Beer Adopted Today in California: Flavored Malt Beverage Coalition Will Pursue Litigation to Challenge the Regulation (June 19, 2008), *available at* http://www.diageo.com/en-row/NewsAndMedia/PressReleases/2008/Tax+Increase+On+Flavored+Beer+Adopted+Today+in+California.htm.

130 *See* Diageo-Guinness USA, Inc. v. California State Bd. Equalization, Case No. 34-2008-00013031 (Sacramento County Super. Ct. 2008). *See also Diageo Challenges California Beer Tax Change*, Forbes.com, June 17, 2008, http://www.forbes.com/feeds/afx/2008/06/17/afx5122509.html.

131 *See* Carol Reiter, *Cheers to Raw Milk is What Devoted Fans Say*, MERCED SUN-STAR, Jan. 16, 2009, at A1.

132 *See* U.S.D.A., CALIFORNIA AGRICULTURAL STATISTICS: 2007 CROP YEAR, *supra* note 1, at 65 (showing that a large number of California dairies closed in 2007).

133 Wendy Cole, *Got Raw Milk? Be Very Quiet*, TIME, Mar. 13, 2007, *available at* http://www.time.com/time/health/article/0,8599,1598525,00.html.

134 *See, e.g.*, Elena Conis, *The Raw Milk Factor*, L.A. TIMES, Mar. 2, 2009, at F3.

135 *See* Carol Ness, Tough New Standards for State's Raw Milk, S.F. CHRON., Oct. 26, 2007, at A1.

136 *See* David E. Gumpert, *Getting a Raw Deal?*, BUSINESSWEEK, Sept. 28, 2006, http://www.businessweek.com/smallbiz/content/sep2006/sb20060928_865207.htm.

illnesses was never traced to raw milk,[137] the state began enforcing the 2007 regulations by employing undercover sting operations against various dairy operations.[138] Then, in 2008, Governor Schwarzenegger vetoed a bill that would have established separate bacteria content standards for raw milk, which would have allowed producers of raw milk to better compete with competitors who sell pasteurized milk.[139]

III. THE "CALIFORNIA EFFECT" AND AMERICA'S FOOD FUTURE

A. California's Food Crackdown: Why Care?

California is banning and cracking down on food. But why should the nearly eighty-eight percent of Americans who live outside the state care what California regulates *in California*? What makes California's food regulations more important to a resident of Peoria, Illinois than, say, Salem, Oregon's proposal to ban at-home cooks from raising chickens in residential areas?[140] Why not focus on this chicken ban or on any of the thousands of food regulations and bans in effect or under consideration around the country in places other than California?[141]

From a culinary perspective, every American should care about California food regulations because the state grows and raises the bulk of our food. It is the capital of "new American cuisine," which was borne of "California cuisine."[142] Much of what we eat and how we eat it are of California. Consider that it can be difficult today to eat a meal in America free of California ingredients or culinary inspiration. Your lobster may come from Maine, but in all likelihood your butter and your salad, your asparagus and your Chardonnay, and your after-dinner ice cream and strawberries come from California. What's more, pairing lobster with grilled asparagus and wine—the inspiration for your dish—probably also came from California.

From a regulatory perspective, every American should care about California's propensity to ban and restrict food because the

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137 *See* John Hall, *Murrieta Family Suing in E. coli Case*, NORTH COUNTY TIMES, Mar. 2, 2008 (declaring that no "pathogen was . . . found in any of the manure tests of [Organic Pastures'] cows or in any tests of packaged dairy products from his business").

138 Adam Foxman, *Raw Milk Issue a Mix-Up, Says Dairy Owner*, VENTURA COUNTY STAR, Jan. 11, 2009, at B1.

139 *See* Conis, *supra* note 134; S.B. 201, 2007–2008 Sess. (Cal. 2008).

140 *See* Thelma Guerrero-Huston, *Salem's Chicken Ban Faces Debate*, STATESMAN JOURNAL, Mar. 2, 2009, at A1.

141 Whatever the cause, the "California effect" may have as much to do with smaller-state envy as it has to do with California's wealth and power. *See infra* Part III.B.

142 *See supra* Part I.

state is the nation's regulatory bellwether,[143] the genesis of many "tipping point" regulatory epidemics.[144] California is where regulations go from seed to seedling to weed, and from whence they subsequently propagate and pervade America.

B. The "California Effect" Generally

In 1995, Professor David Vogel of Berkeley's Haas School of Business described the spread of strict regulations from larger, more influential states to other states as the "California effect."[145] The term "refers to the critical role of powerful and wealthy 'green' political jurisdictions in promoting a regulatory 'race to the top' among their trading partners."[146] The California effect is a more expansive concept than is federalism, because the effect concerns not just the notion of fifty experimental laboratories but "the ratcheting upward of regulatory standards in competing political jurisdictions."[147] Vogel posits that in any given free market economy, as between and among states in America, the whims of "wealthy, powerful states" like California will have an outsized influence that impacts not just regulations within the home state but also in others who trade with that state.[148] Focusing much of his research on environmental regulations, Vogel notes that these factors have meant that California's strict regulations have "helped drive many American environmental regulations upward" throughout the United States.[149]

Vogel uses the example of California's strict automobile emissions standards to illustrate this effect. In 1970, the federal government adopted vehicle emissions standards, and permitted California alone to set stricter standards.[150] The state capitalized on the exemption.[151] When, in 1990, the federal government chose to implement stricter emissions standards, it adopted California's regulations, and permitted the state to adopt still-stricter standards.[152] California again adopted even more

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143 *See* Fried & Simon, *supra* note 65, at 1520 (calling California "a policy bellwether").

144 *See* MALCOLM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE 7 (2000) (likening the birth of new trends and phenomena to "epidemics").

145 DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY 5–8, 259 (1995).

146 *Id.* at 6.

147 *Id.* at 259 ("The term 'California effect' is meant to connote a much broader phenomenon than the impact of American federalism on federal and state regulatory standards.").

148 *Id.* at 5, 7.

149 *Id.* at 6.

150 *Id.* at 259.

151 *Id.*

152 *Id.*

stringent requirements, which a dozen states and the District of Columbia in turn adopted as their own.[153]

In this example, California's decisions influenced both federal and other states' laws.[154] More important, California's stricter regulations influenced automakers, who had to choose whether to opt out of the California market (and later, thirteen others) or to "preserve valuable market access" by building cars that met the stricter standards.[155] Though automakers and California both sued each other over the rules,[156] no automaker chose to stop selling its vehicles in the state.

Outside of vehicle emissions, instances of the "California effect" abound. Perhaps the best example is California's leadership in the spread of smoking bans across America. The city of San Luis Obispo, California passed the world's first public anti-smoking ordinance in 1990.[157] Four years later, the state became the first in the nation to ban indoor smoking in public areas.[158] Today, thirty-one other states and the District of Columbia,[159] along with more than 3,000 municipalities around the country, have nonsmoking laws modeled after California's.[160]

C. The California Effect and Food

While regulations concerning smoking are important to certain constituencies, California regulations concerning food and agriculture impact every American.[161] The California effect,

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153 *Id.*

154 *See* Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE L. & POL'Y REV. 67, 82 (1996).

155 *See* David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277, 1292 (2008).

156 Cent. Valley Chrysler-Jeep, Inc. v. Goldstene, 529 F. Supp. 2d 1151 (E.D. Cal. 2007), *appeal docketed*, No. 08-17378 & 08-17380 (9th Cir. 2008). *Compare* Bob Egelko, *State Wins in U.S. Court on Tailpipe Emissions*, S.F. CHRON., Dec. 13, 2007, at A1 (outlining one industry lawsuit against the state), *with* Mark Lifsher, *California Sues Over Vehicle Emissions*, L.A. TIMES, Sept. 21, 2006, at C1 (outlining a California lawsuit against the auto industry that seeks to reduce tailpipe emissions).

157 Miles Corwin, *Smokers Snuffed: San Luis Obispo Will Implement Nation's Toughest Tobacco Law Today*, L.A. TIMES, Aug. 2, 1990, at A3. *Cf.* Robert Reinhold, *In a Smoking Ban, Some See Ashes*, N.Y. TIMES, Aug. 15, 1990, at A22 (noting that two California cities and one in Colorado had just months later followed San Luis Obispo).

158 *See* American Nonsmokers' Rights Foundation, *Summary of 100% Smokefree State Laws and Population Protected by 100% U.S. Smokefree Laws*, Jan. 5, 2010, http://www.no-smoke.org/pdf/SummaryUSPopList.pdf.

159 *See id.*

160 *See* American Nonsmokers' Rights Foundation, *Overview List—How Many Smokefree Laws?*, Jan. 5, 2010, http://www.no-smoke.org/pdf/mediaordlist.pdf. To explore the spread of smoking bans, see generally Patrick Kabat, Note, *"Till Naught but Ash is Left to See": Statewide Smoking Bans, Ballot Initiatives, and the Public Sphere*, 9 YALE J. HEALTH POL'Y L. & ETHICS 128 (2009).

161 *See supra* Parts I–III.

along with California's place as "a national trendsetter in all matters edible,"[162] increasingly means that the state's burdensome food regulations are spreading across the United States. This article now posits several categories of California effects pertaining to food regulations.

1. California Regulations Passed & Considered in Other States: Foie Gras

When California banned foie gras in 2004, it was the first state to do so. Chicago soon followed suit.[163] New York State, America's largest producer of foie gras, briefly considered a ban,[164] as did New Jersey, home of D'Artagnan, America's largest seller of foie gras.[165] Other states also considered bans,[166] and at least one municipal government enacted a formal ban.[167] One activist group has petitioned the U.S. Department of Agriculture ("USDA") in hopes of forcing a federal ban.[168] A New York ban, New Jersey ban, or federal ban would effectively cripple foie gras production, sales, and consumption in America.

2. California Regulations Adopted by the Federal Government: Organic Certification

California's experience with regulations concerning organic certification closely parallels the story of vehicle emissions standards. California Certified Organic Farmers ("CCOF"), the first organic certifying body in America, formed in 1973.[169] By the end of 1974, similar bodies had emerged in eleven other states, including Oregon.[170]

California passed the nation's first true organic certification law in 1979.[171] Though Oregon's law preceded that of

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162 *See* Steinhauer, *supra* note 56.

163 Chicago overturned its ban in 2008. *See* BBC NEWS, *Chicago Overturns Foie Gras Ban*, May 15, 2008, http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/7403409.stm.

164 Posting of John Del Signore to Gothamist http://gothamist.com/2008/06/11/councilman_urges_albany_to_ban_forc.php (June 11, 2008, 16:06 EST).

165 *See* Gordon Anderson, *Crisis in the Foie Gras Biz*, CNN.com, June 11, 2004, http://money.cnn.com/2004/06/10/pf/goodlife/foie_gras/index.htm.

166 Lisa Rein, *Panel Airs Proposed Foie Gras Ban*, WASH. POST, Mar. 5, 2008, at B5.

167 *See* WJZ.com, *Takoma Park Bans Foie Gras*, July 19, 2008, http://wjz.com/pets/duck.foie.gras.2.775053.html.

168 *See* Press Release, Humane Society of the United States, Animal Protection Groups File Legal Petition Asking USDA to Declare Foie Gras Unfit for Human Consumption (Nov. 28, 2007), *available at* http://www.hsus.org/press_and_publications/press_releases/usdafoiegras112807.html.

169 *See* CCOF, History of CCOF, http://www.ccof.org/history_mr.php#sec1 (last visited Apr. 1, 2010); Press Release, CCOF, CCOF Achieves Largest U.S. Organic Certifier Status (Jan. 15, 2006), *available at* http://www.ccof.org/pr0106.php [hereinafter Press Release, CCOF].

170 *See* GUTHMAN, *supra* note 43, at 113.

171 *Id.*

California,[172] Oregon's law was chiefly an anti-fraud measure[173] intended only to classify which producers could advertise their products as "organic."[174] California regulations built upon Oregon's and in addition defined the term "synthetic," contained public disclosure provisions, and required specific organic labeling language.[175] In 1982, California amended the 1979 regulations, making the state the first to define the term "organic."[176] In 1990, California again amended its law,[177] permitting public agencies or private certifiers like CCOF, today the nation's largest such body,[178] to inspect growers to ensure compliance with the regulations.

In 1990, Congress enacted the first federal organic standards.[179] The California Organic Food Act of 1979, which was based on CCOF's standards, played an important role in the creation of these national standards.[180] Though the rule was

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172 *See* Kyle W. Lathrop, Note, *Pre-Empting Apples with Oranges: Federal Regulation of Organic Food Labeling*, 16 J. CORP. L. 885, 891 (1991).

173 *See id. See also* Kenneth C. Amaditz, Comment, *The Organic Foods Production Act of 1990 and its Impending Regulations: A Big Zero for Organic Food?*, 52 FOOD & DRUG L.J. 537, 539 (1997).

174 Sunbow Farm, A History of Oregon Tilth, http://www.sunbowfarm.org/tilth.php (last visited Apr. 1, 2010).

175 *See* Gordon G. Bones, *State and Federal Organic Food Certification Laws: Coming of Age?*, 68 N.D. L. REV. 405, 410 & n.26 (1992).

176 *See, e.g.*, Luanne Lohr & Timothy A. Park, *Improving Extension Effectiveness for Organic Clients: Current Status and Future Directions*, 28 J. AGRIC. & RES. ECON. 634, 645 (2003).

177 CAL. HEALTH & SAFETY CODE §§ 110810–110958 (repealed 2003).

178 *See* Press Release, CCOF, *supra* note 169.

179 *See* 7 U.S.C. §§ 6501–6523 (2006).

180 E-mail from Jane Baker, Director of Sales and Marketing, California Certified Organic Farmers (CCOF), (Mar. 10, 2009, 07:35 PST) (on file with author). *See also* Bones, *supra* note 175, at n.10 ("The most active state organization is the California Certified Organic Farmers (CCOF) . . . [which was] influential in the passage of state and federal organic food production legislation."); GUTHMAN, *supra* note 43, at 115 (asserting the federal government's 1990 organics law was "largely modeled after the California law").

The California effect also holds true for the state's administrative rules, which influence federal agency rulemaking as relates to food. For example, the USDA's Agricultural Marketing Service (AMS) has proposed and is currently considering a marketing agreement, the National Leafy Greens Marketing Agreement, which the agency says would help food handlers "reduc[e] the risk of pathogenic contamination during the production and handling of leafy greens." Handling Regulations for Leafy Greens Under the Agricultural Marketing Agreement Act of 1937, 72 Fed. Reg. 56678 (Oct. 4, 2007) (to be codified at 7 C.F.R. pt. 962). The USDA specified in its advanced notice of proposed rulemaking that:

> [M]embers of the California [leafy green vegetables] industry initiated the establishment of a State marketing agreement for handlers of leafy greens (http://www.caleafygreens.ca.gov/docs/resources.asp) . . . . Although AMS has not received an official proposal, members of the leafy greens industry have expressed interest in the establishment of similar standards through a Federal marketing program. Industry discussions have focused on the need for a program with national scope. In response, AMS is considering the

based in part on California's standards, organic activists in the state and elsewhere criticized the final rule as watered-down and overinclusive.[181] These same critics had long lamented what had become of California's own organic experience. The state's organic farms today are not, for the most part, mom and pop operations. Instead, they are now mostly large, profitable corporate-owned farms that are in the organic business to (1) turn a profit and (2) hedge their bets—maintaining organic crops along with their conventional crops in large part out of fear that "the state might ban certain key pesticides."[182]

3. California Regulations Forcing Uniformity Nationwide: The "Pennsylvania Bread" Effect

The Pennsylvania food code[183] requires all bread producers within and without the state who sell bread in Pennsylvania to register with the state's agricultural department, and to print a registration mark to that effect on all bread packaging.[184] Because of this, consumers from Alabama to Wyoming are familiar with the language "Reg. Penna. Dept. Agr." on bread packaging,[185] even if these consumers have no idea what the term means.[186] The reason this terminology appears on multi-state packaging, even though only Pennsylvania law requires the language, is that regional and national bakers find it less costly and easier to print the language on all packaging than it would be to "make up a separate package for Pennsylvanians."[187]

> development of a marketing agreement . . . to meet the needs of the produce industry across the fifty States and the District of Columbia.

Id. at 56680. As with the USDA's eventual organic rules, many small producers, organic farmers, and their supporters oppose the leafy-greens measure. *See, e.g.*, Oregon Tilth, National Leafy Greens Marketing Agreement, http://tilth.org/news/national-leafy-greens-marketing-agreement (last visited Apr. 1, 2010) (describing the group's own efforts "in concert with a number of other conservation and organic farming groups . . . in opposition of the Act, which OTCO believes would have serious detrimental consequences for organic growers and the environment, while [doing] little to decrease the incidence of food-borne illness").

181 *See, e.g.*, Claire S. Carroll, *What Does "Organic" Mean Now? Chickens and Wild Fish are Undermining the Organic Foods Production Act of 1990*, 14 SAN JOAQUIN AGRIC. L. REV. 117, 126 (2004).

182 *See* MICHAEL POLLAN, THE OMNIVORE'S DILEMMA 174 (2006).

183 7 PA. CODE § 46.3 (2004).

184 *See* Cecil Adams, *Why is "Reg. Dept. Penna. Agr." On So Many Labels?*, THE STRAIGHT DOPE, http://www.straightdope.com/columns/read/306/why-is-reg-dept-penna-agr-on-so-many-labels (last visited Apr. 1, 2010).

185 *See* Lathrop, *supra* note 172, at 904 (describing briefly the meaning of the term).

186 *See* Adams, *supra* note 180.

187 *Id.*

What Pennsylvania's bread registration is to bread packaging, California's *trans* fat ban[188] is to the contents of many restaurant and packaged foods. The ban applies to national companies, most of whose menu selections and grocery items, respectively, are uniform throughout the nation. These restaurants and food manufacturers will have to decide if it would be—as in the Pennsylvania example—cheaper and easier to cut *trans* fats from their recipes nationwide, rather than having a California version of their product and another version of that same product for the rest of the country. Because of the California effect, that decision will be easier than they might have hoped; states,[189] counties,[190] and cities[191] around the country have followed California's lead and introduced measures to ban *trans* fats.

4. California Regulations Forcing Parties to Seek Preemptive, Uniform Federal Regulations: Menu Labeling

California is the first state to require restaurants to post calorie counts alongside all menu items.[192] The law applies to restaurants with twenty or more locations in the state.[193]

Scarcely had a San Francisco menu-labeling law[194] taken effect when California enacted its own statewide requirements.[195] One of the biggest supporters of the regulation, perhaps surprisingly, was the California Restaurant Association (CRA), the state industry lobbying association.[196] In supporting a uniform state requirement, though, the CRA admitted that one

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188 *See, e.g.*, *California Bans Trans Fats in Restaurants*, MSNBC.com, July 25, 2008, http://www.msnbc.msn.com/id/25853307/.

189 *See, e.g.*, Darren Meritz, *Bill Would Ban Trans Fat Use in Restaurants*, EL PASO TIMES, Mar. 21, 2009, at 5B (describing Texas's plans to ban *trans* fats).

190 *See, e.g.*, Miranda S. Spivack, *Montgomery Bans Trans Fats in Restaurants, Markets*, WASH. POST, May 16, 2007, at A1.

191 *See, e.g.*, Martin Finucane, *Boston Trans Fat Ban Goes Into Effect for Baked Goods*, BOSTON GLOBE, Mar. 12, 2009, http://www.boston.com/news/local/breaking_news/2009/03/boston_trans_fa.html.

192 *See* Patrick McGreevy, *State to Require Calorie Counts*, L.A. TIMES, Sept. 30, 2008, at B1.

193 *Id.*

194 *See, San Francisco Moves Forward on Menu Labeling*, NATION'S RESTAURANT NEWS, Mar. 12, 2008, http://www.nrn.com/breakingNews.aspx?id=351510&menu_id=1368.

195 *See, e.g.*, Press Release, Center for Science in the Public Interest, California First State in Nation to Pass Menu Labeling Law (Sept. 30, 2008), *available at* http://www.cspinet.org/new/200809301.html.

196 *See* Press Release, California Restaurant Association, Governor Signs Menu Labeling Legislation Creating Statewide Standards (Sept. 30, 2008), *available at* http://www.calrest.org/go/cra/news-events/newsroom/governor-signs-menu-labeling-legislation-creating-statewide-standards/.

preemptive state standard "was more reasonable for restaurants and their customers than a patchwork of differing local mandates."[197]

But the California law does not solve the problem of differing local and state regulations across the nation; complying with Seattle's menu-labeling requirements[198] does not necessarily mean compliance in Philadelphia.[199] Thus, following the CRA's lead, the National Restaurant Association is supporting the federal LEAN Act, which would mandate nationwide menu-labeling standards.[200]

IV. WHAT TO MAKE OF CALIFORNIA'S UNPALATABLE FOOD CRACKDOWN: CAUSES AND EFFECTS

A. *Why* is California Cracking Down on Food?

There is ample evidence California is cracking down on food at the state and local level. What is not so clear is *why* the state is doing so.

It would be easy enough to blame the state's food-regulatory climate on one person: Alice Waters. While Waters may be best known for creating the California cuisine movement and helping launch new American food, she is also a "Berkeley radical"[201] who is well known among both her peers and food-regulation experts for "accept[ing] the legitimacy of regulatory [food] bans"[202] and favoring government meddling for the purpose of "legislating good eating habits."[203] Indeed, it can be difficult to distinguish between Waters's regulatory fervor and her passion for food. Her oft-repeated claim that "eating is a political act"[204] has become intertwined with the California cuisine movement and has been

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197 *Id.*

198 *See* News report by Tonya Mosely, *Nutrition Menu Labeling Starts at King County Chain Restaurants*, King5.com, Dec 31, 2008, http://www.king5.com/archive/60348702.html.

199 *See* Press Release, Center for Science in the Public Interest, Philadelphia Passes Strongest Nutrition Labeling Requirements for Chain Restaurant Menus (Nov. 6, 2008), *available at* http://cspinet.org/new/200811061.html.

200 *See* Press Release, National Restaurant Association, National Restaurant Association Applauds LEAN Act Introduction in U.S. House and Senate (Mar. 11, 2009), *available at* http://www.restaurant.org/pressroom/pressrelease.cfm?ID=1756.

201 HARVEY LEVENSTEIN, PARADOX OF PLENTY: A SOCIAL HISTORY OF EATING IN MODERN AMERICA 180 (2003).

202 Posting of Don Boudreaux to Cafe Hayek, http://www.cafehayek.com/hayek/2004/05/whats_good_for_.html (May 15, 2004).

203 Interview by Jamie R. Liu with Anthony Bourdain, *in* Washington D.C. (Jan. 19, 2009), *available at* http://dcist.com/2009/01/chewing_the_fat_anthony_bourdain.php (discussing Bourdain's thoughts on Waters).

204 *See, e.g.*, Eric Asimov, *Proof of What They Say About Small Packages*, N.Y. TIMES, July 30, 2003.

incorporated into movements seeking "sustainable" food and "food democracy."[205] As a result, Waters and her many acolytes in the state that provides so much bounty and inspiration to the rest of the country seem intent on limiting America's access to anything edible that does not walk lockstep with the movement's rigid ideals.

Critics blast her movement, noting that not everyone can afford to eat like Waters,[206] and disparage Waters herself, noting "her efforts [have] helped change the eating habits of the rich, not the poor."[207] Anthony Bourdain, a popular anti-regulatory chef, author, and television host, has been known to use expletives to describe Waters.[208]

In addition to owning restaurants, Waters has put her beliefs into action, as a central figure for the nonprofit Chefs Collaborative, formed in 1993.[209] The group's manifesto demands that government ensure food originates in a place "with unpolluted air, land, and water, environmentally sustainable farming and fishing, and humane animal husbandry"—a statement that indicates the need for drastic and expensive measures taken by at least a half-dozen federal agencies.[210]

Still, it would be unfair to peg (or credit) Waters as the sole force behind California's propensity to ban or curtail certain foods or agricultural practices. A slew of other factors likely also contribute to the leftist, pro-regulatory food climate in California.

From 1930 to 1960, the majority of immigrants to California from other American states identified as New Deal Democrats,

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205 *See generally* Neil Hamilton, *Essay—Food Democracy and the Future of American Values*, 9 DRAKE J. AGRIC. L. 9 (2004). Food democracy, though the author does not proffer a succinct definition of the term, concerns "building a more satisfying food system by offering alternatives to the 'cheap' foods that have come to define our diet[;]" incorporating the "values" of small producers; opposing fast food and agribusiness; the right to be an informed consumer; "the rights of farmers, chefs, and marketers to produce and market foods reflecting their diversity and creative potential; and our nation's ability to have a food system that promotes good health, confidence, understanding, and enjoyment as well as economic opportunity." *Id.* at 12–13.

206 *See, e.g.*, Andrew Martin, *Is a Food Revolution Now in Season?*, N.Y. TIMES, Mar. 22, 2009, at SundayBusiness 1 (quoting a food marketing professor who says that organic food can be too expensive for some, and that canned and frozen foods are healthy and affordable).

207 *See* LEVENSTEIN, *supra* note 201, at 180.

208 *Cf.* Liu, *supra* note 203. Others find Waters' breathy manner of speech and slightly affected accent—Waters hails from New Jersey—to be equally irritating. *See* Interview by Charlie Rose with Alice Waters (Feb. 6, 2008), *available at* http://www.charlierose.com/view/interview/8925.

209 Chefs Collaborative, About Chefs Collaborative, http://chefscollaborative.org/about/ (last visited Apr. 1, 2010).

210 *Id.*

and eventually outnumbered the state's "old Republicans."[211] Those immigrating to California from elsewhere in the United States since 1960, like the New Deal immigrants before them, identified with the political left. These new immigrants, often "hippies," tended to migrate to California not because of the state's economic promise but to escape "restrictive moral codes" elsewhere in the country.[212] But while these immigrants opposed the moral restraints imposed upon them in their hometowns in the American South, the Midwest, and on the East Coast, many soon saw fit to codify their own moral codes in their adopted home of California.[213]

Several factors contributed to this shift. During the 1960s, after the release of Rachel Carson's apocalyptic *Silent Spring*,[214] the issue of environmentalism ballooned in importance. California was an early adopter of so-called "green" regulations, in large part because Californians sought to "protect . . . the resources . . . of the nation's loveliest landscapes."[215] In fact, California has been the nation's leading environmental regulator since at least the 1970s.[216] This rising tide of environmentalism in California coincided with an increasing interest in vegetarianism,[217] a movement also centered in the state,[218] and in animal rights.[219] The free-speech movement, the first large-scale example of student activism, was launched in Berkeley in the 1960s—a fact Alice Waters herself notes in tracing her inspiration for California cuisine.[220] Farm workers also organized during this period to fight perceived exploitation in California. Their efforts, led by organizer Cesar Chavez, formed what would become the United Farm Workers of America, the first farm workers' union in the country.[221]

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211 *See* JAMES G. GIMPEL & JASON E. SCHUKNECHT, PATCHWORK NATION 84 (2004).

212 *Id.* at 61.

213 *Id.* There is nothing particularly novel about an immigrant population gaining power and, in so doing, transforming from oppressed to oppressor. In the 1600s, Puritans escaped persecution in England by immigrating to America. Once in this country, they gained power and proceeded to persecute each other and those unlike them. U.S. STATE DEPT., OUTLINE OF U.S. HISTORY 13 (2005).

214 *See generally* RACHEL CARSON, SILENT SPRING (First Mariner Books 2002) (1962) (launching what became known as the "environmental movement" in a book that details alleged harms caused by manmade pesticides).

215 Joel Kotkin, *Death of the Dream*, NEWSWEEK, Mar. 2, 2009, at 36, 38.

216 *See, e.g.*, VOGEL, *supra* note 145 at 6.

217 *See* KAREN IACOBBO & MICHAEL IACOBBO, VEGETARIAN AMERICA 169–94 (2004) (describing the vegetarian movement in America in their chapter, "Peace, Love, and Vegetarianism: The Counterculture of the 1960s and 1970s").

218 *See id.* at 170–73.

219 *Id.* at 172.

220 *See* Interview by Charlie Rose, *supra* note 208.

221 *See* National Chavez Center, About Cesar E. Chavez, http://www.nationalchavezcenter.org/main.html (last visited Apr. 1, 2010).

As they aged, many of the post-New Deal leftists who immigrated to the state—and subscribed to these movements and supported their attendant regulatory requirements—found influential work in academia and the media, as well as in Congress and state government.[222] California's crackdown on food and agriculture is thus therefore best represented as the a confluence of pro-regulatory leftism, including environmentalism, the labor-rights movement, and the animal-rights movement; and the gradual transition into power of many former 1960s outsiders—along with reaction to the more recent problem of obesity.

Perhaps the archetypal example of this phenomenon—the movement crusader turned establishment regulator—is a graying radical named Edmund G. "Jerry" Brown.[223] Mr. Brown served as governor of California and mayor of Oakland, unsuccessfully sought the presidency three times, and in his current capacity as California attorney general leads the state's Prop 65 prosecutions.[224] Another stellar example of the phenomenon is Tom Hayden, an ex-husband of actress Jane Fonda. Hayden, who was a founding member of the 1960s radical anti-establishment student group Students for a Democratic Society, went on to spend a decade in the California state legislature where he championed animal rights and environmental causes.[225]

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222 LEVENSTEIN, *supra* note 201, at 179.

223 *See* Kevan Blanche, *The Red Side of Brown*, THE WEEKLY STANDARD, Oct. 27, 2006, http://www.weeklystandard.com/Content/Public/Articles/000/000/012/858gbeyz.asp (claiming that Brown possesses an affinity for radical communist murderers like Che Guevara and Fidel Castro).

224 *See* Office of the Attorney General, Edmund G. Brown, Jr., http://ag.ca.gov/ag/brown.php (last visited Apr. 1, 2010); Lou Cannon, *Mayor's 'Magic' Turns City's Luck Around; Ex-Governor Brown and Oakland, Calif., Are Reincarnated as a Team Hard to Beat*, THE WASHINGTON POST, February 17, 1999, at A6. Brown's biography supports the archetype claim, as it notes that during his time as governor he

> established the first agricultural labor relations law in the country, enacted collective bargaining for teachers and other public employees, started the California Conservation Corp (CCC), signed into permanent law the California Coastal Protection Act, earned federal protection of Northern California wild and scenic rivers, brought about the country's first building and appliance energy efficiency standards and made California the leader in solar and alternative energy.

Id.

225 *See, e.g.*, Biography, Tom Hayden, http://www.tomhayden.com/biography/ (last visited Apr. 1, 2010).

B. California Regulations May Not be Achieving Stated Goals and also Raise Concerns About Quality, Quantity, Freedom, and Prosperity

There are several arguments against California's "blunt-instrument approach"[226] to food and agriculture regulation. California's crackdown threatens the quality and quantity of food available in California and across the United States, impedes culinary and agricultural advancement, encumbers economic freedom, hinders prosperity, and raises constitutional concerns.

California's assault on food and agriculture has a negative impact on what and how we eat. The crackdown is bad for the state's farmers, entrepreneurs, and consumers. The state's burgeoning attack on raw milk harms farmers and consumers. This crackdown comes at a time when raw milk is increasing in popularity in the state and across the country.[227] Prop 65, meanwhile, harms businesses that sell a host of healthy foods like chicken, olives, and bread, forcing them to warn consumers about the infinitesimal danger of eating otherwise healthful foods.[228] Even acrylamide levels in less healthy foods are unlikely to cause cancer. One group estimates that, in order to contract cancer from consuming acrylamide, "a person of average weight would have to eat over 62 pounds of chips or 182 pounds of fries, every day, for his or her entire life."[229] In fact, virtually anything we eat can conceivably cause cancer, including fruits and vegetables,[230] but the positive health effects of many foods far outweigh any perceived harm eating these foods might cause.

In the case of foie gras, California's ban could have a far-reaching and dramatic impact on what Americans eat that extends well beyond the targeted food. The Humane Society of the United States, an animal-rights group involved in securing passage of the California ban, recently argued not just that foie gras is the result of the allegedly cruel process of *gavage* but also that it is a "diseased" product that cannot legally be sold in the

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226 *See* Douglas Glen Whitman & Mario J. Rizzo, 2 N.Y.U. J. L. & LIBERTY, 411, 443 (2007).

227 Sharon Kiley Mack, *Popularity of Raw Milk Growing; Product Commands $4.50–$10 a Gallon*, BANGOR DAILY NEWS (MAINE), Aug. 1, 2008, at A1.

228 Prop 65 requires a food seller to post a warning unless it can demonstrate a food containing acrylamide would cause "not more than one additional cancer case (beyond what would otherwise occur) in a population of 100,000 people consuming the food over a lifetime." Proposition 65 in Plain Language!, *supra* note 110.

229 Center for Consumer Freedom, *The Dose Makes the Poison*, May 15, 2006, http://www.consumerfreedom.com/article_detail.cfm/article/176.

230 *See* Robin McKie, *Research Links Cancer to Fruit and Vegetables*, THE OBSERVER, Feb. 17, 2002, at 9 (warning that fruits and vegetables that are treated with fertilizer may cause cancer).

United States.[231] Their argument concerns the swollen livers of foie gras fowl. While foie gras may not frequently be consumed in this country, this "diseased" argument could, if accepted by either state or federal government, have a dramatic impact on one food that *is* widely eaten in America: beef. Why? Most beef cattle in the United States are—like foie gras ducks—fed a diet of corn. Cows do not eat corn in nature. Because eating corn can cause cattle to experience severe gastric distress, most cattle are also fed antibiotics, which permit a cow to eat corn without the attendant gastrointestinal impact.[232] If the Humane Society of the United States were to succeed in having foie gras classified as a "diseased" food, that success might open the door to banning corn-fed beef—which, after all, is treated with antibiotics—as a "diseased" food.[233]

The crackdown also threatens California's place as America's culinary innovator and agricultural engine. California is slowly squeezing the life out of its cuisine via a series of assaults committed from farm to table. The state is banning everything from *haute* cuisine like foie gras to the everyman meals served by the state's brilliant street vendors, from agricultural practices like caging hens to culinary practices like cooking with trans fats. As one commentator notes, "[t]he regime of personal prohibition can be stifling."[234]

California's food crackdown is also bad for consumers across America. The California effect has meant that the state's food regulations and bans extend far beyond its borders, either because its regulations or bans encourage other states or the federal government to adopt them, or because they force producers to change their offerings nationwide, or because they force the regulated industry to seek preemptive nationwide

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231 *See* Anthony Ramirez, *Citing Treatment of Fowl, Groups Urge State to Ban Foie Gras*, N.Y. TIMES, June 22, 2006, at B3 ("[The Humane Society] want[s] foie gras declared an 'adulterated' food within the meaning of Article 17, Section 200 of the [New York State] Agriculture and Markets Law.").

232 *See generally* POLLAN, *supra* note 182 (describing in great detail the antibiotics consumed by corn-fed American beef cattle).

233 Incidentally, a divergent argument can be made that corn-fed beef is not Kosher under Jewish dietary laws. To be Kosher, an animal must "chew the cud," meaning it must swallow, partially digest, and regurgitate its food before finally digesting it. LEVITICUS 11:3-8. The animal also must have cloven hooves. *Id.* Cows do chew the cud when eating their natural diet of grass but, notes author Michael Pollan, "they can't chew their cud when they're on corn." *Cf.* Interview, Michael Pollan, FRONTLINE, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/meat/interviews/pollan.html (last visited Apr. 1, 2010). Thus, if Pollan is correct, cows fed corn do not "chew the cud" and, impliedly, their meat may not be Kosher.

234 Harvey Rishikof, *Long Wars of Political Order—Sovereignty and Choice: The Fourteenth Amendment and the Modern Trilemma*, 15 CORNELL J.L. & PUB. POL'Y 587, 617 (2006).

regulation. The result has been nationwide organic laws that are panned by organic advocates; the likely imposition of nationwide uniform menu-labeling standards; and dozens of discordant state laws battling the imagined scourge of *trans* fats. Evidence these bans and regulations actually encourage healthier eating is scant, which is why scholars like Brian Wansink note that these and similar regulations have had no discernable impact on obesity.[235]

California's crackdown on food raises other serious economic concerns for its residents, for the state, and for the nation. The exorbitant increases in the state's beer and wine taxes will cost thousands of jobs in California. One estimate indicates that Prop 2 could result in the elimination of most of the California egg industry and the loss of thousands of jobs, which could cost the state more than $370 million in gross sales and resulting tax receipts.[236] In addition to unemployment and reduced tax revenue, these regulations will increase prices for alcohol beverages and eggs in California. Because California exports wine and eggs, Americans will also pay higher prices for these goods because of California's regulations.

Finally, California's food regulations and bans are an ineffective and wrongheaded means of dealing with real and imagined problems. California's ban on caged hens will do little more than shift jobs (and hens) from California to other states. Prop 65 casts such a wide net that Californians are subject to warning fatigue. Even the state admits that Prop 65 warnings are ubiquitous.[237] The state's efforts to curb childhood obesity in schools are also not working. Los Angeles, the city that first tried to ban soda from schools, was recently found to be in violation of its own regulations concerning the sale of soda and brownies on campus.[238] While decent people may disagree whether legislation is a path for arresting the very real obesity problem,[239] recent research by the independent RAND Corporation indicates that the presence of so-called junk food in

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235 *See* Baylen Linnekin, *supra* note 96.

236 *See generally* DANIEL A. SUMNER, *supra* note 70.

237 *See Acrylamide and Proposition 65*, *supra* note 110 ("Proposition 65 warnings are common throughout California.").

238 *See* Mary MacVean, *Schools Violate Junk Food Ban*, L.A. TIMES, May 9, 2009, at A9.

239 *Compare* Baylen Linnekin, *supra* note 96 (quoting Prof. Brian Wansink for the proposition that legislation to combat obesity has not been proven effective), and HARSANYI, *supra* note 98 at 53–55 (declaring that legislation has no impact on obesity rates), *with* Benjamin Montgomery, Note, *The American Obesity Epidemic: Why the U.S. Government Must Attack the Critical Problems of Overweight and Obesity Through Legislation*, 4 J. HEALTH & BIOMED. L. 375, 404 (2008) (calling for sweeping "wellness" legislation to counter obesity).

schools has "no statistically or economically significant effect" on body mass, a key indicator of obesity.[240] The RAND study did note that such bans *do* have an impact on school budgets—and a negative one at that—since monies raised by food sales go into school coffers.[241]

C. California Regulations Raise Constitutional Concerns

1. The Dormant Commerce Clause

The Dormant Commerce Clause, an implied provision of the federal Constitution, bars local and state governments from "restrict[ing] trade in a way that ultimately impacts interstate commerce[,] even when the intention of the political entity enacting the law is to effect a change solely within the boundaries of its particular jurisdiction."[242] The Illinois Restaurant Association argued, in challenging Chicago's foie gras ban in 2006, that the city's ban violated the Clause.[243]

The crux of the plaintiffs' Dormant Commerce Clause argument was twofold. First, they argued that Chicago's ordinance was effectively an "economic boycott" against foie gras producers located *outside* the state.[244] Second, they claimed the ordinance did not have the requisite local benefit that a law must have to overcome a Dormant Commerce Clause challenge.[245] The court disagreed on both counts, holding that because the Chicago ban did "not govern foie gras production," and had some local benefit in terms of animal rights, it did not overstep the bounds of the Dormant Commerce Clause.[246] The difference in the case of the California ban is that the state targets producers and consumers outside and inside the state. Whether these differences would be sufficient for a court to determine that California's ban violates the Dormant Commerce Clause is unclear, especially given that the "local effect" requirement may be fulfilled because of California's in-state production. However, since the decision in *Illinois Restaurant Ass'n*, commentators have opined that bans such as those enacted in Chicago and California do indeed violate the Dormant Commerce Clause.[247]

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240 *See* Ashlesha Datar & Nancy Nicosia, *Junk Food in Schools and Childhood Obesity: Much Ado About Nothing?* 5 (RAND Corporation, Working Paper No. 672, 2009).

241 *See generally id.*

242 *See* Alexandra R. Harrington, *Not All it's Quacked up to Be: Why State and Local Efforts to Ban Foie Gras Violate Constitutional Law*, 12 DRAKE J. AGRIC. L. 303, 317 (2007).

243 Ill. Rest. Ass'n. v. City of Chicago, 492 F. Supp. 2d 891 (N. D. Ill. 2007).

244 *Id.* at 899.

245 *Id.*

246 *See id.*

247 *See, e.g.*, Harrington, *supra* note 242 and accompanying text.

They argue that the Chicago and California foie gras bans do illegally interfere with interstate commerce while offering "no prescient public health, safety, or moral justification . . . that would withstand judicial scrutiny."[248] If this is the case, then the foie gras ban and many of California's other bans—including those pertaining to egg-laying hens; genetically modified crops and fish; and *trans* fats—may also violate the Clause. Furthermore, California restrictions on agriculture may present an even more compelling Dormant Commerce Clause case because the state ships the vast majority of its crops to other U.S. states, and accounts for the vast majority of America's fruit, vegetable, and nut exports.[249]

2. Do California's Bans and Regulations Interfere with a Fundamental Right to Food Freedom?

The Supreme Court has never recognized an explicit right to eat certain foods. However, several Court justices have recognized a negative right[250] to food. Justice William O. Douglas wrote, in dictum, that the Ninth Amendment guarantee of unenumerated fundamental rights[251] includes "one's taste for food . . . [which] is certainly fundamental in our constitutional scheme—a scheme designed to keep government off the backs of people."[252] Other Justices have come out against food bans. Justice Stephen Field argued that a right to make and procure

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248 *Id.* at 318.

249 *See supra* notes 21–23 and accompanying text. California's bans may also violate the Privileges and Immunities Clause of the Fourteenth Amendment, which bars states from "mak[ing] or enforc[ing] any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV. The Clause was effectively written out of the Constitution in 1873 with the Supreme Court's holding in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). An effort is currently underway, in *McDonald v. Chicago*, heard by the Court this term, to revive the Clause. McDonald v. Chicago, 567 F.3d 856 (7th Cir. 2009), *cert granted*, 77 U.S.L.W. 3691 (U.S. Sept. 30, 2009) (No. 08-1521).

Proponents argue that the Clause exists at least in part to protect economic liberties, including the right to pursue a given trade. *See* Robert A. Levy, *How Gun Litigation Can Restore Economic Liberties*, 31 CATO POL'Y RPT. 2 (2009). In the *Slaughter-House Cases*, which concerned the economic rights of meat butchers, the Court "ruled that the law was a valid public health measure and did not violate the right of butchers 'to exercise their trade.'" *Id.* A Court decision this term to revive the Clause could seemingly spell the end of California's foie gras ban, among other California regulations, since the ban is after all a public morals measure that concerns the rights of fowl farmers and butchers to exercise their trade.

250 *See, e.g.*, Cass R. Sunstein, *Free Speech Now*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 273 (Geoffrey R. Stone, Richard A. Epstein, & Cass R. Sunstein eds., 1992) (describing a "negative" rights argument as the "right to protection against the government, not to subsidies from the government").

251 U.S. CONST. amend. IX.

252 *See* Olff v. E. Side Union High Sch. Dist., *cert. denied*, 404 U.S. 1042, 1044 (1972) (Douglas, J., dissenting) (likening a fundamental right to wear one's hair in a certain style to one's fundamental right to eat certain foods or enjoy certain cultural pursuits).

food is an integral fundamental right of all Americans.[253] Field called this right an essential element of liberty.[254] Importantly, Field distinguished between food regulation and food bans, contrasting the former, which he called a reasonable exercise of state police power, with the latter, which he would proscribe as unconstitutional.[255] More recently, Justice Antonin Scalia, also in dictum, said the Court need not recognize a right to starve oneself to death in order to protect the "right to eat."[256]

CONCLUSION

Proponents of California's attack on food and agriculture paint the regulations that comprise it and the resultant California effect as a desirable "race to the top." But California's crackdown does not achieve its stated goals—whether the goal is ensuring a minimum level of quality; combating obesity; or protecting animals or consumers. The crackdown certainly does nothing to aid entrepreneurship or innovation. The result of the state's regulations and bans has *not* been that Californians or Americans eat "healthier" or "better" as those terms are defined by the crackdown's advocates.

When it comes to regulation, harsher does not mean better. The race to regulate is not a race to betterment. Ubiquitous and pervasive regulations might themselves be evidence of little more than the existence of "a race to the *strictest* standard."[257] Vogel recognizes the drawbacks of the "California effect," noting that while economic liberalization and strict regulations can be compatible,[258] he is careful "not to equate stricter standards with more effective regulations."[259] Vogel writes that stricter regulations often "contribute little or nothing" toward their

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253 *See* Powell v. Pennsylvania, 127 U.S. 678, 690 (1888) (Field, J., dissenting) ("[T]hat the gift of life was accompanied with *the right to seek and produce food*, by which life can be preserved and enjoyed, in all ways not encroaching upon the equal rights of others . . . . is an element of that freedom which every American citizen claims as his birthright.") (emphasis added).

254 *Id.* at 692 ("The right to procure healthy and nutritious food . . . is among these inalienable rights, which, in my judgment, no State can give and no State can take away except in punishment for crime.").

255 *Id.* at 699 (favoring a state's right to regulate food, but equating the prohibition of a food with an unconstitutional confiscation).

256 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 883, 980 at n.1 (1992) (Scalia, J., dissenting) ("It drives one to say that the only way to protect the right to eat is to acknowledge the constitutional right to starve oneself to death.").

257 Shayna M. Sigman, *Kosher Without Law: The Role of Nonlegal Sanctions in Overcoming Fraud Within the Kosher Food Industry*, 31 FLA. ST. U. L. REV. 509, 533 (2004) (emphasis in original); Raymond B. Ludwiszewski & Charles H. Haake, *Cars, Carbon, and Climate Change*, 102 NW. U. L. REV. 665, 672 (2008).

258 VOGEL, *supra* note 145 at 255.

259 *Id.* at 7.

stated goals, and that *overturning* regulations often benefits the public.[260]

Where does the pervasive spread of California's bans and regulations point America's food future? On the one hand, California's mushrooming food and agricultural regulations and bans—the result of the state's propensity toward hyper-regulation and the resultant California effect—are spreading across America. On the other hand, if these bans and strict regulations are bad for California, then their proliferation is also bad for America.

The many people who claim a food revolution is afoot in America today[261] are probably correct. But revolutions and revolutionaries have tried before to create top-down, small-farm agrarian utopias and to regulate nearly every aspect of human dining and existence.[262] What these societies managed to do instead was to create poverty and famine.

There is an alternative to the vision shared by California regulators, Alice Waters, and their allies. That alternative is *food freedom*—the right of people to grow, buy, sell, cook, and eat whatever foods they want, free from oppressive government intervention. For people who love and care about food and choice, who want to keep food legal, and who enjoy buying, cooking, raising, and eating a variety of foods, only the latter option will suffice.

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260 *Id.*

261 *See, e.g.*, Martin, *supra* note 206 at SundayBusiness 1. *See* also Jamie Oliver, *Jamie Oliver's Food Revolution*, http://www.jamieoliver.com/campaigns/jamies-food-revolution (last visited Apr. 1, 2010).

262 *See, e.g.*, Dan Fletcher, *A Brief History of the Khmer Rouge*, TIME, Feb. 17, 2009, *available at* http://www.time.com/time/world/article/0,8599,1879785,00.html (describing the history of the murderous Khmer Rouge, whose leader Pol Pot's attempts to effect "a radical shift to an agrarian society" resulted in the death of millions of Cambodians).

Recognizing and Regulating Home Schooling in California: Balancing Parental and State Interests in Education

*Paul A. Alarcón**

INTRODUCTION: THE *RACHEL L.* AND *JONATHAN L.* DECISIONS

On February 28, 2008, the California Court of Appeal for the Second Appellate District caused alarm on a national level[1] by ruling that home schooling[2] in California is illegal unless the parent has a teaching credential.[3] In reaching this conclusion, the court of appeal relied almost exclusively on a fifty-five year old California superior court appellate department case and a forty-seven year old California court of appeal case.[4] Both cases had held that statutory predecessors to the private school exemption[5] to California's compulsory school attendance statute[6] were inapplicable to home schooling.[7]

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1 Andrea Longbottom, *Rude Awakening Court Ruling Alarms Homeschool Community*, THE HOME SCHOOL COURT REPORT, May–Jun. 2008, at 11, (finding that a mayor, op-ed pieces of almost every major newspaper, the general public, the media, public school teachers, and people around the world were shocked that "an educational alternative as solidly established as homeschooling was actually being called illegal").

2 Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571, 576 n.1 (Cal. Ct. App. 2008) ("We use the terms 'home school' and 'home schooling' to refer to full-time education in the home by a parent or guardian who does not necessarily possess a teaching credential.").

3 *In re* Rachel L., 73 Cal. Rptr. 3d 77, 79–83 (Cal. Ct. App. 2008) (decertified for publication). The court discussed "whether parents can legally 'home school' their children" and held, based on two prior cases:

> that enrollment and attendance in a public full-time day school is required by California law for minor children unless (1) the child is enrolled in a private full-time day school and actually attends that private school, (2) the child is tutored by a person holding a valid state teaching credential for the grade being taught, or (3) one of the other few statutory exemptions to compulsory public school attendance applies to the child.

Id. (citation omitted).

4 *Id.* at 80–83.

5 CAL. EDUC. CODE § 48222 (West 2006).

6 CAL. EDUC. CODE § 48200 (West 2006).

7 People v. Turner, 263 P.2d 685 (Cal. App. Dep't Super. Ct. 1953); *In re* Shinn, 16

However, in the fifty years since these decisions, home schooling has grown explosively from a curiosity on the fringe of education to a competitive and widely-practiced instructional form.[8] As a result of *In re Rachel L.*, parents wondered if they would have to leave California to avoid criminal prosecution.[9] Home schooling advocates were shocked that an educational methodology—which had gained universal acceptance throughout the United States as a legal form of education—could be effectively outlawed in the country's most populous state.[10] Further, the court of appeal's decision to settle the general question of whether "parents can legally 'home school' their children,"[11] was particularly surprising since *Rachel L.* was a confidential dependency case involving issues unrelated to home schooling.[12] Less than a month later, the Court, perhaps on

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Cal. Rptr. 165 (Cal. Ct. App. 1961). Aside from the private school exemption, the only exemption to California's compulsory school attendance statute which could apply to home schooling is Section 48224 of the California Education Code, the private tutor exemption. However, this exemption requires the tutor to have a state teaching credential for the grade being taught and therefore is not applicable to most home schooling parents. CAL. EDUC. CODE § 48224 (West 2006).

8 Kimberly A. Yuracko, *Education Off The Grid: Constitutional Constraints on Homeschooling*, 96 CAL. L. REV. 123, 124 (2008) ("Home schooling is no longer a 'fringe' phenomenon.") (citations omitted); Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571, 591 n.31 (Cal. Ct. App. 2008) ("Studies indicate 2.2 percent of the entire student population of the United States was home schooled in 2003, up from 1.7 percent in 1999."); U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *The Condition of Education 2005*, June 2005, at 32, *available at* http://nces.ed.gov/pubs2005/2005094.pdf ("In 2003, the number of home schooled students was 1.1 million, an increase from 850,000 in 1999."); Patricia M. Lines, U.S. Department of Education, *Homeschoolers: Estimating Numbers and Growth*, Spring 1999, at 1, *available at* http://www.ed.gov/offices/OERI/SAI/homeschool/homeschoolers.pdf (finding "[a] retroactive estimate done in 1988 suggested 10,000 to 15,000 children received their education at home in the late 1970s" and that "[e]arlier estimates, based on different methodologies, suggested 60,000 to 125,000 school-aged children for the fall of 1983; and 122,000 to 244,000 for fall of 1985; between 150,000 to 300,000 for fall of 1988").

9 Longbottom, *supra* note 1, at 11 ("California member families called HSLDA [Home School Legal Defense Association], wondering if they should move out of the state, or when a truant officer would come knocking at their door and demand their children.").

10 *Id.* HSLDA President Mike Smith commented:

> To say that I was shocked that the court in California ruled that teacher's certification was the only legal way to teach a child in California is putting it mildly . . . . It reminded me of the days when HSLDA began 25 years ago and teacher's certification was the 'sacred cow' that states were clinging to in an effort to keep home schooling from becoming a viable option.

Id.

11 *In re* Rachel L., 73 Cal. Rptr. 3d 77, 79 (Cal. Ct. App. 2008) (decertified for publication).

12 *Id.* at 80 ("A Welfare and Institutions Code section 300 petition was filed on behalf of three minor children after the eldest of them reported physical and emotional mistreatment by the children's father.").

account of the overwhelmingly negative reaction to its decision, depublished its decision and granted a petition for rehearing.[13]

The court of appeal issued its new decision, *Jonathan L. v. Superior Court*, on August 8, 2008.[14] While refusing to back down from its position that no absolute constitutional right to home school exists,[15] the *Jonathan L.* court held that California's private school exemption[16] "permit[s] home schooling as a species of private school education."[17] The court of appeal found the statutory language of the exemption to be ambiguous with respect to its applicability to home schooling.[18] This allowed the court of appeal to conclude, based on various legislative acts relating to the private school exemption, that "[w]hile the Legislature has never acted to expressly supersede *Turner* and *Shinn*, it has acted as though home schooling is, in fact, permitted in California."[19] In addition, the *Jonathan L.* court found it significant that the Superintendent of Public Instruction, the Department of Education, the Governor, and the Attorney General all accepted home schooling as a legal type of private schooling.[20] Finally, the court of appeal stated that its interpretation of the private school exemption avoided serious constitutional questions about the validity of a law which renders home schooling illegal.[21]

The court of appeal concluded its opinion with the observation that, "the fact that home schooling is permitted in California as the result of implicit legislative recognition rather than explicit legislative action has resulted in a near absence of

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13 Jonathan L. v. S.C.L.A., B192878, 2008 Cal. App. LEXIS 548 (Cal. Ct. App. Mar. 25, 2008). The *Jonathan L.* court received and considered sixteen amicus briefs from a wide range of governmental and private parties. Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571, 577 n.3 (Cal. Ct. App. 2008).

14 *Jonathan L.*, 81 Cal. Rptr. 3d 571.

15 *Id.* at 592 ("[N]o such absolute right to home school exists."). Because the court found that parents do not have an absolute right to home school, it held that a dependency court may restrict home schooling if necessary to achieve California's interest in ensuring a child's safety. *Id.* at 592–94. However, the court recognized that grave constitutional issues regarding parents' first amendment rights and the right to direct their children's upbringing would be raised "[i]f home schools are not permitted in California unless under the private tutor exemption (requiring the tutor to be credentialed)." *Id.* at 591.

16 CAL. EDUC. CODE § 48222 (West 2006).

17 *Jonathan L.*, 81 Cal. Rptr. 3d at 576. The Court remanded the case to the dependency court to consider whether the factual situation before it justified restricting home schooling because of an overriding governmental interest in the child's safety. *Id.* at 594.

18 *Id.* at 586.

19 *Id.* at 588–89.

20 *Id.* at 591.

21 *Id.*

objective criteria and oversight for home schooling."[22] The *Jonathan L.* court contrasted this lack of oversight with numerous limitations utilized by other states to regulate home schooling.[23] Consequently, the court of appeal stated that "additional clarity in this area of the law would be helpful."[24]

This Comment focuses on the *Jonathan L.* court's plea for clarity. First, this Comment proposes that the California Legislature explicitly legalize home schooling by enacting a new statutory exemption to California's compulsory school attendance statute. Second, it suggests that the government impose two limitations on home schooling: one which requires parents to file an annual notice of intent to home school their children, and another which requires home schooled students to take annual standardized tests. These requirements will protect California's compelling interest in an educated citizenry while minimizing any imposition upon the parental right to direct the education of their children.

A perusal of the history of education in America reveals a general trend toward government control over the education of children.[25] The universal adoption of compulsory school attendance laws is, perhaps, the clearest reflection of this tendency.[26] The enactment of such laws reflects the principle that states have a compelling interest in education.[27] However, this trend towards government oversight has its detractors.[28] Modern-day home schooling represents one clear educational form sharply divergent from the general trend towards government control. This educational form is founded upon a belief in the supremacy of the parental right to direct the upbringing and education of their children.[29]

In the context of home schooling, these two interests—the governmental and parental—are opposed because home schooling

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22 *Id.* at 595.

23 *Id.* at 595–96 (listing a variety of common limitations imposed on home schooling in other states).

24 *Id.*

25 *See infra* Part I.

26 National Conference of State Legislatures, *Compulsory Education: Overview*, http://www.ncsl.org/programs/educ/CompulsoryEd.htm (last visited Jan. 9, 2010) ("Today, every state and territory requires children to enroll in public or private education or to be home-schooled.").

27 *See infra* Part II.C.

28 *See infra* Part I.

29 Rob Reich, *Why Home Schooling Should Be Regulated*, *in* HOMESCHOOLING IN FULL VIEW: A READER 109, 110 (Bruce S. Cooper ed., 2005) ("Home schoolers of all stripes believe that they alone should decide how their children are educated, and they join together in order to press for the absence of regulations or the most permissive regulation possible.").

parents want complete control over their children's environment and curriculum, removed from the supervision of public officials.[30] However, governmental oversight of some kind is necessary to protect the state's interest in ensuring that students are receiving an adequate education.[31] Without limitations, the California Constitution's assertion of a governmental interest in education becomes meaningless rhetoric, or at least, a mere desire which the state is unable to enforce.[32] On the other hand, home schooling limitations necessarily impose upon the parental interest to the degree they limit and direct the parents' actions.[33] Where such limitations unreasonably trample upon the parental interest in directing the education of their children, courts have found the restrictions unconstitutional.[34] Hence, the question arises as to what limitations, if any, should be adopted, which guarantee that each and every home schooled child receives an adequate education, but which do not unconstitutionally impose upon the parental interest.

In order to answer this question a consideration of both the state and parental interests in education is required. According to the United States Supreme Court, the parents' interest in directing the education of their children is a fundamental constitutional right.[35] Whereas, the state interest in an educated citizenry is a compelling interest in ensuring that students become economically independent and civically responsible.[36]

In order to select the most suitable limitations, a review of restrictions commonly adopted by other states is helpful because

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30 *Id.*

31 *See infra* Part II.A.

32 CAL. CONST. art. IX, § 1.

33 *See* Reich, *supra* note 29.

34 Jeffery v. O'Donnell, 702 F. Supp. 516, 518 (M.D. Pa. 1988) (finding a private tutor statute which required the parent to be "properly qualified" and the curriculum "satisfactory" to be unconstitutionally vague); Mazanec v. N. Judson-San Pierre Sch. Corp., 614 F. Supp. 1152, 1160 (N.D. Ind. 1985) (finding that parents have the constitutional right to educate their children in a home environment and that "[i]t is now doubtful that the requirements of a formally licensed or certified teacher . . . would now pass constitutional muster"), *aff'd*, 798 F.2d 230 (7th Cir. 1986); People v. DeJonge, 501 N.W.2d 127 (Mich. 1993) (striking down a teacher certification requirement for private and home schools as unconstitutional); State v. Newstrom, 371 N.W.2d 525, 527, 532–33 (Minn. 1985) (finding that a requirement that private and home school teachers have qualifications "essentially equivalent" to public school teachers is too vague to "serve as a basis for a criminal conviction," and therefore an unconstitutional violation of due process under the 14th Amendment); State v. Popanz, 332 N.W.2d 750, 756 (Wis. 1983) (holding the state compulsory school attendance statute was "void for vagueness insofar as it fails to define 'private school'"); Roemhild v. State, 308 S.E.2d 154, 159 (Ga. 1983) (holding the state compulsory school attendance law to be "unconstitutionally vague").

35 Troxel v. Granville, 530 U.S. 57, 65–66 (2000) (plurality opinion). See *infra* Part II.B for a discussion of the right of parents to direct the upbringing of their children.

36 *See infra* Part II.C.

these restrictions are widely accepted as reasonable and effective, and they have not been struck down as unconstitutional.[37]

Part I of this Comment summarizes the history of education in America discussing in particular the emergence of modern home schooling. Part II considers the conflict between the governmental and parental interests in education created by home schooling and provides an in-depth analysis of these dueling interests. Part III concludes with a proposal for enacting a home school exemption to California's compulsory school attendance statute, a consideration of limitations adopted by other states, and a proposal for adopting two specific home schooling restrictions.

I. EDUCATION IN AMERICA: HOME SCHOOLING AND THE TREND TOWARDS GOVERNMENT OVERSIGHT

Since the inception of the United States of America, a widespread appreciation of the importance of education has existed.[38] In fact, Thomas Jefferson proposed a system of free schools to be maintained by taxation.[39] However, until the public or common school movement, education was administered locally and usually privately.[40] In the early 1800s, prominent educators began to successfully advocate the creation of statewide public school systems.[41] Every state had a system of free public schools by 1850.[42] Fifty years later the public school movement accomplished its objective of mandatory public education for the elementary level in almost every state.[43] Today, every state has enacted compulsory school attendance statutes.[44]

Thus, the history of education in the United States is one which manifests a trend towards institutionalization and government control.[45] However, this trend has always had its detractors. For example, heavy opposition to publicly controlled schools came from Roman Catholics who believed that the values imparted in public schools had unpalatable Protestant biases.[46]

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37 *See infra* Part III.B.1.

38 ENCYCLOPEDIA BRITANNICA, INC., THE NEW ENCYCLOPEDIA BRITANNICA 18, at 48 (15th ed. 2002) ("Several of the Founding Fathers expressed belief in the necessity of public education . . . .").

39 *Id.*

40 *Id.*

41 *Id.* at 48–49.

42 MURRAY N. ROTHBARD, EDUCATION FREE & COMPULSORY 41 (Ludvig von Mises Inst. 1999) (1971).

43 *Id.*

44 *See* National Conference of State Legislatures, *supra* note 26.

45 EDGAR W. KNIGHT, EDUCATION IN THE UNITED STATES 44 (3rd ed. 1951).

46 Carl F. Kaestle, *Victory of the Common School Movement: A Turning Point in American Educational History*, *in* HISTORIANS ON AMERICA 23, 26 (George Clack & Paul

In the 1950s, home schooling arose as an alternative to the public school system.[47] At the outset, home schooling was dominated by liberal and progressive philosophies.[48] However, by the early 1990s, home schooling was predominately characterized by conservative Christian ideologies.[49]

Since its emergence, home schooling has experienced explosive growth throughout the nation. Estimates indicate that as few as 10,000 to 15,000 students were home schooled in the late 1970s.[50] This number increased dramatically in the 1980s—such that by the end of that decade an estimated 150,000 to 300,000 students were home schooled in America.[51] The 1990s saw a continuation of this rapid growth and by 1998 estimates put the number of home schooled children at nearly 1 million.[52] The National Center for Education Statistics reports that in 2003 the number of home schooled students had climbed to 1.1 million.[53]

As public education became universally available, a question arose regarding whether the states had the power to force every student to attend public schools and thereby eliminate any alternate forms of education.[54] Given that the public school movement included objectives such as uniting a widely diverse population and ensuring competent schooling to all citizens,[55] some thought that states had such a power.[56] However, in *Pierce v. Society of Sisters*, the United States Supreme Court unanimously held that a state act which requires all students to attend public school without providing an exception for private forms of education, "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[57] In stating that "[t]he child is not

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Malamud eds., 2007), *available at* http://www.america.gov/publications/books/historians onamerica.html.

47 Yuracko, *supra* note 8, at 125.

48 *Id.* at 125–26.

49 *Id.*

50 Lines, *supra* note 8, at 1 ("A retroactive estimate done in 1988 suggested 10,000 to 15,000 children received their education at home in the late 1970s . . . .").

51 *Id.* ("Earlier estimates, based on different methodologies, suggested 60,000 to 125,000 school-aged children for the fall of 1983; and 122,000 to 244,000 for fall of 1985; between 150,000 to 300,000 for fall of 1988 . . . .").

52 *Id.* ("[T]he number could have reached about 1,000,000 children by the 1997–98 school year.").

53 *The Condition of Education 2005*, *supra* note 8, at 32.

54 Pierce v. Soc'y of Sisters, 268 U.S. 510, 531 (1925) (finding Oregon statute's "manifest purpose is to compel general attendance at public schools by normal children, between eight and sixteen, who have not completed the eighth grade").

55 ROTHBARD, *supra* note 42, at 44.

56 *Id.*; *Pierce*, 268 U.S. at 531.

57 *Pierce*, 268 U.S. at 534–35. Notably, the Oregon statute provided an exception for individualized private instruction. Hence the Court's ruling in *Pierce* means that the

the mere creature of the State"[58] the Court definitively determined that the "compulsory" character of the public school system is far from absolute. Rather, certain exceptions must exist for alternative forms of education because parents "who nurture [their child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[59] In later decisions, the Supreme Court reaffirmed the principles laid down in *Pierce*.[60]

In summary, since the founding of America, education has generally progressed toward government oversight and control. However, forms of education diverging from this general trend have developed and gained the protection of the Constitution under *Pierce*. Home schooling is one such instructional type which has undergone significant growth during the past few decades.

II. DUELING INTERESTS: AN ANALYSIS OF PARENTAL AND STATE INTERESTS AND HOW THEY CONFLICT

If the history of education in the United States reflects a trend towards governmental oversight,[61] the emergence of home schooling clearly represents a diverging movement towards independent parental control.[62] The latter adopts, as a fundamental principle, the parents' interest in directing the upbringing of their children.[63] In the context of home schooling, this interest inevitably conflicts with the state's interest in education.[64] The resolution of this conflict depends upon the character of each interest.

A. Oversight and Control: An Inevitable Conflict between Parents and the State

In asserting that "[n]o question is raised concerning the power of the State reasonably to regulate all schools," the United States Supreme Court made it clear that *Pierce* does not constitute a complete rejection of the idea that the state has an interest in the education of its citizens which might at times

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state cannot assure the rights of parents by merely providing a single, alternative form of education to public school. *Id.* at 530 n.* (1925).

58 *Id.* at 535.

59 *Id.*

60 *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Troxel v. Granville, 530 U.S. 57 (2000).

61 *See supra* Part I.

62 *See* Reich, *supra* note 29.

63 *See* Reich, *supra* note 29.

64 *See infra* Part II.A.

justify interfering with parental decisions regarding education.[65] However, the Court warned that this power is not absolute—it must not unreasonably burden parents' right to educate their children.[66] Thus, *Pierce* indicates that both the state and parents have a valid interest in the education of children.[67]

Ideally, both of these interests—which have as their object the promotion of excellence and maturity in the student, in the one case due to love and a high sense of obligation and in the other due to civic and economic concerns—will be in perfect harmony. However, in the context of home schooling, parents desire absolute control over the educational environment, completely removed from supervision by public officials.[68] Without any governmentally imposed restrictions—including a basic notice requirement—on home schooling, the state's interest in an educated citizenry is rendered unenforceable since the state cannot determine whether the children are being educated at all, much less, whether they are being adequately educated. Therefore, home schooling creates an inevitable conflict between the parents' interest in directing their children's education, free from any governmental impositions, and the state's interest in adopting some kind of home school restrictions which ensure that home schooled children are adequately educated.

There are three possible solutions to this conflict. First, the parental interest could completely prevail over the state interest—resulting in the complete deregulation of home schooling.[69] Second, the state interest could absolutely overcome the parental interest—rendering home schooling unlawful.[70] Third, the two interests could be balanced—preferably by restrictions that ensure that every home schooled student is given an adequate education without unreasonably imposing on the parental interest. The appropriate solution depends on the legal import of the parental and state interests in education. Therefore, the answer to the *Jonathan L.* court's request for "additional clarity" requires a consideration of both of these interests.[71]

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65 Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925).

66 *Id.* at 535.

67 *See infra* Part II.B–C.

68 *See* Reich, *supra* note 29.

69 See *infra* note 104 for an example of an organization which supports this alternative.

70 See *infra* note 103 for an example of one thinker who supports this possibility.

71 Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571, 596 (Cal. Ct. App. 2008).

B. The Fundamental Constitutional Right of Parents to Direct the Upbringing of Their Children

Western civilization, with rare exceptions, has always recognized that parents have a special interest in directing the upbringing of their children.[72] When America was born, no one dreamed that the government would ever challenge the rights of fit parents to exercise authority over their children.[73] Hence, there is no express inclusion of parental rights in the Constitution or Bill of Rights.[74] However, the United States Supreme Court has a long history of recognizing that the Fourteenth Amendment Due Process clause affords parents a fundamental constitutional right to direct the upbringing and education of their children.[75]

In *Troxel v. Granville*, the Supreme Court held that parents have a "fundamental right to make decisions concerning the care, custody, and control of" their children.[76] The Court stated that "the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court."[77] Further, the Court cited a lengthy history of Supreme Court decisional authority supporting its assertion that the United States Constitution protects the fundamental right of parents to direct the upbringing of their

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72 Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Meyer v. Nebraska, 262 U.S. 390, 401–02 (1923). The Court discussed Plato's theory that children should be held in common without knowing their parents and Sparta's practice of taking children from their parents at a young age and found that:

> [a]lthough such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.

Id.

73 Mike Farris, *Parental Rights: Why Now is the Time to Act*, THE HOME SCHOOL COURT REPORT, Mar.–Apr. 2006, at 6.

> Moreover, it was unimaginable that a socialistic state which purported to care for children over and against fit and willing parents would ever result from the state and national governments being created in the wake of our separation from Britain. No one would ever envision a form of government that pitted fit parents against the state over the right to make decisions concerning their children.

Id. at 8.

74 *Id.* at 7.

75 Troxel v. Granville, 530 U.S. 57, 65–66 (2000) (plurality opinion) (finding that the Fourteenth Amendment Due Process Clause guarantees parents a fundamental constitutional right to direct the upbringing and education of their children and reciting an extensive history of United States Supreme Court cases recognizing that this parental right is rooted in the Fourteenth Amendment).

76 *Id.* at 71; *id.* at 77 (Souter, J., concurring); *id.* at 80 (Thomas, J., concurring).

77 *Id.* at 65 (plurality opinion).

children.[78] Among the cited authority was *Wisconsin v. Yoder* wherein the Court stated that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[79] The *Troxel* decision also referenced *Pierce*,[80] wherein the Court found that the parental right to control the education of children was a constitutional right stating that:

> As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[81]

Pierce was itself based on the earlier *Meyer v. Nebraska* decision, which recognized "the power of parents to control the education of their own."[82]

In summary, the decisional history of the United States Supreme Court reflects the established principle that parents have a fundamental right, protected by the Federal Constitution, to direct the education of their children. However, the state also has an undeniable interest in the education of its citizens, which may clash with this parental right.

C. The State Interest in Ensuring that Citizens are Economically Independent and Civically Responsible

Though the parental interest in directing the education of children rises to the level of a constitutionally protected fundamental right, it is not an absolute right. The California Court of Appeal held as much in its *Jonathan L.* decision, finding that no "absolute right to home school exists."[83] Relying on United States Supreme Court and California Supreme Court authority, the *Jonathan L.* court ruled that the parental "right must yield to state interests in certain circumstances."[84] Thus,

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78 *Id.* at 65–66.

79 Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

80 *Troxel*, 530 U.S. at 65.

81 Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

82 Meyer v. Nebraska, 262 U.S. 390, 401 (1923).

83 Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571, 592 (Cal. Ct. App. 2008).

84 *Id.* at 592–93 (citing *Yoder*, 406 U.S. at 233–34 for the rule that "the power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it

the parental right to control the education of their child may be subjected to reasonable limitations where the state demonstrates a compelling interest that cannot be protected without the limitations.[85]

One such compelling state interest is ensuring that its citizens are educated.[86] The idea that governments have an interest in education which empowers them to exercise control over the education of their citizens reaches back to the foundations of western civilization.[87] However, the fundamental concept of liberty upon which America was founded, and which remains deeply rooted in its legal traditions and constitutional heritage, would never allow the government to completely deprive parents of the control over their children short of extenuating circumstances.[88] Nonetheless, every state does have an indisputable interest in ensuring that its citizens are educated.[89]

But in what does the state's interest in education consist? A purview of American jurisprudence reveals that this interest has two crucial elements—the interest that citizens be civically responsible, and the public policy interest that citizens become economically self-sufficient so as not to constitute a societal burden.

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appears that parental decisions will jeopardize the health or safety of the child" and *In re* Marilyn H., 851 P.2d 826, 833 (Cal. 1993) for the principle that the "welfare of a child is a compelling state interest that a state has not only a right, but a duty to protect" and finding that the state has a compelling interest in a child's safety and therefore may interfere with parental right to home school where it has been judicially determined that there is a substantial risk to the child's safety because the parents have been found to be abusive and unfit in the dependency court).

85 Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("[T]he family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation.") (citations removed).

86 *Jonathan L.*, 81 Cal. Rptr. 3d at 596 (stating that California has a "compelling interest in educating all of its children"); CAL. CONST. art. IX, § 1 ("A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement."); *Meyer*, 262 U.S. at 401 ("That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear . . . .").

87 *Meyer*, 262 U.S. at 401–02.

88 *Id.* at 402 (finding that entrusting total control of a child to public officials would do "violence to both letter and spirit of the Constitution"); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

89 *Jonathan L.*, 81 Cal. Rptr. 3d at 596 (finding that California has a compelling interest in educating its citizens). *See also* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments."); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925) ("No question is raised concerning the power of the State reasonably to regulate all schools . . . .").

Undoubtedly, any consideration of California's interest in education should begin with an examination of the preeminent law of California—its Constitution.[90] Article 9, Section 1 of the California Constitution states that, "A general diffusion of knowledge and intelligence *being essential to the preservation of the rights and liberties of the people*, the Legislature shall encourage by all suitable means the promotion of *intellectual*, scientific, moral, and agricultural improvement."[91] This constitutional language demonstrates that California's interest in education is to ensure that its citizens become civically responsible and thereby capable of preserving "the rights and liberties of the people."[92]

Since the parents' fundamental right to control the upbringing and education of their children is protected by the Federal Constitution, the United States Supreme Court's statements regarding a state's interest in an educated citizenry are particularly significant. On numerous occasions the Supreme Court has held that the government's compelling interest in education basically consists in ensuring the civic competence and economic independence of its citizens. In *Yoder*, the Court asserted that a state's compelling interest in education consists in "prepar[ing] individuals to become self-reliant and self-sufficient participants in society."[93] The Court also spoke of education as the preparation for "citizens to participate effectively and intelligently in our open political system."[94] In *Plyler v. Doe*, the Court stated that, "education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all."[95] In this case, the Court held that a state is only required to ensure that students are provided with a minimum level of education so that they are able to lead "economically productive lives" and maintain "the fabric of our society."[96] In *Pierce*, the Court noted that a state has the power to require "that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."[97] Thus, according to the United States Supreme Court, a state's interest in an educated citizenry is one which provides the basic competency

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90 Sands v. Morongo Unified Sch. Dist., 809 P.2d 809, 834 (Cal. 1991) ("The California Constitution is the supreme law of our state . . . .").

91 CAL. CONST. art. IX, § 1 (emphasis added).

92 *Id.*

93 Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

94 *Id.*

95 Plyler v. Doe, 457 U.S. 202, 221 (1982).

96 *Id.*

97 Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925).

necessary to ensure that students are economically productive as well as civically active and conscientious citizens.

Further, the California Supreme Court has also focused on the economic and civic independence of the student in discussing California's interest in education.[98] In *Serrano v. Priest*, the court stated that, in today's state, education "has two significant aspects: first, education is a major determinant of an individual's chances for economic and social success in our competitive society; second, education is a unique influence on a child's development as a citizen and his participation in political and community life."[99] Beyond this, other courts have found that a state's interest in education is limited to ensuring that students receive the minimum educational skills necessary to function as economically and civically independent adults.[100] Finally, scholars have also posited that a state's interest in education is limited to two basic types: economic and civic.[101]

Thus, a state's interest in education requires educators to provide students with the basic skills minimally necessary to become economically productive as well as civically conscientious citizens. In other words, 'education'—understood as the object of a state's interest—refers to a basic competency in those core subjects necessary for independent functioning in the democratic society of America.[102]

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98 Veterans' Welfare Bd. v. Riley, 208 P. 678, 681 (Cal. 1922) ("It is recognized that the function of education is to fit the scholar for the problem of every-day life . . . ."); *In re* Shinn, 16 Cal. Rptr. 165, 168 (Cal. Ct. App. 1961) ("A primary purpose of the educational system is to train school children in good citizenship, patriotism and loyalty to the state and the nation as a means of protecting the public welfare.").

99 Serrano v. Priest, 487 P.2d 1241, 1255–56 (Cal. 1971).

100 Yuracko, *supra* note 8, at 155 & n.159 (citing several examples of courts which have "emphasized the democracy- and citizenship-promoting purposes of the [constitutional education] clauses as well as their importance for economic prosperity").

101 Thomas W. Washburne, *The Boundaries of Parental Authority: A Response to Rob Reich of Stanford University*, April 22, 2002, http://www.hslda.org/docs/nche/000010/200204230.asp ("It is well understood from a legal perspective that the government's *compelling* interest in education is limited. It has been held numerous times that the government's interest in education is basically only of two varieties: civic and economic."); Rob Reich, *Testing the Boundaries of Parental Authority Over Education: The Case of Homeschooling*, *in* NOMOS XLIII, MORAL AND POLITICAL EDUCATION 275, 286 (Stephen Macedo & Yael Tamir eds., 2002) (stating that "[f]irst, the state has an interest in educating children to become able citizens. Second, the state has an interest in performing a backstop role to the parents in assuring the healthy development of children into independently functioning adults"); Yuracko, *supra* note 8, at 138–42 (citing scholars who argue that the state constitutions and the Federal Constitution impose a duty on states to ensure that their citizens receive an adequate education in basic skills and an opportunity for equal citizenship).

102 *See* Yuracko, *supra* note 8, at 136 ("[C]ourts have interpreted clauses of every type as obligating states to establish and operate public schools that provide children with a basic minimum or adequate education."). A thorough treatment of the definition of 'education' and analysis of what particular skills or subjects constitutes the minimal education necessary to satisfy the state's interest is beyond the scope of this Comment.

In summary, in the context of home schooling, the parental and state interests are, to a degree, in conflict. The solution to this conflict depends upon the import of each interest. The parents' interest is a fundamental constitutional right to direct the education of their children. The state interest is a compelling interest in ensuring that citizens are economically independent and civically responsible.

III. PROPOSAL: STRIKING THE PROPER BALANCE BETWEEN PARENTAL AND STATE INTERESTS IN EDUCATION

As discussed above, two authorities have valid interests in education—the state in ensuring that children are provided with an education which makes them civically responsible and economically independent, and the parents in directing and controlling the education of their children. Home schooling presents unique difficulties to the state's attempt to ensure that its citizens are receiving adequate education since parents exercise nearly absolute control over the educational environment. Simply stated, home schooling creates an inevitable conflict between the two interests because the state must either leave its interest unprotected or impose on the parental interest. Therefore, the question is, "What method should the state adopt to protect its interest without unreasonably imposing on the parents' right?"

In answering this question, some have proposed that home schooling be rendered illegal,[103] while others have asserted that the state should refrain from any regulation of home schooling whatsoever.[104] The problem with either of these positions is that they allow one interest to eliminate the other.[105] However, each interest is a compelling interest which deserves protection.[106] Therefore, the best method for resolving the conflict must balance both interests according to their respective purposes and importance. Some restrictions should be adopted to protect the state's interest. However, to prevent the state from needlessly trampling parental rights, these restrictions should be limited to those necessary to ensure that children are receiving the basic education sufficient to make them economically independent and civically responsible.

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103 Reich, *supra* note 101, at 298 ("Levinson would presumably rule out homeschooling as an educational alternative.").

104 Yuracko, *supra* note 8, at 127 (finding that HSLDA is committed "to ensuring parents' unfettered right to homeschool").

105 Further, the former proposal would violate the parents' constitutional rights. *See supra* Part II.B.

106 *See supra* Part II.B–C.

In order to avoid permitting the imposition of unreasonable limitations on a fundamental constitutional right, any attempt to infringe upon the parents' right to direct the education of their children should be subjected to strict scrutiny.[107] This heightened level of scrutiny is particularly necessary in cases involving home schooling since many parents have religious reasons for home schooling.[108] Both a right to educate and a right to free exercise of religion are at stake for these families.

According to the court of appeal in *Jonathan L.*, to satisfy the standard of strict scrutiny "a state must establish: (1) that the law in question is supported by a compelling governmental interest and; (2) that the law is narrowly tailored to meet that end."[109] The *Jonathan L.* court noted that "[a]s an alternative phrasing of the second element, the statute must represent the 'least restrictive means' of achieving the interest."[110] Therefore, California should adopt home school limitations which utilize the least restrictive means to protect its interest in education—that is, restrictions which encroach as little as possible on the parents' fundamental right to direct the upbringing of their children.

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107 Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring) ("I would apply strict scrutiny to infringements of fundamental rights."); Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571, 592–93 (Cal. Ct. App. 2008) (finding that "[i]n light of *Troxel*, two California cases have applied strict scrutiny in cases alleging violations of the parental liberty interest." Also, that "if a restriction on the right satisfies strict scrutiny, the restriction is constitutional") (citations omitted). *See also Troxel*, 530 U.S. at 65, where the Court found that:

> [t]he Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests.

(plurality opinion) (citations omitted); *id.* at 76–77 (Souter, J., concurring) (rejecting the "State's particular best-interests standard" as too loose a standard which renders the statute "unconstitutional on its face" since it violates the fundamental parental constitutional right to direct the upbringing of children).

108 *See supra* Part II; Yuracko, *supra* note 8, at 126–27 (finding that modern home schooling is dominated by a conservative Christian movement); *Jonathan L.*, 81 Cal. Rptr. 3d at 592 (citing prior cases to find that "it has been suggested that when a parental liberty interest claim is combined with a free exercise claim, strict scrutiny is required") (emphasis omitted). Numerous states have enacted legislation which requires state action to pass strict scrutiny if it substantially burdens parents' free exercise of religion. ALA. CONST. art. I, § 3.01; ARIZ. REV. STAT. ANN. § 41-1493.01 (2004); CONN. GEN. STAT. ANN. § 52-571b (2005); FLA. STAT. ANN. § 761.03 (West 2005); IDAHO CODE ANN. § 73-402 (2006); 775 ILL. COMP. STAT. ANN. 35/15 (West 2001); MO. ANN. STAT. § 1.302 (West 2009); NEV. REV. STAT. ANN. § 392.700 (LexisNexis 2008); N.M. STAT. ANN. § 28-22-3 (LexisNexis 2006); 51 OKLA. STAT. ANN . tit. 51, § 253 (West 2008); 71 PA. STAT. ANN. § 2404 (West Supp. 2009); R.I. GEN. LAWS § 42-80.1-3 (2006); S.C. CODE ANN. § 1-32-40 (2005); VA. CODE ANN. § 57-2.02. (2007).

109 *Jonathan L.*, 81 Cal. Rptr. 3d at 593.

110 *Id.* (quoting Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 91 (Cal. 2004)).

First, this Comment proposes that the California Legislature legalize home schooling in the state by enacting a statutory exception to the state's compulsory school attendance statute. Second, to adequately protect California's interest in an educated citizenry, this Comment suggests that the government adopt two home schooling limitations: one which requires parents to file an annual notice of intent to home school and, another which requires home schooled students to take annual standardized tests.

A. Enacting a Home Schooling Exemption to California's Compulsory School Attendance Statute

The court in *Jonathan L.* observed that the reason California has no "objective criteria and oversight for home schooling" rests in the fact that home schooling "is permitted in California as the result of implicit legislative recognition rather than explicit legislative action."[111] The court of appeal noted that home schooling parents must theoretically adhere to some of the other requirements of the private school exemption to California's compulsory school attendance statute.[112] However, the court also found that, practically, there is no "enforcement mechanism" to ensure that, beyond filing a private school affidavit, home schooling parents are complying with the statutory requirements of the private school exemption.[113]

Indeed, even though the *Jonathan L.* court ultimately concluded that this exemption applies to home schooling, it noted that past case authority and legislative history appears to conflict with this ruling.[114] To further complicate the issue,

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111 *Jonathan L.*, 81 Cal. Rptr. 3d at 595.

112 *Id.* at 595 n.35. The court noted that:

> The remaining restrictions on home schooling in California, which are not at issue in this case, include: (a) home schooling parents must file a private school affidavit; (b) home schooling parents must be capable of teaching; (c) home schooling parents must teach in English and shall offer instruction in the subjects required to be taught in public schools; and (d) home school education must be a 'full-time' school.

Id.

113 *Id.* at 596 ("California impliedly allows parents to home school as a private school, but has provided no enforcement mechanism. As long as the local school district verifies that a private school affidavit has been filed, there is no provision for further oversight of a home school.").

114 *Id.* at 585–90. The court noted that "two California cases which have addressed the issue have concluded that a home school cannot constitute a private full-time day school[,]" and that

> [t]he most persuasive interpretation of the legislative history of the original statutory provisions supports the conclusion that a home school is not a private school. However, the most logical interpretation of subsequent legislative enactments and regulatory provisions supports the conclusion that a home

numerous legislative enactments have created exceptions, for home schools, to various requirements imposed on traditional private schools.[115] In fact, according to the court of appeal, many of the restrictions pertaining to private schools "would be absurd if applied to every home school."[116] Hence, the very legislative acts upon which the *Jonathan L.* court based its holding—those that purport to apply to all private schools but which include exceptions for home schools—draw out the markedly different characters of traditional private schools and home schools and create double standards. Consequently, the regulatory scheme of the private school exemption makes it virtually impossible for California to ensure that its interest in education is being protected in home schools—in part, no doubt, because the exemption was designed for traditional private schools, not home schools.[117]

For these reasons, this Comment proposes first that the California Legislature adopt a new statutory exemption to the state's compulsory school attendance statute which explicitly permits home schooling in California. The benefit of such an explicit exemption is manifold. First, any question as to the validity of home schooling under California law will be put to rest.[118] Second, creating a distinct home schooling exemption will eliminate the unnecessary legal complexity and confusion generated by the legislatively created "home school" exceptions to the numerous regulations and statutes intended to apply to traditional private schools. That is, the creation of a new statutory exemption for home schooling will simplify the body of law relating to California's compulsory school attendance statute. Third, and arguably most important, an exemption which explicitly permits home schooling serves as the basis for adopting explicit home school restrictions to protect California's interest in education.

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school can, in fact, fall within the private school exception to the general compulsory education law.

Id.

115 *Id.* at 588–89.

116 *Id.* at 589 n.28.

117 *Id.* at 587–88.

118 *See, e.g.*, *In re* Rachel L., 73 Cal. Rptr. 3d 77 (Cal. Ct. App. 2008) (decertified for publication); *In re* Shinn, 16 Cal. Rptr. 165 (Cal. Ct. App. 1961); People v. Turner, 263 P.2d 685 (Cal. App. Dep't Super. Ct. 1953). *But see Jonathan L.*, 81 Cal. Rptr. 3d 571, 576 (holding that "California statutes permit home schooling as a species of private school education").

B. Adopting Specific Limitations on Home Schooling in California

An explicit exemption permitting home schooling is only the first step which serves as a basis for adopting the restrictions necessary to protect California's interest in an educated citizenry. As discussed above, the government should only adopt limitations that pass the strict scrutiny test, that is, are the least restrictive means to protect California's interest.[119] Hence, this section first considers home school limitations widely used by other states. Second, it suggests and discusses two home schooling restrictions; namely, mandatory filing of notice of intent to home school and standardized testing. Third, this section concludes with an analysis of the reasons for rejecting the other commonly adopted limitations.

1. Common Limitations Imposed by Other States

In order to protect their interest in education, other states have enacted explicit home schooling statutes and imposed limitations on home schools.[120] A summary of the widely used restrictions is helpful for two reasons. First, the fact that these restrictions became law indicates that a significant number of legislators thought they would be effective. Second, that these limitations have remained law in many states suggests that experience has bestowed its imprimatur upon them.

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119 *See supra* Part III.

120 A majority of the states and the District of Columbia have enacted statutes which expressly apply to home schooling. Further, the rest of the states permit home schooling under more general statutory exceptions to compulsory school attendance laws. ARIZ. REV. STAT. ANN. § 15-802 (2004); ARK. CODE. ANN. §§ 6-15-501 to -508 (2007); COLO. REV. STAT. ANN. § 22-33-104.5 (West 2005); DEL. CODE ANN. tit. 14, § 2703A (2007); D.C. CODE ANN. §§ 38-202, -205 (LexisNexis 2007); FLA. STAT. ANN. § 1002.41 (West 2005); GA. CODE ANN. § 20-2-690(c) (2009); HAW. REV. STAT. ANN. § 302A-1132(a)(5) (LexisNexis 2006); IOWA CODE ANN. §§ 299A.1–299A.10 (West 2009); LA. REV. STAT. ANN. § 17:236 (2001); ME. REV. STAT. ANN. tit. 20-A, § 5001-A (2008); MD. CODE ANN, EDUC. § 7-301 (LexisNexis 2008); MICH. COMP. LAWS ANN. § 380.1561(3)(f) (West 2005); MINN. STAT. ANN. § 120A.22 (West 2008); MISS. CODE ANN. § 37-13-91(3)(c) (2008); MO. ANN. STAT. § 167.031(2) (West 2000); MONT. CODE ANN. § 20-5-102(2)(e) (2009); NEV. REV. STAT. ANN. §§ 392.700, 392.070 (LexisNexis 2008); N.H. REV. STAT. ANN. §§ 193-A:1 to -10 (LexisNexis 2006); N.M. STAT. ANN. § 22-1-2 to -2.1 (LexisNexis 2006); N.Y. EDUC. LAW § 3204(1) (McKinney 2009); N.C. GEN. STAT. §§ 115C-563 to -565 (2007); N.D. CENT. CODE §§ 15.1-20-02 to -04, 15.1-23-1 to -19 (2003); OHIO REV. CODE ANN. § 3321.04(A)(2) (West 2005); OR. REV. STAT. ANN. §§ 339.030, 339.035 (West 2007); 24 PA. CONS. STAT. ANN. § 13-1327.1 (West 2006); R.I. GEN. LAWS § 16-19-1(a) (2006); S.C. CODE ANN. § 59-65-40 (2005); TENN. CODE ANN. § 49-6-3050 (2009); UTAH CODE ANN. § 53A-11-102(2) (2006); VT. STAT. ANN. tit. 16, §§ 11(a)(21), 166b (2009); VA. CODE ANN. § 22.1-254.1 (2007); WASH. REV. CODE ANN. §§ 28A.200.010, 28A.225.010 (West 2006); W. VA. CODE ANN. § 18-8-1a(c) (LexisNexis 2008); WIS. STAT. ANN. §§ 118.15, 118.165(1) (West 2004); WYO. STAT. ANN. §§ 21-4-101, -102 (2009).

The most prevalent restriction enacted requires parents to file an affidavit of intent to home school with local school board or county superintendent of schools.[121] Nearly half of the states also require parents to keep records of courses taken, attendance, or academic progress.[122] A significant number of states require the instructor[s] to meet certain minimum qualifications such as being "competent" to teach, passing a state or national teaching test, having a high school diploma or general equivalency diploma, having a baccalaureate, or having a state teaching certification.[123] About half of the states utilize standardized testing as a method for ensuring that home schooled students are

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121 ARIZ. REV. STAT. ANN. § 15-802 (2004); ARK. CODE ANN. § 6-15-503 (2007); COLO. REV. STAT. ANN. § 22-33-104.5(3)(e) (West 2005); DEL. CODE ANN. tit. 14, § 2704 (2007); FLA. STAT. ANN. § 1002.41 (West 2005); GA. CODE ANN. § 20-2-690(c) (2009); HAW. ADMIN. R. § 8-12-4(5) (2009); KY. REV. STAT. ANN. § 159.030 (West 2006); LA. REV. STAT. ANN. § 17:236.1 (2001); ME. REV. STAT. ANN. tit. 20-A, § 5001-A (2008); MD. CODE REGS. 10.01.01.B (2009); MISS. CODE ANN. § 37-13-91(3)(c) (2008); MO. ANN. STAT. § 167.042 (West 2000); Mont. Code Ann. § 20-5-109 (2009); NEV. REV. STAT. ANN. § 392.700 (LexisNexis 2008); N.H. REV. STAT. ANN. §§ 193-A:5 (LexisNexis 2006); N.M. STAT. ANN. § 22-1-2.1 (LexisNexis 2006); N.Y. COMP. CODES R. & REGS. tit. 8, § 100.10 (2008); N.C. GEN. STAT. §§ 115C-552, -560 (2007); N.D. CENT. CODE § 15.1-23-02 (2003); OHIO ADMIN. CODE § 3301-34-03(A) (2009); OR. ADMIN. R. 581-021-0026(4) (2009); 24 PA. CONS. STAT. ANN. § 13-1327.1 (West 2006); S.D. CODIFIED LAWS § 13-27-3 (2004); TENN. CODE ANN. § 49-6-3050(b)(1), (8) (2009); UTAH CODE ANN. § 53A-11-102 (2006); VT. STAT. ANN. tit. 16, § 166b (2009); VA. CODE ANN. § 22.1-254.1 (2007); WASH. REV. CODE ANN. § 28A.200.010(1) (West 2006); W. VA. CODE ANN. § 18-8-1(c) (LexisNexis 2008); WIS. STAT. ANN. § 115.30(3) (West 2004); WYO. STAT. ANN. § 21-4-102(b) (2009).

122 COLO. REV. STAT. ANN. § 22-33-104.5(3)(g) (West 2005); DEL. CODE ANN. tit. 14, § 2704 (2007); FLA. STAT. ANN. § 1002.41 (West 2005); GA. CODE ANN. § 20-2-690(c) (2009); HAW. ADMIN. R. § 8-12-15 (2009); IND. CODE ANN. § 20-33-2-20 (West 2008); KY. REV. STAT. ANN. § 159.040 (West 2006); ME. REV. STAT. ANN. tit. 20-A, § 5001-A (2008); MD. CODE REGS. 10.01.01.D-E (2009); MINN. STAT. ANN. § 120A.22 (West 2008); MO. ANN. STAT. § 167.031.2(2)(a) (West 2000); MONT. CODE ANN. § 20-5-109 (2009); N.H. REV. STAT. ANN. § 193-A:6(I) (LexisNexis 2006); N.M. STAT. ANN. § 22-1-2.1 (LexisNexis 2006); N.Y. COMP. CODES R. & REGS. tit. 8, § 100.10 (2008); N.C. GEN. STAT. §§ 115C-548, 556 (2007); N.D. CENT. CODE § 15.1-23-05 (2003); 24 PA. CONS. STAT. ANN. § 13-1327.1(e)(1) (West 2006); S.C. CODE ANN. § 59-65-40 (2005); S.D. CODIFIED LAWS § 13-27-3 (2004); TENN. CODE ANN. § 49-6-3050(b)(2) (2009).

123 GA. CODE ANN. § 20-2-690(c)(3) (2009); IOWA CODE ANN. § 299A.2 (West 2009); KAN. STAT. ANN. § 72-1111 (2007); N.M. STAT. ANN. § 22-1-2.1(C) (2008); N.Y. EDUC. LAW § 3204 (McKinney 2009); N.C. GEN. STAT. § 115C-564 (2008); N.D. CENT. CODE § 15.1-23-03 (2003); OHIO ADMIN. CODE § 3301-34-03(A)(9) (2008); 24 PA. CONS. STAT. ANN. § 13-1327.1(a) (West 2006); S.C. CODE ANN. § 59-65-40(1) (2005); TENN. CODE ANN. § 49-6-3050(b)(4), (7) (2009); VA. CODE ANN. § 22.1-254.1 (2007); WASH. REV. CODE ANN. § 28A.225.010 (West 2006); W. VA. CODE ANN. § 18-8-(c) (LexisNexis 2008). *But see* Mazanec v. N. Judson-San Pierre Sch. Corp., 614 F. Supp. 1152, 1160 (N.D. Ind. 1985) ("It is now doubtful that the requirements of a formally licensed or certified teacher as there required would now pass constitutional muster."); People v. Dejonge, 501 N.W.2d 127, 129 (Mich. 1993) ("We hold that the teacher certification requirement is an unconstitutional violation of the Free Exercise Clause of the First Amendment as applied to families whose religious convictions prohibit the use of certified instructors.").

making adequate progress.[124] Finally, a few jurisdictions permit "home visits" by school officials.[125]

This Comment proposes that the California Legislature adopt two of these limitations to provide sufficient oversight and effective enforcement for protecting California's interest in an educated citizenry.

2. Requiring Parents to File an Annual Affidavit of Intent

California should require all home schooling parents to annually submit an affidavit containing a statement of intent to home school. This limitation serves the purpose of putting California on notice as to which children are being educated at home. Notice is a *sine qua non* for protecting California's interest in education because it allows the government to distinguish between truant students and home schooling students. Further, it provides the government with information needed to enforce the standardized testing restriction. Finally, it provides the government with statistical information which can be used in making critical decisions regarding the public school system.

This restriction has been adopted in a majority of states, indicating nearly universal consensus as to its value in ensuring a state's interest in education.[126] It is also minimally intrusive on the parents' right since it requires a negligible amount of effort on the part of the parents—they need only provide basic information once a year to the local school superintendent or board of education. No less intrusive method could provide California with notice regarding which children are being home schooled. Further—inasmuch as it is already required under the private school exemption—this restriction will not change the current impositions on home schooling in California.[127]

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124 ARK. CODE. ANN. § 6-15-504 (2007); COLO. REV. STAT. ANN. § 22-33-104.5(3)(f) (West 2005); GA. CODE ANN. § 20-2-690(c)(7) (2009); HAW. ADMIN. R. § 8-12-18 (2009); IOWA ADMIN. CODE r. 281-31.4 (2008); LA. REV. STAT. ANN. § 17:236.1 (2001); ME. REV. STAT. ANN. tit. 20-A, § 5001-A (2008); MINN. STAT. ANN. § 120A.22 Subd.11 (West 2008); NEB. REV. STAT. ANN. § 79-318(5) (LexisNexis 2007); N.H. REV. STAT. ANN. § 193-A:6 (LexisNexis 2006); N.Y. COMP. CODES R. & REGS. tit. 8, § 100.10 (2008); N.C. GEN. STAT. §§ 115C-549, -564 (2007); N.D. CENT. CODE §§ 15.1-23-09, -11 (2003); OHIO ADMIN. CODE § 3301-34-04 (2009); OR. REV. STAT. ANN. § 339.035(3) to (5) (West 2007); 24 PA. CONS. STAT. ANN. § 13-1327.1(e)(1) (West 2006); S.C. CODE § 59-65-40 (2005); S.D. CODIFIED LAWS § 13-27-3, -7 (2004); TENN. CODE ANN. § 49-6-3050(b)(5) (2009); VT. STAT. ANN. tit. 16, § 166b (2009); VA. CODE ANN. § 22.1-254.1(C) (2007); WASH. REV. CODE ANN. § 28A.200.010 (West 2006); W. VA. CODE ANN. § 18-8-1(c)(2)(D) (LexisNexis 2008).

125 KY. REV. STAT. ANN. § 159.040 (West 2006); MINN. STAT. ANN. § 120A.26 Subd.1 (West 2008); NEB. REV. STAT. ANN. § 79-318(5) (LexisNexis 2007) (granting the Nebraska State Board of Education the power to adopt regulations including testing and visitation).

126 *See supra* note 121.

127 CAL. EDUC. CODE § 48222 (West 2006).

3. Requiring Students to Undergo Standardized Testing

Merely requiring an affidavit of intent to home school, although minimally intrusive, does not adequately protect California's interest in an educated citizenry. That is, filing an affidavit in no way guarantees that children are receiving the basic education required to become economically independent and civically conscientious.[128] Hence, the government should enact a second restriction requiring home schooled students to take annual standardized tests.[129] This limitation enables California to ensure that every home schooled student is making adequate academic progress since a passing score means that the student has acquired at least everything that he must know for the core subjects in his grade level.[130] Further, the determination is made using an impartial methodology—standardized testing.

A standardized testing requirement passes muster under strict scrutiny.[131] It does not infringe upon the parents' freedom to direct the child's education in any way—except to the extent that the parents must provide the child with minimal competence in basic, core subjects. Further, the imposition on the parents' time is slight since the testing will only be administered once a year. Additionally, nearly half of the states have adopted standardized testing as a way of establishing that home schooling children are making adequate progress.[132] Finally, standardized testing is single-handedly sufficient to ensure adequate academic progress.[133]

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128 *See supra* Part II.C.

129 Although standardized testing satisfies strict scrutiny, the California Legislature—in recognition of the different circumstances and exigencies of each family—may choose to include an exception to the requirement of annual standardized testing in the event that the family and the local school district mutually agree to some other reasonable method for guaranteeing that the home schooled children are receiving a minimally adequate education. Such an exception would generate extra costs for the local school district which would have to analyze and approve an alternative method for protecting the state's interest on a case-by-case basis. Therefore, the decision to allow an alternative method should be left to the discretion of the local school board—the parents would have no right to require consideration of an alternative method to standardized testing. For similar reasons, the school board would not have the authority to require parents, who are in compliance with the standardized testing requirement, to adopt an alternative method for ensuring the state's interest in education.

130 Standardized Testing and Reporting Program, http://www.startest.org/cst.html (last visited Jan. 18, 2010) (stating that California Standards Tests "measure students' progress toward achieving California's state-adopted academic content standards, which describe what students should know and be able to do in each grade and subject tested").

131 *See* Murphy v. Arkansas, 852 F.2d 1039, 1043 (8th Cir. 1988) (finding "the state has no means less restrictive than its administration of achievement tests to ensure that its citizens are being properly educated").

132 *See supra* Part III.B.1.

133 The California Department of Education should adopt remediation regulations applicable to cases where a child's test scores show inadequate progress. Given that students perform poorly on standardized tests for a wide variety of reasons—not all of

4. An Analysis of the Rejected Limitations

In contrast to these two simple limitations, the other commonly used restrictions, discussed above, either do not as effectively advance the state interest, or unnecessarily trample parents' fundamental constitutional right to direct the education of their children.[134] Clearly, adding any of these restrictions to the two proposed would violate the least restrictive means prong of the strict scrutiny standard since these two alone adequately protect California's interest in education.

As stated above, many states require parents to keep detailed records.[135] This requirement constitutes a regular, often daily, imposition on the instructor and therefore is a much more burdensome method for ensuring that the students are making adequate progress than the standardized testing requirement.[136] Hence, this restriction would probably not pass muster under strict scrutiny.

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which are related to academic ability—the remedial response should not be to immediately suspend the parents' right to educate their child at home. Such a draconian response is probably an unconstitutional violation of the parents' fundamental rights. However, some remedial response is necessary if California's interest in education is to have any meaningful protection at all. Although a full consideration of the best remedial regulations is beyond the scope of this Comment, it should be noted that other states use remedial responses ranging from requiring the child to take another test before the end of the school year to requiring the child to be evaluated for learning disabilities and having a certified teacher supervise the child's progress during the remediation period. *See, e.g.*, COLO. REV. STAT. ANN. § 22-33-104.5(5) (West 2005) (requiring child to be placed in a traditional school if child scores at or below the thirteenth percentile and the child's scores do not improve upon re-testing using an approved test selected by parents); IOWA CODE ANN. § 299A.6 (West 2008) (requiring child who scores below the thirtieth percentile to be placed in a traditional school unless the child receives a better score on a second test administered before the beginning of the next school year or the director of the department of education approves a plan of remediation); N.H. REV. STAT. ANN. § 193-A:6 (LexisNexis 2006) (giving parents one year to bring child's educational progress up to "a level commensurate with his ability"); N.D. CENT. CODE §§ 15.1-23-11 to -13 (2003) (requiring child to be evaluated for disabilities by a multidisciplinary assessment team, if child's scores fall below the thirtieth percentile, and requiring parents to file a plan of remediation developed in consultation with a certified teacher); OHIO ADMIN. CODE §§ 3301-34-04, -05 (2009) (requiring parents to submit a remediation plan and quarterly progress reports if child's score falls below the twenty-fifth percentile); OR. REV. STAT. ANN. § 339.035(4) (West 2007) (requiring up to three additional tests, if child's score is below the fifteenth percentile and continues to decline, and granting the superintendent of education the discretion to order the child's education supervised by a certified teacher or to place the child in a traditional school for up to twelve months); S.D. CODIFIED LAWS § 13-27-7 (2004) (allowing school board to refuse to grant a certificate of excuse to home school for a child who makes "less than satisfactory" academic progress); W. VA. CODE § 18-8-1(c)(2) (LexisNexis 2008) (requiring parents to initiate remediation program if child's score is below the fiftieth percentile and allowing the superintendent of education to seek court order denying right to home school if there is clear and convincing evidence that the child is suffering from educational neglect).

134 *See supra* Part III.B.1.

135 *See supra* Part III.B.1.

136 For an example of home schooling regulations requiring parents to maintain attendance records, see *supra* note 122.

Some states require the instructor to have minimum qualifications such as a teaching certificate or a college degree.[137] The teaching certificate requirement is inadequate because it does not ensure that the parent will actually provide higher quality education.[138] Similarly, a college degree requirement insufficiently guarantees adequate instruction since merely having some degree does not assure that the parent can impart the basic required skills.[139]

Finally, a few states have procedures for "home visits" by school officials.[140] These visits probably violate strict scrutiny since parents could submit any information regarding their instructional format without a highly intrusive home visit.[141]

In summary, the government should adopt two home schooling restrictions from those commonly used in other states; namely, the requirement that parents file an annual notice of intent to home school and the requirement that home schooled children take an annual standardized test. These two restrictions pass muster under a strict scrutiny analysis and together assure California's interest in economically independent and civically responsible citizens. The government should not adopt any additional limitations to avoid violating the least restrictive means prong of the strict scrutiny test.

CONCLUSION

The *Jonathan L.* court's decision to overrule its earlier holding and recognize home schooling as legal in California demonstrates that home schooling is no longer a fringe curiosity but has become a socially accepted form of education. However, as the court of appeal stated, California has no regulatory scheme which allows the state to guarantee that its interest in economically independent and civically conscientious citizens is

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137 *See supra* Part III.B.1.

138 People v. DeJonge, 501 N.W.2d 127, 141 (Mich. 1993) (finding that "empirical studies disprove a positive correlation between teacher certification and quality education").

139 This is also true of other instructor qualification requirements of this type, such as having a high school diploma or general equivalency diploma.

140 *See supra* Part III.B.1.

141 *See, e.g.*, CAL. CONST. art. I, § 1 (establishing privacy as an inalienable right belonging to all people); Brunelle v. Lynn Pub. Sch., 702 N.E.2d 1182, 1184, 1186 (Mass. 1998) (finding that "[w]ith appropriate testing procedures or progress reports, there may be no need for periodic on-site visits," viewing a home visit requirement "carefully in light of constitutional considerations," and finding that such a requirement "may call into play issues of family privacy in seeking to keep the home free of unwarranted intrusion").

adequately protected in each home school.[142] Hence, under current California law, the state's interest in education is put at risk by home schooling.[143] Therefore, the government should explicitly regulate home schooling. However, parents have a fundamental constitutional right to direct the upbringing and education of their children.[144] Thus, any attempt to restrict home schooling must pass muster under judicial strict scrutiny so that it does not trample this parental right.[145]

In answer to the *Jonathan L.* court's plea for clarity, the California Legislature should legalize home schooling by enacting a home schooling exemption to the state's compulsory school attendance statute. This new exemption would lay to rest any question of the validity of home schooling in California. Moreover, it would simplify the law relating to California's compulsory school attendance statute. Finally it would serve as the basis for adopting restrictions which advance California's interest in education.

Additionally, the government should impose two limitations on home schooling: a filing of annual notice of intent to home school requirement, and an annual standardized testing requirement. The first requirement allows California to determine which students are truant and which are home schooled, to enforce the second requirement; and to collect information regarding education in California. This requirement clearly passes strict scrutiny since no viable, less intrusive means exist for informing the state of the parents' intent to home school. However, this requirement alone is not sufficient to guarantee that students are receiving a minimally adequate education.

Therefore, the second restriction enables the state to ensure that students are receiving an adequate education by testing their basic competency levels in the core classes required by the California school system. This limitation passes muster under strict scrutiny because it does not significantly infringe upon the parents' freedom or ability to direct the child's education and has been adopted, in some form or another, by nearly half of the states.[146] Further, it guarantees that the child is receiving an adequate education without requiring further limitations on the parental right. In contrast, the other restrictions widely used by

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142 Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571, 596 (Cal. Ct. App. 2008) (noting that California lacks "regulatory framework for homeschooling" and stating that "additional clarity in this area of the law would be helpful").

143 *See supra* Part III.A.

144 *See supra* Part II.B.

145 *See supra* Part III.

146 *See supra* Part III.B.1 and 3.

different states either constitute a greater imposition on parental rights or do not as effectively protect the state's interest.[147]

Finally, there may be pragmatic reasons for California to place even less restrictive limitations on home schooling than required by the Federal Constitution. For example, home schooling's more individualized focus gives parents greater flexibility and thereby permits them to adapt the curriculum to take into account different learning styles of their children. Further, home schooling allows for experimentation in educational methodologies in a way which is difficult, if not impossible, in a large, bureaucratic public education system.[148] Thus, relaxed home schooling regulations may encourage the variable and experimental aspects of home schooling.[149]

147 *See supra* Part III.B.4.

148 Such experimentation and improvement may be badly needed since some believe that the public school system in California is providing an inferior education to many students. *See, e.g.*, Stanford University School of Education, News Bureau, http://ed.stanford.edu/suse/news-bureau/displayRecord.php?tablename=press&id=58 (last visited Jan. 18, 2010) ("California students, parents and community leaders agree: comprehensive change is needed to fix education system.").

149 For example, yearly standardized testing may limit the parents' ability to adopt alternative educational methods because of the need to ensure that their children are annually advancing in certain subjects, at a certain rate, so that they can pass the tests.

One Step at a Time: Reforming Drug Diversion Programs in California

*Megan N. Krebbeks**

INTRODUCTION

In 1972, California allowed nonviolent drug offenders to complete treatment and rehabilitation as a substitute for jail time.[1] Since then, California has expanded its drug diversion programs[2] in a couple of ways.[3] Recently, Californians had an opportunity to expand and improve drug diversion programs by voting in favor of the Nonviolent Offender Rehabilitation Act (hereinafter "Proposition 5").[4] Proposition 5 sought to build upon the foundation laid by the Substance Abuse and Crime Prevention Act of 2000 (hereinafter "Proposition 36") and also further improve and fund drug diversion programs in California.[5]

While the existing diversion programs are generally successful, the programs need help to further treatment goals and alleviate the state's current budgetary and prison population

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1 Mehgan Porter, Comment, *Proposition 36: Ignoring Amenability and Avoiding Accountability*, 21 BYU J. PUB. L. 531, 533 (2007).

2 Drug diversion programs divert a drug offender from prison and place him into a treatment program. California Campaign for New Drug Policies, Drug Courts/Deferred Entry and Proposition 36, Nov. 2000, http://www.drugreform.org/prop36/pdf/drugcourts.pdf.

3 California expanded drug diversion programs with the creation of adult drug courts in 1991. California Department of Alcohol and Drug Programs, Fact Sheet: Drug Court Programs, Apr. 2009, *available at* http://www.adp.ca.gov/FactSheets/DrugCourtPrograms.pdf [hereinafter *Fact Sheet: Drug Court Programs*]. In 2000, California further expanded drug diversion programs with the passage of the Substance Abuse and Crime Prevention Act of 2000 (Proposition 36). CAL. PENAL CODE § 1210 (Deering 2008).

4 The Nonviolent Offender Rehabilitation Act of 2008 appears on the California ballot on the November 2008 election as "Proposition 5." *See generally* Proposition 5: Official Title and Summary, *available at* http://voterguide.sos.ca.gov/past/2008/general/analysis/pdf/prop5-analysis.pdf#analysis [hereinafter *Proposition 5 Voter Information Guide*] (providing an overview, analysis and full text of Proposition 5).

5 Proposition 5, Text of Proposed Laws 86, *available at* http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf [hereinafter *Text of Proposition 5*].

crises.[6] Proposition 5 would have helped solve some of these issues. However, on November 4th, Californians voted against Proposition 5 which, for the time being, leaves drug diversion programs in California struggling until new legislation is enacted to solve the current problems.[7] In order for drug diversion to continue to aid California in alleviating prison overpopulation and the budget crisis, California needs legislation much like Proposition 5 that will restructure and adequately fund drug diversion programs, saving money and allowing California to focus on truly dangerous criminals.

Beginning with a general history of drug diversion in the United States, Part I puts this issue in a historical and national context as it delves into how and why drug diversion evolved in the 1960s. It also touches upon the roots of California's drug diversion programs and introduces the three current programs at work in the California criminal justice system.

Part II describes in detail each drug diversion program currently operating in California. These programs are: Proposition 36, drug court, and deferred entry of judgment. The differences between the three programs are illuminated to enhance the understanding of the drug diversion system in California.

Part III examines the successes and failures of the current drug diversion system. It focuses on Proposition 36 because it encompasses more defendants and resources than drug court and deferred entry of judgment. Part III also discusses areas where the current system needs improvement.

After describing and discussing the current drug diversion system, Part IV introduces the latest effort to reform and update the drug diversion programs in California. It begins with a background of Proposition 5 and describes the changes that Proposition 5 would make to the current programs. Part V then discusses how Proposition 5 could have improved the current diversion programs, mainly through increased funding and organization. Finally, this comment offers a few suggestions explaining why Proposition 5 failed to garner enough support at the polls and proposes how similar legislation could pass in the future.

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6 *Id.* at 87.

7 Statement of Vote: November 4, 2008, General Election, *available at* http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf.

I. BACKGROUND

A. History of Drug Diversion Programs in the United States

In 1962, the landmark case of *Robinson v. California* prompted a change in the United States judicial system's approach to drug addicted offenders.[8] In *Robinson*, the Supreme Court struck down a California statute which made the status of drug addiction a criminal offense.[9] The majority opinion noted that the statute "[was] not one which punishes a person for the use of narcotics, for their purchase, sale or possession . . . [r]ather, we deal with a statute which makes the 'status' of narcotic addiction a criminal offense."[10] Building upon this, the court analogized penalizing drug addiction to criminalizing a person's disease, which would essentially be cruel and unusual punishment under the Eighth and Fourteenth Amendments.[11] Justice Douglas noted in his concurrence that the statute's purpose was "not to cure, but to penalize."[12] *Robinson* helped prove that drug addiction was a disease requiring treatment and not deserving of punishment.[13] In 1966, Congress followed the judiciary's lead by passing the Narcotic Addict Rehabilitation Act of 1966,[14] giving courts the authority to sentence drug addicts who violated Federal criminal laws to treatment programs as an alternative to imprisonment.[15] These two events paved the way for states to handle drug offenders in ways other than incarceration.

B. California's History With Drug Diversion

After Congress enacted the Narcotic Addict Rehabilitation Act,[16] California began its foray into drug diversion programs with the codification of sections 1000–1000.4 of the California Penal Code in 1972.[17] The court in *People v. Superior Court (On Tai Ho)* explained that sections 1000–1000.4 "authorize[d] the courts to 'divert' from the normal criminal process persons who are formally charged with first-time possession of drugs, have not yet gone to trial, and are found to be suitable for treatment and

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8 Robinson v. California, 370 U.S. 660 (1962).

9 *Id.* at 667.

10 *Id.* at 666.

11 *Id.*

12 *Id.* at 676 (Douglas, J., concurring).

13 JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 35 (2001).

14 42 U.S.C. § 3401 (2006) (establishing the Congressional policy that narcotic addicts should be rehabilitated and returned to society rather than prosecuted).

15 NOLAN, *supra* note 13, at 35.

16 42 U.S.C. § 3401.

17 Porter, *supra* note 1.

rehabilitation at the local level."[18] Sections 1000–1000.4 eventually became known as Deferred Entry of Judgment,[19] ("DEJ"), when the California legislature amended sections 1000–1000.4 in 1997.[20]

Building upon the seeds planted by DEJ, California began its first adult drug court[21] program in Alameda County in 1991.[22] By 1996, drug related crimes continued to plague California at an even greater level as California's rate of incarceration for drug offenses climbed to the highest in the nation at 134 per 100,000 prisoners.[23] Although California had a program in place to deal with nonviolent drug offenders,[24] the amount of offenders overwhelmed the system and California needed an answer.[25] In response to the growing problem, Californians approved Proposition 36 in November of 2000.[26] Together, DEJ, drug court, and Proposition 36 have provided options for many drug

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18 People v. Superior Court (On Tai Ho), 520 P.2d 405, 407 (Cal. 1974). The court further stated:

> The purpose of such legislation, which has recently been adopted with variations in several of our sister states, is two-fold. First, diversion permits the courts to identify the experimental or tentative user before he becomes deeply involved with drugs, to show him the error of his ways by prompt exposure to educational and counseling programs in his own community, and to restore him to productive citizenship without the lasting stigma of a criminal conviction. Second, reliance on this quick and inexpensive method of disposition, when appropriate, reduces the clogging of the criminal justice system by drug abuse prosecutions and thus enables the courts to devote their limited time and resources to cases requiring full criminal processing.

Id.

19 CAL. PENAL CODE § 1000.1 (West 2008) (requiring that in a deferred entry of judgment case, the defendant pleads guilty to the charges and, pending successful completion of a drug treatment program, the charges against the defendant are dismissed).

20 People v. Davis, 93 Cal.Rptr. 2d 905, 907 (Cal. Ct. App. 2000).

21 *See* California Department of Alcohol and Drug Programs and the Judicial Council of California, Drug Court Partnership Act of 1998 Final Report at 8, Mar. 2002, http://www.adp.ca.gov/Drug Courts/pdf/DCP_FinalReport_March2002.pdf for a definition of drug courts:

> Drug courts are a specially designed court calendar, the purposes of which are to achieve a reduction in recidivism and substance abuse among offenders and to increase their likelihood of successful return to the community through early, judicially supervised treatment, mandatory periodic drug testing, and use of appropriate sanctions and other continuous rehabilitation services.

22 *Fact Sheet: Drug Court Programs*, *supra* note 3.

23 Peter Banys, California Society of Addiction Medicine, Recommendations for Improvements to Proposition 36, at 3 (2007) (presentation for the Little Hoover Commission on Aug. 23, 2007), http://www.csam-asam.org/pdf/misc/Prop36-LDC-2007.pdf (stating that California's drug incarcerations increased by more than 250 percent during a ten year span from 1986 to 1996).

24 Prior to drug courts, DEJ was the only drug diversion program in California.

25 Banys, *supra* note 23, at 3 (noting that in 1999, 52.9 percent of new drug imprisonments in California were for possession rather than sale or manufacture).

26 42 U.S.C. § 1210 (2006); Banys, *supra* note 23, at 3 (noting that California voters passed Proposition 36 by a vote of 61 percent to 39 percent).

offenders who may otherwise have faced incarceration. In order to more fully understand the current structure of California's drug diversion programs, an introduction to DEJ, drug court, and Proposition 36 follows.

II. DRUG DIVERSION PROGRAMS IN CALIFORNIA

A. Deferred Entry of Judgment

DEJ allows a nonviolent drug offender to avoid a sentence imposing jail time.[27] In a DEJ case, the defendant pleads guilty to the charges, waives time for the pronouncement of the judgment,[28] and, pending successful completion of a drug treatment program, the sentence will not be imposed and the court will dismiss the charges.[29] However, if the defendant does not complete the treatment program, or the court deems the defendant no longer suitable for DEJ, the court will enter judgment and sentencing will proceed as normal.[30] Before a court may grant DEJ, the defendant must fulfill certain eligibility requirements.[31]

First, the defendant's offense must fall into the listed charges in section 1000(a).[32] The defendant must then satisfy six additional requirements making him eligible for DEJ.[33] These requirements include: 1) that the defendant has no conviction for an offense involving drugs prior to the charged offense; 2) that the charged offense was nonviolent; 3) that there was no

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27 CAL. PENAL CODE § 1000(a) (West 2008) (including offenses eligible for DEJ: use, possession, or under the influence of a controlled substance, unlawful possession of paraphernalia used for unlawfully injecting or smoking a controlled substance, unauthorized possession of marijuana, and unlawfully being present in an area where controlled substances are being used with knowledge of its occurrence).

28 When a defendant waives time for the pronouncement of the judgment, sentencing is essentially delayed until the defendant completes a drug treatment program; or, if the defendant does not complete the drug treatment program, judgment would be entered upon his failure to do so.

29 CAL. PENAL CODE § 1000.1(3) (West 2008) (requiring that the drug treatment program must last at least eighteen months).

30 CAL. PENAL CODE § 1000.3 (West 2008) (stating that a defendant would be deemed no longer suitable for participation in DEJ if he was performing unsatisfactorily, not benefiting from treatment, or the defendant had been convicted of a misdemeanor showcasing his propensity for violence).

31 CAL. PENAL CODE § 1000(a) (West 2008).

32 *Id.* The violations that are eligible for DEJ are: sections 11350, 11357, 11364, 11365, 11377, as well as 11550 of the Health and Safety Code, section 23222(b) of the Vehicle Code, section 11358 of the Health and Safety Code if the marijuana is for personal use, section 11368 of the Health and Safety Code if the drug was procured by a fake prescription and is for the personal use of defendant, section 653(f)(d) of the Penal Code if the solicitation was for acts directed to personal use only, section 381 and 647(f) of the Penal Code if for being under the influence of a controlled substance, and section 4060 of the Business and Professions Code. *Id.*

33 CAL. PENAL CODE § 1000(a)(1)–(6) (Deering 2008).

violation relating to drugs other than a violation of section 1000; 4) that the defendant has never had probation or parole revoked without completion; 5) that the defendant has not completed or been terminated from diversion or DEJ within five years of the charged offense; and 6) that the defendant has no prior felony conviction within five years of the charged offense.[34] These requirements severely limit the pool of eligible defendants for participation in DEJ.

Perhaps the most important of these requirements is contained in section 1000(a)(1)—that the defendant has no prior conviction for any offense involving controlled substances.[35] This provision bars all criminals with a drug history other than a first time offender from participation in DEJ. Although eligibility for DEJ requires the satisfaction of many requirements, there are tangible and important benefits to the program. Primarily, that the charges can be dismissed and the arrest expunged from the defendant's record.[36]

B. Drug Courts

The first drug court in California welcomed clients[37] in 1991.[38] In a drug court, "[T]he emphasis shifts away from placing blame and administering appropriate punishment, toward identifying the underlying causes of the offending behavior, and working to address those causes through treatment."[39] Rather than serving jail time, an offender in drug court participates in a court-monitored treatment program.[40] A defendant's opportunity to participate in a drug court depends on the existence of a drug court within the county in which he committed his crime.[41] Counties are not required to have drug court programs; rather, section 1000.5 of the California Penal Code grants the authority to the presiding judge of a superior court to establish a drug court program.[42] Each county's drug

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34 *Id.*

35 CAL. PENAL CODE § 1000(a)(1) (Deering 2008).

36 CAL. PENAL CODE § 1000.4(a) (Deering 2008).

37 Offenders in drug court are routinely referred to as clients, rather than defendants or offenders. This trend reflects the overall ideology of drug court as a therapeutic and ameliorative program, rather than one based simply in punitive measures.

38 *Fact Sheet: Drug Court Programs*, *supra* note 3.

39 Sara Steen, *West Coast Drug Courts: Getting Offenders Morally Involved in the Criminal Justice Process*, *in* DRUG COURTS: IN THEORY AND IN PRACTICE 51, 54 (James L. Nolan, Jr. ed., 2002).

40 NOLAN, *supra* note 13, at 39.

41 *Fact Sheet: Drug Court Programs*, *supra* note 3 (reporting that in April of 2009 all but five counties in California had an adult drug court; counties without drug courts are: Alpine, Colusa, Imperial, Mono, and Trinity).

42 CAL. PENAL CODE § 1000.5(a) (Deering 2008).

court is run according to standards set by the presiding judge in the county, or a judge appointed by the presiding judge, along with the district attorney and public defender.[43] For example, in Los Angeles County the standards require that the defendant have no prior convictions involving violence or the sale, manufacturing, or trafficking of drugs.[44] County drug programs also typically have a mission statement that outlines the goals and hopes of the program in rehabilitating its participants.[45]

Drug courts in California use several different models, one of which is the pre-plea model of diversion.[46] When a defendant is arrested and charged with a nonviolent drug offense, and drug court is an available option, a defendant must be deemed suitable for participation in drug court through an intake interview done by a member of the drug court team.[47] If the defendant is found suitable, it is ultimately the defendant's choice if he wants to opt into the drug court program as opposed to enduring the traditional punishment.[48] In court, the defendant does not enter a plea of guilty, and criminal proceedings are suspended pending successful completion of drug court.[49] A drug court program typically consists of:

> [A] regimen of graduated sanctions and rewards, individual and group therapy, urine analysis testing commensurate with treatment needs, close court monitoring and supervision of progress, educational or vocational counseling as appropriate, and other requirements as agreed to by the presiding judge or his or her designee, the district attorney, and the public defender.[50]

If the defendant satisfactorily completes the drug court program, the criminal charges will be dismissed and the arrest will be deemed to have never occurred.[51] However, if the court finds that the defendant is not performing satisfactorily, or has

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43 *Id.*

44 Standards & Practices, Los Angeles County Drug Court Program, May 23, 2006.

45 The Los Angeles County Drug Court Program's mission statement is:

> The mission of the Los Angeles County Drug Court Programs is to provide the non-violent substance abuse defendant who recognizes his/her problem and voluntarily chooses to enter into a contract with a court-supervised treatment program and participate in all phases of treatment an opportunity to improve his/her quality of life and possibly further benefit by the reduction and/or dismissal of criminal charges.

Id.

46 *Fact Sheet: Drug Court Programs*, *supra* note 3.

47 Glade F. Roper & James E. Lessenger, *Drug Court Organization and Operations*, *in* DRUG COURTS: A NEW APPROACH TO TREATMENT AND REHABILITATION 284, 290–91 (James E. Lessenger & Glade F. Roper eds., 2007).

48 Steen, *supra* note 39, at 51–52.

49 CAL. PENAL CODE § 1000.5(a) (Deering 2008).

50 *Id.*

51 CAL. PENAL CODE § 1000.5(b) (Deering 2008).

subsequently engaged in or been convicted of certain types of criminal conduct, the court will then reinstate the criminal charges.[52]

C. Proposition 36

Proposition 36 is California's most recent drug diversion program.[53] Arising in response to issues with the existing diversion programs,[54] the California legislature enacted Proposition 36.[55] Section 1210.1 requires "any person convicted of a nonviolent drug possession offense [to] receive probation."[56] As a condition and requirement of probation, the defendant must complete a drug treatment program.[57] A key difference between previous diversion programs and Proposition 36 is the point in the judicial process at which the defendant is assigned to a treatment program.[58] Unlike DEJ and drug court, Proposition 36 participants enter a treatment program post-conviction.[59]

A defendant eligible for Proposition 36 has a conviction for a nonviolent drug possession offense.[60] As defined by the California Penal Code, a nonviolent drug possession offense is

> the unlawful personal use, possession for personal use, or transportation for personal use of any controlled substance identified in [Sections 11054–58] of the Health and Safety Code, or the offense of being under the influence of a controlled substance in violation of Section 11550 of the Health and Safety Code. The term 'nonviolent drug possession offense' does not include the possession for sale, production, or manufacturing of any controlled substance.[61]

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52 *Id.*

53 CAL. PENAL CODE § 1210 (Deering 2008).

54 The problem with the existing system was that there was a lack of legislation requiring the diversion of a defendant from jail and into a treatment program. Porter, *supra* note 1, at 534.

55 *Id. See also* Gregory A. Forest, Comment, *Proposition 36 Eligibility: Are Courts and Prosecutors Following or Frustrating the Will of Voters?*, 36 MCGEORGE L. REV. 627, 639–40 & nn.109–10 (2005) (discussing how Proposition 36 requires an offender eligible for Proposition 36 treatment be given probation, not be sent to prison).

56 CAL. PENAL CODE § 1210.1(a) (Deering 2008).

57 *Id.*

58 CAL. PENAL CODE § 1000 (Deering 2008) (stating that a defendant enters DEJ after a guilty plea); § 1000.5(a) (stating that a defendant enters drug court before entering a plea); § 1210.1(a) (stating that a defendant enters a treatment program after conviction).

59 CAL. PENAL CODE § 1210.1(a) (Deering 2008).

60 *Id.*

61 CAL. PENAL CODE § 1210(a) (Deering 2008). The court in *People v. Goldberg* noted that "[t]he manifest purpose behind Proposition 36 was to divert into treatment those persons whose *only* offenses were nonviolent drug possession offenses." People v. Goldberg, 105 Cal. App. 4th 1202, 1208 (Cal. Ct. App. 2003).

In addition to the conviction, the defendant must fulfill certain prerequisites specified by Penal Code section 1210.1.[62]

Upon successful completion of the drug treatment program and compliance with the terms of the defendant's probation, the court dismisses the indictment, and the arrest and conviction are deemed to have never occurred.[63] Defendants essentially have three chances at getting their case dismissed, as section 1210.1(f)(3)(C) provides three opportunities for a defendant to complete the requirements of Proposition 36.[64] If the defendant fails to complete a drug treatment program or comply with probation, the probation can be modified or revoked and the defendant will be incarcerated according to his conviction.[65]

III. ADVANTAGES AND DISADVANTAGES OF THE STATUS QUO

A. Success of the Current Drug Diversion System

Proposition 36 and drug courts provide the majority of the statistics for evaluating the success of drug diversion programs in California. Because DEJ is limited to a small amount of offenders due to its statutory requirements,[66] it does not affect as many drug offenders as Proposition 36 and drug courts, and consequently will not be analyzed to the same extent as the aforementioned programs. In its sixth year of operation (July 2006–June 2007), approximately 34,702 offenders were placed in Proposition 36 treatment.[67] Estimates place drug court populations between 3,000 and 4,000 people.[68]

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62 CAL. PENAL CODE § 1210.1(b)(1)–(5) (Deering 2008) (specifying that in order to qualify for Proposition 36, a defendant may not fall under the following categories: (1) defendants who were previously convicted of one or more violent felonies, unless the non-violent drug possession occurred after a period of five years in which the defendant was free of prison custody and the commission of the felony, or a misdemeanor conviction involving physical injury or the threat of physical injury to another; (2) defendants who are convicted of a non-drug related misdemeanor in the same proceeding as the non-violent drug possession offense; (3) defendants who were armed with a deadly weapon, with the intent to use the deadly weapon, while in possession of or under the influence of a controlled substance; (4) defendants who refuse drug treatment as a condition of probation; (5) defendants who have two separate convictions for non-violent drug possession offenses and have participated in two separate courses of drug treatment and have been found by the court to be unamenable to treatment).

63 CAL. PENAL CODE § 1210.1(e)(1) (Deering 2008).

64 CAL. PENAL CODE § 1210.1(f)(3)(C) (Deering 2008).

65 CAL. PENAL CODE § 1210.1(f)(1) (Deering 2008).

66 *See supra* note 33 and accompanying text.

67 UCLA INTEGRATED SUBSTANCE ABUSE PROGRAMS, EVALUATION OF PROPOSITION 36: THE SUBSTANCE ABUSE AND CRIME PREVENTION ACT OF 2000 REPORT 19 (2008), http://www.adp.cahwnet.gov/SACPA/PDF/2008_Final_Report.pdf [hereinafter UCLA REPORT 2008].

68 Drug Policy Alliance, Comparing Dug Courts and Prop. 36 1 http://www.prop36.org/pdf/summary_comparison.pdf (last visited Jan. 11, 2008). Because there is a lack of statewide data on drug courts, the drug court population can only be

Proposition 36 treats the largest amount of nonviolent drug offenders in California.[69] Due to its size, Proposition 36 has the ability to make the most significant impact upon the California budget and criminal justice system. Since Proposition 36 passed in 2000 and came into effect in 2001, the drug possession prison population in California prisons has fallen.[70] Not only has Proposition 36 decreased the drug possession prison population, Proposition 36 also stunted the overall prison population growth in California.[71] Before the passage of Proposition 36, the California Department of Corrections projected that the prison population would reach 180,000 by June of 2005.[72] In June 2005, four years after the implementation of Proposition 36, the prison population was just over 164,000, and ended the year at 166,000, well below the projected 180,000.[73] While Proposition 36 reduced prison populations during its first few years of existence, it also had a hand in reducing violent crimes in California.[74] Between 2000 and 2004, the violent crime rate in California dropped 11.2 percent.[75] The effect of Proposition 36 on California's prisons and crime rates cannot go unnoticed.

Proposition 36 has also resulted in a number of financial benefits to California since its inception.[76] By reducing the amount of prisoners in the prison system, Proposition 36 saved California over $350 million in the past eight years.[77] Along with the savings from a decreased amount of prison admissions, California has been able to put off the costly venture of constructing new prisons.[78] The California Legislative Analyst's Office noted in February of 1999 that:

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estimated. *Id.* *See also* Banys, *supra* note 23, at 4 (noting that drug courts in California handle only about 3 percent of at-risk offenders).

69 In 2006–2007, 48,996 offenders were referred to Proposition 36, 41,925 offenders were assessed, and 34,702 offenders were placed into treatment. UCLA REPORT 2008, *supra* note 67, at 19.

70 SCOTT EHLERS & JASON ZIEDENBERG, JUSTICE POLICY INSTITUTE, PROPOSITION 36: FIVE YEARS LATER 4 (2006), http://www.csam-asam.org/pdf/misc/Prop36-fiveyearslater.pdf (noting that the number of drug offenders in California prisons went from 19,736 in December of 2000 to 14,325 in December of 2005).

71 *Id.* at 8.

72 *Id.*

73 *Id.*

74 *Id.* at 14.

75 *Id.* (noting that violent crime rate drop in California exceeded the national violent crime rate drop by 3 percent).

76 UCLA REPORT 2008, *supra* note 67, at 218, 223, 227.

77 EHLERS & ZIEDENBERG, *supra* note 70, at 24 (estimating based on the assumptions that the offenders diverted from prison would have served the average prison sentence for drug possession, 1.48 years, at the cost of incarceration for a single inmate in the year of 2005).

78 *Id.* at 25.

> [T]he state will run out of bed space by as soon as 2001 and would need additional space for as many as 27,000 inmates by June 30, 2004. That is the equivalent of five to six state-operated prisons carrying a one-time construction cost of $1.6 billion and annual ongoing operational costs of more than $500 million.[79]

California has constructed only one prison since the passage of Proposition 36, and that prison received approval prior to Proposition 36.[80]

Along with saving state money in terms of prisons and the amount of prisoners, Proposition 36 saves money for California based on participants in the program.[81] For each dollar allocated to Proposition 36, the program generates two dollars of savings.[82] In addition, for each offender who completes Proposition 36 treatment, the state saves $5,836, approximately four dollars for every one dollar spent.[83] Furthermore, Proposition 36 saves California money even when an offender does not enter treatment, or fails to complete it.[84] Offenders referred to Proposition 36 but who do not enter treatment save approximately $4,037,[85] and offenders who fail to complete Proposition 36 treatment save approximately $1,792.[86] Simply comparing the costs of drug treatment compared to the cost of incarceration proves the money-saving achievements of Proposition 36. Currently, the average yearly cost per inmate in a California prison is $49,000.[87] The average cost for a drug treatment program ranges from $1,800 to $6,800 per client.[88]

Proposition 36 also provides benefits to both the state and its participants as participants in Proposition 36 receive valuable education and information for changing their addictive behaviors and recovering from drug addiction.[89] The California Society of

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79 *Id.* (citing the California Legislative Analyst's Office, Feb. 16, 1999).

80 *Id.* (noting that only one prison has been built since the passage of Proposition 36, the Kern Valley State Prison, which had been approved for construction prior to the passage of Proposition 36).

81 UCLA REPORT 2008, *supra* note 67, at 225–27.

82 *Id.* at 225.

83 *Id.* at 227 (noting that much of the savings originate from avoiding incarceration costs).

84 *Id.*

85 *Id.*

86 *Id.*

87 California Department of Corrections and Rehabilitation, Fourth Quarter 2008 Facts and Figures, http://www.cdcr.ca.gov/Divisions_Boards/Adult_Operations/Facts_and_Figures.html (last visited Jan. 19, 2010) (reporting that with a prison population of 171,085, the cost of incarceration for all prisoners is over $10 billion) [hereinafter *Facts and Figures*].

88 Drug Courts/Deferred Entry and Proposition 36, *supra* note 2.

89 *See* Hundreds of Prop 36 Graduates Form Chain of Recovery at State Capitol, Celebrate Program's Success, PROP36.ORG, Apr. 18, 2007, http://www.prop36.org/pr041807.html.

Addiction Medicine found that "nearly three out of four clients entering [Proposition] 36 treatment make substantial progress and reach positive outcomes."[90] 34.4 percent of offenders complete Proposition 36 treatment with positive results.[91] As of April 2007, over 70,000 offenders have graduated from Proposition 36 treatment.[92] Graduates of Proposition 36 often credit the program with changing and saving their lives.[93]

While Proposition 36 has successfully treated a large group of substance abuse offenders, drug courts have also found success, albeit with a smaller proportion of drug offenders.[94] Drug courts have a completion rate of 55 percent statewide,[95] but also deal with a significantly smaller portion of nonviolent drug offenders as compared to Proposition 36.[96] While drug courts serve a small amount of offenders, they are still capable of saving significant amounts of taxpayer dollars.[97] One year in jail for a single offender costs $49,000,[98] while the cost of a full drug treatment program averages $3,000 per client.[99] Over the long term, drug courts save California an average of $11,000 per client.[100] In total, drug courts save California over $18 million

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90 *Proposition 36 Revisited*, 30 CAL. SOC'Y OF ADDICTION MED. 1 (Spring 2005), http://www.csam-asam.org/pdf/misc/Spring2005.pdf (noting that while some offenders may not complete treatment, they receive what is called a "standard dose" of treatment, meaning that they spend the same amount of time in treatment as those who complete treatment).

91 *Id.*

92 Prop36.org, *supra* note 89. *See also* Dave Fratello, *Jail Won't Cure Drug Users*, L.A. TIMES, July 17, 2006, at B11 (acknowledging that Proposition 36 not only saves money, but also saves lives).

93 Substance Abuse and Crime Prevention Act of 2000, Success Stories, http://www.prop36.org/successStories_TammyB.php (last visited Nov. 16, 2009) (reporting that a graduate of Proposition 36 wrote that Proposition 36 allowed her "to become a parent again, a daughter, a sister, an aunt, a cousin, a neighbor").

94 *See* Proposition 36 Revisited, *supra* note 90.

95 *Id. See also* CALIFORNIA DEPARTMENT OF ALCOHOL AND DRUG PROGRAMS, COMPREHENSIVE DRUG COURT IMPLEMENTATION ACT OF 1999, FINAL REPORT TO THE LEGISLATURE MARCH 2005 9 (2005), http://www.adp.cahwnet.gov/DrugCourts/pdf/CDCI_FinalReportToLegislature_March2005.pdf (reporting that in June 2004, of the 6,966 adult offenders who exited the drug court program for the previous year, 3,849 successfully completed drug court treatment).

96 *See supra* note 68 and accompanying text. *See also* BANYS, *supra* note 23, at 4 (noting that drug courts in California handle only about 3 percent of at-risk offenders).

97 Drug Courts/Deferred Entry and Proposition 36, *supra* note 2.

98 *Facts and Figures*, *supra* note 87.

99 C. WEST HUDDLESTON, III, DOUGLAS B. MARLOWE, & RACHEL CASEBOLT, NATIONAL DRUG COURT INSTITUTE, PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES, at 8 (May 2008) [hereinafter PAINTING THE CURRENT PICTURE] *available at* http://www.ndci.org/publications.html.

100 *Id.*

dollars per year, proving that money spent on drug courts is a sound investment.[101]

B. Where the Current System Needs Improvement

In spite of the successes of the current drug diversion programs,[102] the system is not perfect, and California is still burdened with high prison populations,[103] a budget crisis,[104] and a general need for coordination between the current diversion programs.[105] Funding issues threaten the ability of drug diversion programs to effectively operate and provide valuable services for California.[106] Decreased funding for treatment programs often results in limited treatment options for offenders with varying needs.[107]

When Proposition 36 became law, funding provisions accompanied it in the form of the Substance Abuse Treatment Trust Fund.[108] The trust fund provided for an initial $60 million for the fiscal year of 2000–2001 and $120 million for the following years ending in 2005–2006.[109] After the end of the 2005–2006 fiscal year, re-funding Proposition 36 proved to be a contentious issue in the California legislature.[110] Supporters of Proposition 36 fought for a budget increase but were defeated.[111] Funding for Proposition 36 remained at $120 million.[112] In 2006–2007, although requests for increased funding were made, Governor Schwarzenegger threatened to reduce funding to the original amount of funding, $60 million.[113] Through the Offender Treatment Program,[114] an additional $20 million was available

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101 *See* Caitlin Liu, *Drug Courts Worth the Cost, Report Says*, L.A. TIMES, Apr. 16, 2003, at B3.

102 These programs are DEJ, Proposition 36, and drug courts.

103 The population in California prisons as of the fourth quarter in 2008 was 171,085. *Facts and Figures*, *supra* note 87.

104 George Skelton, *Lavish spending not the culprit*, L.A. TIMES, Dec. 25, 2008, at B1.

105 Currently, deferred entry of judgment, proposition 36, and drug courts are not linked by a statutory law.

106 Banys, *supra* note 23, at 10.

107 Judith Appel, Glenn Backes, & Jeremy Robbins, Drug Policy Alliance, *California's Proposition 36: A Success Rip for Refinement and Replication*, 3 CRIMINOLOGY & PUB. POL'Y 585, 589 (2004), *available at* http://www.drugpolicy.org/docUploads/CPP410_Appel_1st.pdf.

108 HIGHLIGHTS OF PROPOSITION 36, (Feb. 20, 2001), http://www.courtinfo.ca.gov/programs/drugcourts/documents/highlights.pdf.

109 *Id.*

110 Proposition 36 Revisited, *supra* note 90.

111 Porter, *supra* note 1, at 551 & n.114 (discussing the failure of Senate Bill 1137 which would have added $25 million to Proposition 36 funds).

112 *Id.*

113 Prop36.org, About Prop 36, http://www.prop36.org/about.html (last visited Nov. 16, 2009).

114 The Offender Treatment Program was established in 2006–2007 to enhance the Substance Abuse and Crime Prevention Act. Substance Abuse and Crime Prevention Act

for 2006–2007, but only for counties with the ability to match the funds.[115] While funding for Proposition 36 has remained essentially the same throughout its existence,[116] the demonstrated need for more funding cannot be ignored.[117] Since the enactment of Proposition 36, purchasing power has decreased 25 percent due to inflation; simply stated, $120 million dollars will not buy the same treatment as it bought in 2001.[118]

Another area where Proposition 36 could use help lies with a group of defendants who are particularly difficult to treat.[119] These defendants, identified by the term "criminal recidivists,"[120] should be handled differently by Proposition 36 as compared to the average Proposition 36 participant. Criminal recidivists are those defendants with five or more convictions in the past thirty months.[121] Using up ten times the resources as the average defendant, criminal recidivists place an undue burden on the system.[122] While only a small portion of Proposition 36 defendants are criminal recidivists,[123] the amount of valuable resources consumed by recidivists is a waste. These defendants need to be handled differently as they pose unique and different challenges to the Proposition 36 system.[124]

While the success of the current drug diversion system cannot be diminished, it is important to recognize that improvements can always be made and as California changes, the drug diversion system must change along with it. Motivated by a need for greater organization and improved funding, the Nonviolent Offender Rehabilitation Act, also known as Proposition 5, was introduced to take Proposition 36, DEJ, and drug courts to the next level.

(SACPA), California Department of Alcohol and Drug Programs, http://www.adp.state.ca.us/SACPA/index.shtml (last visited Nov. 16, 2009).

115 Banys, *supra* note 23, at 10.

116 About Prop 36, *supra* note 113.

117 A UCLA study on Proposition 36 estimated that the minimum amount of necessary funding was $230 million, while a survey of counties revealed that the actual need was $270 million. Banys, *supra* note 23, at 10.

118 *Id.* *See also* NORA and Treatment, Drug Policy Alliance Network, http://www.prop5yes.com/wp/wp-content/uploads/fact-sheets/nora-treatment.pdf (last visited January 22, 2010) (noting that funding is not adequate for the 35,000 clients who enter Proposition 36 each year).

119 These types of defendants are those who refuse treatment, those who do not show up to treatment, and those who are inherently at more of a risk than the average defendant. Banys, *supra* note 23, at 8.

120 *Id.*

121 *Id.*

122 *See id.*

123 *Id.*

124 One suggestion that seems prudent is to place the criminal recidivists directly into a drug court rather than into Proposition 36 treatment. *Id.* at 8–9.

IV. THE NONVIOLENT OFFENDER REHABILITATION ACT OF 2008

A. Background of Proposition 5

The three drug diversion programs in California have never functioned together in a coordinated effort to alleviate substance abuse.[125] The Nonviolent Offender Rehabilitation Act of 2008,[126] sought to fluidly combine the three existing drug diversion programs in California for the first time.[127] Proposition 5 was meant to be a "major reorientation of state policies to provide greater rehabilitation, accountability and treatment options for youth, nonviolent offenders and nonviolent prisoners and parolees."[128] While DEJ, Proposition 36, and drug courts would have remained a part of Proposition 5 in practice, Proposition 5 sought to bring the programs together and create guidelines and standards that would universally apply and create a system in which drug offenders could seamlessly transfer from one program to another.[129]

Proposition 5 created a three-track system designed to provide clarity in determining eligibility and appropriateness in terms of treatment level.[130] The three tracks sought to "expand the types of offenders who are eligible for diversion, and expand and intensify the services provided to offenders mainly by increasing the funding available to pay for them."[131] In addition to revamping the drug diversion programs, Proposition 5 sought to introduce funding provisions designed to better support drug diversion and rehabilitation programs in California.[132]

Funding for the three drug diversion programs in California exist independent of each other.[133] Proposition 36 received its funding from the Substance Abuse and Crime Prevention Act.[134] Defendants in DEJ often paid for their own treatment programs,[135] and drug courts relied on funding from the state

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125 *Id.* at 2, 4. *See supra* note 120 and accompanying text.

126 The Nonviolent Offender Rehabilitation Act of 2008 appears on the California ballot on the November 4th 2008 election as "Proposition 5." *See Text of Proposition 5*, *supra* note 5, at 86.

127 *See id.*

128 *Id.*

129 *Proposition 5 Voter Information Guide*, *supra* note 4.

130 *Id.* (reporting that Track I is the lowest level of treatment and oversight while Track III comprises the highest level of treatment and oversight).

131 *Id.*

132 *Id.*

133 DEJ, Proposition 36, and drug courts all received their funding through different sources. *Id.*

134 CAL. HEALTH & SAFETY CODE § 11999.4 (Deering 2009) (stating that The Substance Abuse Treatment Trust Fund was established to carry out the purpose of Proposition 36).

135 *Proposition 5 Voter Information Guide*, *supra* note 4.

independent of any Proposition 36 funds.[136] This often resulted in all three programs being underfunded.[137] Proposition 5 sought to improve the funding of drug diversion programs through annually allocating $460,000,000 to improve and expand treatment programs.[138] In terms of division amongst the three tracks, 15 percent of the funds were apportioned to Track I, 60 percent to Track II, and 10 percent to Track III.[139]

Track I of Proposition 5 essentially resembled DEJ.[140] Eligible offenders for Track I were those charged with a nonviolent drug possession offense.[141] Offenders with a current or prior conviction for a violent or serious felony, an offender with a prior conviction for any felony within the past five years, or an offender charged with a non-drug related offense in conjunction with the nonviolent drug possession offense would have been excluded from Track I.[142] However, unlike DEJ where a defendant is ineligible if he has a prior conviction for any offense involving controlled substances,[143] a defendant was eligible for Track I if he had one prior conviction for a nonviolent drug possession offense.[144] Similar to DEJ, the defendant's participation in Track I was designed to last approximately six to eighteen months,[145] and after successful completion of the treatment program the criminal charges would be dismissed and the case records and files permanently sealed.[146] If a defendant failed to begin treatment in Track I, judgment would be entered and the defendant would then be transferred to Track II treatment.[147]

Track II treatment was similar to Proposition 36.[148] Under the eligibility requirements of Track II, a defendant is convicted

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136 Drug Courts are funded through the California Department of Alcohol and Drug Programs and any county appropriations. California Department of Alcohol and Drug Programs, Laws & Regulations: California Drug Courts, http://www.adp.ca.gov/DrugCourts/laws.shtml (last visited Jan. 25, 2010).

137 *See supra* note 106 and accompanying text.

138 *Proposition 5 Voter Information Guide*, *supra* note 4.

139 *Text of Proposition 5*, *supra* note 5, at 103.

140 The title of Track I is "Treatment Diversion with Deferred Entry of Judgment." *Id.* at 90.

141 *Id.* at 90–91.

142 *Id.* at 91. Although a judge has the discretion to allow an ineligible offender to participate in Track I, if the only reason for ineligibility is that the offender has a concurrent charge for another offense, the court may determine that it is in the interest of the defendant and in the furtherance of justice to permit deferred entry of judgment.

143 CAL. PENAL CODE § 1000(a)(1) (Deering 2008).

144 *Text of Proposition 5*, *supra* note 5, at 91.

145 *Id.*

146 *Id.*

147 *Id.*

148 Like Proposition 36, Track II is the middle level of treatment and oversight. *Id.* at 86.

of a nonviolent drug possession offense and sentenced to treatment and probation.[149] Defendants considered ineligible are those with previous convictions for a violent and serious crime,[150] those in possession of certain drugs while armed with a deadly weapon,[151] those with five or more convictions for any types of offenses in the prior thirty months,[152] a defendant convicted of other felonies or misdemeanors at the same time as a new drug charge,[153] a defendant with two separate convictions for nonviolent drug possession offenses and participation in two separate courses of drug treatment and is found by the court to be unamenable to any and all forms of drug treatment,[154] and a defendant who refuses drug treatment as a condition of probation.[155] If a defendant's probation is terminated due to the failure to begin treatment, the defendant could be transferred to Track III treatment at the discretion of the court.[156] A defendant's probation under Track II can also be revoked due to the commission of a new crime that is not a nonviolent drug possession offense or by violating a non-drug related condition of probation.[157] The court then has the discretion of sentencing the defendant to Track III diversion treatment or to incarceration in county jail for no longer than one year.[158]

However, if the defendant violates probation by committing a nonviolent drug possession offense or a misdemeanor for simple possession or the use of drugs or drug paraphernalia, the court will conduct a hearing to determine whether probation should be revoked.[159] The court should only revoke probation in situations where the alleged violation is proven and the state can prove by a preponderance of the evidence that the defendant poses a danger to others.[160] If the court does not revoke probation, it can either intensify or change the drug treatment plan and also impose a

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149 *Id.* at 92.

150 *Id.* (stating that unless the nonviolent drug possession offense occurred after a period of five years in which the defendant remained free of both prison custody and the commission of an offense that results in a felony conviction other than a nonviolent drug possession offense, or a misdemeanor conviction involving physical injury or the threat of physical injury to another person).

151 *Id.*

152 *Id.* (stating that a defendant ineligible for Track II solely on this basis will be eligible for Track III treatment diversion).

153 *Id.* (stating that with respect to a misdemeanor conviction, a judge may allow an offender to participate in Track II treatment diversion).

154 *Id.* (requiring the court to find this by clear and convincing proof).

155 *Id.*

156 *Id.*

157 *Id.* at 93.

158 *Id.*

159 *Id.*

160 *Id.*

graduated sanction.[161] Similar to Proposition 36,[162] a defendant has a few chances under Track II to complete drug treatment before termination from the program.[163] If a defendant has for the second or third time potentially violated probation, the court will hold a hearing to determine whether probation should be revoked.[164]

The most intense and supervised program in Proposition 5 was Track III.[165] Track III brought drug courts into the statutory scheme of Proposition 5.[166] Proposition 5 sought to "strengthen California's drug courts by adequately funding those courts, permitting those courts to fashion their own eligibility criteria and operating procedures, and holding them accountable by requiring those courts, for the first time, to systematically collect and report data regarding their budgets, expenditures, and treatment outcomes."[167] Defendants eligible for Track III were offenders who committed a nonviolent drug possession offense but were ineligible for Track II, a defendant who participated unsuccessfully in Track II, or a defendant who committed a nonviolent offense and appeared to have a serious problem with substance abuse or addiction.[168] Proposition 5 increased the funding of drug courts to nearly double the current amount.[169] This would have provided the adequate funding that drug courts require to function properly.

Along with creating the three-track system, Proposition 5 also included provisions that would have changed parole rules.[170] Proposition 5 sought to make changes to state parole programs including new limits on parole terms and new rules for the revocation of parole violators.[171] Proposition 5 would have reduced the amount of parole for some offenders to six months,[172] and increased parole terms for an offender whose most recent

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161 *Id.*

162 CAL. PENAL CODE § 1210.1(f)(3) (Deering 2008) (allowing a defendant essentially three opportunities under Proposition 36 to get his case dismissed).

163 *Text of Proposition 5*, *supra* note 5, at 94.

164 *Id.*

165 *Id.* at 95.

166 *Id.* at 100.

167 *Id.* at 88.

168 *Id.* at 95.

169 The current funding for drug courts is approximately $24 million and through Proposition 5, that amount will increase to $45 million. NORA and Drug Courts, Yes on Proposition 5 the Nonviolent Offender and Rehabilitation Act, http://www.prop5yes.com/wp/wp-content/uploads/fact-sheet/nora-drug-courts.pdf.

170 *Proposition 5 Voter Information Guide*, *supra* note 4, at 33.

171 *Id.*

172 Offenders who would receive a reduced parole term include those whose most recent term in prison was for a drug or nonviolent property crime and no serious, violent, gang, or sex crimes on his record. *Id.*

term in prison was for a violent or serious felony.[173] Along with different parole terms, Proposition 5 would have created a Parole Reform Oversight and Accountability Board to set state parole policies and to direct rehabilitation programs.[174] Proposition 5 thus enveloped two areas of change for the California criminal justice system—diversion programs and parole reforms.[175]

B. How Proposition 5 Could Have Improved the Status Quo

Had Proposition 5 passed, the drug diversion system in California would have changed for the better. First, Proposition 5 would have brought all three drug diversion programs under one umbrella.[176] The significance of this would have been that instead of failing out of DEJ or Proposition 36, a defendant could simply be transferred to a higher level of treatment. This would correct the criminal recidivist issue with Proposition 36.[177] In section 17(f)(6) of the proposed text of Proposition 5 a defendant is ineligible for Track II treatment if that defendant, in the previous 30 months, has five or more convictions for any offense.[178] These defendants, the criminal recidivists who plagued Proposition 36 with their excessive consumption of funds,[179] would be immediately eligible for Track III treatment.[180] This provision would identify at-risk defendants and appropriately place them in a higher and more intensive level of treatment.

Proposition 5 also sought to properly fund drug diversion programs.[181] As previously discussed, drug diversion programs cannot function at their most efficient level unless there is adequate funding.[182] Since the initial funding for Proposition 36 expired in 2006,[183] requests for increases in funding have been denied, much to the detriment of the program.[184] While Proposition 5 allocated $460,000,000 to improve and expand treatment programs, it could have also saved California over $1 billion.[185] Proposition 5's funding provisions could also increase access to drug treatment programs. In DEJ, defendants

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173 Parole would be increased from 3 to 5 years for these offenders. *Id.*
174 *Id.* at 34.
175 *Id.* at 30.
176 *Text of Proposition 5*, *supra* note 5, at 87.
177 Banys, *supra* note 23, at 4.
178 *Text of Proposition 5*, *supra* note 5, at 92.
179 *See* Banys, *supra* note 23, at 8.
180 *Text of Proposition 5*, *supra* note 5, at 92.
181 *Id.* at 101.
182 *See* Banys, *supra* note 23, at 10.
183 HIGHLIGHTS OF PROPOSITION 36, *supra* note 108, at 3.
184 About Prop 36, *supra* note 113.
185 *Proposition 5 Voter Information Guide*, *supra* note 4 at 30.

often are required to pay for their own treatment and this excluded many who could not afford the funds for treatment.[186] Proposition 5 allocates more funds to Track I and gives access to treatment programs for people who previously could not participate due to financial restrictions.[187] As Proposition 36 proved to be a worthwhile investment,[188] it seems that Proposition 5 would also have been a sound investment in terms of the drug diversion programs.

C. What Caused the Failure of Proposition 5?

After Proposition 36 passed by a 61 percent to 39 percent margin in 2000,[189] it may have seemed obvious that an electorate, which had previously supported drug diversion, would show the same support for similar legislation. However, eight years after Proposition 36, Californians proved that theory wrong as Proposition 5 failed to win at the polls.[190] A variety of reasons may account for Proposition 5's failure, including anti-Proposition 5 propaganda and voter discomfort with the parole sections of Proposition 5.[191]

The parole sections of Proposition 5 may have been the driving force behind Proposition 5's failure. Proposition 5 is essentially a double-edged sword for fighting prison overcrowding and budget concerns. On one side is the nonviolent offender rehabilitation portion which seeks to initially keep offenders out of prison.[192] On the other side are the proposed changes to the state parole and probation system.[193] Because Californians overwhelmingly supported Proposition 36,[194] they may have supported Proposition 5's drug rehabilitation, if not for the parole provisions.

The parole section may have alienated voters in a couple of ways. First, voters may have been averse to allowing criminals to serve shorter terms of parole. The parole provisions of Proposition 5 would have decreased parole terms for certain

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186 NORA 5 and Treatment, *supra* note 118.

187 *Id.*

188 *See* UCLA REPORT 2008, *supra* note 67, at 225.

189 Banys, *supra* note 23, at 3.

190 The results of Proposition 5 were almost the exact opposite of the results for Proposition 36 as Proposition 5 was defeated 59.7 percent to 39.3 percent. Election Results *supra* note 7. Proposition 36 was passed by 61 percent to 39 percent. Banys, *supra* note 23, at 3.

191 *See, e.g.*, Editorial Endorsements 2008, *Good intentions, but . . .*, L.A. TIMES, Sept. 26, 2008, http://articles.latimes.com/2008/sep/26/opinion/ed-5prop26.

192 *Proposition 5 Voter Information Guide*, *supra* note 4 at 86.

193 *Id.*

194 *See supra* note 26 and accompanying text.

offenders.[195] Voters also may not have felt comfortable with the "minimum supervision" provisions of Proposition 5.[196] This may have made voters feel as though parolees would not be adequately monitored and supervised. Along with actual changes to parole terms, voters may have been apprehensive to green-light a piece of legislation that created two new state agencies for parole and treatment oversight.[197] In a year where the budget crisis was at the forefront of almost every citizen's mind,[198] it was a difficult time to propose the creation of new agencies requiring serious amounts of funding.

Along with the alienating effect of the parole provisions of Proposition 5, the anti-Proposition 5 campaign likely repelled many voters. Many opponents and advertisements against Proposition 5 argued that it was a "drug dealer's bill of rights"[199] and would give criminals a "get-out-of-jail-free" card.[200] Casting Proposition 5 in this light made it appear that Proposition 5 would allow violent criminals and drug dealers to roam free. However, simply reading the text of Proposition 5 shows that these statements are untrue.

The very first, and most important, requirement for participation in the three-track system of Proposition 5 is that the defendant is charged with or convicted of a *nonviolent* drug possession offense.[201] Proposition 5 defines a nonviolent drug possession offense as "the unlawful personal use, possession for personal use, or transportation for personal use, or being under the influence, of any controlled substance . . . the term nonviolent drug possession offense does not include the possession for sale, transportation for sale, production, or manufacturing of any controlled substance."[202] Through its definition of a nonviolent drug possession offense, Proposition 5 clearly excludes drug dealers or offenders who have committed a violent crime. Because most voters likely did not read the actual text of

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195 The offenders who would receive shorter parole terms are offenders whose most recent term in prison was for a nonviolent drug possession or nonviolent property crime and without a serious, violent, gang related, or sex crime on their record. *Proposition 5 Voter Information Guide*, *supra* note 4 at 33.

196 These provisions provided for parolees to be placed on parole for six months. *Id.*

197 Proposition 5 sought to create the Treatment Diversion Oversight and Accountability Commission and Parole Reform Oversight and Accountability Board. *Text of Proposition 5*, *supra* note 5, at 98, 102.

198 *See, e.g.*, Skelton, *supra* note 104.

199 Jeff Denham, *Prop 5: Drug Dealer's Bill of Rights*, Flashreport.org, Oct. 20, 2008, http://www.flashreport.org/featured-columnslibrary0b.php?faID=2008102002091010.

200 See *Proposition 5 Voter Information guide*, *supra* note 4, for a summary of arguments against Proposition 5 and rebuttals to arguments in favor of Proposition 5.

201 *Text of Proposition 5*, *supra* note 5, at 89.

202 *Id.*

Proposition 5, and voted against it based on the propaganda on television or on websites, the anti-Proposition 5 campaign may have deceived uninformed voters to vote against Proposition 5.

D. Proposition 5 Failed—Now What?

Eight years after Proposition 36 changed the way the criminal justice system dealt with nonviolent drug offenders, California had a chance to further improve and expand the treatment programs that have had over 70,000 success stories.[203] Because voters did not approve Proposition 5, California faces the budget and prison crises without a plan for solving these problems.[204] While Proposition 36 has had success in diverting nonviolent drug offenders from prisons, Proposition 36 and the other drug diversion programs need improvements in order to function properly and provide benefits to California. Proposition 5 would have made significant progress for the current drug diversion system.[205] Even though Proposition 5 failed to pass in November of 2008, the issue cannot be put on the back burner.

Advocates for the reform of the current drug diversion programs in California should continue to propose legislation that brings together Proposition 36, DEJ, and drug courts. This legislation should also seek to better fund the drug diversion programs as they have proven their worth to California's economy by saving taxpayer's money.[206] However, in the future, legislation seeking to reform and improve the drug diversion system should remain separate from efforts to change the parole system. The two-part nature of Proposition 5 likely contributed to its defeat as the parole provisions may have alienated voters who in the past had supported nonviolent offender rehabilitation (through the support of Proposition 36). Proposition 5 may have been an example of legislation attempting to do too much at once. Perhaps separating drug rehabilitation and parole reforms would make it easier for one, or both, types of reforms to pass.

CONCLUSION

California's history of drug diversion programs has not been without challenges and hardships. In times of great financial strife, it is even more difficult to convince voters to allocate resources toward rehabilitation programs. However, the

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203 Hundreds of Prop 36 Graduate, *supra* note 89.

204 Ethan Nadelmann, *Prop. 5 vs. the Prison-Industrial Complex*, L.A. TIMES, Nov. 3, 2008, http://www.latimes.com/news/opinion/la-oew-nadelman3-2008nov03,0,3924232.story.

205 *See* discussion *supra* Part IV.B.

206 *See* discussion *supra* Part III.A.

diversion programs in California have proven their value and are worthy of improvements and increased funding. In order for voters to approve future reforms, it is imperative to drum up the same support that voters showed for Proposition 36 in 2000.[207] This could be accomplished through attempting to pass the nonviolent offender rehabilitation provisions of Proposition 5, without the hindering effects of the parole sections. Like the path toward recovery from substance abuse, progress is made one step at a time, and it would be wise for legislation seeking to reform the diversion programs in California to follow a similar course.

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207 *See supra* note 26.

Digest: In re Jose C.

Megan Krebbeks

Opinion by Werdegar, J., with George, C.J., Kennard, J., Baxter, J., Chin, J., Moreno, J., and Corrigan, J.

Issue

Whether the supremacy clause of the United States Constitution, 18 U.S.C. § 3231, or any other provision of federal law, preempts California Welfare and Institutions Code section 602.

Facts

Federal agents arrested plaintiff Jose C., a minor, after observing plaintiff leading six other persons through the California desert just across the Mexican border.[1] After the federal agents transferred plaintiff to state custody, the Imperial County District Attorney filed a juvenile wardship petition under Welfare and Institutions Code section 602 (section 602), alleging a violation of federal immigration law.[2] Section 602 gives California state courts jurisdiction to declare a juvenile who "violates any law of this state or of the United States . . . to be a ward of the court."[3] Though the federal courts have "original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States,"[4] section 602 enables state courts to address juvenile violations of federal immigration law. At trial, plaintiff's counsel objected on the grounds that the juvenile court lacked jurisdiction to adjudicate the federal criminal violations.[5] The juvenile court overruled the objection and declared plaintiff to be a ward of the court, found him guilty of a felony, and sentenced him to a maximum of ten years confinement.[6] The court of appeal affirmed plaintiff's conviction.[7] The Supreme Court of California granted review to determine

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1 *In re* Jose C., 198 P.3d 1087, 1091 (Cal. 2009).
2 *Id.*
3 CAL. WELF. & INST. CODE § 602(a) (West 2008).
4 18 U.S.C. § 3231 (2006).
5 *Jose C.*, 198 P.3d at 1091–92.
6 *Id.* at 1092.
7 *Id.*

whether section 602 gives a state court jurisdiction to declare a juvenile a ward of the court based on violations of federal law.[8]

Analysis

In a unanimous opinion, affirming the court of appeal, the Supreme Court of California observed that section 3231 establishes two general principles. First, federal district courts may exercise jurisdiction over federal criminal offenses; and second, state courts may not directly prosecute violations of federal criminal statutes.[9] Plaintiff contended that section 3231 went a step further and argued that section 3231 prohibited state courts from "interpreting and adjudicating in any proceeding whether a federal criminal statute has been violated."[10] Plaintiff's interpretation of section 3231 would have preempted state court jurisdiction over his case.[11] The court was not persuaded by this argument and held that the juvenile wardship proceedings did not violate section 3231's grant of exclusive jurisdiction to the federal courts and so were not preempted by section 3231.[12] The court found that the state court's interpretation and application of federal law posed no threat to federal interests because state courts were bound by federal precedent and their interpretations would be subject to direct review by the United States Supreme Court.[13]

The court also acknowledged the interplay between state and federal law enforcement and judicial proceedings:

> Congress may pass a law barring a particular act and imposing a specific punishment, and a state legislature may pass a state law barring the same act and imposing a different specific punishment, as well as vesting jurisdiction over violations of the state law in its state courts, without encroaching upon the exclusive jurisdiction of the federal courts to adjudicate violations of the federal law and impose the federal punishment.[14]

Plaintiff also argued that the state court adjudication of a federal immigration offense is preempted as an infringement of Congress' exclusive power to regulate immigration.[15] The court found this argument unconvincing. The court noted that federal criminal law relating to the jurisdiction of immigration matters

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8 *Id.*
9 *Id.*
10 *Id.* at 1093.
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.* at 1094–95.
15 *Id.* at 1096.

makes no mention of state courts.[16] While Congress expressly vested jurisdiction in the federal courts, the "absence of an express exclusion of state court jurisdiction 'is strong, and arguably sufficient, evidence that Congress had no such intent'" to preempt state court jurisdiction regarding immigration matters.[17]

Next, the court analyzed the four ways in which Congress may preempt state law: express, conflict, obstacle, and field preemption.[18] In this situation, the court explained, the issue was one of field and obstacle preemption.[19] Field preemption occurs where Congress intends to preempt all state law in a particular area by fully enacting comprehensive federal regulations, thus leaving no space for state regulation.[20] Obstacle preemption exists where the challenged state law is an obstacle to the accomplishment and execution of purposes and objectives of Congress.[21] The court found no intent by Congress to fully occupy the field of immigration law and thus preempt state regulations.[22] Similarly, the court found no evidence that section 602 stood as an obstacle to federal objectives and purposes.[23] Instead, it found that section 602 mirrored federal objectives and furthered a legitimate state interest.[24]

Holding

The court held that section 3231 and the exclusive federal authority over immigration matters did not preempt the state wardship proceedings that declared plaintiff a ward of the court.[25]

Legal Significance

This case affirms the state's power and authority to conduct juvenile wardship proceedings even in instances where violations of federal criminal law are implicated. In doing so, it allows California to retain some control over immigration matters within its territory.

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16 *Id.* at 1097. *See also* 8 U.S.C. § 1329 (2006).

17 *Jose C.*, 198 P.3d at 1097 (quoting Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820, 823 (1990)).

18 *Id.* at 1098–1101.

19 *Id.* at 1098.

20 *Id.* at 1099.

21 *Id.* at 1100.

22 *Id.* at 1098–99.

23 *Id.* at 1100–01.

24 *Id.* at 1101.

25 *Id.* at 1091.

Digest: Musaelian v. Adams

Julie Sarto

Opinion by Werdegar, J., expressing the unanimous view of the court.

Issue

Under California Code of Civil Procedure section 128.7[1] can attorney's fees be awarded to a party who represented him or herself in responding to a filing abuse?

Facts

Joseph Reiter, represented by Attorney William L. Adams, obtained a default judgment against Andrew Musaelian and Andrew Musaelian's business, Attorney Legal Research (ALR).[2] Reiter sought partial satisfaction of this judgment through a forced sale of a residence owned jointly by Andrew Musaelian and his wife, Mary Musaelian.[3] Seeking to avoid the sale, Mary Musaelian filed a third party claim of ownership.[4] When the Superior Court denied this claim, the Musaelians sought to protect their home by filing for chapter 13 relief in the United States Bankruptcy Court for the Northern District of California.[5] Still seeking to satisfy the judgment against Andrew Musaelian and ALR, Reiter filed claims against the bankruptcy estate.[6] However, the bankruptcy court dismissed the claim against ALR, reasoning that it could be satisfied only from ALR's assets, which did not include the Musaelian's home.[7]

Based on Reiter's attempts to force the sale of the Musaelian's residence to satisfy the default judgment entered against ALR, Mary Musaelian then filed this suit against Reiter and Adams, seeking damages on theories of negligence, intentional infliction of emotional distress, abuse of process,

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1 CAL. CIV. PROC. CODE § 128.7 (West 2006).

2 Musaelian v. Adams, 198 P.3d 560, 561 (Cal. 2009). Reiter brought suit seeking damages for conduct relating to litigation between him and one of ALR's clients. *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

slander of title, invasion of privacy, and malicious prosecution.[8] Adams, representing himself and, joined by Reiter, demurred on the grounds that the first five causes of action were subject to the litigation privilege of Civil Code section 47, and that the sixth cause of action for malicious prosecution lacked merit because the state court action had terminated in Reiter's favor.[9] They additionally moved under section 128.7 for sanctions, including attorney fees against Mary Musaelian and her attorney.[10]

In sustaining Adams' and Reiter's demurrers without leave to amend, the trial court also granted the motions for sanctions, ordering Mary Musaelian and her attorney to pay $25,050 to Adams as "reasonable sanctions including attorney fees."[11] Reversing the award of attorney fees to Adams, the court of appeal concluded that because Adams had represented himself, he had not "incurred" attorney fees for purposes of sanctions under section 128.7.[12]

Analysis

The court first noted that, in California, following the "American Rule" and codified in Code of Civil Procedure section 1021, each party to a lawsuit ordinarily must pay its own attorney fees.[13] The measures and modes of attorney compensation are left to the agreement of the parties "[e]xcept as attorney's fees are specifically provided for by statute."[14] The court then acknowledged that California Code of Civil Procedure section 128.7 was such a statute.[15] Section 128.7 requires that parties and their attorneys certify that pleadings or other written materials presented to the courts have merit "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances."[16] Sanctions are authorized for violations of the section:

> A sanction imposed for violation of subdivision (b) shall be limited to what is sufficient to deter repetition of this conduct or comparable conduct by others similarly situated. . . . [T]he sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of

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8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.* at 562; CAL. CIV. PROC. CODE § 1021 (West 2006).
14 *Musaelian*, 198 P.3d at 562 (citing § 1021).
15 *Id.*
16 *Id.* (citing § 1021(b)).

> some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation.[17]

Next, the court looked to *Trope v. Katz*,[18] where the court held that the phrase "attorney's fees" in Civil Code section 1717 does not include compensation for an attorney's time and effort spent representing him or herself or for professional business opportunities lost as a result of self-representation.[19] The words "incur" and "attorney's fees" were examined and their ordinary and usual meanings were found to imply an agency relationship inconsistent with self-representation.[20] The general meaning of "incur" is "to become liable," and "attorney's fees" is the consideration a litigant actually pays or becomes liable to pay in exchange for legal representation; "[a]n attorney litigating in *propria persona* pays no such compensation."[21] The court reasoned that the language in section 128.7 should be interpreted in a similar manner and found that the inclusion of the words "incur" and "attorney's fees" in this section also implied an agency relationship where the client and the attorney are not one and the same, and where the attorney expects remuneration.[22]

The court additionally found that the statute viewed attorney's fees as an expense and authorized a court to impose sanctions in the form of "reasonable attorney's fees and other expenses incurred."[23] The word "expense" is associated with an obligation to pay, and a party who acts on his or her own behalf does not produce an expense that the party is obligated to pay.[24] Nor do lost earnings that a self-represented litigant might have obtained, but for devoting time to representing him or herself in litigation, constitute an expense.[25]

The court acknowledged that two California appellate court cases upheld awards of attorney fees, both having identified a need to compensate parties who had been compelled to respond to bad faith tactics.[26] Furthermore, the court noted that these courts found that to disallow an award of attorney's fees to self-represented attorneys would create "a separate and artificial category of litigants who would be inadequately protected against

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17 *Id.* (citing § 1021(d)) (emphasis omitted).
18 902 P.2d 259 (Cal. 1995).
19 *Musaelian*, 198 P.3d at 562.
20 *Id.*
21 *Id.* (italics added).
22 *Id.*
23 *Id.* (citing § 1021(d)) (emphasis omitted).
24 *Id.*
25 *Id.* at 563.
26 *Id.* (discussing Abandonato v. Coldren, 41 Cal. App. 4th 264 (1995) and Laborde v. Aronson, 92 Cal. App. 4th 459 (2001)).

another party's sanctionable activities."[27] The court found this reasoning to be inconsistent with the primary purpose of section 128.7—to deter filing abuses, not to compensate those affected by them.[28] This purpose would not suffer if attorney fees are not allowed for attorneys representing themselves.[29] The court was not concerned that a party that engaged in abusive filing practices would have been able to avoid monetary sanctions simply because the opposing party was a self-represented attorney—because section 128.7 provides the trial court with a wide range of options, all of which are designed to deter filing abuses.[30]

Holding

The court held that an award of monetary sanctions for frivolous litigation tactics under Code of Civil Procedure section 128.7 could include an award of attorney fees in favor of an attorney who represented him or herself.

Legal Significance

This decision reaffirms the idea that the phrase "attorney fees" does not include compensation for the time and effort attorneys expend representing themselves or for professional business opportunities lost because of self-representation. It extends its application to section 128.7. As a result of this decision, an attorney who responds *pro se* to a filing abuse may not recover sanctions under section 128.7 in the form of an award of attorney fees.

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27 *Id.* (discussing Abandonato v. Coldren, 41 Cal. App. 4th 264 (1995) and Laborde v. Aronson, 92 Cal. App. 4th 459 (2001)).

28 *Id.* at 564.

29 *Id.*

30 *Id.*

Digest: Schatz v. Allen Matkins Leck Gamble and Mallory LLP

Kasey C. Phillips

Opinion by Moreno, J., expressing the unanimous view of the court.

Issue

Does the Mandatory Fee Arbitration Act ("MFAA")[1] preclude the enforcement of a valid agreement to arbitrate under the California Arbitration Act ("CAA")[2]?

Facts

In February 1999, Dr. Richard A. Schatz ("Schatz") retained the law firm of Allen Matkins Leck Gamble & Mallory LLP ("Allen Matkins") to represent him in a lawsuit regarding the assignment of income from a partnership.[3] The retainer agreement contained a provision stating that the agreement applied to "any additional matters we handle on your behalf or at your direction."[4] The arbitration provision of the agreement provided that Schatz could "line out" the arbitration section if he did not agree to it. However, Schatz did not line out the arbitration provision and thus agreed that "in the event of any dispute arising out of or relating to this agreement, our relationship, or the services performed (including but not limited to disputes regarding attorney's fees or costs . . .), such dispute shall be resolved by submission to binding arbitration . . . ."[5]

In February 2000, Allen Matkins represented Schatz in an easement dispute; no new retainer agreement was signed at that time.[6] Schatz paid Allen Matkins $179,088.69 for their work in the easement case, but when he ceased payments shortly before the case went to trial, Allen Matkins demanded an additional

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1 CAL. BUS. & PROF. CODE, §§ 6200–6206 (West 2009).

2 CAL. CIV. PRO. CODE §§ 1280–1294.2 (West 2008).

3 *Schatz v. Allen Matkins Leck Gamble and Mallory LLP*, 198 P.3d 1109, 1112 (Cal. 2009).

4 *Id.*

5 *Id.*

6 *Id.*

$169,917.42 in a letter dated April 2003.[7] Schatz failed to respond to the letter, and in January of 2004 Allen Matkins invoked the arbitration provision of the original retainer agreement.[8] Schatz alleged that the arbitration provision did not apply because the retainer did not mention the easement litigation and the reference to "additional matters" was not sufficiently emphasized.[9] Schatz also claimed that the arbitration provision was unenforceable under *Alternative Systems v. Carey* and that he was entitled to invoke MFAA and exercise his "statutory rights to nonbinding fee arbitration, and if he so elects, trial *de novo* before a jury."[10]

Allen Maktins disagreed with Schatz's assessment of the arbitration provision but agreed to nonbinding arbitration under the MFAA.[11] When the arbitrator ruled in favor of Allen Matkins, Schatz filed a complaint for "trial *de novo*, declaratory relief, and refund of attorney fees."[12] In reply, Allen Matkins filed a petition to compel binding arbitration under the original retainer agreement.[13] Schatz opposed, arguing that *Alternative Systems'* construction of the MFAA nullified the binding arbitration provision.[14] Allen Matkins replied, asserting binding contractual arbitration would fulfill the MFAA's *de novo* trial requirement because the California Supreme Court impliedly rejected the holding in *Advantage Systems*.[15]

The trial court found for Schatz and the court of appeal affirmed.[16] The California Supreme Court granted Allen Matkin's petition for review.[17]

Analysis

The court began with a comparison of the MFAA and the CAA, recognizing them as "separate and distinct" schemes.[18] While the CAA applies to almost any civil dispute, the MFAA only covers disputes regarding legal fees and costs.[19] Additionally, the obligations to arbitrate under the MFAA are

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7 *Id.*
8 *Id.* at 1112.
9 *Id.* at 1112–13.
10 *Id.* (citing Alternative Systems v. Carey, 67 Cal.App.4th 1034 (1998)) (italics added).
11 *Id.*
12 *Id.* (italics added).
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.* at 1114.

statutory, thus, even in the absence of an agreement to arbitrate, a client may call for arbitration under the MFAA while under standard arbitration, both parties must agree to arbitrate.[20] Under the MFAA, an attorney cannot compel a client to arbitrate an agreement, but a client may compel an attorney to do so.[21] Arbitration awards granted under the MFAA are not binding and either party may seek trial *de novo* or the parties may agree that the arbitration is binding.[22] The MFAA does not expressly reference the CAA, but it provides that an attorney must give written notice to a client "prior to or at the commencement of any other proceeding against the client under a contract between attorney and client which provides for an alternative to arbitration . . . for recovery of fees, costs, or both."[23] In *Aguilar v. Lerner*, the California Supreme Court inferred the clause "any other proceeding against the client under a contract between attorney and client" to include contractual arbitration under CAA.[24] The MFAA states that if an attorney engages in any other proceedings and the client is entitled to arbitration under the MFAA, then the client may request a stay of the other proceeding.[25] The MFAA also provides that parties may consent in writing to be bound by an arbitrator's award at any time, but that in the absence of a written agreement to bind, both parties are entitled to a trial after arbitration is timely sought.[26]

The court then delved into the decisions in *Alternative Systems* and *Aguilar*, explaining that they were "critical to understanding" the present case.[27] In *Alternative Systems*, the client and lawyer had an arbitration agreement but the client invoked arbitration under the MFAA.[28] After the MFAA arbitration, the client rejected the award and filed for trial *de novo*.[29] Subsequently, the dispute was litigated by the American Arbitration Association over the objections of the client who challenged the arbitrator's jurisdiction; the arbitrator found for the attorney and the client filed a motion to vacate the arbitrator's award because "contractual arbitration was

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20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.* (emphasis omitted).
24 *Id.* (citing Aguilar v. Lerner, 88 P.3d 24 (Cal. 2004)).
25 *Id.*
26 *Id.* at 1115.
27 *Id.*
28 *Id.* (citing Alternative Systems v. Carey, 67 Cal.App.4th 1034 (1998)).
29 *Id.*

'preempted by the MFAA with its right to trial *de novo*."[30] The trial court denied the motion but the court of appeal reversed.[31]

The court of appeal in *Alternative Systems* emphasized that the 1996 amendments to the MFAA strengthened client protections so that stays applied to *any* proceedings initiated by an attorney to resolve a fee dispute.[32] The court pointed out that the public policy behind the MFAA was to reduce disparity in bargaining power in attorney fee matters by providing the client the opportunity to elect arbitration of a fee dispute, unless that client has already agreed in writing to arbitrate all fee disputes.[33] The court also noted that the MFAA requires a written waiver of the right to trial *de novo* after the dispute arises. Additionally, the court rejected the attorney's contention that the American Arbitration Association ("AAA") arbitration would act as "trial after arbitration" under the MFAA.[34]

In *Aguilar*, the client sued the attorney waiving his right to MFAA arbitration.[35] The attorney filed a motion to compel binding arbitration under CAA.[36] The client opposed, claiming that under MFAA a client could not be compelled to arbitrate because arbitration was optional.[37] The court found that the client had waived his rights to the MFAA arbitration and thus, waived any rights afforded him under the MFAA scheme.[38] The court refused to determine whether the client was able to overcome the motion to compel had he not waived his MFAA rights.[39] However, in a concurring opinion Justice Chin expressly addressed that issue.[40]

First, Justice Chin reiterated the MFAA mandate that an attorney must inform the client of his or her rights under the MFAA before or contemporaneous to commencing "an action [or] . . . *any other proceeding* against the client under a contract between attorney and client which provides for an alternative to arbitration . . . ."[41] He emphasized that the "italicized language" indicated parties may contract to use an alternative proceeding

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30 *Id.* (italics added).
31 *Id.*
32 *Id.*
33 *Id.*
34 *Id.* at 1116.
35 *Id.* (citing Aguilar v. Lerner, 88 P.3d 24 (Cal. 2004)).
36 *Id.*
37 *Id.*
38 *Id.*
39 *Id.*
40 *Id.* (citing *Aguilar*, 88 P.3d 24 (Cal. 2004) (Chin, J., concurring)).
41 *Id.* (emphasis in original).

to resolve their dispute rather than resorting to judicial action.[42] Justice Chin went on to state that if a client invoked MFAA, the Act would provide a stay of other proceedings until the MFAA arbitration was completed; but only until the MFAA arbitration was completed.[43] While Justice Chin acknowledged that the statutory language of the MFAA lacked clarity, he expressly rejected the *Alternative Systems* court's inference that "the client's right to trial *de novo* trumps contractual obligations under binding arbitration" stating that such an inference would render meaningless the MFAA acknowledgement that parties could consent to a form of dispute resolution other than judicial action.[44] Justice Chin rejected *Alternative Systems* as illogical because it provided the client with the means of escaping an agreement to submit disputes to binding arbitration by simply asking for nonbinding arbitration.[45] The court of appeal in the instant case dismissed Justice Chin's analysis, instead choosing to follow the decision in *Alternative Systems*, and found that clients have the "right to trial *de novo* after nonbinding arbitration under the MFAA even when they have signed prospective waivers of trial after arbitration[;]" thus, "the MFAA trumps the CAA" in those situations.[46]

The court then looked directly to the statutory language of the MFAA.[47] The court found that the MFAA, when invoked, provided automatic stays for actions or other proceedings, including binding arbitration, but that such proceedings would move forward once MFAA arbitration was completed.[48] The court then rejected Schatz's argument that the MFAA disallows binding arbitration, stating that the MFAA "does not foreclose the possibility that, under a general agreement between the parties, the *nonbinding* MFAA process should be followed by *binding* arbitration, rather than by lawsuit."[49] The court also recognized that the MFAA provides for a trail following the MFAA arbitration, but does not confer "immunity from valid defenses, such as the existence of a contractual obligation to arbitrate."[50]

Finally, the court considered whether the MFAA impliedly

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42 *Id.*
43 *Id.*
44 *Id.* at 1116–17 (italics added).
45 *Id.* at 1117.
46 *Id.* (citing Schatz v. Allen Matkins Leck Gamble and Mallory LLP, 146 Cal.App.4th 674 (2007)) (italics added).
47 *Id.* at 1118.
48 *Id.*
49 *Id.* at 1119 (emphasis in original).
50 *Id.*

repealed the CAA.[51] The court first established that "[a]ll presumptions are against a repeal by implication" and that an implied repeal is only found where statutes conflict such that no harmony can be achieved.[52] The court found that the MFAA could not possibly repeal the CAA because the two acts do not govern the same subject matter—the MFAA covers "nonbinding arbitration that the parties did not agree to in advance" and the CAA covers "binding arbitration agreed to in advance."[53] The court also acknowledged that the statutes may be reconciled because each creates a different type of arbitration, both of which may be given effect.[54] The MFAA creates a nonbinding arbitration; if the arbitration is unsuccessful, the MFAA has fulfilled its role and the parties may pursue other proceedings including judicial action or binding arbitration, to resolve the dispute. In the event the parties selected binding arbitration, or contracted to such in advance, the CAA would apply.[55] The court identified two anomalies that would be created by interpreting the MFAA to repeal the CAA: (1) clients would be able to evade their agreements to arbitrate by requesting and completing MFAA nonbinding arbitration, thus making a charade out of MFAA arbitration just to get to trial, and (2) attorneys could evade their agreements to arbitrate if their clients requested arbitration under the MFAA, thus a client might not choose to invoke their MFAA rights because of the chance that the nonbinding arbitration might fail, and the attorney would proceed to trial instead of the agreed upon binding arbitration.[56]

Holding

The court held that "the MFAA does not stand as an obstacle to the enforcement of a valid agreement to arbitrate pursuant to the CAA."[57]

Legal Significance

The decision establishes that the MFAA and CAA are designed to work together. The MFAA protects, in the form of nonbinding arbitration with the potential for trial *de novo*, clients who find themselves engaged in fee disputes with their attorney. Meanwhile, the CAA protects the arbitration agreements entered

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51 *Id.*
52 *Id.*
53 *Id.* at 1120.
54 *Id.*
55 *Id.*
56 *Id.* at 1120–21.
57 *Id.* at 1121.

into by both client and attorney. When the MFAA has fulfilled its role, the CAA takes over.

Digest: Spielbauer v. County of Santa Clara

Katayon Khajebag

Opinion by Baxter, J., expressing the unanimous view of the court.

Issue

Is a public employer required to offer formal immunity from the use of incriminating statements in response to an employee's invocation of his or her Fifth Amendment right against self-incrimination before it can dismiss the employee for refusing to answer questions in connection with its investigation?

Facts

In January 2003, a Santa Clara deputy public defender ("plaintiff") represented Michael Dignan on charges of ammunition possession by a felon.[1] Dignan was arrested with Troy Boyd, his roommate.[2] As part of the defense strategy, plaintiff sought to introduce Boyd's statement to the police that his parents owned the house where the ammunition was located. Boyd also stated that he was renting the home from his parents at the time of the arrest. Plaintiff hoped that this testimony would create reasonable doubt as to whether Dignan had control of the area in which the ammunition was found.[3] However, Boyd testified he had sublet portions of the home to other people in the past, including Dignan.[4] When the prosecutor moved to exclude Boyd's statement as hearsay, plaintiff noted that Boyd was unavailable at the time of trial and the statement would fall within a hearsay exception and thus could be admitted.[5]

At a hearing on the matter, plaintiff stated that a warrant was out for Boyd's arrest and "if the San Jose Police are not going to be able to find Mr. Boyd, I think that my investigator is going to be very hard put to find . . . " him as well.[6] After the hearing, a police sergeant was able to contact Mr. Boyd simply by going to

1 Spielbauer v. County of Santa Clara 199 P.3d 1125, 1141 (Cal. 2009).
2 *Id.* at 1128.
3 *Id.*
4 *Id.*
5 *Id.*
6 *Id.*

the house where the ammunition was found.[7] Boyd told the police officer that he had "recently spoken to 'a public defender investigator.'"[8] Plaintiff was confronted with Mr. Boyd's statement and he confessed to speaking with Boyd.[9] However, plaintiff maintained that any conversation he may have had with Boyd was "attorney work product"[10] and therefore he was under no obligation to disclose the content of the conversation.[11] The prosecutor argued that plaintiff had purposefully misled the court.[12] The court did not rule on potential ethical violations, and instead ruled that Boyd was in fact an available witness and would consider the objection to the admission of Boyd's statement.[13]

Some time later, the Chief Assistant Public Defender, David Mann, learned of plaintiff's potential misconduct and that the prosecutor in the Dignan case intended "to 'go after' [plaintiff] in some manner."[14] This meant one of three possibilities: file misdemeanor charges against plaintiff, report plaintiff to the State Bar, or let the Public Defender's office take care of the plaintiff's discipline.[15] Shortly after learning about the incident, Mann launched an internal investigation. On April 1, 2003 plaintiff and his attorney appeared for an interview on the matter; several department heads were also present, including Mann. During the course of the first interview, plaintiff refused to answer any questions.[16] Each time the following admonition was made to plaintiff: "you have a right to remain silent and not incriminate yourself. Your silence, however, may be deemed insubordination, leading to administrative discipline up to and including termination. *Any statement made during this interview cannot . . . be used against you in any subsequent criminal proceeding.*"[17] In response to the admonition, plaintiff's attorney responded that such an admonition did not apply to public defenders and as such any protection from criminal prosecution must be administered via a formal court order.[18] At a subsequent interview on the same matter plaintiff again refused to answer certain questions and on June 9, 2003 plaintiff was discharged

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7 *Id.* at 1128–29.
8 *Id.* at 1129.
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*

for: "(1) insubordination . . . (2) gross misconduct unbecoming a county officer, and (3) seeking, in violation of office rules governing attorney ethics, to mislead a court by artifice or false statement."[19] An administrative hearing upheld the charges and the related discipline.[20]

Plaintiff sought mandamus relief in the Superior Court, arguing that he was improperly dismissed for refusing to answer his employer's questions.[21] In addition, plaintiff argued that his refusal to answer certain questions was based on his right against self-incrimination.[22] Finally, plaintiff argued that his right against self-incrimination was properly invoked as his employer never obtained a formal grant of criminal use immunity.[23] The Superior Court disagreed and upheld the actions of the Public Defender's Office.[24] The court of appeal reversed, finding that "a public employee must receive a formal grant of criminal use immunity before being required, on pain of discipline, to answer potentially incriminating official questions about his or her job performance."[25] The California Supreme Court granted review.

Analysis

Both the Fifth Amendment of the United States Constitution and the California Constitution state that no person shall "'be compelled *in a criminal cause* to be a witness against themselves.'"[26] These provisions not only guarantee protection from self-incrimination from being forced to testify against oneself, but also protects a person from answering questions in any other proceeding "civil or criminal, formal or informal"[27] where the person reasonably believes the answers will be incriminating in a subsequent criminal case. Additionally, one cannot be forced to choose between their job and asserting the privilege.[28] Put another way, one cannot be put in a position where asserting the privilege will subject them to punishment.[29] The only exception is when the refusal to answer would frustrate "legitimate governmental objectives;" in such a situation the use

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19 *Id.* at 1130.
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.*
24 *Id.*
25 *Id.*
26 *Id.* at 1131 (citing U.S. CONST. amend. V. § 3; CAL. CONST. art. I, § 15).
27 *Id.* (citing Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)).
28 *Id.*
29 *Id.*

of immunity is proper in order to compel the individual to answer the otherwise potentially incriminating questions.[30]

This rule has been extended to a public employer's threat of punishment to an employee who refuses to answer potentially incriminating questions. Thus, it is a well-established rule that "incriminating answers coerced from a public employee under threat of dismissal *cannot be used against the employee in a criminal proceeding*."[31] However, this protection against self-incrimination does not extend to protect an individual from non-penal adverse use of incriminating statements.[32] Therefore, an employee who makes incriminating statements under threat of potential employment discipline may still be punished, and even terminated so long as the employee's right to self-incrimination in criminal proceedings is protected.[33] However, the employee cannot be punished simply for invoking his Constitutional right against self-incrimination, even with assurances that his answers will not be used in criminal proceedings against him.[34]

In this case, the plaintiff and the court of appeal used several California statutes[35] to come to the conclusion that:

> One subjected to coercive official questioning in a noncriminal setting is constitutionally privileged to refuse to answer unless personally immunized, and, if personal immunity is denied, or is unavailable from an authorized source, the person cannot be sanctioned for remaining silent, but if one does speak under official compulsion, without the protection of formal immunity, the Constitution nonetheless prohibits direct or derivative use of the statements in a criminal prosecution against the declarant.[36]

However, both California cases as well as the Supreme Court have held differently.[37] Those cases have held time and time again that a public employee may, under threat of employment sanctions, be compelled to answer potentially incriminating questions so long as they are still afforded the protection of the Fifth Amendment.

The Supreme Court, in *Garrity v. New Jersey*,[38] and its progeny,[39] has stated that a public employee cannot be

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30 *Id.*

31 *Id.* (citing Garrity v. New Jersey, 385 U.S. 493, 496–97 (1967)).

32 *Id.* (citing Segretti v. State Bar, 15 Cal.3d 878, 886–87 (1973)).

33 *Id.*

34 *Id.*

35 *Id.* at 1133 (citing various California statutes).

36 *Id.* at 1132.

37 *Id.* at 1133–34.

38 385 U.S. 493, 496–97 (1967).

39 *See* Gardner v. Broderick 392 U.S. 273 (1968) (discussing a New York police officer that was asked to sign a waiver of his Fifth Amendment right and was told that failure to

terminated simply for invoking the protection of the Fifth Amendment. However the Court noted that if an employer coerces an employee to answer questions that are "specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal *without requiring relinquishment of the benefits of the constitutional privilege*"[40] the dismissal would not be the result of invoking the privilege.

The court therefore rejected the court of appeal's reasoning that authorized criminal use immunity was necessary before a public employee could be coerced into answering potentially incriminating statements.[41] Thus, within the instant matter, no state or federal constitutional provision, nor any case law allowed plaintiff to refuse to answer potentially incriminating statements until or unless he received criminal use immunity.[42]

Holding

Neither the California Constitution, nor the Federal Constitution provide that immunity must granted against criminal use before a public employee is forced to answer potentially incriminating questions.[43] Additionally, a public employer may terminate an employee for failure to answer questions if the employee's Fifth Amendment right against self-incrimination in a criminal prosecution is maintained.[44]

Legal Significance

As a result of this decision, the California Supreme Court reaffirmed the notion that public employees may be forced to answer questions so long as the employee is not required on pain of job termination to forfeit his right against self-incrimination in a subsequent criminal proceeding.

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do so would lead to his termination); Spevack v. Klein 385 U.S. 511 (1967) (holding that an attorney cannot be disbarred solely for refusing to answer questions at a disciplinary hearing on the basis of his Fifth Amendment right); Sanitation Men v. Sanitation Comm'r. 392 U.S 280 (1968) (discussing employees that were told they would be terminated if they invoked their right against self-incrimination in order to avoid testifying before the commissioner).

40 *Spielbauer*, 199 P.3d at 1134 (citing *Sanitation Men*).

41 *Id.* at 1141.

42 *Id.*

43 *Id.*

44 *Id.*

Digest: People v. Ramirez

Darrell J. Greenwald

Opinion by Corrigan, J., expressing the unanimous view of the court.

Issue

Is the crime of grossly negligent discharge of a firearm under section 246.3(a) of the California Penal Code[1] a necessarily lesser-included offense of the crime of discharge of a firearm at an inhabited dwelling under section 246 of the California Penal Code?[2]

Facts

Police responded to an apartment where a man was reportedly holding a gun to a woman's head.[3] When ordered outside by the police, Defendant, Jessie Jose Ramirez, fired several shots from a shotgun out of the front and rear windows of the apartment.[4] In all, ten spent shells were found in

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1 In full, section 246.3(a) reads:

> Except as otherwise authorized by law, any person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty of a public offense and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison.

CAL. PENAL CODE § 246.3(a) (West 2009).

2 In full, section 246 reads:

> Any person who shall maliciously and willfully discharge a firearm at an inhabited dwelling house, occupied building, occupied motor vehicle, occupied aircraft, inhabited housecar, as defined in Section 362 of the Vehicle Code, or inhabited camper, as defined in Section 243 of the vehicle Code, is guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for three, five, or seven years, or by imprisonment in the county jail for a term of not less than six months and not exceeding one year. [¶] As used in this section, 'inhabited' means currently being used for dwelling purposes, whether occupied or not.

CAL. PENAL CODE § 246 (West 2009).

3 People v. Ramirez, 201 P.3d 466, 467 (Cal. 2009).

4 *Id.* at 467–68. After police identified themselves, knocked on the door and ordered the occupants out, a shotgun was fired through the window knocking one officer backwards and spraying him with glass. *Id.* at 467. Once the officers took cover, several more shots were fired through the window, as well as from a rear window. Police again ordered the occupants out of the apartment. *Id.* The defendant's wife, Samantha, and their five-year-old daughter, came out first. *Id.* at 467–68. As Samantha emerged, she told officers that the defendant had put down his gun. *Id.* at 468. Then the defendant,

Defendant's apartment.[5] Although no one was struck by any of the rounds fired by Defendant, several of the shots struck three neighboring apartments.[6]

Defendant was convicted, *inter alia*, of "ten counts of grossly negligent shooting and three counts of shooting at an inhabited dwelling."[7] He was sentenced to fifteen years to life, plus thirty years and four months.[8] On appeal, Defendant argued that three of the grossly negligent shooting convictions must be reversed because that crime is a necessarily lesser-included offense of shooting at an inhabited dwelling.[9] The Court of Appeal affirmed Defendant's convictions.[10] The Supreme Court of California granted Defendant's appeal from the appellate court's decision.[11]

Analysis

As a preliminary matter, the parties agreed that three of the grossly negligent shooting counts and the three counts of shooting at an inhabited dwelling were based on the same acts.[12] Then the Court observed that under section 954 of the California Penal Code, "a single act or course of conduct can lead to convictions 'of any number of the offenses charged,'"[13] but added that a judicially created exception to section 954 prohibits multiple convictions based on necessarily included offenses.[14]

The court identified "two tests for determining whether one offense is necessarily included in another: the 'elements' test and the 'accusatory pleading test,'"[15] but noted that only the statutory elements test was proper for "deciding whether a defendant may be convicted of multiple *charged* crimes."[16] The court settled on the "elements" test for deciding the case at bar because, here, the

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Jessie Jose Ramirez, came out of the apartment with his hands up. *Id.* As the defendant exited he told the officers, "I'm your man, the gun's on the couch." *Id.*

5 *Id.* at 468.

6 *Id.* One of the shotgun slugs fired pierced three walls of another apartment and was directed at a bedroom where an eight-month-old baby was sleeping. *Id.* Another slug broke the window to a different apartment, hit the living room wall, and caused minor injuries to the occupant. *Id.*

7 *Id.* The defendant was also convicted of the attempted deliberate and premeditated murder of a police officer, assault with a firearm upon a police officer, being a felon in possession of a firearm, and child endangerment. *Id.* at 468 n.4.

8 *Ramirez*, at 468.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.* (citing CAL. PENAL CODE § 954).

14 *Id.* at 468 (referencing People v. Ortega, 968 P.2d 48 (Cal. 1998) and People v. Pearson, 721 P.2d 595 (Cal. 1986)).

15 *Id.* (referencing People v. Lopez, 965 P.2d 713 (Cal. 1998)).

16 *Id.* (citing People v. Reed, 137 P.3d 184 (Cal. 2006)).

case involved "the conviction of multiple alternative *charged* offenses."[17]

The court observed that the "elements" test looks strictly to the statutory elements, not to the specific facts of a given case.[18] The test is "whether all the statutory elements of the lesser offense are included within those of the greater offense . . . if a crime cannot be committed without also committing a lesser offense, the latter is a necessarily included offense."[19] On this basis, Defendant argued that "the crime of shooting at an inhabited dwelling (§ 246) cannot be committed without also committing a grossly negligent shooting (§ 246(a))."[20] The Attorney General countered that unlike section 246, the language section 246.3(a) requires "the actual presence of a person in harm's way."[21]

Applying the "elements" test to the case at bar, the court found that section 246 requires the following elements: "(1) acting willfully and maliciously, and (2) shooting at an inhabited house."[22] Next, it recognized that section 246.3(a) requires the following elements: "(1) the defendant unlawfully discharged a firearm; (2) the defendant did so intentionally; (3) the defendant did so in a grossly negligent manner which could result in the injury or death of a person."[23]

First, the court dismissed the Attorney General's argument, reasoning that the plain language and legislative history of the statute confirm that section 246.3(a) requires the likely presence of people in the area and not "that an actual person be in proximity to the grossly negligent shooting."[24] Second, the Court compared the elements of both offenses and found that "[a]lthough the *mens rea* requirements are somewhat differently described, both are general intent crimes" and both offenses "require that the defendant willfully fire a gun."[25] The court also reasoned that the offense of shooting at an inhabited building under section 246 is "grossly negligent because a significant risk

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17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.* at 469.

21 *Id.* In support of his argument, the Attorney General pointed to the following italicized language in section 246.3(a): "Except as otherwise authorized by law, any person who willfully discharges a firearm in a grossly negligent manner *which could result in injury or death to a person* is guilty of a public offense . . . ." *Id.* (citing CAL. PENAL CODE § 246.3(a)(italics added)).

22 *Id.*

23 *Id.*

24 *Id.* at 469–72.

25 *Id.* at 472.

of injury or death is foreseeable."[26] It then declared that "the high probability of human death or personal injury in section 246 is similar to, although greater than, the formulation of likelihood in section 246.3(a), which requires that injury or death 'could result.'"[27] Finally, the court found that the only "difference between the two, and the basis for the more serious treatment of a section 246 offense, is that the greater offense requires that an inhabited dwelling or other specified object be within the defendant's firing range."[28] Thus, the court concluded that all the elements of section 246.3(a) are necessarily included in the more stringent requirements of section 246.[29] Accordingly, the court reversed the judgment of the Court of Appeal and remanded with directions to reverse three of the grossly negligent shooting counts against Defendant.[30]

Holding

The court held that grossly negligent discharge of a firearm under section 246.3(a) of the California Penal Code is a necessarily lesser-included offense of discharge of a firearm at an inhabited dwelling under section 246 of the California Penal Code.[31]

Legal Significance

As a result of this case, a defendant may not be convicted under both section 246 and section 246.3(a) of the California Penal Code if both charges are based on the same act(s) of the defendant because the latter is a necessarily lesser-included offense of the former.

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26 *Id.* at 469.
27 *Id.* at 472.
28 *Id.*
29 *Id.*
30 *Id.*
31 *Id.*

Digest: Vargas v. City of Salinas

Paul A. Alarcón

Opinion by George, C.J., with Kennard, J., Baxter, J., Werdegar, J., Chin, J., Moreno, J., and Corrigan, J. Concurring Opinion by Moreno, J., with Werdegar, J.

Issues

(1) Whether the protections of a motion-to-strike provided in California's anti-SLAPP ("Strategic Lawsuit Against Public Participation") statute are available to a public entity or its officials.

(2) Whether the Court of Appeal for the Sixth District correctly concluded that the "express advocacy" standard from section 54964 of the California Civil Code, rather than the standard laid out in *Stanson v. Mott*, controlled the distinction between activities which presumptively may and those which presumptively may not be paid for by public funds.

(3) Whether, under the correct standard, the trial court's decision to grant the City of Salinas' anti-SLAPP motion to strike was proper.

Facts

Plaintiffs and Appellants, Angelina Morfin Vargas and Mark Dierolf, were the proponents of a local tax-relief initiative, ultimately termed Measure O, which qualified for the November 2002 ballot in the City of Salinas.[1] Measure O was designed to reduce and finally repeal the City's utility user tax which generated a substantial percentage of the city's general fund budget.[2] Once qualified, the Salinas City Council was required to either adopt the substance of the proposed initiative as an ordinance, submit the initiative to the voters, or direct the municipality's staff to prepare a report on the impact of the proposed initiative should it become law.[3] The city council elected to have a report prepared and, once the report was completed, decided not to adopt the initiative as an ordinance but

1 Vargas v. City of Salinas, 205 P.3d 207, 209 (Cal. 2009).
2 *Id.* at 210–11.
3 *Id.* at 211 (citing CAL. ELEC. CODE §§ 9212, 9215 (West 2003)).

rather to send it to the voters.[4] Thereafter, the city council adopted recommendations from the city staff regarding the city services and programs that would be reduced or eliminated should Measure O pass.[5]

Subsequently, the City of Salinas posted the minutes of each city council meeting on the city's website, according to its regular practice, as well as the city's report on the potential impact of Measure O, slideshows relating to Measure O from different city departments, and a report by the city responding to the alternative reductions suggested by the proponents of Measure O.[6] Further, the city produced a one-page document describing Measure O, the utility user tax, and the services which would be reduced or eliminated.[7] This document was made available to the public in all city libraries, city hall, and the city website. Finally, articles in the city newsletter regularly discussed the utility user tax, Measure O, and its effect on city services.[8]

Plaintiffs filed suit and accused Defendants, the City of Salinas and its manager Dave Mora, of engaging in unlawful campaign activities by using public funds "to prepare and distribute pamphlets, newsletters and Web site materials."[9] Defendants filed a motion to strike pursuant to California's anti-SLAPP statute.[10] The trial court granted this motion and Plaintiffs appealed.[11] The court of appeal found, in accordance with a lengthy heritage of courts of appeal decisions, that the anti-SLAPP statute's protections apply to public entities and, in the instant case, that Defendants had established the first prong of the anti-SLAPP statute—that Defendants' statements and actions concerned a matter of public interest.[12] Further, the court of appeal found that Plaintiffs were unable to satisfy their burden of making a prima facie showing that they would likely succeed on the merits of the action since Defendants' statements and actions were not unlawful under the "express advocacy" standard provided in section 54964 of the California Civil Code.[13] The court of appeal rejected the Plaintiffs' assertion that the

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4 *Id.*
5 *Id.* at 211–12.
6 *Id.* at 212.
7 *Id.*
8 *Id.* at 212–13.
9 *Id.* at 213.
10 *Id.* at 213–14.
11 *Id.* at 214.
12 Vargas v. City of Salinas, 37 Cal. Rptr. 3d 506, 514–20 (Cal. Ct. App. 2005) (review granted and opinion superseded), *aff'd*, 205 P.3d 207 (Cal. 2009).
13 *Id.* at 520–526.

standard articulated in *Stanson*, rather than section 54964, should control.[14] Upon further appeal, the California Supreme Court granted Plaintiffs' petition of review.[15]

Analysis

As a preliminary matter, the California Supreme Court found that the protections of California's anti-SLAPP statute extend to public entities.[16] The court noted that it need not decide whether or not "the First Amendment of the federal Constitution or article I, section 2 of the California Constitution directly protects government speech" either in general or of the types involved in the instant case.[17]

The court considered the anti-SLAPP statute, its legislative history, and a related statute.[18] First, subdivision (e) of the anti-SLAPP statute, which defines an "act" deserving of anti-SLAPP protection, is phrased in broad terms and does not distinguish between private entities or individuals and public ones.[19] Further, the California Legislature stated that the anti-SLAPP statute was to be "construed broadly" and the legislative history of the provision revealed legislative concern that abusive lawsuits may discourage statements by public officials regarding public issues.[20] Finally, California's SLAPPback statute, enacted after the numerous courts of appeal decisions which found the anti-SLAPP statute to apply to public entities, expressly permits a public entity to bring an "action for malicious prosecution or abuse of process arising from the filing or maintenance of a prior cause of action that has been dismissed pursuant to a special motion to strike."[21] This statutory authorization to bring SLAPPback actions would be meaningless and incomprehensible if public entities were not protected by the anti-SLAPP statute.[22] The court also summarily concluded that Defendant's statements constituted "protected activity" within the meaning of the anti-SLAPP statute because they concerned a matter of public interest and, therefore, that prong one of the anti-SLAPP test had been satisfied.[23]

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14 *Id.* at 523–25.
15 *Vargas*, 205 P.3d at 215.
16 *Id.* at 217.
17 *Id.* at 216.
18 *Id.* at 216–17.
19 *Id.* at 216.
20 *Id.* at 217.
21 *Id.* (quoting CAL. CIV. PROC. CODE § 425.18(b)(1) (West 2003)).
22 *Id.*
23 *Id.*

1. The Proper Legal Standard for Determining Whether Actions Relating to Elections and Ballot Measures May be Paid for by Public Funds

The court compared two possible legal standards for whether the statements or actions of a public entity or its officers may or may not be paid for by public funds or utilize public resources.[24] The court of appeal accepted the bright-line "express advocacy" standard adopted by section 54964 of the California Civil Code because the appellate court believed that this statute rendered *Stanson* inapplicable since *Stanson* expressly limited itself to cases not involving clear and unmistakable language authorizing expenditure of public funds for campaign purposes.[25] In *Stanson*, the California? Supreme Court articulated a standard which distinguished between public fund spending for "*campaign purposes*," which was not allowed, and for "*informational purposes*," which was permitted.[26] In that opinion, the court also stated that "no hard and fast rule governs every case" and that, in certain cases, courts would have to make the determination based "upon a careful consideration of such factors as the style, tenor and timing of the publication."[27]

The court concluded that the court of appeal had erred in applying the "express advocacy" standard.[28] Section 54964 does not "affirmatively *authorize*" the use of public funds for communications which do not expressly advocate the approval or rejection of a ballot measure.[29] Rather, the section "simply *prohibits* a municipality's use of public funds for communications that expressly advocate such a position."[30] Further, the court concluded that the legislative history of section 54964 did not support the conclusion that the legislature intended to overturn *Stanson*—the committee report explicitly mentioned *Stanson* but in no way indicated an intent to "depart from or modify" that decision.[31] Finally, utilizing the "express advocacy" standard in cases like the instant one raises troubling constitutional concerns.[32] The court noted that "[i]f a public entity could expend public funds for *any* type of election-related communication so long as the communication avoided 'express words of advocacy'

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24 *Id.* at 220–28.
25 *Vargas*, 37 Cal. Rptr. 3d at 523–25.
26 *Vargas*, 205 P.3d at 221 (quoting Stanson v. Mott, 551 P.2d 1, 11 (Cal. 1976)).
27 *Id.* (quoting *Stanson*, 551 P.2d at 12) (emphasis omitted).
28 *Id.* at 228.
29 *Id.* at 224.
30 *Id.*
31 *Id.* at 225–26.
32 *Id.* at 226.

and did not 'unambiguously urge[ ] a particular result'" then "the public entity easily could overwhelm the voters by using the public treasury to finance . . . campaign material containing messages that, while eschewing the use of express advocacy, nonetheless as a realistic matter effectively promote one side of an election."[33] Thus, because no statute clearly and unmistakably authorized Defendants to use public funds for campaign activities, the standard elucidated in *Stanson* applies to the instant case.[34]

2. Whether the Conduct of the City of Salinas and the City Manager Violated the Standard Articulated in *Stanson*

Since no statute clearly and unambiguously authorized Defendants to use public funds for campaign activities, the court turned to the question of "whether the activities fall within the category of informational activities that may be funded through such general appropriations or, instead, constitute campaign activities that may not be paid for by public funds in the absence of such explicit authorization."[35] The court noted that neither the material posted on the website, the one-page document, or the newsletters clearly fell within the categories which *Stanson* recognized as presumptively improper—"bumper stickers, posters, advertising 'floats,' or television and radio 'spots' . . . [or] the dissemination, at public expense, of campaign literature prepared by private proponents or opponents of a ballot measure"—but the court declared this list not to be exhaustive.[36]

The court rejected Plaintiffs' contention that the "style, tenor, and timing" of the challenged communications violated the *Stanson* rule because they impermissibly took sides in the election contest.[37] The court interpreted *Stanson* as banning a public entity from "taking sides" in election contests by using "the public treasury *to mount an election campaign*."[38] In the instant case, Defendants' activities were not impermissible to the extent they merely "evaluate[d] the merits of [the] proposed ballot measure and [made their] views known to the public."[39]

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33 *Id.* (alteration in original).

34 *Id.* at 228. The court noted that, since section 54964 does not clearly and unmistakably authorize Defendants to use public funds for campaigning activities, the court did not need to address the serious constitutional question which such an explicit legislative authorization would pose. *Id.*

35 *Id.*

36 *Id.* (alteration in original).

37 *Id.* at 228–29.

38 *Id.* at 229 (quoting Stanson v. Mott, 551 P.2d 1, 9–10 (Cal. 1976)).

39 *Id.* Indeed, the court noted that merely by refusing to adopt the proposed

The court found that merely posting the reports and minutes of council meetings on the website, so as to make them available to the public, constituted permissible informative, rather than campaign, activity.[40] Similarly, the one-page document made available in the city hall and libraries was not impermissible advocacy since the document did not "recommend how the electorate should vote on the ballot measure" and because its "style and tenor is not at all comparable to traditional campaign material."[41] Rather, "from the perspective of an objective observer, the document clearly is an informational statement that merely advises the public of the specific plans that the city council voted to implement, should Measure O be adopted."[42] The court also found relevant the fact that the document was "simply made . . . available at the city clerk's office and in public libraries to members of the public who sought out the document."[43]

Finally, the court concluded that "the City did not engage in impermissible campaign activity by mailing to city residents" the newsletter containing articles about Measure O.[44] The court cautioned that in some cases mass mailings of material relating to ballot measures right before an election could constitute improper campaign activity.[45] However, the court found significant the fact that the newsletter was "a regular edition" rather than a special edition mailed to a larger number of citizens than usual.[46] Additionally, the "the style and tenor of the publication in question was entirely consistent with an ordinary municipal newsletter and readily distinguishable from traditional campaign material."[47] Thus, the articles were "moderate in tone and did not exhort voters with regard to how they should vote" and provided information "in an objective and nonpartisan manner."[48]

The court highlighted certain factors which contributed to its conclusion that Defendants' actions were merely informational and not campaign activities. First, the information

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ordinance and instead sending it to the voters, the city council could not help but reveal their view that the measure should fail. *Id.*

40 *Id.* at 230.

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.* at 231.

47 *Id.*

48 *Id.*

communicated was primarily factual.[49] Second, the statements "avoided argumentative or inflammatory rhetoric."[50] Third, the information was conveyed in a manner "consistent with established practice regarding use of the Web site and regular circulation of the city's official newsletter."[51] Therefore, the court concluded that the court of appeal was correct to decide that Plaintiffs had failed to meet their burden under prong two of the anti-SLAPP statute.[52] Thus, the court affirmed the decision of the court of appeal.[53]

Holding

The court held that "a lawsuit against a public entity that arises from its statements or actions is potentially subject to the anti-SLAPP statute" and that "the campaign activity/informational material dichotomy set forth in *Stanson* remains the appropriate standard for distinguishing the type of activities that presumptively may not be paid for by public funds, from those activities that presumptively may be financed from public funds."[54] However, the court concluded that, in the instant case, "the appellate court reached the correct result in upholding the trial court's order granting defendants' motion to strike."[55]

Concurrence

Justice Moreno agreed that the "express advocacy" standard was insufficient and that Defendants' actions were not unlawful.[56] However, in light of Proposition 13 passed by voters in 1978, he questioned whether the "concept of prohibited 'campaign activity' set forth in *Stanson*, and reaffirmed by the majority meets the current needs of governance."[57] Proposition 13 removed the power to raise local revenues from local legislatures to the electorate.[58] "In this context, local and regional agencies sometimes have been specially charged with the task of sponsoring ballot propositions to raise revenue to fund various infrastructure improvements and services that are

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49 *Id.* at 232.
50 *Id.*
51 *Id.*
52 *Id.*
53 *Id.*
54 *Id.* at 217, 228 (citation omitted).
55 *Id.* at 232.
56 *Id.*
57 *Id.* at 234.
58 *Id.*

deemed necessary."[59] Hence, difficulties might arise from attempting to reconcile "the funding of an active informational campaign to promote or defend a lawfully government-sponsored ballot measure" with the majority's "informational/campaign activity dichotomy."[60] Of course, as the majority and *Stanson* recognized, the legislature may expressly authorize "a public entity to expend public funds for campaign activities or materials" by clearly and unmistakably granting this permission.[61]

Legal Significance

In *Vargas*, the California Supreme Court has finally expressly held that California's anti-SLAPP statute applies to public entities and their officers or employees. Further, the court has reaffirmed the rule and standard enunciated in *Stanson* that public entities may not use public resources to support campaign activities but may use such funds to provide the public with impartial information. In rejecting the "express advocacy" standard, the court rejected the position that merely avoiding communications for or against a particular ballot measure would protect a public entity or its officers from lawsuits. Additionally, while *Stanson* provided clear examples of what types of activities constitute "advocacy" and what are "informational," the instant case provides factors to which courts may look for guidance in cases involving activities which do not neatly fit into the campaign/informational dichotomy. These factors suggest that a public entity which avoids communications that are substantively campaign-like and does not involve procedurally irregular expenses or communications is likely to prevail in a subsequent prosecution. However, the *Vargas* court's conclusion that the "government may not take sides" rule, expressed in *Stanson*, only applies where the public funds are used "to mount an election campaign" leaves open the possibility that the court is actually relaxing the standard articulated in *Stanson*. Future decisions may be required for clarity. Finally, whether the California Legislature may constitutionally authorize the use of public funds for campaigning remains unresolved.

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59 *Id.*

60 *Id.* at 235.

61 *Id.* at 235–36. "Of course, any such legislation would have to conform to constitutional constraints so as to preserve 'the integrity of the electoral process.'" *Id.* at 236.

Digest: Strauss v. Horton

Errick J. Winek

Opinion by George, C.J. Concurring Opinions by Kennard, J., and Wedegar, J. Concurring and Dissenting Opinion by Moreno, J.

Issues

(1) Whether under the California Constitution, Proposition 8 is permissible as a revision of, rather than an amendment to, the California Constitution.

(2) Whether Proposition 8 violates the separation of powers doctrine under the California Constitution.

(3) Whether and to what effect, if not unconstitutional, Proposition 8 would have on same-sex marriages prior to its passage on November 4, 2008.

Facts

On November 4, 2008, Proposition 8 passed with a majority of persons voting to amend the California Constitution.[1] In doing so, this state initiative added section 7.5—more commonly known as the "California Marriage Protection Act"[2]—to article I of the California Constitution.[3] This newly-added language clarified the constitutional definition of marriage, stating "[o]nly marriage between a man and a woman is valid or recognized in California"[4] and became effective the day after the passage of Proposition 8.[5] If deemed valid, Proposition 8 had the potential to impact an estimated 18,000 same-sex marriages performed prior to its passage in the November 2008 election.[6]

On November 5, 2008, three petitions were filed questioning the validity of Proposition 8.[7] Within the various petitions, the

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1 Strauss v. Horton, 207 P.3d 48, 59 (Cal. 2009).

2 CAL. CONST. art. 1, § 7.5.

3 *Strauss*, 207 P.3d at 59.

4 *Id. See also* CAL. CONST. art. 1, § 7.5

5 *Strauss*, 207 P.3d at 59.

6 *Id.*

7 *Id.* at 68–69. (discussing the three petitions: Strauss v. Horton (S168066) (alleging that Proposition 8 was an invalid revision to the state constitution and seeking a writ of mandate ordering state officials not to enforce Proposition 8); Tyler v. State of

assertion that Proposition 8's denial of the same-sex couple's right to marry constituted an impermissible revision[8], rather than an amendment to the California Constitution that could not lawfully be proposed by the initiative process was a common undertone.[9] Moreover, one specific petition argued that Proposition 8 violated the separation of powers doctrine in the California Constitution[10], and another challenged retroactive application of Proposition 8 on marriages performed prior to its passage in the November 2008 election.[11] Both *Strauss v. Horton* and *Tyler v. State of California* requested the court stay enforcement of Proposition 8 until the court had an opportunity to consider the petitions.[12] Shortly after, official proponents of the recently passed Proposition 8 filed a motion to intervene on all three cases.[13]

On November 19, 2008 the court granted the proponents' motion to intervene and denied the petitions to stay execution of Proposition 8 until a final decision was rendered.[14] In addition, the court issued an order to show cause via expedited briefing schedule calling for all parties to address the issues presented in the three petitions.[15] On March 5, 2009, the court consolidated the rulings on the three petitions into one decision though an order.[16]

Analysis

1. Proposition 8's Effect on the Constitutional Right to Marry

After a thorough review of same-sex marital jurisprudence, the court considered the impact Proposition 8 had on the right to marry in the California constitutional context.[17] Opponents to Proposition 8 argued that the new constitutional section could potentially impact either the right to privacy or due process

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California (S168066) (arguing that Proposition 8 was an invalid revision and unconstitutional under the separation of powers doctrine); City and County of San Francisco v. Horton (S168078) (contending that Proposition 8 was an invalid revision to California Constitution and, even if constitutional, proposing that Proposition 8 could not retroactively apply to same-sex couples married before its passage)).

8 *See* CAL. CONST. art. XVIII, §§ 1–4(2).

9 *Strauss*, 207 P.3d at 68–69.

10 *Id.* at 68.

11 *Id.* at 69.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.* at 74.

aspects of the California Constitution.[18] Proponents, however, claimed that Proposition 8 merely sought to limit the definition of marriage solely to same-sex couples, not to impede the rights of same-sex couples to have a legally recognized family.[19] The court reasoned that Proposition 8 crafted a limited exception to the privacy and due process clause of the California Constitution.[20] By its terms, the court articulated, Proposition 8 referred only to the literal word "marriage" and did not impact the rights of same-sex couples to establish an organized family relationship.[21]

2. Revision

Having determined that Proposition 8 carved out the right of same-sex couples to access the designation of "marriage," the court turned to the petitioner's first point of contention that the constitutional change caused by Proposition 8 was not an amendment, but rather an invalid constitutional revision.[22] Section 3 of the California Constitution allows for amendments to be made either through proposal in the Legislature or through the initiative process.[23] However, the court stated a revision to the California Constitution could only be proposed through a constitutional convention or by a two-thirds vote of the entire State Legislature.[24]

While both constitutional amendments and revisions require a majority of voters approval, a revision—which substantially alters the entire Constitution, the basic framework of the governmental structure or the powers held by one or more governmental branches[25]—requires prior approval of two-thirds of each house of the California State Legislature.[26] The court explained that the distinction between an amendment and a

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18 *Id.* at 75.
19 *Id.* at 76–77.
20 *Id.* at 75.
21 *Id.*
22 *Id.* at 78.
23 *See* CAL. CONST. art. XVIII, §§ 1–3. *See also* CAL. CONST. art. II, § 8 defining "initiative" as:

> The power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them . . . may be proposed by presenting the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election.

Id.
24 *Strauss*, 207 P.3d at 79–80.
25 *Id.* at 99.
26 *Id.* at 80.

revision could be determined by considering both the quantitative and qualitative effects of the measure on California's constitutional scheme.[27] In the court's view, the addition of a 14-word section did not quantify enough to rise to the level of a revision.[28] Additionally, Proposition 8 did not constitute a "fundamental change in the *basic governmental plan or framwork*" as to constitute a substantive revision to the California Constitution.[29] Rather, the court opined that the limited effect of Proposition 8 only to use of the term "marriage" indicated that Proposition 8 was an amendment.[30]

3. Separation of Powers Doctrine

Petitioners also argued that Proposition 8 violated the separation of powers doctrine.[31] Though petitioners claimed that Proposition 8 was a carefully crafted method of re-litigating the *Marriage Cases*, the court stated that Proposition 8 did not reconsider the decision.[32] Rather, the state initiative amended the California Constitution and created a new substantive rule.[33] Being that the passage of the proposition created a new constitutional amendment, it became the judiciary's duty to ensure its application.[34] In announcing that it was within the right of the electorate to propose and adopt an amendment to the California Constitution, the court declared that neither the people, nor the legislature, infringed upon the powers of the judiciary.[35]

4. Attorney General's Claim that Proposition 8 Abrogated Inalienable Rights

Along with the contentions raised by petitioners, the Attorney General articulated that Proposition 8 was a constitutional violation because it abrogated same sex couple's inalienable rights protected by the California Constitution.[36] In dismissing this claim, the court said that the limited effect of Proposition 8 in creating an exception to the right to use the label

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27 *Id.* at 80–114. *See also* CAL. CONST. art. II, § 8, art. XVIII, §§ 2, 3.
28 *Id.* at 98.
29 *Id.* at 99.
30 *Id.* at 114.
31 *Id.*
32 *Id.* at 114–15.
33 *Id.* at 115.
34 *Id.* at 116.
35 *Id. See also* CAL. CONST. art. II, § 8(a) (stating "[t]he initiative is the power of the *electors* to propose statutes and amendments to the Constitution and to adopt or reject them") (emphasis added).
36 *Strauss*, 207 P.3d at 116.

"marriage" did not impact same-sex couple's inalienable rights.[37] Moreover, the court declared that inalienable rights were not completely immune from restriction and could be affected by a constitutional amendment aimed at limiting that right.[38]

5. Retroactive Impact of Proposition 8 on Pre-Existing Marriages

After concluding that Proposition 8 could not be invalidated on any of the petitioner's or Attorney General's theories, the court considered what effect, if any, Proposition 8 would have on same-sex marriages performed before the passage of Proposition 8 in November 2008.[39] The opponents of Proposition 8 argued that it could only be read as being prospective in nature, while proponents of Proposition 8 claimed that the language was written so to impact all same-sex marriages performed in California, both before or after Proposition 8's effective date.[40]

In weighing these arguments, the court noted that the language of Proposition 8 did not explicitly contain a retroactive provision on its face.[41] Rather, the language, written in present tense, did not definitively evidence a design to apply retroactively.[42] Even when confronted by the claim from the proponents that extrinsic evidence showed that Proposition 8 was to be applied to all marriages before and after Proposition 8's passage, the court stated that the official title and general summary of Proposition 8 for the election did not "clearly and unambiguously" indicate an intent for the initiative to be applied in this manner.[43] In the absence of such language and intent, the court concluded that Proposition 8 could not retroactively invalidate the same-sex marriages performed before its passage.[44]

Holding

The court held that Proposition 8 was an amendment to the California Constitution, did not violate the separation of powers doctrine, was not invalid as an abrogation of the inalienable rights doctrine, and did not apply retroactively to same-sex

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37 *Id.*
38 *Id.* at 116–19.
39 *Id.* at 119.
40 *Id.* at 119–20.
41 *Id.* at 120.
42 *Id.*
43 *Id.* at 120–21.
44 *Id.* at 122.

marriages before its effective date.[45]

Concurrence (Kennard, J.)

The focus of Justice Kennard's concurrence centered on the view that interpreting the laws of the California Constitution—which becomes particularly crucial when individual rights are involved—was within the power of the judiciary.[46] However, the power to alter the California Constitution was not within the role of the judicial branch, but rather a power invested in the people of California.[47] Acknowledging that Proposition 8 changed the California Constitution, Kennard recognized that the court was now duty-bound to discharge the obligations arising with the new amendment.[48]

Concurrence (Werdegar, J.)

While tending to agree with the majority that Proposition 8 was a constitutional amendment as opposed to an invalid revision, Justice Werdegar took issue with the definition of "revision" used.[49] Rather than the approach used by the majority, Werdegar opined that the analysis should focus on whether the scope of Proposition 8 sufficiently changed an individual liberty to a degree that would comprise to a constitutional revision.[50]

Dissent

Justice Moreno agreed with petitioners that Proposition 8 discriminated against a suspect class to a level that epitomized a substantial and dramatic change in the governmental structure that it had to be deemed a constitutional revision.[51] Moreover, Moreno disagreed with the majority's belief that limiting only the designation of "marriage" to opposite-sex couples carved out a "'narrow' or 'limited' exception to the requirement of equal protection"[52] Ultimately the dissent concluded that the change brought by Proposition 8 could have only resulted from a constitutional revision.[53]

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45 *Id.*
46 *Id.* at 123.
47 *Id.* at 123.
48 *Id.* at 123–24.
49 *Id.* at 124.
50 *Id.* at 127–28.
51 *Id.* at 129.
52 *Id.* at 130.
53 *Id.* at 138.

Legal Significance

This decision affirmed Proposition 8 as a valid constitutional amendment to the California Constitution restricting the designation of "marriage" only to opposite-sex couples. However, the decision held that Proposition 8 did not invalidate the marriages of same-sex couples performed prior to the passage of Proposition 8 in November 2008 due to the absence of a retroactive provision or clear legislative intent that Proposition 8 should have a retroactive force.

Digest: Bonander v. Town of Tiburon

Habib Hanna

Opinion by Kennard, J., expressing the unanimous view of the court.

Issue

When a property owner brings a lawsuit that contests an individual assessment levied under the Municipal Improvement Act of 1913[1] by challenging the assessment for failing to comply with article XIII D of the California Constitution,[2] must the property owner comply with the requirements governing validation proceedings brought under California Code of Civil Procedure sections 860 through 870.5?

Facts

Several property owners in the Town of Tiburon in Marin County, California petitioned the city council to create an assessment district in order to install underground utility wires carrying electricity, telephone, and other cable services, replacing overhead wires and poles.[3]

Subsequently, an engineer submitted a report that identified the new underground electrical, telephone, and cable facilities as the special benefit that would potentially be gained by property owners of the 221 parcels located in the proposed district.[4] To determine the special benefit conferred on each affected property owner, the report assigned points based on three categories: (1) aesthetic benefit from removal of poles and overhead wires, (2) improved safety, and (3) greater service reliability.[5]

The city council sent notices of a public hearing and voting ballots to the owners of the affected parcels and 71 percent of the affected property owners voted in favor of the project.[6] The Town then ordered and received a final engineer's report, and, based on

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1 *See* CAL. STS. & HIGH CODE §§ 10000–10706 (West 2005).
2 CAL. CONST. art. XIII D, § 4.
3 Bonander v. Town of Tiburon, 208 P.3d 146, 148 (Cal. 2009).
4 *Id.*
5 *Id.*
6 *Id.*

that report, the city council voted unanimously to approve the project and the assessments.[7]

Plaintiffs are affected property owners who filed a lawsuit asking the court for declaratory and injunctive relief by alleging that the assessment violated article XIII D of the state Constitution because the apportionment method used by the district resulted in assessments against plaintiffs' parcels that exceeded the special benefit those parcels would receive.[8] According to plaintiffs, their property would receive no aesthetic benefit at all and little, if any, safety benefit, because the utility poles and overhead wires would remain even after the project was completed.[9]

Plaintiffs then served the summons and complaint on the city council, but they did not serve the owners of the other affected parcels within the district.[10] The city council answered the complaint, alleging that plaintiffs' claims were barred as untimely under Streets and Highways Code section 10400 and, that plaintiffs had failed to publish notice in a local newspaper or file proof of publication within 60 days of the complaint's filing date, as required by California Code of Civil Procedure sections 861 and 863.[11]

Plaintiffs then applied for an order amending the caption on their summons to include "all interested persons," in an attempt to bring the summons into compliance with Code of Civil Procedure section 863.[12] The trial court granted plaintiffs' application and plaintiffs thereafter published the amended summons in a local newspaper, once per week, for four successive weeks.[13] Plaintiffs finally filed proof of publication of the amended summons 85 days after the original complaint was filed.[14]

As a result, the city council filed a motion to dismiss the lawsuit because plaintiffs had failed to comply with Code of Civil Procedure sections 861, 861.1, and 863, which require that the summons—in actions governed by those sections—be directed to "all persons interested" and that proof of publication must be

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7 *Id.*
8 *Id.* at 148–49.
9 *Id.* at 149.
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*

filed within "60 days from the filing of the complaint."[15] Plaintiffs missed the statutory deadline by 25 days.[16]

The trial court ruled on the motion and ordered dismissal of the complaint because the plaintiffs' action was a validation proceeding "subject to special statutory procedures codified in . . . [the] Code of Civil Procedure."[17] The trial court's ruling was based on the fact that plaintiffs had failed to file proof of service by publication within the requisite 60 days from the filing of the complaint, and because they had failed to show good cause for their delay.[18] The California Court of Appeal affirmed the trial court's ruling.[19]

Analysis

The California Supreme Court relied heavily on the intent of the legislature when it enacted and amended the various statutes at issue in this case and on the historical treatment of similar cases.[20] The main point of contention for the court was the distinction between property owners *contesting* a proposed assessment and city government officials or contractors seeking to *validate* the proposed assessments.[21] The court started by reviewing the history of such actions and cited several instances where property owners successfully contested the validity of similar assessments.[22] The court noted that, historically, property owners could petition the superior court for a writ of review in order to contest the validity of the proceedings that led to the assessment.[23] The court also cited other cases where property owners brought actions for declaratory or injunctive relief.[24] In addition, the court cited several instances where property owners could challenge the validity of an assessment as a defense in an action brought to enforce the assessment.[25] Finally, the court noted that there have been several cases where the "legislative act authorizing formation of the assessment

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15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.* at 149–50.
19 *Id.* at 150.
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.* (citing Miller & Lux v. Bd. of Supervisors, 208 P. 304 (Cal. 1922); Imperial Water Co. v. Supervisors, 120 P. 780 (Cal. 1912); Peterson v. Bd. of Supervisors, 225 P. 28 (Cal. 1924)).
24 *Id.* (citing Imperial Land Co. v. Imperial Irrigation Dist., 161 P. 116 (Cal. 1916); Imperial Land Co. v. Imperial Irrigation Dist., 161 P. 113 (Cal. 1916); Southwick v. Santa Barbara, 109 P. 610 (Cal. 1910)).
25 *Id.* (citing Swamp Land etc. Dist. 341 v. Blumenberg, 106 P. 392 (Cal. 1909); Reclamation Dist. 531 v. Phillips, 41 P. 335 (Cal. 1895)).

district expressly conferred on property owners the right to bring actions challenging their individual assessments."[26]

The court then proceeded to review the history and evolution of the statutes implicated by this lawsuit. First, the court looked at the Improvement Act of 1911 which allowed city governments to undertake street improvement projects and to fund those projects by issuing municipal bonds.[27] Next, the court looked at a critical component of its analysis, the Municipal Improvement Act of 1913 which allowed cities to construct water, electric, gas, lighting and other infrastructure projects funded primarily by special assessments on those properties that would benefit from the projects.[28] The court then noted that in 1937 the California State Legislature amended the Improvement Act of 1911 to allow city governments and contractors hired to work on projects funded through the Improvement Act of 1911 to file validating actions which would "determine the validity of" the proposed projects and the requisite assessments imposed in order to fund those projects.[29]

The court followed the progression of these two legislative acts to their modern day iterations. Of importance, the court noted that the legislature amended Streets and Highways Code section 10601 in 1961 by reaffirming the fact that only local city governments or a contractor could bring a validation lawsuit and that "the action authorized by [section 10601] shall not be brought by any person other than the legislative body or the contractor."[30] The court explained that the legislature intended this amendment as a way of expressing clear intent to limit validation actions to those brought by local city governments or contractors in order to test the veracity of their proposed assessments before the work on the project(s) started.[31]

However, the court went on to point out an important distinction underlying this analysis. First, Streets and Highways Code section 10601 was intended to govern validation actions which were distinct both in nature and in outcome from the contest action at the heart of this particular lawsuit.[32] The court stated that lawsuits to "contest assessments continue to be governed solely by [Streets and Highways Code] section 10400, as they have been since 1913, and therefore they are not subject

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26 *Id.* at 151.
27 *Id.*
28 *Id.*
29 *Id.*
30 *Id.* at 152–53.
31 *Id.* at 153.
32 *Id.*

to the general validation procedure, and in particular they are not subject to the requirement of newspaper publication."[33] As a result, the court concluded that—unlike actions under section 10601 which are intended to validate an assessment and are primarily driven by a desire to enforce the assessments—actions under section 10400 emanate from a desire to *invalidate* the assessment and are motivated by an entirely divergent goal, the property owner's desire to avoid having to pay what he or she considers a non-beneficial assessment forced upon the property.[34]

The court also concluded that publication of the summons in a newspaper was not required under California Code of Civil Procedure sections 860 through 870.5 because those sections were intended to govern validation actions where notice to all the affected parties was required in order to give each affected property owner an opportunity to challenge the validity of the proposed assessment.[35] In addition, the court stated that the 60-day time limitation similarly did not apply in contest actions because this time limitation was a function of the same sections of the Code of Civil Procedure that govern general validation actions initiated by city governments or private contractors.[36]

Holding

The court held that the general validation procedure found in California Code of Civil Procedure sections 860 through 870.5 do not apply when the property owners are contesting individual assessments levied under the Municipal Improvement Act of 1913.[37] As a result, the court ordered both the California Court of Appeal and the trial court to reverse their respective judgments.[38]

Legal Significance

This decision retains the rights of California property owners to challenge the imposition of special assessments on their property. The decision is important in several ways. The court's high degree of deference to the intent of the state legislature implies that the court feels this is an area of law where regulatory power should be reserved to the legislature. However, the case is also important because the court delineates a carefully crafted decision that upholds the protection of property

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33 *Id.*
34 *Id.* at 154.
35 *Id.* at 154–55.
36 *Id.*
37 *Id.* at 155.
38 *Id.*

owners while maintaining deference to the legislature, and while retaining the ability of local city governments and contractors to utilize the validating procedures when enacting special assessments for infrastructure and other important public works projects.

Digest: People v. Nguyen

Meagan S. Tom

Opinion by Baxter, J. with George, C.J., Werdegard, J., Chin, J., Moreno, J. and Corrigan, J. concurring. Dissenting Opinion by Kennard, J.

Issue

Does the United States Constitution allow the use of prior juvenile adjudication to increase sentences under the Three Strikes law even though there is no right to a jury trial in juvenile proceedings?

Facts

In an amended complaint, defendant Vince Vinhtuang Nguyen was charged in December 2004 with four felony counts.[1] For sentencing purposes, the amended complaint also alleged that the defendant had a qualifying "prior felony conviction" under the Three Strikes Law, a 1999 juvenile adjudication for assault with a deadly weapon.[2]

Defendant pled no contest to one felony, possession of a firearm by an ex-felon, and a misdemeanor, possession of a billy[3] on March 2005 pursuant to a plea agreement.[4] Defendant had also waived his statutory right to a jury trial to determine whether he had suffered a qualifying prior felony conviction, *i.e.* the 1999 juvenile adjudication.[5] The trial court decided that the strike allegation was true based upon documentary evidence and noted that the court file regarding the 1999 juvenile matter indicated that defendant admitted to the violation.[6]

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1 People v. Nguyen, 209 P.3d 946, 949 (Cal. 2009). Defendant was charged with of possession of a firearm by an ex-felon, possession of ammunition by an ex-felon, possession of a billy, and possession of methamphetamine. *Id.* Defendant was also charged with two misdemeanors: being under the influence of a controlled substance and possession drug paraphernalia. *Id.*

2 *Id.*

3 Possession of a billy could be charged and/or convicted as either a felony or a misdemeanor. *Id.* at n.3.

4 *Id.* at 949. In exchange for the guilty plea, the other counts were dismissed. *Id.*

5 *Id.*

6 *Id.*

Defendant objected to the trial court's use of the prior juvenile proceeding as a strike in the current case, in violation of his Sixth Amendment rights, since the juvenile adjudication had no right to a jury trial.[7] The trial court rejected this argument and sentenced defendant to 16 months for the firearm possession conviction, doubled to 32 months based upon the previous qualifying strike.[8]

Defendant appealed, raising the Sixth Amendment sentencing issue. In the first opinion, the Court of Appeal upheld the trial court's sentence, stating that while the Sixth amendment forbids the use of contested juvenile adjudications for enhanced sentencing in a subsequent adult offense, since the defendant had admitted that he had committed the violation in the juvenile case, the current sentence was not affected by the lack of a jury trial.[9] On rehearing, the Court of Appeal reversed, stating that since minors tried for criminal offenses have no right to jury trial, "the use of *any* juvenile adjudications as prior convictions to enhance subsequent adult sentences is prohibited by the Sixth Amendment."[10] The Supreme Court of California granted review.

Analysis

The United States Supreme Court has established that an adult criminal defendant has a general right under the Fifth, Sixth, and Fourteenth Amendments, to a jury trial finding beyond a reasonable doubt of any fact that increases the sentence for a felony conviction that goes beyond the maximum term permitted by conviction of the charged offense alone.[11] *Apprendi* found that the Sixth Amendment adopted the common law tradition that any fact that is crucial to the maximum punishment for an offense is considered an "element" of the offense and subject to the same requirements of proof beyond reasonable doubt and a jury trial.[12]

Under California's Three Strikes Law,[13] the complaint against a defendant can, for the purposes of sentencing enhancement, charge that defendant had previously had a

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7 *Id.*

8 *Id.* at 949–50.

9 *Id.* at 950.

10 *Id.* (emphasis in original).

11 *Id.* at 947 (citing Apprendi v. New Jersey, 530 U.S. 466 (2000); Oregon v. Ice 129 S.Ct. 711 (2009); Cunningham v. California, 549 U.S. 270 (2007); Blakely v. Washington, 542 U.S. 296 (2004)).

12 *Id.* (citing *Apprendi*).

13 CAL. PENAL CODE §§ 667(b)–(i), 1170.12(a)–(d) (West 2009).

juvenile adjudication qualifying as a prior felony conviction.[14] The Three Strikes Law statutorily affords an adult criminal defendant the right to a jury trial whether he or she has suffered an alleged conviction.[15] Here, Defendant had waived his right to a jury trial regarding the alleged conviction and the trial court determined he had suffered a qualifying conviction based upon documentary evidence.[16] Under *Apprendi*, any fact "that allows enhancement of an adult defendant's maximum sentence *for the current offense* must, unless the defendant waives his jury-trial right, be determined by a jury in the *current case*."[17] The court found that the statutory process under the Three Strikes Law complies with the *Apprendi* rule.[18]

However, defendant argued that he qualifies for the prior conviction exception[19] under the *Apprendi* rule, stating that regardless of the jury trial rights in the current case, the lack of jury trial in the juvenile proceeding excludes all use of the resulting adjudication to enhance sentencing in the current case.[20] The court rejected this argument, stating that *Apprendi* does not preclude the sentence-enhancing use of a prior valid, fair, and reliable adjudication against an adult felon, because the defendants had all the constitutional protections afforded, even though it does not include the right to jury trial in previous juvenile adjudication.[21] The court found it logically incompatible to conclude that a constitutionally decided juvenile adjudication that justified confinement of a juvenile, would be considered "constitutionally inadequate" when used at a later date to

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14 People v. Nguyen, 209 P.3d 946, 948 (Cal. 2009).

15 *Id.*

16 *Id.*

17 *Id.* at 950 (emphasis in original).

18 *Id.* at 951.

19 The prior conviction exception arose out of a pre-*Apprendi* case, *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *Id.* In *Almendarez-Torres*, the court found that the Constitution did not require treatment of prior convictions as an element of the current criminal offense and therefore did not need to be proved beyond a reasonable doubt. *Id.* (citation omitted).

20 *Id.*

21 *Id.* at 953. The United States Supreme Court has previously held that minor criminal defendants, who may be confined in a correctional institution are constitutionally entitled to nearly all the same procedural rights and protections as adult criminal defendants, except for the right to a jury trial. *Id.* (citations omitted). The Court discusses *McKeiver v. Pennsylvania*, the 1971 United States Supreme Court decision which found that there was no constitutional jury trial right in juvenile proceedings, stating that it reflected the concern that the introduction of juries would interfere too greatly with the effort to deal with youthful offenders in a less formal and adversarial setting, echoing society's preference for protective and rehabilitative proceedings instead. *Id.* at 956 (citing McKeiver v. Pennsylvania, 403 U.S. 528, 545–51 (1971)).

establish an individual's recidivism in order to enhance adult offense sentencing.[22]

The court further stated that all California Court of Appeal panels have previously held that the issue of juvenile convictions being used to enhance sentencing for adult offenses does not violate the Fifth, Sixth, and Fourteenth Amendments, even though there is no jury trial right.[23] Since the juvenile adjudication is being used to show the recidivism of the now adult defendant the court found that it was a highly rational basis for enhancing an adult's sentence.[24] The court stated that recidivism after the juvenile adjudication was even more compelling reason for enhancing sentencing, since he had been previously found to have committed criminal conduct and did not reform, despite the state's previous interventions.[25]

The court also pointed out that the majority of federal decisions and other states' decisions have also reached a similar conclusion after the *Apprendi* decision, determining that nonjury juvenile adjudications can be used to enhance later adult sentences, and its' ruling is consistent with these other decisions.[26]

Holding

The court held that the use of prior juvenile adjudication to increase a defendant's sentence under the Three Strikes law does not violate the right to a jury trial.[27]

Dissent

Justice Kennard agreed with the majority that under California's Three Strikes law that the existence of a prior juvenile court adjudication of criminal conduct triggers increased punishment.[28] However, Justice Kennard interpreted *Apprendi* to extend not only to the "fact" of the existence of a prior adjudication, but also requiring a jury trial on the conduct that led to that adjudication.[29] Justice Kennard argued that the majority's reasoning would "open[] the door to wholesale evasion or trivialization of the holding in *Apprendi*"[30] and allow for

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22 *Id.* at 955.
23 *Id.* at 954.
24 *Id.* at 956.
25 *Id.* at 957.
26 *Id.*
27 *Id.*
28 *Id.* at 961.
29 *Id.*
30 *Id.* at 962.

legislation to be enacted defining any sentence-increasing circumstance for the current offence in terms of prior court determinations or adjudication.[31] Under this situation, a judge, not a jury, would determine if a specific aggravating circumstance had occurred, after which a jury would determine if a trial judge had actually made that specific factual determination; this was not the United States Supreme Court's intention in *Apprendi*.[32]

Justice Kennard also felt the decision of the court conflicted with its' recent decision in *People v. Towne*, where it was held that a defendant's sentence may not be increased based on a prior determination, in a nonjury revocation proceeding, of a probation or parole violation.[33] The implied view in *Towne*, according to Justice Kennard, is that the constitutional right to a jury trial extends to both the conduct leading to the nonjury adjudication, not only the existence of it.[34]

Justice Kennard also found that the lack of the right to a jury trial in juvenile proceedings, which the majority reasons could be constitutionally used in sentencing because they have been "reliably adjudicated in proceedings that included . . . every substantial safeguard . . . *except* the right to jury trial"[35] troubling. It is the problem of having the facts of a juvenile court adjudication being determined by "a single employee of the state"[36] rather than abiding by "the system envisioned by a Constitution that guarantees *trial by jury*."[37]

Legal Significance

This ruling places California with the majority of other states and federal decisions, finding that juvenile adjudication could be used to enhance adult sentencing despite the denial of a right to a jury trial during the juvenile adjudication. This ruling further affirms and situates the *Apprendi* rule within the current sentencing practices of the Three Strikes Law. *Nguyen* also clarifies that in regards to sentencing, the right to a jury trial when determining an aggravating factors is required unless the defendant waives that right.

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31 *Id.*
32 *Id.*
33 *Id.* (summarizing People v. Towne, 44 Cal.4th 63 (Cal. 2008)).
34 *Id.*
35 *Id.*
36 *Id.* (citing *Apprendi*).
37 *Id.* (citing *Apprendi*) (emphasis added by Kennard, J.).

Digest: 21st Century Ins. Co. v. Superior Court

Rachel Warren

Opinion by Chin, J., with George, C.J., Baxter, J., Moreno, J., and Corrigan, J. Concurring Opinion by Kennard, J. Concurring Opinion by Werdegar, J.

Issue

Should attorney's fees be included under the made-whole rule for med-pay insurance policy reimbursement?

Facts

Silvia Quintana sustained personal injuries after an automobile accident with a third party.[1] Under her med-pay[2] insurance policy, 21st Century Insurance paid Quintana $1,000.[3] Quintana then brought a personal injury claim against the third party, which was eventually settled for $6,000.[4] To obtain this settlement, Quintana incurred approximately $2,100 in attorney fees.[5] At 21st Century's request for reimbursement, Quintana sent the insurer $600, which amounted to the $1,000 med-pay benefit less a pro rata share of the attorney fees.[6] The insurer accepted this amount as full reimbursement.[7]

Subsequently, Quintana brought a class action lawsuit against 21st Century.[8] Her causes of action alleged a violation of Business and Professions Code section 17200, conversion, unjust enrichment and declaratory relief.[9] Her main argument was that the insurer could not require *any* reimbursement from her, because when taking her attorney fees into account, she had not

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1 21st Century Insurance Company v. Superior Court, 213 P.3d 972, 974 (Cal. 2009).

2 A "med-pay" insurance policy provides medical coverage for the insured's medical expenses caused by an accident. *Id.* The amount of coverage is typically low, in exchange for lower premiums. *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.* at 974–75.

8 *Id.* at 975.

9 *Id.*

yet been made whole.[10] Essentially, Quintana's reasoning was that, after subtracting the attorney fees from her $7,000 total recovery ($1,000 from med-pay and $6,000 from the settlement) she only recovered approximately $4,900.[11] This fell short of her total actual damages of $6,000, and thus under the made-whole rule the insurer was not permitted to request reimbursement.[12] According to Quintana, the made-whole rule is not satisfied, and thus reimbursement cannot be sought, unless the insured has also recovered the full amount of attorney fees.[13] Her claim represented a class of similarly-situated California policyholders of 21st Century.[14]

21st Century then demurred on the complaint on the grounds that in California, litigation expenses are not included in calculating whether an insured has been made whole.[15] Instead, 21st Century argued that under the common fund doctrine, attorney fees should be separately calculated in equitable apportionment, with the insurer paying a pro rata portion of the fees.[16] The insurer maintained that this was consistent with both the made-whole rule and the common fund doctrine.[17] The trial court overruled the demurrer, and the insurer filed a petition for writ of mandate with the Court of Appeal.[18] In granting the writ, the Court of Appeal held that any attorney fees incurred by an insured in recovering losses from a third party tortfeasor should not be considered when determining whether the insured has been made whole for reimbursement purposes.[19] Accordingly, the Court of Appeal ordered the trial court to vacate the judgment and enter an order to sustain 21st Century's demurrer.[20] Quintana petitioned the California Supreme Court for review.[21]

Analysis

The court catalogued the history of both the made-whole rule and the common fund doctrine in California.[22] The made-whole rule places a limit on when an insurer can invoke its policy's

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10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.* at 976–78.

reimbursement clause.[23] Specifically, the made-whole rule provides that there can be no reimbursement until the insured has recovered the entire amount of his or her damages.[24] The court pointed out that the California Court of Appeal has previously defined the made-whole rule in such a way that does not consider attorney fees,[25] and no California court has ever specifically held otherwise.[26] The common fund doctrine provides that a plaintiff who brings an action resulting in the creation or preservation of a common fund may recover his or her attorney fees out of that common fund.[27] This hundred-year-old legal theory was extended to insurance law in 1961,[28] and has been recognized as applicable to insurance reimbursement since 1975 as a way to avoid unjust enrichment to the insurer.[29]

The court noted that in this was a case of first impression because California courts have thus far been unclear as to how the made-whole rule and common fund doctrine are to be applied to attorney fees in the med-pay reimbursement context.[30] As an example, the court pointed to *Plut v. Fireman's Fund Ins. Co.*, where the Court of Appeal held that the insurer is entitled to reimbursement only after the insured has recouped his or her loss plus "some or all" of the litigation expenses, but failed to expand on what "some or all" entailed or discuss the common fund doctrine.[31] The court also looked to *Progressive West Ins. Co. v. Superior Court*, which held that the made-whole rule does apply to reimbursement claims, and that under the common fund doctrine, the reimbursement must be reduced by a proportional amount of incurred attorney fees.[32] As such, thus far California cases have not made clear whether the insured is entitled to recover *some* costs under a pro rata common fund doctrine theory, or *all* costs under the made-whole rule.[33]

Due to the lack of clarity in California jurisprudence, the court looked to other states.[34] Unfortunately, a survey of sister states was inconclusive, because those states recognizing the

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23 *Id.* at 976 (citing Plut v. Fireman's Fund Ins. Co., 85 Cal.App.4th 98, 104 (2000); Sapiano v. Williamsburg Nat. Ins. Co., 28 Cal.App.4th 533, 536 (1994)).

24 *Id.* (citing *Plut*, 85 Cal.App.4th at 104).

25 *Sapiano*, 28 Cal.App.4th at 536–37.

26 *21st Century*, 213 P.3d at 976.

27 *Id.* at 977 (citing Lee v. State Farm Mut. Ins. Co., 57 Cal.App.3d 458, 466 (1976)).

28 *Id.* (citing United Servs. Auto Assn. v. Hills, 109 N.W.2d 174 (Neb. 1961)).

29 *Id.* (citing Quinn v. State of California, 539 P.2d 761 (Cal. 1975)).

30 *Id.* at 978.

31 *Id.* (citing Plut v. Fireman's Fund Ins. Co., 85 Cal.App.4th 98, 105 (2000)).

32 *Id.* at 978–79 (citing Progressive West Ins. Co. v. Superior Court, 135 Cal.App.4th 263, 276 (2005)).

33 *Id.* at 979.

34 *Id.*

made-whole rule for insurance law have yet to reach a consensus on the issue.[35]

The court next turned to *Chong v. State Farm Mut. Auto Ins. Co.*, a federal district court decision predicting that California courts would be likely to follow jurisdictions holding that litigation costs incurred by the insured must be included in calculating whether the insured has in fact been made whole.[36] In determining that this was not unfair to the insurance company, the federal district court held that the burden of going unpaid should fall to the insurer because it is being paid to assumed that risk.[37] A contrary holding, the district court reasoned, would allow an insurer to simply "sit on the sidelines" while the insured made the efforts to recover from the third party tortfeasor and then reap the rewards to reimbursement.[38]

The court found the reasoning of *Chong* unpersuasive.[39] First, the assumption that the insurance company has assumed the risk ignores the limited nature of med-pay insurance provisions.[40] In exchange for lower premiums, the policy holder of a med-pay insurance policy has only contracted for the insurer to assume the risk of medial payments; anything beyond this exceeds the insurer's contractual risk.[41] Secondly, the "sit on the sidelines" rationale was not persuasive because an insurer is generally prohibited from intervening in personal injury cases and thus could not participate in the lawsuit if it wanted to.[42] Even if the insurer could intervene, it would likely be met by resistance from the insured's attorney.[43] Further, the court pointed out that the insurer would not have a reason to intervene, since it is unlikely that litigation costs would be larger than the amount of reimbursement.[44] Thus, the court rejected Quintana's implicit reliance on *Chong* to assert that including attorney fees in the made-whole calculation will not give policyholders double recovery.[45]

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35 *Id.* at 979–80.

36 Chong v. State Farm Mut. Auto. Ins. Co. 428 F.Supp.2d 1136, 1147 (S.D.Cal. 2006).

37 *Id.* at 1145 (quoting Skauge v. Mountain States Telephone & Telegraph Co. 565 P.2d 628, 632 (Mont. 1977) (italics omitted)).

38 *Id.* at 1145.

39 *21st Century*, 213 P.3d at 981.

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.*

Finally, the court looked to policy considerations, noting again that the primary policy reason for insurance reimbursement is to prevent double recovery on the part of the insured.[46] First, the court found that the collateral source rule was not controlling because it addresses the distribution of litigation costs as between parties to a lawsuit (the injured party and the tortfeasor), and thus was inapplicable as to the distribution of litigation costs as between an insured and non-party insurer.[47] The court also rejected Quintana's reliance on the covenant of good faith and fair dealing, as this doctrine does not apply to med-pay reimbursement disputes.[48] Because med-pay provisions are express contractual provisions, the court refused to read implied terms or impose additional substantive duties.[49] Moreover, the court pointed out that including attorney fees in made-whole calculations would essentially shift the burden of paying attorney fees to the insurance companies, resulting in the additional costs being passed to consumers through increased premiums.[50] This would cause med-pay insurance to become less accessible to those who need it most.[51]

In contrast, the court found that pro rata allocation under the collateral source doctrine balances the interests of both the insurer and the insured for med-pay reimbursement situations.[52] The insured receives the benefit of lower premiums and may retain payments if he or she is unable to recover from the third-party tortfeasor.[53] And, the made-whole rule still guarantees that the insured recover the full amount of actual damages before reimbursement is claimed.[54] So long as it is undisputed that the recovery amount adequately compensates the insured, equity is satisfied when the insurer reduces the amount of reimbursement to account for its fair share of the attorney fees.[55]

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46 *Id.* (citing Helfend v. Southern Cal. Rapid Transit Dist. 465 P.2d 61, 64 n.7 (Cal. 1970)).

47 *Id.* at 981–82. The collateral source rule "prohibits the reduction of damages a tortfeasor owes to the plaintiff because the plaintiff received compensation from an independent source." *Id.* (citing *Helfend*, 465 P.2d at 63).

48 *Id.* at 982 (citing Progressive West Ins. Co. v. Superior Court, 135 Cal.App.4th 263, 276–81 (2005)).

49 *Id.* at 982.

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

Holding

The court affirmed the Court of Appeal.[56] The court held that attorney fees are not to be included in the made-whole calculation, but rather that pro rata apportionment of attorney fees between insured and insurer is the better allocation of responsibility.[57] Therefore, because Quintana did not dispute the amount of the med-pay provision payment, nor that the $400 originally deducted from reimbursement was less than 21st Century's share, 21st Century properly accounted for its pro rata share and Quintana had effectively been made whole.[58]

Concurrences

Justice Kennard concurred in the judgment, expanding on the reasoning that Quintana's position was contrary to California law.[59] Justice Kennard clarified that although *Plut v. Fireman's Fund Ins. Co.* was imprecise, its statement that reimbursement may be sought only when the insured has recovered "some or all" of his attorney fees is an accurate reflection of California law.[60] This is because recoupment of "some" of the litigation expenses refers to a situation where the insurance payments comprise only a portion of the total loss, in which case the insurer will be responsible for its pro rata share.[61] Recoupment of "all" of the litigation expenses refers to a situation where the insurance payments is equal to the total loss, in which case the insurer's pro rata share would essentially be 100%.[62]

Secondly, Justice Kennard asserted that pro rata allocation of attorney fees is more consistent with the "American rule" under which each party bears his own litigation costs.[63] Justice Kennard pointed out that if the burden of attorney fees cannot be shifted to the actual tortfeasor, it is inconsistent to allow it to be shifted to the insurance carrier.[64] Further, equitable apportionment is also consistent with similar workers' compensation situations, which also requires pro rata share of litigation costs.[65] Lastly, Justice Kennard echoed the sentiment of the majority in explaining that including attorney fees in the made-whole rule would preclude any insurer reimbursement

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56 *Id.* at 982–83.
57 *Id.* at 982.
58 *Id.*
59 *Id.* at 983 (Kennard, J., concurring).
60 *Id.* at 984 (citing Plut v. Fireman's Fund Ins. Co. 85 Cal.App.4th 98, 105 (2000)).
61 *Id.* at 984.
62 *Id.*
63 *Id.* at 984–85
64 *Id.* at 985.
65 *Id.*

under med-pay provisions because the average policy limit is lower than average litigation costs.[66] This would force in an increase in the cost of providing med-pay insurance, thus resulting in higher premiums.[67]

Justice Werdegar filed a separate concurrence to provide "alternative rationale" for the court's conclusion.[68] First, Justice Werdegar looked to the relationship between subrogation and reimbursement, and pointed out that the reason insurers seek reimbursement rather than subrogation in personal injury claims is because California bars the assignment of personal injury claims.[69] This is simply a procedural difference, with the principles behind reimbursement and subrogation—that the insured should not be permitted to received double recovery—remains identical.[70] As such, Justice Werdegar reasoned that reimbursement and subrogation cases should have the same *substantive* outcomes.[71] Including attorney fees in the made-whole calculation would yield different results, because under subrogation the insurer would recover its payment less its share of attorney fees, while under reimbursement the insurer would recover nothing.[72] But, under the pro rata theory the results would be identical, with both subrogation and reimbursement resulting in the insured recovering its payment less its share of attorney fees.[73]

Secondly, Justice Werdegar pointed out that if attorney fees were included in the made-whole rule, the amount of reimbursement would be dependent on the extent of the insured's attorney fees.[74] Since contingency fees vary, this would result in disparate treatment of policyholders.[75] This causes a med-pay policy to effectively convert from medical to legal reimbursement, which is not the purpose of med-pay insurance.[76]

Legal Significance

The court's decision precludes an insured who has received med-pay insurance benefits from factoring in his or her litigation costs when determining whether he or she has been "made

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66 *Id.*
67 *Id.*
68 *Id.* at 986 (Werdegar, J., concurring).
69 *Id.*
70 *Id.* at 987.
71 *Id.*
72 *Id.* at 987–88.
73 *Id.*
74 *Id.* at 988.
75 *Id.*
76 *Id.*

whole" by amounts recovered from a third party tortfeasor. Instead, once it is undisputed that the insured has received a recovery amount satisfying the full amount of actual damages, the insured may deduct only a pro rata share of attorney fees from the reimbursement amount owed to the insurer.