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Evidence

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Battling Domestic Violence Through the Admission of Character Evidence

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I. INTRODUCTION

Domestic violence[1] is one of the most pressing problems of modern times,[2] and the problem is compounded by the difficulties faced in prosecuting offenders.[3] With the heightened publicity of the O.J. Simpson trial and allegations of spousal abuse, domestic violence has reached the limelight of the issues plaguing society.

The California Supreme Court recently decided that juries can consider expert testimony on "Battered Women's Syndrome"[4] to determine if a defendant was acting in self-defense when she killed the domestic abuser.[5] The problem of determining the

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1. *See* CAL. FAM. CODE § 6211 (West 1994) (defining "domestic violence" as abuse against any of the following people: (1) A spouse or former spouse, (2) a cohabitant or former cohabitant, (3) a person with whom the respondent is having or has had a dating or engagement relationship, (4) a person with whom the respondent has had a child, (5) a child of a party, and (6) any other person related by consanguinity or affinity to the second degree); *see also id.* § 6209 (West 1994) (providing that a "cohabitant" is a person who regularly resides in the household); *id.* (defining "former cohabitant" as a person who formerly regularly resided in the household).

2. *See Battered-Woman Defense Gains*, L.A. TIMES, Sept. 3, 1996, at B6 [hereinafter *Battered-Woman*] (noting that in 1995, California law enforcement authorities logged more than 60,000 arrests for spousal abuse and that in 1995, 179 murders were attributed to domestic violence).

3. David Kline, *Assembly Approves Bill to Allow Admission of Past Domestic Violence Evidence*, CAPITOL NEWS SERVICE, July 9, 1996, at 9; *see id.* (finding that legislation is needed to achieve more domestic violence prosecution because "very often the victims are too intimidated, frightened, or dependent upon the person who is committing this domestic violence to testify against him or her in court"); *see also* Duke Helfand, *Eyes on Evidence; LAPD Equips Patrol Cars with New Cameras to Document Domestic Abuse Victims' Injuries and Win Cases in Court*, L.A. TIMES, June 6, 1996, at B1 (noting that about one-fifth of the 20,000 domestic abuse cases filed by the District Attorney's office each year are dismissed because of uncooperative victims); *id.* (stating that as many as eight of 10 battered women who contact police fail to press charges or pursue their case in court); William L. Seymour, *Domestic Violence Evolves from Being Family Matter to Criminal One*, FRESNO BEE, Jan. 14, 1996, at B1 (reasoning that domestic violence cases are not easy to prosecute because victims sometimes blame themselves for their injuries, and also noting that "investigating and pursuing a domestic violence case is emotionally draining" for a prosecutor); Deborah Yaffe, *Justice Is Elusive for Imperfect People in an Imperfect System*, RECORDER, June 3, 1996, at 1 (finding that of 140 domestic violence arrests made in 11 communities on a randomly chosen date, 71 (just over half) were dismissed in court or went unprosecuted).

4. *See Battered-Woman, supra* note 2, at B6 (providing an expert's description of "Battered Women's Syndrome," a pattern of violence experienced by repeatedly abused women which can destroy their self-esteem, leaving them feeling powerless and sometimes leading them to respond with violence).

5. People v. Humphrey, 13 Cal. 4th 1073, 1089-90, 921 P.2d 1, 11, 56 Cal. Rptr. 2d 142, 152-53 (1996); *see id.* (holding that the evidence presented by defendant was relevant to show a case of perfect self-defense because it demonstrated the reasonableness, as well as the subjective existence, of defendant's belief in the need to defend); *see also* CAL. EVID. CODE § 1107(a), (b) (West 1995) (admitting evidence regarding "Battered Women's Syndrome" and the effects upon victims of domestic violence if the proper foundation of relevancy and the proper

scope of proof allowed by evidence of "Battered Women's Syndrome" is but one of the many issues surrounding the domestic violence problem.[6]

Recently the Los Angeles Police Department equipped 400 patrol cars with "top-of-the-line" cameras so that officers may document domestic violence attacks immediately for use by prosecutors to pursue charges "even when victims refuse to testify in court."[7] The City of Oakland has a new policy to battle domestic violence wherein police officers are expected to arrest "batterers" immediately if they witness an assault or see evidence of injury.[8] These are just some of the ideas that counties and cities have pursued in their fight against domestic violence, and convicting repeat domestic violence offenders has recently been made easier by action taken by the California Legislature.

II. CHARACTER EVIDENCE AS A TOOL TO BATTLE DOMESTIC VIOLENCE

Existing law provides that "evidence of a person's character or a trait of his or her character[9] is inadmissible when offered to prove his or her conduct on a specified occasion."[10] However, many exceptions limit the scope of this general rule,[11]

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qualifications of expert witnesses can be shown); *Battered-Woman, supra* note 2, at B6 (stating that juries can consider expert testimony in deciding whether a "reasonable person" in the defendant's position would have felt life-threatening danger, which is the legal standard for acquittal on grounds of self-defense, when acting to kill a domestic abuser).

6. *See supra* note 3 and accompanying text (describing the difficulties associated with prosecuting domestic violence offenders); *see also infra* notes 7-8 and accompanying text (detailing some new techniques used to battle domestic violence).

7. Helfand, *supra* note 3, at B1; *see id.* (noting that police and advocates for battered women expect that photographing recent domestic violence attacks will dramatically assist the fight against domestic violence in Los Angeles).

8. *See* Yaffe, *supra* note 3, at 1.

9. This evidence will be collectively referred to as character evidence in this Legislative Note.

10. CAL. EVID. CODE § 1101(a) (amended by Chapter 261); *see id.* (noting that evidence of a person's character is inadmissible when offered to prove conduct on a specific occasion "whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his conduct"); *see also* 1 B.E. WITKIN, CALIFORNIA EVIDENCE, *Circumstantial Evidence* § 325 (3d ed. 1986) (stating the reasons for the exclusionary rule of evidence is that character evidence is of slight probative value, that character evidence tends to distract the trier of fact, and that introduction of character evidence may result in the confusion of issues); *cf.* FED. R. EVID. 404 (providing for the exclusion of character evidence in federal trials with limited exceptions).

11. *See, e.g.*, CAL. EVID. CODE § 1101(b) (amended by Chapter 261) (allowing evidence that a person committed a crime, civil wrong, or other act to be admitted if it is found to be relevant to prove some fact, such as motive or intent, other than his disposition to commit the act); *id.* § 1102 (West 1995) (providing that in a criminal action, an opinion or evidence of a defendant's reputation is admissible if it is offered by the defendant to prove his or her conduct is in conformity with such evidence, or when it is offered by the prosecution to rebut evidence admitted by the defendant); *id.* § 1103(a) (West Supp. 1997) (admitting evidence in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct when it is offered by the defendant to prove conduct of the victim is in conformity with the character trait, or when it is offered by the prosecution to rebut the defendant's evidence); *id.* § 1103(b) (West Supp. 1997) (allowing the prosecution to rebut defendant's offer according to § 1103(a) by admitting evidence of defendant's violent behavior, or evidence of defendant's specific instances of conduct); *id* § 1106 (West 1995) (providing that the defendant in a civil action for damages resulting from sexual harassment, sexual assault, or sexual battery, may cross-examine a witness introduced by the plaintiff

including one that allows evidence regarding the defendant's commission of past sexual offenses to be offered to prove the disposition of the defendant in an action charging him with a sexual offense.[12] Chapter 261 creates a similar exception that permits evidence of the defendant's commission of other acts of domestic violence to be admissible in a criminal action in which the defendant is currently accused of an offense of domestic violence.[13] The author of Chapter 261 believes that criminal prosecution is the only way to interrupt the escalating pattern of domestic violence, and since Chapter 261 allows juries to look at patterns of the defendant's acts of domestic violence, criminal prosecution will increase.[14]

Chapter 261 allows jurors to see a defendant's patterns of domestic violence by admitting past acts, whether against the current victim or a prior victim, to show the defendant's disposition to commit acts of domestic violence.[15] Existing evidentiary laws are inadequate in the area of domestic violence because other acts of domestic violence committed by the defendant against the victim, or another victim, are excluded often due to their prejudicial effect.[16] Even when other acts of domestic violence are admitted, the inference of defendant's propensity to commit domestic violence is forbidden.[17] Thus, Chapter 261 prevents jurors from having to conclude that the current act of domestic violence is an "isolated incident, an accident, or a mere fabrication."[18]

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relating to plaintiff's sexual conduct and may also offer relevant evidence limited specifically to the rebuttal of plaintiff's evidence). *But see id.* § 352 (West 1995) (granting the trial judge discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice, confuse the issues, or mislead the jury).

12. *Id.* § 1108 (West Supp. 1997). *See generally* Pamela J. Keeler, *Review of Selected 1995 California Legislation*, 27 PAC. L.J. 349, 761 (1996) (describing the effect of allowing evidence of prior sexual offenses against a defendant to prove a disposition to commit a similar crime).

13. CAL. EVID. CODE § 1109(a) (enacted by Chapter 261); *see id.* (stating that this evidence shall not be admitted if it is inadmissible pursuant to § 352); *id.* § 352 (West 1995) (providing that the trial judge has discretion to exclude any evidence if its probative value is substantially outweighed by danger of undue prejudice, confusion of issues, or of misleading the jury); *see also id.* § 1109(e) (enacted by Chapter 261) (limiting the admission of otherwise admissible character evidence relating to defendant's commission of domestic violence to that conduct which occurred in the last 10 years).

14. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1876, at 4 (June 25, 1996) (noting that without allowing jurors to see the propensity of defendants to commit acts of domestic violence, "we will continue to see cases where perpetrators of this violence 'will beat their intimate partners, even kill them, and go on to beat or kill the next intimate partner'").

15. *See* CAL. EVID. CODE § 1109(a) (enacted by Chapter 261) (providing that evidence of defendant's commission of other acts of domestic violence is not made inadmissible by § 1101).

16. *See* CAL. EVID. CODE § 352 (West 1995) (granting the court discretion to exclude evidence if its prejudicial effect on the defendant is greater than its possible probative value).

17. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1876, at 3 (June 25, 1996).

18. *Id.*; *see id.* (stating that Chapter 261 accomplishes three objectives: (1) It remedies the California Evidence Code's inadequacy in domestic violence prosecutions, (2) it gives jurors crucial information needed to come to proper decisions, and (3) it maintains proper safeguards for defendants).

III. PROTECTIONS AFFORDED TO DEFENDANT

Opponents of Chapter 261 argue that character evidence is generally excluded because of the potential prejudicial effect it places upon the defendant.[19] Because the prosecution must prove that the defendant committed the charged crimes beyond a reasonable doubt, opponents argue that allowing evidence of prior acts lowers the burden of proof because the jury may determine that the defendant is more likely to have committed the current offense charged when the defendant committed these acts in the past.[20]

Chapter 261, however, does not eliminate the normal evidentiary safeguards designed to protect the defendant. First, the evidence of prior domestic violence must be relevant.[21] Second, before the evidence is to be offered, "the people shall disclose the evidence to the defendant . . . at least 30 days before the scheduled date of the trial."[22] Additionally, acts occurring more than ten years prior to the charged offense will not be admissible unless the court finds it to be in the interest of justice.[23] Furthermore, Chapter 261 does not mandate the admission of prior acts of domestic violence, it merely makes them admissible. Because § 1109(a) specifically makes reference to California Evidence Code § 352, the trial judge will have to weigh the prejudicial value of the evidence to admit the evidence.[24]

Use of the Penal Code definition of domestic violence in Chapter 261 narrows the scope of the legislation to intimate partners and former intimate partners.[25] By choosing this definition of domestic violence as opposed to the one contained in

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19. *Id.* at 7.

20. *Id.*; *see id.* (noting that prosecutors will be able to argue that the defendant's current crime of domestic violence is consistent with the defendant's character for spousal abuse).

21. *See* CAL. EVID. CODE § 210 (West 1995) (defining "relevant evidence" as evidence which (1) is relevant to either the credibility of a witness or hearsay declarant and (2) has a tendency to prove or disprove any disputed fact which is of consequence to the determination of the action).

22. *Id.* § 1109(b) (enacted by Chapter 261); *see id.* (providing that the evidence offered to the defendant shall include statements of witnesses or a summary of the substance of any testimony that is expected to be offered by the people); *see also id.* (stating that if the defendant shows good cause, then the required disclosure period may be greater than 30 days).

23. *Id.* § 1109(e) (enacted by Chapter 261).

24. *Id.* § 1109(a) (enacted by Chapter 261); *see id.* (specifically stating that evidence of a defendant's commission of past acts of domestic violence is admissible only if it is not made inadmissible by § 352); *see also id.* § 352 (West 1995) (granting the trial court discretion to exclude evidence if the probative value of its admission is substantially outweighed by its prejudicial effect).

25. *See* CAL. PENAL CODE § 13700(b) (West Supp. 1997) (defining "domestic violence" to mean abuse committed against an adult or fully emancipated minor who is a spouse, former spouse, cohabitant, former cohabitant, or a person with whom the suspect has had a child or is having a dating or engagement relationship); *id.* (defining "cohabitant" to mean two unrelated adults living together for some period of time, resulting in some permanency of relationship); *id.* (stating that the following are factors used in determining cohabitation: (1) Sexual relations while sharing the same living quarters, (2) sharing of income or expense, (3) joint use or ownership of property, (4) the continuity or length of relationship, and (5) whether the "co-residents" hold themselves out to be husband and wife); *see also id.* § 13700(a) (West Supp. 1997) (defining "abuse" as intentionally or recklessly causing or attempting to cause bodily injury).

Family Code § 6211,[26] the authors limit the admissible evidence to conduct "which is similar in character to the charged domestic violence crime, and which was committed against the victim of the charged crime or another similarly situated person."[27] Finally, hearsay rules will remain in effect to control what forms of evidence are admissible.[28]

IV. CHARACTER EVIDENCE AND THE CONSTITUTION

When character evidence is introduced at trial, it heightens the possibility that a defendant will be convicted because he is determined to be a "bad person" in the eyes of the jury rather than on the basis of being found guilty beyond a reasonable doubt on the merits of the crime.[29] Thus, defendants are more likely to be convicted because of their "status"[30] as domestic abusers when character evidence showing past acts of domestic violence is admitted.[31] "Although the United States Supreme Court has not passed on the constitutionality of using character evidence to convict, the Court has expressed great reservations about the use of state power to convict individuals on account of their status."[32]

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26. *See supra* note 1 (defining "domestic violence" as it appears in California Family Code § 6211).

27. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1876, at 5 (June 25, 1996). *Compare supra* note 1 (defining "domestic violence" according to the definition contained in California Family Code § 6211) *with supra* note 25 (defining "domestic violence" according to the definition contained in the California Penal Code).

28. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1876, at 6 (May 7, 1996) (arguing that the interests of the defendant are protected because existing protections afforded to a defendant, such as restrictions on hearsay evidence, are not impaired by Chapter 261); *see also* CAL. EVID. CODE § 1200(a) (West 1995) (defining "hearsay evidence" as evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter asserted); *id.* § 1200(b) (West 1995) (stating that except as provided by law, hearsay evidence is inadmissible); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1876, at 6 (May 7, 1996) (stating that a primary candidate for evidence of past acts of domestic violence will be the existence of a temporary restraining order, and that this evidence is generally regarded as hearsay). *But see* CAL. EVID. CODE § 1300 (West 1995) (providing that a final court judgment of a felony conviction is admissible to prove any fact essential to that judgment because it is "peculiarly reliable" and the seriousness of the crime charged "assures the facts will be thoroughly litigated").

29. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 1876, at 6 (Apr. 23, 1996); *see supra* note 20 and accompanying text (stating that the prosecution's burden of proof is lowered when evidence of defendant's prior acts of domestic violence are admissible at trial).

30. *See* BLACK'S LAW DICTIONARY 1410 (6th ed. 1990) (defining "status crime" as "a class of crime which consists not in proscribed action or inaction, but in the accused's having a certain personal condition or being a person of a specified character," and giving vagrancy as an example of a status crime); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2230 (1981) (defining "status" as the condition (arising out of crime) of a person that determines the nature of his legal relations to the state).

31. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 1876, at 6 (Apr. 23, 1996); *see id.* at 7 (noting that the status offense in this case could be having a prior criminal conviction for similar conduct, for instance domestic violence, charged in the case in question).

32. *Id.* at 6-7; *see* Robinson v. California, 370 U.S. 660, 667 (1962) (holding that a state law which imprisons a person due to his status of being addicted to drugs, even though he may never have used or possessed drugs in the state, "inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment").

In *Robinson v. California*,[33] the Supreme Court held that the Fourteenth Amendment precludes a state from convicting an individual due to his status of being addicted to narcotics.[34] The statute in question punished the status of narcotic addiction as a criminal offense.[35] The statute did not punish a person for the use of narcotics, nor for the purchase, sale, or possession of them.[36]

The problem with this statute was that an offender could be "continuously guilty of this offense;" regardless of whether the offender had ever bought or possessed narcotics in California he could be prosecuted "at any time before he reform[ed]."[37] The Court analogized this to making it a criminal offense for a person to be mentally ill or to have a disease, both of which would "doubtless be universally thought to be an infliction of cruel and unusual punishment."[38]

By allowing evidence of past acts of domestic violence to be admissible as character evidence against a defendant in a present action for domestic violence, Chapter 261 could be found to violate the Eighth Amendment prohibition against cruel and unusual punishment. It allows a defendant to be convicted by a jury (informed of defendant's history of domestic violence) due to his status as a domestic violence offender. However, drawing an analogy between the status of committing acts of domestic violence and the status of narcotic addiction or vagrancy is a superfluous comparison. Drug addiction and vagrancy are examples of personal conditions for which one should not be punished, whereas domestic violence is a crime defined by a proscribed action, namely abuse against one's spouse, for which one should be punished.[39] Therefore, Chapter 261 is likely to be found to punish people because of their present acts of domestic violence, rather than due to their status of being a domestic violence offender, and thus should not be violative of the Eighth Amendment.

V. CONCLUSION

Chapter 261 amends the Evidence Code to allow circumstantial evidence of a defendant's character to be used against him or her in a present action for domestic violence.[40] The amendments to the Evidence Code were made in response to the

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33. 370 U.S. 660 (1962).

34. *Robinson*, 370 U.S. at 667.

35. *Id.* at 666; *see id.* (interpreting California Health and Safety Code § 11721, repealed in 1972 and replaced by California Health and Safety Code § 11550); *see also* CAL. HEALTH & SAFETY CODE § 11550 (West 1995) (providing that it shall be a misdemeanor for any person to use or be under the influence of a controlled substance or narcotic drug).

36. *Robinson*, 370 U.S. at 666.

37. *Id.*

38. *Id.*

39. *See supra* note 30 (defining "status crime" as a crime which consists of having a certain personal condition or character, not a crime consisting of proscribed actions like domestic violence); *see also supra* note 25 (defining the crime of "domestic violence" as consisting of the proscribed action of abuse against a spouse).

40. CAL. EVID. CODE § 1101(a) (amended by Chapter 261).

difficulties associated with proving and convicting defendants of domestic violence, a major problem in today's society.[41] Since Chapter 261 was modeled after California Evidence Code § 1108, which allows evidence of a defendant's past sexual offenses to be used in a current action for a sexual offense, it seems that it will survive any challenges posed.

APPENDIX

Code Sections Affected

Evidence Code § 1109 (new), § 1101 (amended).
SB 1876 (Solis); 1996 STAT. Ch. 261

41. *See supra* notes 2-3 and accompanying text.

Beyond the Reach of the Courts?: The Constitution, Retroactivity, and Childhood Sexual Abuse

Christine M. Adams

> [I]t must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.[1]

I. INTRODUCTION

Awareness of the prevalence of childhood sexual abuse is increasing,[2] but the infrequent conviction of perpetrators of such abuse has been repeatedly demonstrated.[3] A primary reason that perpetrators of alleged childhood sexual abuse remain criminally unaccountable for their actions is the running of the statute of limitations.[4] Because of the increased recognition of the pervasiveness of childhood sexual abuse, several states' legislatures have sought to provide a means for redressing past wrongs by amending or eliminating the statute of limitations for causes of action based on childhood sexual abuse.[5] In California, Chapter 130 is the latest example of such legislative action.[6] Since the retroactive application of a statutory limitation period

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1. Missouri, Kan., & Tex. R.R. v. May, 194 U.S. 267, 270 (1904) (Holmes, J.).

2. *See* NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, CHILD SEXUAL ABUSE: LEGAL ISSUES AND APPROACHES (rev. ed. 1981) (revealing that a national study has found that one-third of the United States population has experienced some form of childhood sexual abuse); *see also* Meridith F. Sopher, *"The Best of All Possible Worlds": Balancing Victims' and Defendants' Rights in the Child Sexual Abuse Case*, 63 FORDHAM L. REV. 633, 634 n.12, 635 n.17 (1994) (providing citation reporting that between 3% to 38% of the population experience sexual abuse while a minor, and additionally noting the increase in reports of molestation and the number of children referred to sexual assault centers); Nina Darton et al., *The Pain of the Last Taboo*, NEWSWEEK, Oct. 7, 1991, at 70 (reporting the results of a prominent psychologist's study, finding that 27% of the women and 16% of the men surveyed revealed a history of sexual trauma experienced as a child).

3. Sopher, *supra* note 2, at 643 n.71; *see id.* (noting the infrequent rate of conviction).

4. *See* Susan J. Hall, *Adult Repression of Childhood Sexual Assault*, 22 N.C. CENT. L.J. 31, 44 (1996) (explaining that expiration of a claim for childhood sexual abuse often occurs (citing Rebecca L. Thomas, *Adult Survivors of Childhood Sexual Abuse and Statutes of Limitations*, 2 WAKE FOREST L. REV. 1245, 1246 (1991))).

5. *See, e.g.*, ALA. CODE § 15-3-5(a)(4) (1995) (foregoing imposition of a statutory limitation period completely for all felonies, which includes specified sex crimes); ARK. CODE ANN. § 5-1-109(h) (Michie 1995) (tolling the statute of limitations until the victim is eighteen); NEB. REV. STAT. § 29-110(2) (Supp. 1994) (extending the statute of limitations by seven years if the victim is under the age of sixteen); OR. REV. STAT. § 131.125(2) (1990) (providing that when the victim is less than sixteen, the statute is tolled until the age of sixteen is reached or the crime is reported); *see also* Gary M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression*, 84 J. CRIM. L. & CRIMINOLOGY 129, 150-53 (1993) (providing citation and detailed discussion of the recent legislative initiative in this area, and noting that states have extended, tolled, or eliminated the statutory limitation periods applicable to childhood sexual offense).

6. *See* CAL. PENAL CODE § 803 (amended by Chapter 130) (applying retroactively a statutory period of one year from time of reporting childhood sexual abuse to the filing time of criminal charges).

has generated confusion and has received disparate treatment in the courts, this Legislative Note provides an analysis of the legislation, legal history, and constitutionality of newly enacted Chapter 130.

II. ANALYSIS OF CHAPTER 130

Before Chapter 130 was enacted, a minor was permitted to initiate a criminal complaint within one year of the date that the minor reported the specified sex crimes.[7] Additionally, a person of any age was authorized to file a criminal complaint alleging that the person was a victim of specified sex crimes while a minor.[8] In response to judicial reception of retroactive application of prior law,[9] Chapter 130 expressly states the legislative intent to make the statutory limitation periods for commencing criminal actions in both instances retroactive, effectively reviving previously time-barred causes of action in specified circumstances.[10]

Proponents of Chapter 130 feel the measure is necessary to combat the judicial response to the retroactive application of a 1993 amendment to California Evidence Code § 803 and to clarify legislative intent in this area.[11]

Many people agree that providing an aggrieved the opportunity to seek justice in court against the perpetrator of childhood sexual abuse is necessary and desirable.[12] There exists, however, serious concerns about reviving previously time-barred criminal causes of action.[13] This Legislative Note continues by addressing the legal background of the retroactive application of statute of limitation periods[14] and the constitutional[15] and pragmatic[16] concerns such retroactivity raises.

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7. 1993 Cal. Legis. Serv. ch. 390, sec. 1(f), at 1855 (amending CAL. PENAL CODE § 803).

8. *Id.*

9. *See infra* notes 23, 28-60 and accompanying text (providing the details of several federal and state court decisions dealing with childhood sexual abuse and retroactive statutes of limitation).

10. *See* CAL. PENAL CODE § 803 (amended by Chapter 130); *see id.* § 803(f), (g) (amended by Chapter 130) (specifying the circumstances under which a revived cause of action exists and the statutory period for filing a criminal complaint against the alleged perpetrator of the abuse).

11. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2014, at 1 (June 17, 1996); *see* 1993 Cal. Legis. Serv. ch. 390, at 1854-55 (amending CAL. PENAL CODE § 803).

12. *See* Ernsdorff & Loftus, *supra* note 5, at 140-41 (stating that such causes of action reflect society's willingness to impose accountability for the sexual abuse of children); *see also* Sopher, *supra* note 2, at 640-42 (discussing arguments supporting criminal prosecution).

13. *See* Tyson v. Tyson, 727 P.2d 226, 227 (Wash. 1986) (expressing concern over allowing an action after extended time had elapsed); *see also* Ernsdorff & Loftus, *supra* note 5, at 154-62 (describing the concern over the accuracy of later remembered events and the potential of therapist bias).

14. *See infra* Part III.

15. *See infra* Part IV.A., B.

16. *See infra* Part V.

III. LEGAL BACKGROUND

In 1993, the California Legislature enacted a law which eliminated the statute of limitations on child molestation.[17] The author of that bill introduced Chapter 130 to combat the inefficacy of several attempts by survivors of childhood abuse to bring legal action against the perpetrator of their abuse.[18] Several California courts have dismissed cases against defendants where the statute of limitations applicable at the time the alleged sexual abuse occurred had expired.[19] These courts noted that under principles of statutory construction, the newly enacted statute of limitations were not intended to be applied as suggested by the prosecution.[20] Furthermore, one court held that if the statute of limitation period enacted by the prior amendment to § 803 was found to evince a legislative intent to make it retroactively applicable, a violation of ex post facto law[21] existed, prohibiting such retroactive application.[22] Due to a recent court's examination of the issue, it warrants extensive examination.[23] Initially, however, the foundational cases for the nonretroactive application principle will be explored.[24]

Providing the statutory backdrop for the cases that follow is the history behind California Penal Code § 803(g).[25] Added to the Penal Code in 1993 and effective January 1, 1994, § 803(g) extended the statutory limitation for filing a criminal complaint charging the commission of a sex crime.[26] Under the amended subdivision, the statute of limitations was extended for persons reporting sexual abuse committed

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17. 1993 Cal. Legis. Serv. ch. 390, sec. 1(f), at 1855 (amending CAL. PENAL CODE § 803).

18. *See* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2014, at 3 (June 17, 1996) (claiming that various rulings by the California Court of Appeal have resulted in the double victimization of children; the children were sexually abused and later prohibited by the court from seeking judicial recourse due to time lapse).

19. *See infra* notes 29-30 and accompanying text (elaborating on various cases dismissing causes of action based on childhood sexual abuse).

20. *See infra* note 29 and accompanying text (discussing cases that have relied upon requirements of express legislative intent to retroactively apply newly enacted provisions).

21. *See* U.S. CONST. art. I, § 9 (prohibiting ex post facto laws); CAL. CONST. art. I, § 9 (containing the same prohibition); *see also* Tapia v. Superior Court (State), 53 Cal. 3d 282, 295, 807 P.2d 434, 441, 279 Cal. Rptr. 592, 599 (1991) (stating that the California and federal provisions are essentially the same). *See generally* Collins v. Youngblood, 497 U.S. 37, 42-43 (1991) (defining an "ex post facto law" as one that punishes as criminal an act innocent when committed, increases the burden for a crime after commission, or eliminates a defense existing at the time the offense was committed (citing Beazell v. Ohio, 269 U.S. 167, 169-170 (1925))).

22. *See infra* notes 38-40 (reviewing *People v. Sowers*, 40 Cal. App. 4th 1478, 48 Cal. Rptr. 2d 250 (1995)).

23. *See* People v. Sowers, 48 Cal. Rptr. 2d 250 (1995), *rev. granted*, 51 Cal. Rptr. 2d 83 (1996) (holding that retroactive application was not violative of ex post facto guarantees).

24. *See infra* notes 29, 32, 39 and accompanying text (examining cases dismissing criminal actions initiated after the statutory limitation period applicable when the alleged act transpired had elapsed).

25. *See* 1993 Cal. Legis. Serv. ch. 390, sec. 1(f), at 1855 (amending CAL. PENAL CODE § 803) (changing the statutory limitation period for enumerated sexual offenses, as specified).

26. *Id.*; *see id.* (providing that a criminal complaint may be filed within one year of reporting childhood sexual abuse, as specified).

against them while a minor, under specified circumstances, for a period of one year within which to file a criminal complaint.[27]

The California Court of Appeal for the Second District held, in *Lynch v. Superior Court*,[28] that the revival and extension of a statutory limitation period that had expired under the formerly applicable Penal Code section was barred by a correlative Penal Code section, as well as by ex post facto prohibitions.[29] The court dismissed the prosecution of eight counts of lewd acts upon a child.[30]

Five months later, the Sixth District had an opportunity to adjudicate a similar issue. In *People v. Regules*,[31] the court sustained a demurrer to twenty-four counts of sex acts against minors as a violation of the ex post facto clause.[32] The court discussed numerous cases in California where the extension of a criminal statute of limitations period which had not yet expired was not violative of the Constitution to lend support to their decision that an extension of a statutory period that had expired was violative of the Constitution.[33] In particular, the court relied on Judge Learned Hand's explanation in *Falter v. United States*[34] that the revival of barred prosecution would seem unfair while the extension of a limitation period not yet expired may not be.[35] Additionally, the court distinguished the United States Supreme Court *Collins v. Youngblood* opinion which clarified and narrowed ex post facto protection.[36]

A few short months after the *Regules* court held that retroactive application of California Penal Code § 803(g) violated the ex post facto clause of the Constitution, the Court of Appeal for the Fourth District questioned that result.[37] Although the court held that the prosecution for crimes for which the statutory limitation period

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27. *Id.*

28. 33 Cal. App. 4th 1223, 39 Cal. Rptr. 2d 414 (1995).

29. *Lynch*, 33 Cal. App. 4th at 1226-28, 39 Cal. Rptr. 2d at 415-16 (holding that a criminal statutory limitation period may be extended before expiration but not after expiration; and also stating that California Penal Code § 805.5(c)(1) also prohibited application of newly enacted California Penal Code § 803 since it expressly retained limitation periods applicable before the new section became operative).

30. *Id.* at 1228-29, 39 Cal. Rptr. 2d at 417.

31. 44 Cal. Rptr. 2d 688, *rev. granted*, 905 P.2d 418, 46 Cal. Rptr. 2d 749 (1995).

32. *Regules*, 44 Cal. Rptr. 2d at 691; *see id.*(affirming the refusal to reinstate the complaint against the defendant).

33. *See id.* at 689 (discussing cases relying on Learned Hand's explanation in *Falter v. United States*, 23 F.2d 420 (1928), that reviving an expired cause of action is different than extending the time in which to file a complaint under an existing cause of action). The *Regules* court, however, ignores an additional comment by Judge Hand that suggests the appropriateness of determining *how much* violence is done to fairness and justice by reviving such an action. *See id.*

34. 23 F.2d 420 (1928).

35. *Regules*, 44 Cal. Rptr. 2d at 689; *see id.* (citing examples of California court decisions following *Falter*).

36. *See id.* at 690 (distinguishing the *Collins* decision); *see also Collins*, 497 U.S. at 41-52 (declaring the proper applicability of an ex post facto analysis to statutes that punish an act as criminal that was innocent when committed, increase the burden for a crime after commission, or eliminate a defense available existing at the time of commission). The statute must fit one of these three categories to warrant analysis under the Constitution. *Collins*, 497 U.S. at 41-52.

37. *See* People v. Sowers, 48 Cal. Rptr. 2d 250 (1995), *rev. granted*, 912 P.2d 534, 51 Cal. Rptr. 2d 83 (1996).

had run was prohibited,[38] the court relied on principles of statutory construction to reach that result.[39] Regarding retroactivity, significant emphasis was placed on the absence of any express language to apply California Penal Code § 803(g) to the instant case to negate California Penal Code § 3, which explicitly states that no part of the Penal Code shall be retroactively applied absent such expression.[40]

The court then addressed the respondent's ex post facto argument. Assuming arguendo that express application of California Penal Code § 803(g) to the instant case was found, the court clearly differentiated between retroactive legislation and ex post facto violation.[41]

The *Sowers* court suggests that insofar as the *Lynch* and *Regules* cases were decided on ex post facto violation grounds, the United States Supreme Court decision in *Collins* undermines those decisions.[42] In the *Collins* case, the Supreme Court narrowed the definition of what constituted an ex post facto law under the United States Constitution.[43] The Court held that to fall within the traditional notion of ex post facto analysis, the criminal statute would have to punish a previously innocent act as criminal, make punishment for a crime more burdensome, or deprive an accused of a defense available at the time of commission of the offense.[44]

Courts have relied on the third definition of an ex post facto law as provided in the *Collins* decision to find that eliminating a defense of expiration of a statutory limitation period violates the ex post facto clause.[45] Explicitly addressing the meaning of "defense" as it fits within the scope of an ex post facto analysis, the decision in *Lynch* does not comport with the explication of "defense" as provided in *Collins*.[46] The *Lynch* court found elimination of a statute of limitations defense analogous to a substantive right protected by the constitutional prohibition against an ex post facto law.[47] The *Collins* court admitted that even if a right is considered

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38. *See id.* at 252 n.4, 255-56 (concluding that the prosecution of a crime for which the statutory limitation period applicable before legislation changing that statute was effective is offensive to rules of statutory construction by relying on *Evangelatos v. Superior Court (State)*, 44 Cal. 3d 1188, 753 P.2d 585, 246 Cal. Rptr. 629 (1988)).

39. *See id.* at 255-56.

40. *See id.* at 255 (discussing the relationship between California Penal Code § 803(g) and the presumptions attached to legislative statutes).

41. *See id.* at 252-53 (clarifying that even if a statute is not found to be ex post facto it could nevertheless be retroactive).

42. *Id.* at 252 n.4.

43. *See Collins*, 497 U.S. at 41-44; *see also infra* notes 45, 47 and accompanying text (detailing the analysis of the ex post facto claim in *Collins*).

44. *Collins*, 497 U.S. at 41-44.

45. *See supra* notes 29, 32, 39 and accompanying text (providing examples of such cases); *see also Sowers*, 48 Cal. Rptr. 2d at 252 n.4 (questioning the result in several cases relying on the third ex post facto definition, namely eliminating a then-existing defense).

46. *See Collins*, 497 U.S. at 51-52 (limiting an ex post facto analysis to statutes pertaining to the *definition* of crimes, defenses, or punishments).

47. *See Lynch*, 33 Cal. App. 4th at 1228, 39 Cal. Rptr. 2d at 416 (holding that protection against greater punishment imposed after the offense was committed than was previously applicable is analogous to elimination of a substantive defense).

"substantial," that alone is insufficient to bring it within an ex post facto analysis.[48] *Regules* rejects the analysis requirement under *Collins*, distinguishing the types of statutes involved in the litigation.[49] In addition, the *Regules* court noted the different judicial opinions regarding whether the statute of limitations is an element of the crime so as to bring it within the protection of the ex post facto analysis previously established in *Collins*.[50] The *Regules* court, however, avoided deciding whether or not it believed that the statute of limitations is an element of the crime by stating that the "well settled" rule barring a revival or extension of an expired statutory period would be followed.[51]

In addressing the ex post facto argument, the *Sowers* court found the ex post facto analysis of *Collins* controlling, relying on a California Supreme Court decision that interpreted the California and federal ex post facto clauses identically.[52] The court found that the case at bar presented no question under the *Collins* ex post facto analysis.[53]

Finally, in *People v. Maloy*,[54] the Fifth District found retroactive application of § 803(g) of the California Penal Code did not violate ex post facto provisions.[55] The *Maloy* court adopted the ex post facto definition found in *Collins* and, applying the three category approach, found that the change in the California Penal Code, as applied to the case at bar, did not fit that definition.[56]

These cases reveal the confusion in the lower courts regarding statutory limitation periods, ex post facto analysis, and retroactivity. The current state of judicial affairs in California regarding these issues reveals the need for supreme court disposition. Currently, the *Regules* and *Sowers* cases are pending review by the Supreme Court of California.[57]

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48. *Collins*, 497 U.S. at 51.

49. *See Regules*, 44 Cal. Rptr. 2d at 690.

50. *Id.* at 691 nn.4-5; *see id.* (noting the different views regarding whether the limitation period is an element of the crime).

51. *See id.*

52. *See Sowers*, 48 Cal. Rptr. 2d at 255-56.

53. *See id.* at 253-54 (distinguishing between ex post facto and retroactive laws and failing to provide any ex post facto analysis of the case at bar).

54. 44 Cal. Rptr. 2d 691, *rev. granted*, 905 P.2d 993, 47 Cal. Rptr. 2d (1995).

55. *See Maloy*, 44 Cal Rptr. 2d at 700 (explaining that retroactive application would not necessarily offend the ex post facto clause).

56. *See id.* at 699 (construing the change in law not violative of the categories established in *Collins*); *supra* notes 37, 38, 44-50 and accompanying text (discussing the *Collins* case).

57. People v. Sowers, 912 P.2d 534, 51 Cal. Rptr. 2d 83 (1996); People v. Regules, 905 P.2d 418, 46 Cal. Rptr. 2d 749 (1995).

IV. CONSTITUTIONALITY OF CHAPTER 130

Chapter 130 explicitly provides for retroactive application to causes of action arising before the effective date of the enacted provisions.[58] A statutory construction analysis based on lack of legislative clarity, as demonstrated in *Lynch* and *Sowers*, is therefore unnecessary. What remains, however, are interesting questions regarding the intricacies of several constitutional provisions. Given the lack of clear standards enunciated in California court analyses of the constitutionality of statutory retroactivity, this Legislative Note will address various issues raising constitutional concerns.

A. *The Ex Post Facto Clause and Chapter 130*

While the *Collins* case illustrated that reliance on the deprivation of a "substantial" right alone is insufficient to warrant ex post facto protection,[59] an analysis of whether a statutory limitation defense involves the definition of a crime, a defense to a crime, or punishment of a crime, thus invoking ex post facto analysis, is required. As illustrated by the *Regules* case, disposition in California courts regarding this issue is unsettled.[60] Where prior law is unsettled, there is arguably no justifiable reliance on it. Absent justifiable reliance, it could be argued that retroactive application of changed limitations periods on unsettled law is not improper. Additionally, the United States Supreme Court held that the statute of limitations relates to a remedy rather than a right, and that retroactive revival of a previously barred action merely frustrates a hope that a defense exists.[61] If these arguments could be implemented successfully, Chapter 130 would probably survive an attack under the ex post facto clause.

B. *Retroactivity and the Due Process Clause*

Of the cases examining changes in the statutory limitation period applicable to prosecution of perpetrators of childhood sexual abuse, no court has reached the issue of a due process violation.[62] As examined in the *Sowers* and *Collins* cases, the

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58. *See* CAL. PENAL CODE § 803(f)(1), (g)(1) (amended by Chapter 130) (allotting a one-year period following the report of victimization to file a criminal action).

59. *See* Collins v. Youngblood, 497 U.S. 37, 51-52 (holding that the deprivation of a jury trial, although identified as implicating a substantial right, is insufficient to find an ex post facto violation).

60. *See supra* note 50 and accompanying text (illustrating disparate judicial treatment as to whether the statute of limitation is such an element).

61. *See* Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 315 (1945) (holding that the limitation period ordinarily relates to remedies, not rights, and concluding that remedies are not included within the protection under an ex post facto analysis).

62. Due process protection is afforded under the Fourteenth Amendment to the Federal Constitution. *See* U.S. CONST. amend. XIV. The California Constitution also contains the guarantee. *See* CAL. CONST. art. I, §§ 7, 15; *see also* DeShaney v. Department of Social Servs., 489 U.S. 189, 194-97 (1989) (elaborating on the purpose

distinction between "substantial" and "procedural" law is moot regarding an ex post facto analysis.[63] Regarding a due process claim, however, a deprivation of a vested right or substantial impairment of such right denies due process of law in violation of the Federal and California Constitutions.[64] While retroactivity lacks any clear definition, it is related to the above point as follows. When the impact of a law substantially changes the legal significance of events transpiring before the law becomes effective, or interferes with rights existing before the law became effective, the courts have held that such a law is retroactive.[65] In examining retroactive laws with an emphasis on a due process analysis, several factors must be weighed to determine if the retroactivity, as applied to the case at bar, is violative of due process protection.[66]

Examining the primary factors given by the *Flournoy* court to evaluate a potential violation reveals that Chapter 130 is unlikely to be found constitutionally infirm.[67] Chapter 130 serves a significant state interest in providing a forum for its citizens to redress past wrongs, as well as punishing and deterring future crimes of sexual abuse of minors. Since childhood sexual abuse is often repressed,[68] the retroactive application of Chapter 130 is important in effectuating the aforementioned purpose.[69] Viewed together, the foregoing factors would seem to tip the scales toward constitutional retroactive application of Chapter 130.

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behind due process protection, particularly noting preventing the abuse of state power against citizens); Lassiter v. Department of Social Servs., 452 U.S. 18, 24-25, 27-28 (1981) (discussing the process a court undertakes to evaluate a due process claim).

63. *See Collins*, 497 U.S. at 46 (declaring that reliance on "substantial" or "procedural" analysis is no longer proper).

64. *See* Flournoy v. State, 230 Cal. App. 2d 532, 41 Cal. Rptr. 198 (1965) (listing the following factors for consideration in retroactivity cases: (1) The nature and strength of the policy interest served by the retroactive statute, (2) the extent to which the statute changes or eliminates the asserted right in existence prior to the statute, and (3) the nature of the right which the statute alters). The last factor includes elements of reliance and expectation and requires explanation in the context of this Legislative Note. *See id.* at 536-37, 41 Cal. Rptr. at 200-01. This factor, to some, involves whether or not justifiable reliance upon, and engaging in behavior in expectation of, the continuation of a previously-existing right are infringed upon to such a degree that a change or elimination of the right would equate to "surprise" legislation. *Id.* Applied to this discussion, the criminal defendant would argue that there was justifiable reliance on the statute of limitations having run and that action was taken in expectation of that expiration. Weighed against this assertion would be the various state interests in providing a forum for redressability of past wrongs to state citizens and the necessity of deterring similar crimes in the future.

65. *See* cases cited *infra* notes 68-73.

66. *See, e.g., In re* Marriage of Bouquet, 16 Cal. 3d 583, 591, 546 P.2d 1371, 1376, 128 Cal. Rptr. 427, 431-32 (1976) (considering various factors in determining the legitimacy of a retroactive law); *Flournoy*, 230 Cal. App. 2d at 532, 41 Cal. Rptr. at 198 (same).

67. *See supra* note 64 (listing applicable factors).

68. *See infra* Part V (containing a discussion of the repression of childhood sexual trauma).

69. *See* Hall, *supra* note 4, at 44 (focusing discussion of the infrequency of conviction in childhood sexual assault cases within an analysis of statutory limitation periods, and suggesting that if the passage of time did not have the legal effect of barring a claim, the potential to bring successful suits would improve). Additionally, policy factors can weigh in the balance and provide a foundation for constitutional retroactive application of law. *See Flournoy*, 230 Cal. App. 2d at 525, 41 Cal. Rptr. at 195.

This, however, is not the end of the analysis. Weighed against these factors are: (1) The extent of justifiable reliance upon former law, (2) the extent actions have been taken in such reliance, and (3) the disrupting effect a retroactive application of the law would have on such actions.[70] Arguably, it is general knowledge that statutory limitation periods exist for most crimes. Whether or not a perpetrator relies on such statutory limitation periods justifiably and acts in accordance with such reliance is purely conjectural. Recognizing that retroactive application of California Penal Code § 803(f) and § 803(g) will disrupt the alleged perpetrator's freedom from prosecution under the formerly applicable statutory limitation period, it is, however, not likely that it disrupts actions taken in reliance on former law regarding expiration of statutory limitation periods. Considering the lack of judicial clarity on this subject, reliance on nonretroactivity principles would therefore be unjustified. Thus examined, Chapter 130 does not seem violative of due process. The decision of the legislature to retroactively apply newly enacted statutes of limitation periods effectuates legitimate interests of the state without unduly infringing on the justified expectations of an alleged perpetrator of sex crimes against a minor.

C. Statutorily Created v. Constitutionally Guaranteed Rights

An additional point deserves examination. Statutes of limitations are not constitutionally demanded, but rather are concessions by a state or federal government that prosecution beyond a specified time will not be commenced.[71] However, as a statutorily created right of defense, these provisions can be modified or repealed without offending a vested or substantial right.[72] Viewed this way, the retroactive application of Chapter 130 repeals a statutorily created defense of expiration of the statute of limitation period as it previously existed. As such, it may be viewed as constitutionally permissible.

V. REPRESSION AND CHAPTER 130—PRAGMATIC CONCERNS

Repression of childhood sexual abuse is not uncommon.[73] Different psychological theories have been posited to explain this phenomenon and documentation

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70. *Bouquet*, 16 Cal. 3d at 592, 546 P.2d at 1376, 128 Cal. Rptr. at 432.

71. BLACK'S LAW DICTIONARY 927 (6th ed. 1990); *see* Tyson v. Tyson, 727 P.2d 226, 227-28 (Wash. 1986) (discussing that the purpose behind the statute of limitations is to ensure reliability of evidence, providing protection against claims filed beyond a time that a reasonable defense can be mounted, and encouraging swift adjudication).

72. *See* Graczyk v. Worker's Compensation Appeals Bd., 184 Cal. App. 3d 997, 1007-08, 229 Cal. Rptr. 494, 501-02 (1986) (discussing fully a repeal of a statutory right, and finding the destruction of a statutory right not improper).

73. *See generally* Hall, *supra* note 4 (providing a thorough discussion of repression, including cites to various psychological studies explicating the phenomena).

exists in several arenas verifying its existence.[74] While the ideological foundations of psychological theory is beyond the scope of this discussion, the legal impact of repression of childhood sexual trauma as it relates to Chapter 130 warrants exploration. This discussion will explore how Chapter 130 relates to later retrieval of repressed memories and the tolling of statutes of limitations, the reliability of later retrieval, and the implications of tolling on the constitutional protections afforded a criminal defendant.

A. Judicial Treatment of Repression's Effect on Tolling

1. Civil Actions

The "delayed discovery rule"[75] applied in civil actions to prevent the injustice of dismissing an otherwise valid claim because of the passage of an arbitrary time period has recently been used by adult survivors of childhood sexual abuse with modest success.[76] Utilizing this principle, the memory of sexual trauma experienced as a minor was "undiscovered" and "undiscoverable" before later retrieval.[77] Upon "discovery," the victim learns the origin of injury and is allowed to initiate civil action against the alleged perpetrator of that injury.[78] Several states, including California, have adopted legislation tolling the statute of limitations for initiation of civil suits alleging childhood sexual abuse.[79]

2. Criminal Actions

In contrast to the treatment of defendants in civil actions, arduous attention is directed toward protecting the constitutional rights of the defendant in a criminal

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74. *See id.* at 31-34 (briefly describing behaviorism, cognition theory, symbolic interactionism, and Freudian psychoanalytic theory as the various psychological theories providing the foundation for understanding repression); *see also* Ernsdorff & Loftus, *supra* note 5, at 129 nn.1-6 (citing numerous sources of collected data regarding repression of childhood sexual abuse).

75. *See* Norrie Clevenger, *Statute of Limitations*, 30 J. FAM. L. 447, 455 & n.40 (1992) (explaining that the "delayed discovery" rule provides that a cause of action accrues when the plaintiff discovers, or through due diligence should have discovered, injury by the defendant); *see also* Hall, *supra* note 4, at 47 (explaining that allowing an adult the opportunity to prove abuse occurred and prove the defendant was the abuser is the purpose behind the "delayed discovery" rule).

76. Originally used in medical malpractice cases, civil suit plaintiffs have been afforded the ability to use the rule to combat the unfairness of barring an otherwise colorable claim. *See* Ernsdorff & Loftus, *supra* note 5, at 144-45 & n.93 (discussing the "delayed discovery" rule and other equitable relief theories successfully utilized in civil cases to circumvent the statutory limitation expiration).

77. *See id.* at 142-43 (noting that the inability to discover injury present in medical malpractice cases is analogous to the repressed memory of childhood sexual abuse).

78. *See id.* at 143 (explaining the "discovery" principle). *See generally* Clevenger, *supra* note 76 (examining the applicability of this rule in instances of alleged childhood sexual abuse).

79. *See, e.g.*, CAL. CIV. PROC. CODE § 340.1(a) (West Supp. 1997) (providing three years from date of discovery for initiation of civil suits).

proceeding. In affording such protection, criminal statutes of limitation periods possess traditions of impenetrability.[80] The purpose of such a limitation period and the ramifications of a verdict returned against the defendant provide the foundation for rejecting a "delayed discovery rule" in criminal cases.

The "continuing crime" and "concealment" theories have been posited to circumvent otherwise rigid tolling principles applicable to criminal statutes of limitations, as found in sexual offense statutes.[81] These arguments, however, have not met with the acceptance the "delayed discovery rule" is gaining in the judiciary, and relatively few criminal cases have been able to show justification for tolling a criminal statutory limitation period.[82]

B. Implications of Recent Legislative Response

In the context of childhood sexual abuse, the validity of adhering to the rigidity of criminal statutory limitation periods as it relates to defendant protection can be legitimately criticized. Furthermore, various state legislatures are responding to what is perceived as an unjust benefit to an alleged perpetrator of sexual abuse of minors by eliminating or modifying applicable statutory limitation periods in cases of childhood sexual abuse.[83] While this response is welcomed, even applauded, aggressive initiative absent rational and comprehensive legislation could pose difficulty. Several troubling issues emerge when the purpose behind protections traditionally afforded a criminal defendant are ignored.

1. Authenticity and Reliability—Later Recall Difficulties

Since later recall of repressed memories is potentially subject to numerous altering influences, the authenticity of the alleged events can be justifiably questioned. One purpose of criminal statutory limitation periods is to ensure the trier-of-fact that the evidence possesses qualities enabling correct resolution.[84] As time passes, memories fade and the potential for proving a case or defending against one diminishes. The ability to rely on evidence presented with no temporal proximity to

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80. *See* Toussie v. United States, 397 U.S. 112, 115 (1970) (liberally interpreting limitation periods in favor of repose, and thus protecting the criminal defendant).

81. *See infra* note 83 (discussing two such cases).

82. *See, e.g.*, Crider v. State, 531 N.E.2d 1151, 1154 (Ind. 1988) (using the "concealment" theory to toll the statute of limitations); State v. Danielski, 348 N.W.2d 352, 356 (Minn. Ct. App. 1984) (allowing the "continuing theory" in a criminal proceeding).

83. *See, e.g.*, Ernsdorff & Loftus, *supra* note 5, at 151 n.117 (citing several legislative responses to the tolling issue).

84. *See* Tyson v. Tyson, 727 P.2d 227, 227-28 (Wash. 1986) (noting the purpose of the ex post facto guarantee).

the alleged crime is weakened. The recognition of these factors provides the foundation for the very principles of time barring stale claims.[85]

2. *How Chapter 130 Addresses the Issues*

California Penal Code § 803(g) provides that persons, regardless of age, alleging they were the victim of specified crimes may file a criminal complaint within one year of reporting such abuse, as specified.[86] The qualifications in this subsection arguably provide the authentication and reliability protection required in the context of later recalled childhood sexual abuse as the basis for a present cause of action. In such cases, Chapter 130 would revive any cause of action previously time barred under California Penal Code § 800 or § 801 and provides a six-month window of opportunity to report sexual victimization as a minor.[87] Within one year of such a report, a criminal complaint may be filed.[88]

VI. CONCLUSION

Chapter 130 allows a victim of childhood sexual abuse a day in court; it does not abrogate other available defenses and does not assure the plaintiff a successful suit against the alleged perpetrator of the abuse. The burden of proof, evidentiary requirements, and other protections afforded a criminal defendant remain intact. In sum, while judicial inconsistency exists in this emotionally charged area of law, avenues exist to provide plaintiffs a forum to redress past wrongs while protecting a criminal defendant against arbitrary prosecution.[89] With legislative clarity and social resolve to eradicate this pervasive, yet often unredressed crime, laws retroactively modifying or eliminating statute of limitation periods will probably be found constitutionally permissible as effectuating legitimate interests of the state without undue burden. Recognizing this, it is likely that Chapter 130 will be upheld as constitutional.

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85. *Id.*

86. CAL. PENAL CODE § 803(g) (amended by Chapter 130); *see id.* (providing that § 803(g) applies when the general criminal limitation period in California Penal Code § 800 or § 801 has expired and, inter alia, independent evidence exists that corroborates the victim's allegation in satisfaction of a "clear and convincing" burden of proof standard).

87. *Id.*; *see id.* (specifying a six-month period in which a person of any age must report alleged childhood sexual trauma).

88. *Id.*; *see id.* (allowing a one-year statute of limitation period within which to file a revived claim).

89. *See, e.g.*, Ernsdorff & Loftus, *supra* note 5, at 167-72 (positing specific procedural requirements as solutions to providing the plaintiff an opportunity in court and preserving the traditional protections of a criminal defendant).

APPENDIX

Code Section Affected

Penal Code § 803 (amended).

AB 2014 (Boland); 1996 STAT. Ch. 130

The Confrontation Clause and Evidentiary Admissions

Christine M. Adams

I. INTRODUCTION

Under existing law, evidence of a statement[1] made other than by a witness, that is offered to prove the truth of the matter asserted is inadmissible at trial.[2] This is known as the hearsay rule.[3] Various exceptions to the hearsay rule allow particular evidence to be admitted as specified by law.[4]

The purpose behind exclusion of certain types of hearsay evidence is to ensure the reliability of testimony by means of the oath, the exposure of the declarant to cross-examination, and the opportunity for the jury to observe the demeanor of the declarant at trial.[5] The hearsay rule precludes admission in the judicial record of statements that do not fit an established exception to the hearsay rule and that are not subject to the rigors of cross-examination.[6]

Under Chapter 560, evidence of prior inconsistent statements of a witness properly admitted in a preliminary hearing or trial of the same criminal matter are not made inadmissible by the hearsay rule, provided the declarant is unavailable.[7] Additionally, Chapter 560 provides that a party against whom a statement is offered

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1. *See* CAL. EVID. CODE § 1200 (West 1995) (defining "statement" as an oral or written assertion or nonverbal conduct of a person, if it is intended as an assertion); *cf.* FED. R. EVID. 802 (same).

2. CAL. EVID. CODE § 1200(b) (West 1995); *see id.* (stating that except as provided by law, hearsay evidence is inadmissible); *see also* FED. R. EVID. 802 (stating that hearsay is not admissible except as provided by the federal rules of evidence or other rules prescribed by the Supreme Court).

3. CAL. EVID. CODE § 1200 (West 1995); *cf.* FED. R. EVID. 802 (enunciating the federal hearsay rule).

4. *See* CAL. EVID. CODE §§ 1220-1350 (West 1995 & Supp. 1997) (listing the exceptions to the hearsay rule); *see, e.g., id.* § 1350 (West 1995) (detailing the circumstances in which evidence of a statement made by a declarant in a criminal proceeding is not made inadmissible by the hearsay rule, provided the declarant is unavailable at trial); *cf.* FED. R. EVID. 803(1)-(24) (listing the exceptions applicable regardless of declarant availability); *id.* 804(b)(1)-(5) (providing for various exceptions where the declarant is unavailable as a witness at trial).

5. FED. R. EVID. 802 advisory committee's note; *see* California v. Green, 399 U.S. 149, 162 (1970) (explaining that statements made absent oath or affirmation and not offered in the presence of the trier-of-fact are not sufficiently reliable); People v. Cudjo, 6 Cal. 4th 585, 608, 863 P.2d 635, 649, 25 Cal. Rptr. 390, 404 (1993) (explaining that hearsay is generally excluded because of the difficulty of testing perception and memory as well as the inability of the trier-of-fact to observe the demeanor of the witness at trial).

6. *See supra* note 2 and accompanying text (indicating that hearsay evidence is inadmissible).

7. CAL. EVID. CODE § 1294 (enacted by Chapter 560); *see id.* § 1294(a)(1), (2) (enacted by Chapter 560) (listing the types of prior inconsistent statements to include videotaped statements and transcripts of prior hearings); *cf.* FED. R. EVID. 804 (defining "unavailability" to include a declarant who persists in refusing to testify concerning the subject matter of the statement, testifies to a lack of memory regarding the subject matter of the statement, or is unable to be present and testify because of death).

may examine or cross-examine any person who testified at the earlier proceeding regarding the prior inconsistent statement of the witness who is now unavailable.[8]

Chapter 560 seeks to rectify a common problem in criminal proceedings involving gang-related violence.[9] Often, a key witness for the prosecution recants or denies earlier inculpating statements or, at trial, hides or is otherwise unavailable.[10] Accordingly, the Los Angeles District Attorney, as sponsor of the bill, noted the reliance of the prosecution's bar on former testimony.[11] Chapter 560 is opposed by California Attorneys for Criminal Justice who stated that the admission of such evidence is a violation of the accused's right of confrontation.[12]

In addition to Chapter 560, Chapter 416 also affects the admissibility of hearsay evidence at trial.[13] Chapter 416 would allow the admission of evidence of a statement made by an unavailable declarant against a party when that evidence relates to the infliction or threat of infliction of physical harm.[14] Under specified circumstances, Chapter 416 would exempt prior statements from exclusion under the hearsay rule.[15] Unlike Chapter 560, admissibility of statements under Chapter 416 does not depend on their prior admission in the record of a prior judicial or preliminary hearing.[16]

Chapter 416 would permit the admission of various statements by a victim in evidence, which may include personal diaries.[17] The admission of such statements is intended to reflect the perception of the victim in the judicial record.[18] The author

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8. *See* CAL. EVID. CODE § 1294(b) (enacted by Chapter 560) (providing for the right to examine or cross-examine any person who testified at the preliminary hearing or proceeding regarding the statement of the unavailable witness).

9. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2483, at 2-3 (May 30, 1996).

10. *Id.* at 3.

11. *Id.*

12. *Id.*; *see id.* (detailing the opposition's premise that the admission of such evidence violates the right to confront a witness against him or her as provided in the Sixth Amendment).

13. *See infra* notes 14-15 and accompanying text (discussing Chapter 416 and the exception from the hearsay bar of prior statements).

14. *See* CAL. EVID. CODE § 1370(a) (enacted by Chapter 416) (stating the conditions to be met before a request for the admission of the statement as evidence is made).

15. *See id.* § 1370 (a)(1)-(3) (enacted by Chapter 416) (providing that evidence of a statement by an unavailable declarant is not made inadmissible by the hearsay rule if the statement purports to narrate, describe, or explain an act, condition, or event purportedly perceived by the declarant where that act, condition, or event is past, present, or future infliction of physical abuse).

16. *Compare id.* § 1370 (b)(1) (enacted by Chapter 416) (allowing admission if the statement was made in contemplation of trial) *with id.* § 1294 (enacted by Chapter 560) (permitting prior statements to be admitted in a judicial proceeding or preliminary hearing).

17. *Id.* § 1370 (enacted by Chapter 416); *see id.* § 1370 (a)(1)-(3) (enacted by Chapter 416) (providing no bar to the admissibility of personal statements); *see also* David Kline, *Measure to Ease Rules on Hearsay Evidence Clears Assembly Committee*, METROPOLITAN NEWS ENTERPRISES (New York), July 5, 1996, at 5 (supplying examples of various personal statements, including written or electronic diary entries).

18. *See* ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2068, at 2-3 (Apr. 22, 1996) (summarizing the intent of AB 2068 to provide the trier of fact with a more comprehensive understanding of the situation from the victim's point of view); *see also* Pamela Martineau, *Assembly Approves Bill to Broaden Hearsay Exceptions*, METROPOLITAN NEWS ENTERPRISES (New York), May 7, 1996, at 8 (noting the support of various Assemblymembers who favor providing the trier of fact with a comprehensive record regarding the situation

of Chapter 416 feels that the inclusion of such statements is reasonable where a defendant admits to charges of physical abuse because such admission lends credibility to the declarant's assertion.[19] Chapter 416, however, does not require the defendant's admission before a request to admit the prior statement as evidence can be made.[20]

Chapter 416 is opposed by California Attorneys for Criminal Justice.[21] They feel that if such evidence is admitted, it is possible for a jury to convict a defendant in order to punish him for prior wrong acts, disregarding the need for sufficient evidence to convict him for the crime actually charged.[22]

II. ANALYSIS OF CHAPTERS 416 AND 560

Notwithstanding the noted support and opposition for Chapter 416 and Chapter 560, significant constitutional issues must be addressed. The Sixth Amendment guarantees that in all criminal proceedings, the accused has the right to confront the witnesses that provide evidence at trial.[23] Accordingly, the Supreme Court has had several occasions to rule on the requirements of that constitutional guarantee as it relates to the introduction of evidence at trial.[24]

A. Sixth Amendment Implications

In *Pointer v. Texas*,[25] the Court noted that the defendant's right to confront witnesses, as part of the adversarial process, was a fundamental right under the Sixth Amendment.[26] The relationship between the Confrontation Clause and the admissibility of evidence has been the subject of rigorous debate among legal scholars.[27]

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surrounding the accused and the alleged victim).

19. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2068, at 11-12 (Apr. 22, 1996); *see id.* (stating that the defendant's admission gives the victim's statement sufficient trustworthiness to be admitted at trial).

20. *See* CAL. EVID. CODE § 1294 (enacted by Chapter 416).

21. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2068, at 12 (Apr. 22, 1996).

22. *Id.*; *see id.* (stating that to allow juries to hear such evidence would be unduly prejudicial to the defendant and could result in a verdict based on unsubstantiated and incomplete information).

23. U.S. CONST. amend VI; *see* CAL. CONST. art. I, § 15 (incorporating the Sixth Amendment into the California Constitution).

24. *See infra* notes 29, 36, 39, 41, 55 and accompanying text.

25. 380 U.S. 400 (1965).

26. *Pointer*, 380 U.S. at 403-06.

27. *See, e.g.*, Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557 (1988); Laird C. Kirkpatrick, *Confrontation and Hearsay*, 70 MINN. L. REV. 665 (1986); Graham C. Lilly, *Notes on the Confrontation Clause and* Ohio v. Roberts, 36 U. FLA. L. REV. 207 (1984); Nancy H. Baughan, Note, White v. Illinois*: The Confrontation Clause and the Supreme Court's Preference for Out-of-Court Statements*, 46 VAND. L. REV. 235 (1993); Patrice L. Harris, Note, *Confrontation Clause*, 28 HOW. L.J. 171 (1985).

In *California v. Green*,[28] the Court noted the two popular views for the admission of prior statements of an unavailable witness at trial.[29] The Court did not label one view better than the other but clearly stated that, regardless of the view taken, any change in the law of evidence would have to comport with the Sixth Amendment.[30] The Court ultimately held that when a declarant is a witness at trial and subject to cross-examination, the dangers of admitting the prior statement are absent and no violation of the Sixth Amendment exists.[31] According to the *Green* Court, the protections afforded under the Confrontation Clause of the Sixth Amendment, as they relate to an available witnesses at trial, are not violated by admitting prior statements.[32] The principles behind the Confrontation Clause as it relates to the exclusion of the prior out-of-court statements are generally noted to include concern that: (1) The prior statement may not have been made under oath; (2) the declarant may not have been subject to cross-examination; and (3) the jury is unable to observe and judge the declarant at the time the statement is made.[33]

A decade later, in *Ohio v. Roberts*,[34] the Court revisited the relationship between the Confrontation Clause and the admission of hearsay evidence.[35] The Court explained that the Confrontation Clause of the Sixth Amendment restricted the admission of evidence in two ways. First, necessity must be proven, and second, the statement must either possess a guarantee of trustworthiness or be proven reliable before admission.[36] In addition, in holding that an available declarant's prior statement is admissible, the Court implies that an unavailable declarant's admission may

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28. 399 U.S. 149 (1970).

29. *Green*, 399 U.S. at 154-55 (stating that the traditional view is that out-of-court statements are inadmissible and may not be offered to prove the truth of the matter asserted, while the minority view would permit the substantive use of prior inconsistent statements). *See generally* FED. R. EVID. 801(d)(1)(a) (allowing for the substantive use of prior inconsistent statements as an exception to the hearsay rule); Stanley A. Goldman, *Guilt by Intuition: The Insufficiency of Prior Inconsistent Statements to Convict*, 65 N.C. L. REV. 1, app. at §§ I-III (1986) (detailing the extent to which various states have adopted Federal Rule of Evidence 801(d)(1)(a) and noting any modification thereof).

30. *See Green*, 399 U.S. at 156 (stating that the creation of new exceptions for the admission of evidence over the hearsay rule will often raise constitutional questions regarding the right of confrontation).

31. *Id.* at 153-58.

32. *See id.* at 158-61 (concluding that the available witness is subject to being called to testify and, if called, would be subject to examination in full view of the jury and that these factors sufficiently protect the accused's right to confrontation at trial).

33. *See id.* at 158 (discussing the theory behind the hearsay rule and the exclusion of out-of-court statements at trial); *see also* Ohio v. Roberts, 448 U.S. 56, 71 (citing Daniel Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions*, 85 HARV. L. REV. 1378 (1972) as declaring that the purpose behind cross-examination is to challenge the honesty, perception, and memory of the declarant in view of the jury).

34. 448 U.S. 56 (1980).

35. *See infra* notes 36-37 and accompanying text. *See generally* Lilly, *supra* note 27, at 207 (analyzing the *Ohio v. Roberts* decision and the Confrontation Clause extensively).

36. *See Roberts*, 448 U.S. at 65-66 (acknowledging the preference for face-to-face accusation, the requirement of necessity of the statement before disposal of that preference, as well as the purpose of the fact finding process to determine the accuracy and reliability of the evidence admitted). Additionally, the Court would require the offered evidence to possess an independent guarantee of trustworthiness to satisfy the "reliability" requirement when such evidence does not meet an exception to the hearsay rule. *Id.*

be improper. Discussing this implication, one legal scholar noted that if every out-of-court statement must be made by an unavailable declarant, the *Roberts* test would have rendered the twenty-four exceptions in Federal Rule of Evidence 803 on constitutionally-shaky ground.[37]

Three key United States Supreme Court cases analyzed the constitutional protections afforded under the Sixth Amendment and the relationship those provisions have with evidentiary admissions. The Supreme Court, in *United States v. Inadi*,[38] announced that the *Roberts* decision could not be read so narrowly as to stand for the proposition that no out-of-court statement can be offered in evidence unless the unavailability of the declarant is shown.[39] The *Inadi* Court stated that their decision in *Roberts* was not intended as a revision of the law of evidence and was not intended to be so broadly interpreted.[40] In addition, the *Inadi* decision eliminated the requirement of proving unavailability in certain cases.[41] Later, in *Bourjaily v. United States*,[42] the Court concluded that the reliability prong of the *Roberts* test was not constitutionally mandated by the Sixth Amendment, thereby discarding entirely the two-prong rule espoused in *Roberts*.[43] Finally, in *White v. Illinois*,[44] the last decision of the United States Supreme Court regarding this topic, the Court held that testimony admitted under the medical examination[45] and spontaneous declaration[46] exceptions to the hearsay rule do not require the prosecutor to prove the unavailability of the declarant at trial.[47]

B. The Current State of the Confrontation Guarantee

The *White* decision left open the question whether other existing exceptions to the hearsay rule or subsequent changes in the law of evidence would be exempt from

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37. *See* Kirkpatrick, *supra* note 27, at 689-91 (discussing the nexus between the unavailability requirement and several exceptions to the hearsay rule); *see also* FED. R. EVID. 803(1)-(24) (noting that these specified exceptions do not require unavailability before admission of the statement at trial).

38. 475 U.S. 387 (1986).

39. *Inadi*, 475 U.S. at 392-94.

40. *Id.* at 392.

41. *See id.* at 399-400 (holding that in conspiracy cases the principles of the unavailability requirement do not apply); *see also* CAL. EVID. CODE § 1223 (West 1995) (allowing the admission of coconspirator statements offered against a party as specified).

42. 483 U.S. 171 (1987).

43. *Bourjaily*, 483 U.S. at 182 (concluding that, just as unavailability need not be proven before admission of a prior statement in evidence, reliability is also not mandated by the Constitution).

44. 502 U.S. 346 (1992).

45. *See* FED. R. EVID. 803(4) (describing the exception for statements given for the purpose of medical diagnosis or treatment).

46. *See id.* 803(2) (providing that a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by that event or condition is an exception to the hearsay rule); *see also* CAL. EVID. CODE § 1240(b) (West 1995) (providing that evidence of a statement made under stress of excitement is not made inadmissible by the hearsay rule as specified).

47. *White*, 502 U.S. at 357.

proving the unavailability of the declarant at trial before admission of prior statements in evidence. The Court stated generally that the decision in *Inadi* rules out a strict reading of the *Roberts* decision.[48] Therefore, it could be true that existing or new exceptions to the hearsay rule would be exempt from proving the unavailability of the declarant at trial. In addition, the Court has never provided a definition of the "particularized guarantees of trustworthiness" discussed in *Roberts* that, if possessed by the evidence sought to be admitted, would exempt it from the unavailability requirement.[49] This unexplained phrase also provides room for the liberalization of the hearsay rule and could allow for the admission of a wider range of hearsay evidence in the future.

Since the Court has moved away from its previous strict interpretation of the Sixth Amendment as previously interpreted by the Court, it is likely that Chapter 560 will be upheld as constitutional. Chapter 560 retains the requirement of former testimony properly admitted at a prior judicial proceeding.[50] Thus, the statement would have been subject to cross-examination, satisfying the right of the accused to confront witnesses against him.[51]

Chapter 416, however, does not expressly require admission in a prior proceeding. Chapter 416 allows personal diaries and other statements offered by the declarant into evidence if the circumstances surrounding the statement indicate its trustworthiness.[52] Chapter 416 is likely to pose serious constitutional issues under the Sixth Amendment's guarantee of the right of confrontation. Chapter 416 does not seem to possess an overwhelming reason to dispense with the right of the accused to confront the witness at trial and may be considered an abridgement of the Constitution.[53] In addition, because there is no express requirement that the defendant corroborate the statement sought to be admitted or that the statement be subjected to prior cross-examination, and the declarant is not available for his demeanor to be judged, Chapter 416 could violate the Confrontation Clause.[54] If however, Chapter 416 were found to provide circumstances that meet the particular guarantee of trust-

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48. *White*, 399 U.S. at 357; see United States v. Inadi, 475 U.S. 387, 392 (1986) (restricting the application of the *Roberts* holding).

49. *See* Jonakait, *supra* note 27, at 557 n.56 (discussing the Court's failure to explain what is necessary to satisfy the guarantee of trustworthiness required under *Roberts*, and suggesting that the term could be satisfied under circumstances provided for in the "catch-all" provision of Federal Rule of Evidence 803(24) and 804(b)(5)); *see also Roberts*, 448 U.S. at 66 (stating that where evidence does not fall within an exception to the hearsay rule, it must be excluded absent a showing of particularized guarantees of trustworthiness).

50. *See* CAL. EVID. CODE § 1292(a) (enacted by Chapter 560).

51. *See supra* note 23 and accompanying text (setting forth the constitutional right to confrontation).

52. CAL. EVID. CODE § 1370 (enacted by Chapter 416).

53. *See* People v. Horn, 225 Cal. App. 2d 1, 4, 36 Cal. Rptr. 898, 900 (1964) (requiring that the prosecution point to a statute that authorizes the impairment of the accused's right of confrontation and must bring the admission clearly within the statute's guidelines); *see also* People v. Volk, 221 Cal. App. 2d 291, 296, 34 Cal. Rptr. 351, 353 (1963) (stating that a court should zealously protect the right of the defendant to confront witnesses).

54. *See supra* notes 29, 31-37 and accompanying text (detailing the various judicial requirements necessary to uphold the admission of hearsay under the Confrontation Clause).

worthiness mentioned in *Roberts*,[55] it could pass constitutional muster. Therefore, the introduction of evidence pursuant to Chapter 416 may provide a test case to procure a more definite statement from the United States Supreme Court regarding what is required under that portion of the *Roberts* decision.

California, among other states, has adopted a right of confrontation guarantee similar to that of the Federal Constitution.[56] California courts have had occasion to rule on the constitutionality of admission of hearsay evidence, thereby giving meaning to that guarantee.[57] For example, courts have held that when an opportunity for cross-examination existed in a prior proceeding, the constitutional right of confrontation is not abridged upon admission of a prior statement.[58] A declarant would not be required to repeat his prior testimony in front of the accused.[59] Additionally, California courts have held that the requirement of confrontation does not preclude the admission of evidence which fits within a hearsay exception.[60] When former testimony is sought to be admitted,[61] the prior opportunity of the defendant to cross-examine the witness is sufficient to satisfy the federal right of confrontation.[62] In *People v. Johnson*,[63] a California court established that preliminary hearing testimony of a witness is admissible in certain circumstances.[64] The court in

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55. *See Roberts*, 448 U.S. at 65-66 (discussing how the established hearsay rule exceptions satisfy the reliability requirement and when the evidence cannot be brought within an exception, other guarantees of trustworthiness would be required). The Court, however, does not elaborate on what these particular guarantees might include.

56. *See* CAL. CONST. art. I, § 15 (providing for the right of confrontation in all criminal proceedings); *cf.* CONN. CONST. art. I, § 8 (stating that "[i]n all criminal prosecutions the accused shall have a right to . . . be confronted with the witnesses against him"); MD. CONST. art. 21 (stating that "in all criminal proceedings, every man hath a right . . . to be confronted with the witnesses against him"); N.Y. CONST. art. I, § 6 (providing that "[i]n any trial in any court whatever the party accused shall be . . . confronted with the witnesses against him").

57. *See supra* note 54 and accompanying text.

58. *See, e.g.*, People v. Bynum, 4 Cal. 3d 589, 483 P.2d 1193, 94 Cal. Rptr. 241 (1971).

59. *Id.* at 589, 603, 483 P.2d at 1200, 94 Cal. Rptr. at 248 (citing *California v. Green* as establishing that admission of a statement given under circumstances approximating a trial does not violate the confrontation clause); *see also* People v. Noorlander, 76 Cal. App. 2d 274, 274, 172 P.2d 766, 766 (1946) (holding that there is no constitutional requirement of in-court repetition of prior testimony when that prior testimony was stipulated to and defendant waived his right to a jury trial).

60. *See, e.g.*, People v. Salas, 58 Cal. App. 3d 460, 467, 129 Cal. Rptr. 871, 875 (1976) (holding statements within a recognized exception constitutionally admissible at trial); *see also* People v. Hermes, 73 Cal. App. 947, 955, 168 P.2d 44, 48 (1946) (same).

61. *See* CAL. EVID. CODE § 1235 (West 1995) (providing for the admissibility of prior inconsistent statements at an earlier judicial proceeding or preliminary hearing); *cf.* DEL. CODE ANN. tit. 11, § 3507 (1995) (providing that in a criminal prosecution, the voluntary out-of-court statement of a witness who is present and subject to cross-examination may be used substantively at trial); 725 ILL. COMP. STAT. ANN. 5/115-10.1 (West 1992) (detailing the requirements for the admissibility of prior inconsistent statements at trial); N.C. GEN. STAT. § 8C-1(b)(1) (1995) (providing for admission of prior testimony in civil actions).

62. People v. Green, 3 Cal. 3d 981, 990, 479 P.2d 998, 1004, 92 Cal. Rptr. 494, 500 (1970).

63. 39 Cal. App. 3d 749, 114 Cal. Rptr. 545 (1974).

64. *See Johnson*, 39 Cal. App. 3d at 751, 114 Cal. Rptr. at 550 (establishing that if the witness was cross-examined at the hearing, the testimony is necessary to the trial, and the prosecution has made a good faith effort to secure the witness for trial, the prior testimony is constitutionally admissible).

People v. Salas,[65] interpreted the relationship between California's constitutional guarantee of confrontation and the law of evidence relating to the admissibility of former testimony.[66] The *Salas* court held that the exception under California Evidence Code § 1235 is valid and is not subject to constitutional attack.[67]

For the reasons outlined above, Chapter 560 will likely be upheld under both the United States and California Constitutions. Most likely, however, Chapter 416 will face difficulty under both federal and state constitutions. Unless other means of guaranteeing the reliability of statements offered into evidence under Chapter 416 are adopted, it is likely that Chapter 416 will not successfully meet a constitutional challenge.

To confront and cross-examine witnesses testifying against the accused is a fundamental right that has been protected by the courts.[68] The line of cases discussed above caution the legislature that any change in the California Evidence Code regarding the admissibility of hearsay must be ready for challenge under the Sixth Amendment.[69] Chapter 560 seems likely to meet that challenge while Chapter 416 may have to rely on a yet undetermined standard for admissibility under the "particularized guarantees of trustworthiness" mentioned in the *Roberts* decision.[70]

III. TOWARD A COHESIVE BUSINESS RECORDS EXCEPTION

In addition to Chapter 416 and Chapter 560, the legislature further amended the California Evidence Code with Chapter 146. Chapter 146 changes the requirements of an affidavit produced in response to a subpoena duces tecum.[71] Chapter 146 brings California Evidence Code § 1561 and § 1562 in line with § 1271 which provides for the introduction of specified business records.[72]

While business records are considered hearsay of the act, event, or conditions they describe, an exception exists whereby they may be admitted in evidence.[73] The trustworthiness of various business records is presumed to meet the reliability

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65. 58 Cal. App. 3d 460, 129 Cal. Rptr. 871 (1976).

66. *See Salas*, 58 Cal. App. 3d at 467, 129 Cal. Rptr at 876.

67. *Id.*

68. *See, e.g., Volk*, 221 Cal. App. 2d at 296, 34 Cal. Rptr. at 353 (declaring that one of the fundamental rights of an accused is to confront witnesses during trial).

69. *See supra* notes 29-48 and accompanying text.

70. *See supra* note 36 and accompanying text.

71. CAL. EVID. CODE §§ 1561, 1562 (amended by Chapter 146); *see id.* § 1561(a)(1)-(5) (amended by Chapter 146) (requiring the affidavit to state that the affiant is the custodian of the records or an otherwise qualified witness, that the copy contained is a true copy, that the records were prepared in the ordinary course of business, the identity of the records and a description of their method of preparation); *id.* § 1562 (amended by Chapter 146) (stating, inter alia, that the affidavit produced pursuant to § 1561 is admissible as evidence of the method of production of the records subpoenaed).

72. *See id.* § 1271 (West 1997) (listing the requirements for the introduction of business records as an exception to the hearsay rule).

73. *Id.*

requirement enunciated in *Roberts*; the documents are largely relied on in commercial endeavors and are part of regular business operations.[74] These facts combine to render the documents presumably reliable.

Chapter 146 allegedly corrects a technical difficulty left after the 1989 amendment of California Evidence Code § 1271.[75] When § 1271 was amended, the requirements for admissibility of business records were changed.[76] Unfortunately, other sections of the California Evidence Code, namely § 1561 and § 1562, that were impacted by § 1271, were not amended. In sum, these sections describe the general procedure for production of business records, including the requirement that an affidavit describe the manner in which the requested documents were compiled.[77] However, the sections do not contain provisions that ensure the reliability or trustworthiness of the documents sought to be introduced. Therefore, a business record could meet all of the requirements of § 1561 and § 1562 of the California Evidence Code but fail to meet the more stringent requirements of § 1271. This was precisely the case in *Taggart v. Super Seer Corporation*.[78]

In *Taggart*, the court illustrated the inadequacy of § 1561 of the California Evidence Code in a holding that found a report sought to be introduced into evidence to be inadmissible hearsay.[79] Since the report contained no evidence of how the business records were prepared or where the source of the information contained therein could be found, the record lacked the trustworthiness required to admit the business record under an exception to the hearsay rule.[80] By enacting Chapter 146, the legislature has effectively incorporated the requirements of California Evidence Code § 1271 into § 1561 and § 1562, thus eliminating the need for subsequent testi-

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74. As a recognized exception to the hearsay rule, business records would satisfy the reliability prong of the *Roberts* test. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980); *see also* Glen Weissenberger, *Hearsay: Business Records and Public Records*, 51 U. CIN. L. REV. 42, 46-47 (1982) (discussing the rationale for the business record exception); *supra* note 36 and accompanying text (detailing the requirement of reliability before the admission of such evidence).

75. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 3001, at 1 (June 18, 1996) (summarizing the promulgation of AB 3001 to correct the technical difficulty present, namely, that an otherwise acceptable affidavit fails to meet the requirements of CAL. EVID. CODE § 1271); *see also* 1989 Cal. Stat. ch. 1416, sec. 31, at 2 (amending CAL. EVID. CODE § 1271).

76. *See* Taggart v. Super Seer Corp., 33 Cal. App. 4th 1697, 1707, 40 Cal. Rptr. 2d 56, 62 (1995) (noting the 1989 amendment to California Evidence Code § 1562 and the implication that admission of a copy of business records under § 1562 is dependent upon conformity with California Evidence Code § 1271).

77. *See* CAL. EVID. CODE §§ 1561, 1562 (amended by Chapter 146) (describing the affidavit that must accompany business records, and the admissibility of (1) the affidavit and (2) copies of the requested records).

78. *See Taggart*, 33 Cal. App. 4th at 1706, 40 Cal. Rptr. at 61 (noting the failure of an affidavit to provide a foundation for admissibility under California Evidence Code § 1271 despite conformity with § 1561).

79. *See id.* at 1706-08, 40 Cal. Rptr. at 61-62 (explaining that an affidavit satisfying only California Evidence Code § 1561 was not proven to be reliable, and that this inadequacy rendered the affidavit inadmissible as evidence).

80. *See id.* at 1706, 40 Cal. Rptr. at 61.

mony regarding the identity, preparation, and source of the information contained in such records.[81]

The foregoing analysis of the business records exception reveals that the modification of California Evidence Code § 1561 and § 1562 poses no constitutional difficulty. The reliability prong of the *Roberts* decision is arguably satisfied by the requirements of admission under § 1561 and § 1562. The admission of the required affidavit is unlikely to infringe upon the accused's constitutional right to confront witnesses.

IV. CONCLUSION

When society, through the legislature, seeks to curtail any perceived advantage an accused possesses at trial, constitutional issues loom large. While the accused in a criminal trial is afforded extensive protection against unconstitutional evidentiary admissions, Chapters 416, 560, and 146 reveal that when permissible, those protections may be narrowed. It remains to be seen if these carefully drafted changes in the California Evidence Code will result in any state or federal constitutional challenges. The foregoing commentary demonstrates the author's belief that Chapters 560 and 146 pose no violation of the Sixth Amendment. Chapter 416, however, would have been on more solid constitutional ground if reliability requirements were incorporated into its provisions.

APPENDIX

Code Sections Affected

Evidence Code § 1294 (new).
AB 2068 (Richter); 1996 STAT. Ch. 416
Evidence Code § 1370 (new).
AB 2483 (Firestone); 1996 STAT. Ch. 560
Evidence Code §§ 1561, 1562 (amended).
AB 3001 (Napolitano); 1996 STAT. Ch. 146

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81. *See* CAL. EVID. CODE §§ 1561, 1562 (amended by Chapter 146) (adding the additional requirements of identification of the records and the method such records are produced to the general requirements for the production of business records); *see also* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 3001, at 1 (June 18, 1996) (containing the proponent's opinion that such an elimination of required testimony is both cost effective and time saving).

Efforts Made to Increase the Use of Mediation

Julie Momjian

I. INTRODUCTION

Overcrowded court dockets and the increased costs of courtroom litigation[1] have forced state courts and legislatures to develop alternative methods of dispute resolution.[2] These methods encourage the resolution of disputes among parties before any unnecessary time or money is expended.[3] Mediation has been the method which has generated the greatest enthusiasm in the legal field.[4] Mediation initiates a form of dispute resolution that involves the intervention of a neutral third party whose sole purpose is to facilitate negotiation between the disputants.[5] A great advantage of mediation, and one that sets it aside from other methods of dispute resolution such as arbitration, focuses on the nonbinding nature of the process.[6] The mediator, through the entire mediation process, has no authority to impose a decision on the participants, although the mediator can assist the parties in finding a way to communicate and eventually reach an agreement that is satisfactory to both sides.[7]

Most parties that turn to mediators in lieu of judges or juries tend to successfully resolve their disputes.[8] A survey carried out by the Center for Public Resources Institute for Dispute Resolution reveals that the success rate of private, voluntary mediation is eighty-one percent.[9] Further, mediation fosters positive feelings between

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1. *See* Charles L. Linder, *With the Courts Crowded, Private Justice for the Rich and Famous*, L.A. TIMES, Dec. 25, 1995, at M6 (reporting that the average civil case takes 20 months to get to trial).

2. James M. Assey, Jr., *Mum's the Word on Mediation: Confidentiality and* Synder-Falkinham v. Stockburger, 9 GEO. J. LEGAL ETHICS 991, 991 (1996).

3. Campbell C. Hutchinson, *The Case for Mandatory Mediation*, 42 LOY. L. REV. 85, 86 (1996); *see id.* at 85 (remarking that a better means of resolving disputes must be established because of the fact that litigation has become too "expensive, time consuming, combative, protracted, and destructive of relationships").

4. Yaroslav Sochynsky, *Alternative Dispute Resolution: How to Use It to Your Advantage*, CA13 ALI-ABA 397, 399 (1996); *see* CAL. CIV. PRO. CODE § 1775 (West Supp. 1997) (declaring that alternative dispute resolution in a fair, timely, appropriate, and cost-effective manner is an essential function of the judicial branch and that mediation in particular should be encouraged as a method of alternative dispute resolution).

5. Hutchinson, *supra* note 3, at 86.

6. *Id.*; *see* Bradford W. Wyche, Comment, *Mediation: Changing the Way We Think About Disputes*, S.C. LAW., May/June 1996, at 27 (stating that an arbitrator makes the decision for the parties while a mediator has no authority to impose a binding decision).

7. Assey, *supra* note 2, at 992; *see id.* (stating that the mediator, unlike a judge, identifies issues, uncovers causes of conflict, and helps explore the consequences of not settling).

8. Wyche, *supra* note 6, at 27.

9. *Id.*; *see id.* (reporting that according to the Center for Public Resources Institute for Dispute Resolution, the success rate for mediations mandated by the court is 64%); *see also* Lester J. Levy, *Consider Alternatives Before Filing Suit*, S.F. CHRON., Mar. 21, 1994, at A19 (emphasizing that studies indicate that companies experience a better than 80% success rate when they attempt to resolve their disputes through mediation).

the disputing parties.[10] When the mediation results in a mutual agreement by the parties, both sides leave the mediation with a positive sentiment about the entire process and outcome;[11] whereas if the parties had gone to court, one side would inevitably leave the courthouse with feelings of bitterness toward the outcome.[12] Thus, mediation provides parties with a healthy way to resolve a dispute which will ultimately save the potential litigant time, money, and energy, while at the same time preserving the relationship between the parties.[13]

II. THE IMPORTANCE OF CONFIDENTIALITY

Because mediation sessions are primarily aimed at helping parties come to an agreement, for mediation to work, the process must be such that it places the parties at ease, thereby facilitating the use of compromise by both sides.[14] Compromise requires parties to admit deep feelings involved in some issues and often make admissions of facts that they would normally not concede.[15] Thus, in order to engender openness among the parties, it is essential that statements made during a mediation session be kept confidential.[16] Confidentiality assures a disputant that statements made during a mediation session can in no way harm the disputant in the future if mediation fails.[17] Moreover, ensuring confidentiality encourages the use of mediation by guaranteeing that a party will not jeopardize his or her potential suit in

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10. Sochynsky, *supra* note 4, at 402.

11. *Id.; see id.* (remarking that when mediation does work, parties leave with a good feeling about the outcome, and may even leave as business partners or friends).

12. *See id.* at 401 (contrasting mediation to a settlement conference in which the judge tells the parties what a fair settlement would be, whereas mediation helps the parties find their way to an agreement that is satisfactory to both sides).

13. Hutchinson, *supra* note 3, at 88; *see id.* (stating that a successful mediation will result in substantial savings to the parties by eliminating trial and appeal expenses, and reducing discovery expenses); *see also* Levy, *supra* note 9, at A19 (stating that companies that have used mediation have saved up to 75% over previous litigation costs).

14. Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation*, 2 OHIO ST. J. ON DISP. RESOL. 37, 38 (1986); *see id.* (stating that effective mediation requires candor).

15. *Id.*

16. *Id.*

17. *See* Assey, *supra* note 2, at 992. The Second Circuit Court of Appeals stated the following proposition:

> If participants cannot rely on the confidential treatment of everything that transpires during these [mediation] sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute.

Lake Utopia Paper, Ltd. v. Connelly Containers, Inc., 608 F.2d 928, 930 (2d Cir. 1979) (per curiam). *But see* Regents of the Univ. v. Sumner, 42 Cal. App. 4th 1209, 1213, 50 Cal. Rptr. 2d 200, 202 (1996) (holding that oral statements that define the scope of the settlement agreement reached after mediation are admissible to enforce the settlement since § 1152.5 of the California Evidence Code only protects statements made during the course of mediation, not oral agreements made after the mediation is over).

the future by making statements during the mediation process which might be detrimental to the case.[18]

Although there are several ways to protect statements made during mediation from becoming admissible as evidence, these methods often do not afford parties who have undergone mediation heightened protection.[19] Thus, many states have enacted specific provisions which ensure the confidentiality of statements made during mediation sessions.[20] California law provides disputants assurance that statements made during the course of mediation are not admissible as evidence nor subject to discovery.[21] Although the confidentiality provision provides parties with protection of those statements made during the mediation process, the provision, by itself, leaves open a gap with respect to statements made prior to the mediation process.[22]

The selection of the mediator is ultimately in the hands of the disputing parties.[23] Selecting the appropriate mediator to assist in the resolution of a dispute is of utmost importance because the mediator may potentially impair the chances of a fair resolution.[24] To test the qualifications and qualities of the mediator, either side may want to ask the potential mediator questions about certain aspects of the case to deter-

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18. Freedman & Prigoff, *supra* note 14, at 38; *see* Ryan v. Garcia, 27 Cal. App. 4th 1006, 1010, 33 Cal. Rptr. 2d 158, 160-61 (1994) (recognizing that the public policy underlying § 1152.5 of the California Evidence Code, which ensures confidentiality, is the promotion of mediation as a preferable alternative to judicial resolution of disputes).

19. Freedman & Prigoff, *supra* note 14, at 40; *see id.* (explaining that evidentiary exclusions under Federal Rule of Evidence 408, discovery limitations under Federal Rule of Civil Procedure 26, and agreements of confidentiality are among the ways in which parties could contest the admissibility of statements made during mediation); *id.* (contending that the above referenced provisions fail to afford these parties adequate protection).

20. *See, e.g.*, FLA. STAT. ANN. § 44.201(5) (West 1988 & Supp. 1997) (asserting that any information related to the dispute obtained from files, reports, case summaries, mediator notes, or other communications is confidential and cannot be disclosed unless there is written consent by all parties to the suit); IND. CODE ANN. § 4-21.5-3.5-18 (West Supp. 1996) (stating that an attorney must submit to the mediator confidential statements of the proceeding before the mediation conference, which shall remain privileged and confidential unless there is an agreement by the parties to the contrary); OR. REV. STAT. § 36.205 (West Supp. 1997) (proclaiming that communications made in connection with the mediation, whether made to the mediator, or to a party, or to any other person, if made at the mediation session, shall remain confidential); VA. CODE ANN. § 8.01-576.10 (Michie Supp. 1996) (stating that all memoranda, work products, or other materials which are in the case file of a dispute resolution program will be confidential).

21. CAL. EVID. CODE § 1152.5(a)(3) (amended by Chapter 174); *see id.* § 1152(a) (West 1995) (stating that evidence that a person has offered another a compromise for an injury is inadmissible to prove liability for loss or damage); CAL. FAM. CODE § 3177 (West 1994) (providing that mediation of custody and visitation issues will be confidential); CAL. GOV'T CODE § 11420.20 (West Supp. 1997) (requiring the Office of Administrative Hearings to adopt rules for alternative dispute resolution after July 1, 1997, which shall include confidentiality of mediation or arbitration proceedings); CAL. LAB. CODE § 65 (West 1989) (establishing that the records of the Department of Industrial Relations relating to labor disputes are confidential).

22. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1522, at 2 (June 26, 1996).

23. *See* Sochynsky, *supra* note 4, at 408 (explaining how to select the appropriate mediator).

24. *Id.*; *see id.* (specifying the attributes that a mediator should possess in order to effectively carry out the mediation job, including the following: excellent communication and negotiating skills, good active listening skills, a sense of fairness, a good understanding of human nature and practical psychology, good judgment, and the ability to analyze complex legal issues quickly).

mine expertise or sensitivity.[25] However, although selection of a suitable mediator necessitates this type of questioning, prior to the enactment of Chapter 174, statements made to a prospective mediator during a consultation were both subject to discovery and admissible during trial.[26]

Chapter 174 eliminates this problem by making confidential any statements made during a consultation with a mediator or mediation service for the purpose of retaining mediation services.[27] This provision ensures that parties contemplating mediation have no reason to avoid utilizing the process.[28]

However, opponents argue that Chapter 174 leaves itself open to potential abuse.[29] For instance, a party may wrongfully claim that a damaging communication sought to be admitted by the opposing party is inadmissible because it was made *for the purpose of hiring* the person as a mediator.[30] Consequently, opponents have suggested amending the statute to include a writing as evidence of the consultation.[31]

Advocates of Chapter 174, on the other hand, assert that a writing would merely complicate a process that is aimed at minimizing the formality of a court proceeding.[32] Moreover, supporters argue that abuse of the language of the provision will not be a threat to Chapter 174 because the phrase stating "for the purpose of hiring that service or mediator"[33] will most likely be strictly construed by judges.[34]

III. CONCLUSION

Mediation offers disputants an alternative method of dispute resolution which saves parties time and money, while at the same time minimizing the burdens placed on the overcrowded court system. Confidentiality, when guaranteed by the legislature, has the potential of encouraging parties to choose mediation as an alternative method of dispute resolution.[35] Without the assurance of confidentiality, parties may fear that if the mediation were to fail, statements made before or during the process

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25. *Id.*; *see id.* at 410 (stating that before a mediator is chosen, time should be taken to learn about the mediator so that everyone will be comfortable with the selection).

26. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1522, at 2 (June 26, 1996).

27. CAL. EVID. CODE § 1152.5(a)(3) (amended by Chapter 174).

28. *Wilson Signs Measure Designed to Increase Confidentiality of Mediation*, CAPITOL NEWS SERVICE (Sacramento, Cal.), July 18, 1996, at 3; *see id.* (stating that a representative of the California Dispute Resolution Council testified that the legislation was needed to avoid having parties refrain from using mediation).

29. David Kline, *Panel Approves Bill to Increase Confidentiality of Mediation*, CAPITOL NEWS SERVICE (Sacramento, Cal.), May 15, 1996, at 9.

30. *Id.*; *see id.* (stating that any person may claim, after the fact, that a social conversation at a cocktail party with a person who just happens to practice mediation was a consultation "for the purpose of retaining the mediator or mediation service").

31. *Id.*

32. *Id.*

33. *See* CAL. EVID. CODE § 1152.5(a)(3) (amended by Chapter 174).

34. Kline, *supra* note 29, at 9.

35. Ryan v. Garcia, 27 Cal. App. 4th 1006, 1010, 33 Cal. Rptr. 2d 158, 160-61 (1994).

would be used against them at trial.[36] For this reason, disputants may avoid using the mediation process altogether. Moreover, confidentiality, when offered, must protect the disputants at every level of the mediation process. Chapter 174 preserves the confidentiality of mediation *before* the beginning of the mediation process, thereby providing disputants with an incentive to resolve their disputes through a mechanism other than the overcrowded court system.

APPENDIX

Code Section Affected

Evidence Code § 1152.5 (amended).

AB 1522 (Greene); 1996 STAT. Ch. 174

36. *See supra* note 17 and accompanying text.

Evidence: The Usage of Hypnotically Enhanced Testimony Against Criminal Defendants

Joshua M. Dickey

I. INTRODUCTION

Opinions vary and misconceptions abound when hypnosis is the topic of conversation. For many people, hypnosis is no more than a parlor trick in which a "hypnotist" commands willing "volunteers" to act ridiculously. Others believe that hypnosis assures the veracity of the spoken word, much like a magic truth serum. Still, others do not believe in hypnosis at all. Thus, the opinions of lay persons and hypnosis researchers vary widely on the subject.

No generally accepted definition of hypnosis exists; however, most credible definitions include the suspension of critical judgment and the existence of extreme suggestibility.[1] Because of varying definitions and opinions, controversy surrounds the use of hypnosis in criminal trials.

II. POST-HYPNOTIC TESTIMONY: ADMISSIBILITY PROBLEMS AND JURISDICTIONAL SOLUTIONS

A. *Investigatory Usage*

Police departments often use hypnosis as an investigatory tool.[2] The ability of hypnosis to unlock blocked memories allows police to gain information otherwise seemingly beyond their reach.[3] Although some of the testimony gained from a hypnotized witness may be inaccurate,[4] the inaccuracies generally do not prejudice the defendant because the police only use the testimony to track down other

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1. Robert S. Spector & Teree E. Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 OHIO ST. L.J. 567, 570 (1977); *see id.* (defining "hypnosis" as an alteration in consciousness and concentration, in which the subject manifests a heightened degree of suggestibility, while awareness is maintained); *see also* Gary A. Shaw, *The Admissibility of Hypnotically Enhanced Testimony in Criminal Trials*, 75 MARQ. L. REV. 1, 1 (1991) (stating that nobody knows exactly what hypnosis is); Lisa K. Rozzano, Comment, *The Use of Hypnosis in Criminal Trials: The Black Letter of the Black Art*, 21 LOY. L.A. L. REV. 635, 639 (1988) (characterizing hypnosis as a state akin to sleep wherein an individual can exclude peripheral stimuli and intensely focus on a topic).

2. Rozzano, *supra* note 1, at 637.

3. *See id.* (stating that the increased potential for remembering events often leads to reliable independent physical evidence). *But see* Shaw, *supra* note 1, at 13-14 (suggesting that hypnosis may only result in success on a small number of occasions because much of the information gained from a hypnotized witness is inaccurate).

4. Shaw, *supra* note 1, at 15; *see infra* Part II.B. (describing factors contributing to the inaccuracy and unreliability of hypnotically enhanced testimony).

evidence.[5] Rather, the inaccuracies merely result in wasted resources used in following false leads.[6]

However, post-hypnotic testimony (testimony obtained after the witness underwent hypnosis) may prejudice a defendant when used against the defendant as evidence.[7] Accuracy of evidence is essential when a person's freedom hangs in the balance. A jury bases its decision upon the evidence presented; inaccurate evidence poses the danger of leading to an otherwise undeserved conviction.[8] Several factors contribute to the inaccuracy and unreliability of post-hypnotic testimony making it particularly dangerous as evidence.[9]

B. Evidentiary Usage

Three main problems render post-hypnotic testimony unreliable. Those problems are hyper suggestibility, confabulation, and memory hardening.[10]

1. Hyper Suggestibility

Hypnosis renders a person extremely susceptible to suggestion.[11] In fact, some people argue that suggestion is the "keystone of hypnosis."[12] For example, a hypnotist could suggest to the witness that the color of the defendant's jacket was brown when, in fact, the witness did not know the color of the defendant's jacket.[13] Suggestions may be transmitted both intentionally and unintentionally.[14] Moreover, even relatively minor details have proven to influence the subject of hypnosis.[15]

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5. *See* Shaw, *supra* note 1, at 15 (stating that no negative impact results from the inaccuracies).

6. *Id.*

7. *See* Rozzano, *supra* note 1, at 638 (expressing concern that unreliable post-hypnotic testimony may result in a wrongful conviction).

8. *See id.* (observing that inaccuracies in testimony may lead to a conviction based upon unreliable evidence).

9. *See* Shaw, *supra* note 1, at 8 (listing hyper suggestibility, confabulation, and memory hardening as factors that render post-hypnotic testimony inaccurate); *see also* Rozzano, *supra* note 1, at 639 (listing the same factors).

10. Shaw, *supra* note 1, at 8; *see* Rozzano, *supra* note 1, at 639 (listing the same general problems, although memory hardening is termed overconfidence).

11. Rozzano, *supra* note 1, at 639; *see* WEBSTER'S NEW INTERNATIONAL DICTIONARY 2286 (3d ed. 1971) (defining "suggestion" as the "inducing of an idea that is accepted or acted on readily and uncritically, as in hypnosis" or "the idea induced or the stimulus used to induce it").

12. Shaw, *supra* note 1, at 8.

13. *See id.* (asserting that a hypnotist could place memories in a witness's mind that do not match the reality of what the witness actually perceived).

14. *Id.* at 8-9.

15. *See* Rozzano, *supra* note 1, at 639-40 (stating that factors such as the hypnotist's clothes, the hypnotist's tone of voice, the phrasing of questions, and the environment of the hypnotic session influence the subject's answers).

Thus, some express concern that conducting a hypnotic session free of suggestion may be impossible.[16]

This poses problems because the witness cannot differentiate between the witness's own memories and those memories suggested after the hypnotic session.[17] The suggestion essentially becomes part of the witness's memory. Therefore, when courts admit post-hypnotic testimony, they run the risk that a witness might be recalling memories suggested to them by the hypnotist rather than testifying about actual recollections.[18]

2. *Confabulation*

Hypnosis suspends the subject's critical judgement, which hinders the subject's ability to differentiate between events that actually occurred and fantasy or mere guesses.[19] Confabulation occurs when the subject unknowingly makes up memories to fill in the memory gap.[20] Although several factors contribute to this phenomenon,[21] the danger lies in the post-hypnotic witness's inability to distinguish reality from confabulation.[22] Thus, confabulation creates a further risk of potential inaccuracies inherent in post-hypnotic testimony.

3. *Memory Hardening*

Memory hardening, or overconfidence, amplifies the problems created by hyper suggestibility and confabulation, and further creates problems of its own. Hypnosis may greatly increase an individual's confidence in their post-hypnotic testimony,[23] causing an otherwise hesitant witness to appear completely confident in his or her memory after undergoing hypnosis.[24] Thus, a witness may present a different appearance as a result of undergoing hypnosis.[25]

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16. *See, e.g.*, Shaw, *supra* note 1, at 9.
17. *Id.*
18. *See id.* at 8-9 (stating that the witness may adopt the suggestions of the hypnotist as actual recollections).
19. Rozzano, *supra* note 1, at 642.
20. Shaw, *supra* note 1, at 10; *see id.* (asserting that the subject of hypnosis may transfer fantasy, exaggeration, or other memories to compensate for a lack of memory regarding the particular subject); *see also* Rozzano, *supra* note 1, at 642 (characterizing hypnotically recalled memory as a "mosaic" of actual events, irrelevant actual events, and fantasy).
21. *See* Shaw, *supra* note 1, at 10-11 (citing the subject's wish to please the hypnotist, the subject's desire to help, and the hypnotist's use of leading questions as the possible causes of confabulation).
22. *See* Rozzano, *supra* note 1, at 642.
23. *See* Shaw, *supra* note 1, at 12 (stating that hypnosis may increase an individual's belief and confidence in his or her "memory" so that the witness is able to pass a lie detector test even when the testimony is in fact false).
24. Rozzano, *supra* note 1, at 643.
25. *See id.* (stating that the witness could appear confident in his or her testimony whereas prior to the hypnosis the witness would have appeared uncertain or tentative).

Predictably, a jury may lend more credence to a witness's testimony because of that witness's presentation.[26] In addition, the post-hypnotic witness could testify confidently regarding events that only exist in his or her memory because of hypersuggestibility or confabulation.[27]

Taken individually or as a whole, these three factors pose significant problems when considering the admissibility of post-hypnotic testimony in criminal trials. However, the possible relevance and utility of such testimony militate against banning the use of post-hypnotic testimony altogether. Therefore, jurisdictions vary in the way they address the problems that this testimony presents.

C. Different Approaches Regarding Admissibility

In general, jurisdictions have employed one of the following approaches with respect to the admissibility of post-hypnotic testimony: per se admissibility, admissibility with safeguards, and per se inadmissibility.[28] "Per se admissible" jurisdictions analogize hypnotically refreshed testimony to testimony refreshed by reading documents.[29] Thus, the use of hypnosis does not affect the admissibility of the testimony. Rather, these jurisdictions view the use of hypnosis as a credibility issue.[30] Accordingly, cross-examination is the tool used to address the problems associated with hypnosis because the jury decides whether the evidence is believable.[31] The Federal Rules of Evidence endorse this approach.[32]

"Admissible with safeguards" jurisdictions assume that safeguards can ensure the reliability of post-hypnotic testimony.[33] This approach seeks to balance the utility

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26. *Id.* at 644; *see id.* (noting the possible inability of the jury to determine the witness's credibility because of the witness's "unshakable demeanor").

27. Shaw, *supra* note 1, at 12; *see id.* (stating that hypnosis may enable a witness to pass a lie detector test even though the testimony is false).

28. *See* Thomas M. Fleming, *Admissibility of Hypnotically Refreshed or Enhanced Testimony*, 77 A.L.R. 4TH 927 (1995) (discussing the three jurisdictional approaches). *But see* Rozzano, *supra* note 1, at 664-67 (discussing a fourth standard: the ad hoc balancing approach). The ad hoc balancing approach can fit into the other three jurisdictional standards.

29. Randy J. Curato et al., *Evidence: Hypnotically Enhanced Testimony—A Question of Admissibility or Credibility for Criminal Courts?*, 58 NOTRE DAME L. REV. 101, 106 (1982).

30. Shaw, *supra* note 1, at 15-16.

31. Curato et al., *supra* note 29, at 106.

32. Rozzano, *supra* note 1, at 649; *see id.* at 649 n.50 (listing specific provisions of the Federal Rules of Evidence dealing with the competency of evidence); *see also* FED. R. EVID. 402 (declaring all relevant evidence admissible unless a statute or rule prohibits its admission); *id.* 403 (excluding unfairly prejudicial evidence); *id.* 802 (prohibiting the admission of hearsay evidence unless an exception provides otherwise). *See generally* Fleming, *supra* note 28 (discussing the different jurisdictional approaches regarding the admissibility of post-hypnotic testimony and listing cases from each jurisdiction).

33. Rozzano, *supra* note 1, at 653; *see* State v. Hurd, 432 A.2d 86, 96-97 (N.J. 1981) (establishing the following safeguards: (1) The hypnotic session must be conducted by a psychologist or psychiatrist experienced in the use of hypnosis, (2) the hypnotist must be independent, (3) a written record of any information must be given to the hypnotist before the hypnotic session, (4) the hypnotist must receive a detailed written account of the witness's testimony prior to the hypnotic session, (5) the session must be recorded and (6) the session must be

of hypnosis with the dangers of its use.[34] Thus, once the proponent of the evidence fulfills the procedural safeguards, the hypnotically enhanced testimony becomes admissible.[35] Once admitted, the opponent of the testimony may only attack the reliability of the procedures, not the reliability of hypnosis in general.[36]

Finally, "per se inadmissable" jurisdictions view post-hypnotic testimony as inherently unreliable because of the dangers posed by hypnosis.[37] These jurisdictions find hypnosis analogous to scientific evidence.[38] As scientific evidence, these jurisdictions subject hypnosis to the *Frye* test—a test which bases the admissibility of scientific evidence upon the scientific community's acceptance of the evidence as reliable.[39] Whether a witness who has undergone hypnosis may testify to a pre-hypnotic recollection varies with the jurisdiction.[40] California falls into this category.

III. CALIFORNIA LAW

Prior to the adoption of California Evidence Code § 795, the admissibility of hypnotically enhanced testimony was governed solely by California courts.[41] In *People v. Ebanks*[42] a California court first confronted the attempted use of hypnosis in a criminal prosecution.[43] The court summarily dismissed the issue holding that hypnotism was not recognized in the United States.[44] Consequently, this decision barred the use of hypnosis in criminal trials by California courts.[45]

Many years later, California courts changed position. For instance, in *People v. Colligan*,[46] a police officer hypnotized a victim of an armed robbery, in order to enable the victim to recall the license plate number of the getaway car.[47] While under hypnosis, the victim gave a description of the armed robber.[48] The defendant claimed

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limited to only the hypnotist and the subject of hypnosis); *id.* (requiring the proponent of the evidence to prove that the requirements are met by a preponderance of the evidence).

34. Curato et al., *supra* note 29, at 107.

35. *Id.*

36. *Id.* at 108.

37. Rozzano, *supra* note 1, at 656; *see id.* at 676-94 (discussing constitutional problems with the use of hypnotically enhanced testimony by a prosecutor against a criminal defendant).

38. Curato et al., *supra* note 29, at 108-09.

39. *See* Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (specifying that novel scientific evidence must be based upon reliable scientific principles and be generally accepted by the relevant scientific community); *see also infra* notes 51-53 and accompanying text (reviewing California's version of the *Frye* test).

40. Rozzano, *supra* note 1, at 656.

41. *See* People v. Ebanks, 117 Cal. 652, 665-66, 49 P. 1049, 1053 (1897) (declaring that the law does not recognize hypnosis and rejecting its usage without reference to any statute).

42. 117 Cal. 652, 49 P. 1049 (1897).

43. *Ebanks*, 117 Cal. at 665-66, 49 P. at 1053.

44. *Id.* at 665-66, 49 P. at 1053.

45. *See* Cornell v. Superior Court, 52 Cal. 2d 99, 102, 338 P.2d 447, 448 (1959) (citing *Ebanks* in support of the proposition that statements made while under hypnosis are not admissible at trial).

46. 91 Cal. App. 3d 846, 154 Cal. Rptr. 389 (1979).

47. *Colligan*, 91 Cal. App. 3d at 849, 154 Cal. Rptr. at 390.

48. *Id.*

that the victim's prior hypnosis tainted her identification of him at trial.[49] The court upheld the defendant's conviction finding that the use of hypnosis did not render the identification per se inadmissible.[50]

In *People v. Diggs*,[51] the court refined the idea that hypnotically enhanced testimony was not per se inadmissable, by analogizing the use of hypnotic testimony to the use of a new scientific technique.[52] The court specified the following three requirements that the witness must establish to ensure the reliability of the testimony: (1) The reliability of the method, (2) the expert status of the witness testifying to the reliability of the method, and (3) that the appropriate scientific procedure was used.[53] Finding that the evidence met these three requirements, the court upheld the use of hypnosis to enhance the victim's memory because the prosecution demonstrated that the testimony was sufficiently reliable.[54] Two years later, the California Supreme Court decided *People v. Shirley*.[55] In this case, a deputy district attorney hypnotized the victim in order to enhance her memory.[56] The court declined to adopt the "admissibility with safeguards" rule applied in other jurisdictions.[57] Instead, the court reaffirmed the *Kelly* test[58] that the court adopted in *Diggs*.[59] However, unlike *Diggs*, the court found that the relevant scientific community did not find hypnotically enhanced or refreshed testimony acceptable or reliable.[60] Thus, the court found the testimony inadmissable because hypnosis was not acceptable to the appropriate scientific community.[61]

In 1984, California adopted Evidence Code § 795.[62] Section 795 limits testimony to events recalled prior to hypnosis and requires the preservation of pre-hypnotic

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49. *Id.* at 850, 154 Cal. Rptr. at 391.

50. *Id.*

51. 112 Cal. App. 3d 522, 169 Cal. Rptr. 386 (1980).

52. *Diggs*, 112 Cal. App. 3d at 531, 169 Cal. Rptr. at 391.

53. *Id.*

54. *Id.*

55. 31 Cal. 3d 18, 723 P.2d 1354, 181 Cal. Rptr. 243 (1982).

56. *Shirley*, 31 Cal. 3d at 29, 723 P.2d at 1359, 181 Cal. Rptr. at 248.

57. *Id.* at 36-39, 723 P.2d at 1364-65, 181 Cal. Rptr. at 253-55; *see id.* (discussing the approach adopted in other jurisdictions that allow hypnotically refreshed testimony provided that specified procedural safeguards are met, and rejecting that approach).

58. *See* People v. Kelly, 17 Cal. 3d 24, 30, 549 P.2d 1240, 1244, 130 Cal. Rptr. 144, 148 (1976) (specifying three elements of the test which must be satisfied: (1) The witness must establish the reliability of the method by showing the general acceptance of the scientific community, (2) the proponent must qualify the witness as an expert, and (3) the proponent must establish that the correct scientific procedures were used).

59. *See supra* notes 51-53 and accompanying text.

60. *Shirley*, 31 Cal. 3d at 54, 723 P.2d at 1375-76, 181 Cal. Rptr. at 265; *see id.* at 54 n.32, 723 P.2d at 1375 n.32, 181 Cal. Rptr. at 264 n.32 (castigating the *Diggs* court for basing its conclusion upon the testimony of one expert rather than the acceptability of hypnosis in the relevant scientific community).

61. *Id.* at 66-67, 723 P.2d at 1383-84, 181 Cal. Rptr. at 272-73.

62. CAL. EVID. CODE § 795 (amended by Chapter 67).

testimony in written, audiotape, or videotape form.[63] Thus, California law holds post-hypnotic testimony per se inadmissible.[64]

Section 795 further specifies who may conduct the hypnosis, in addition to specifying various other procedural requirements.[65] Prior law required licensed Marriage, Family, and Child Counselors (MFCCs) to be certified by the Board of Behavioral Science Examiners.[66]

Chapter 67 amends existing law by no longer requiring certification of MFCCs.[67] Instead, MFCCs need only be experienced in the use of hypnosis to qualify under the statute.[68] The Board of Behavioral Science Examiners no longer certifies MFCCs in hypnosis because certification was not required of any other disciplines.[69] Thus, MFCCs no longer needed certification to use hypnosis in their practice. Yet, § 795 still required certification which was no longer provided and no longer available to MFCCs.[70] Therefore, Chapter 67 ensures that MFCCs can continue to conduct hypnosis for the limited use of pre-hypnotic testimony in criminal trials.

IV. ANALYSIS OF CALIFORNIA LAW

Hypnosis is often useful for medical and investigatory purposes.[71] California law seeks to accommodate these valid uses of hypnosis, while protecting against the dangers inherent with post-hypnotic testimony, by only allowing testimony regarding events recalled prior to hypnosis.[72] If testimony relating to pre-hypnotic memory were barred, police would likely refrain from using hypnosis to aid in their investigations, and would possibly discourage the medical use of hypnosis, for fear

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63. *Id.* § 795(a)(1)(2) (amended by Chapter 67).

64. *See id.* § 795(a)(1) (amended by Chapter 67) (limiting the admissibility of testimony of a witness who has undergone hypnosis to instances when the witness recalled prior to hypnosis).

65. *Id.*; *see id.* § 795(a)(3)(A)-(D) (amended by Chapter 67) (requiring a record of the witness's pre-hypnotic recollection and the information provided to the hypnotist, the witness's informed consent, and a video record of the hypnotic session).

66. 1987 Cal. Stat. ch. 285, sec. 1, at 1346-47 (amending CAL. EVID. CODE § 795); *see id.* (limiting the performance of hypnosis to certified MFCCs, licensed medical doctors, psychologists, or licensed clinical social workers experienced in the use of hypnosis).

67. *Compare* CAL. EVID. CODE § 795 (amended by Chapter 67) (requiring only that MFCC be experienced in the use of hypnosis to conduct hypnosis) *with* 1987 Cal. Stat. ch. 285, sec. 1, at 1346-47 (amending CAL. EVID. CODE § 795) (requiring MFCCs to be certified in hypnosis by the Board of Behavioral Science Examiners).

68. CAL. EVID. CODE § 795 (amended by Chapter 67).

69. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 2296, at 2 (June 4, 1996); *see* CAL. BUS. & PROF. CODE § 4980.02 (West Supp. 1996) (ceasing to require certification of MFCCs by the Board of Behavioral Science Examiners, and instead only requiring competence as established by their education, training, or experience in the use of hypnosis).

70. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 2296, at 2 (June 4, 1996).

71. Shaw, *supra* note 1, at 70 (stating that the use of hypnosis is valid for medical and investigatory uses).

72. *See* CAL. EVID. CODE § 795(a)(1) (amended by Chapter 67) (limiting the admissibility of the testimony of a witness who has undergone hypnosis to events recalled prior to the hypnotic session).

of jeopardizing their investigation.[73] However, under the California Rules of Evidence, the dangers of hypnosis would not attach to the witness's testimony because the witness would only testify to memories recalled prior to undergoing hypnosis.[74]

Unfortunately, merely limiting the testimony of a witness to events recalled and related prior to the hypnotic session may not adequately protect a defendant. Even pre-hypnotic testimony is not without its share of risks.[75] First, without proper procedures, determining whether the testimony is pre-hypnotic or post-hypnotic may be difficult.[76] California law adequately deals with this problem by requiring the preservation of pre-hypnotic testimony in a tangible form, the independence of the hypnotist, a written record of the information given to the hypnotist prior to the hypnotic session, and the video taping of the hypnotic session.[77] These procedures enable the courts to determine whether the testimony is pre-hypnotic or post-hypnotic.[78]

Second, memory hardening may pose problems even with pre-hypnotic recollections.[79] Hypnosis may increase an individual's confidence in his or her recollections.[80] A witness may question a recollection prior to hypnosis, whereas that same witness may appear totally confident in the accuracy of a recollection after hypnosis.[81] This unwarranted confidence may mislead the jury and seriously undermine the defendant's ability to cross-examine the witness.[82]

Section 795 requires that the "substance of the pre-hypnotic memory" be "preserved in written, audiotape, or video tape form."[83] Moreover, § 795 requires the

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73. *See* Shaw, *supra* note 1, at 70 (commenting that police could still use hypnosis for investigatory purposes without jeopardizing the use of valid information obtained prior to hypnosis).

74. CAL. EVID. CODE § 795(a)(1) (amended by Chapter 67).

75. *See* Shaw, *supra* note 1, at 73-74 (noting the possibility that a witness's pre-hypnotic testimony may be inaccurate).

76. *Id.* at 71.

77. CAL. EVID. CODE § 795(3)(A)-(C) (amended by Chapter 67).

78. *See* Shaw, *supra* note 1, at 71-73 (specifying procedures to ensure that testimony is in fact pre-hypnotic, and noting that these procedures, while applying to pre-hypnotic testimony, mimic the *Hurd* guidelines for post-hypnotic testimony). *Compare* State v. Hurd, 432 A.2d 86, 96-97 (N.J. 1981) (specifying procedural safeguards to ensure the reliability of hypnotically enhanced testimony) *with* CAL. EVID. CODE § 795 (amended by Chapter 67) (containing many of the *Hurd* protections and applying them to pre-hypnotic testimony).

79. Shaw, *supra* note 1, at 73.

80. *See supra* notes 23-25 and accompanying text (discussing the phenomenon of memory hardening).

81. *See* Rozzano, *supra* note 1, at 643 (stating that the witness could appear confident while testifying whereas prior to the hypnosis the witness would have appeared uncertain or tentative).

82. *See* Shaw, *supra* note 1, at 73 (stating that memory hardening interferes with a defendant's right to cross-examine a witness).

83. CAL. EVID. CODE § 795(a)(2) (amended by Chapter 67); *cf.* People v. Tunstall, 468 N.E.2d 30, 34 (N.Y. 1984) (listing the following factors to determine if a defendant's right to cross-examine a witness has been impaired by memory hardening of the witness: (1) The degree of the witness's confidence prior to hypnosis, (2) the witness's belief that hypnosis yields the truth, (3) the degree of witness's hypnosis, (4) the length of the hypnotic session, (5) the questions asked in the hypnotic session, (6) the extent of additional details supplied by hypnosis, and (7) any other factors the court deems appropriate based upon the circumstances).

proponent of the evidence to prove by clear and convincing evidence that neither the reliability of the witness nor the defendant's ability to cross-examine the witness has been impaired.[84] Additionally, the statute allows the defendant to attack the credibility of the witness.[85] Thus, in theory, a defendant need only raise the issue of memory hardening to force the proponent to prove that this phenomenon did not occur.

However, in practice, California law may be inadequate because it fails to require a visual assessment of the witness's pre-hypnotic testimony. Videotaping captures the essence of the witness's pre-hypnotic testimony best because a person conveys confidence not only with the spoken word but with body language as well.[86] Audiotapes and the written word do not account for a witness's physical conduct in recalling events. Thus, audiotapes deprive the court of an important factor in making its determination. A wise prosecutor would videotape the pre-hypnotic recollection since the prosecutor has the burden of showing that hypnosis did not affect the defendant's ability to cross-examine the witness.[87]

However, the statute authorizes written and audio recordation of the pre-hypnotic recollection.[88] Because the statute does not require a determination based upon visual assessment, some courts may find the written word enough to satisfy the proponent's burden. Should the court do so, it would fail to account for the witness's body language and demeanor, which are important factors in determining whether memory hardening occurred. Therefore, a court's determination without a visual assessment of the witness's pre-hypnotic testimony may deny a defendant's right to cross-examination.[89] Thus, placing a clear and convincing evidence burden on the prosecution may not be enough to protect the defendant's rights.

On the other hand, § 795 requires the videotaping of the hypnotic session including the *pre- and post-hypnosis* interview.[90] If the pre-hypnosis interview includes the witness's recall of events, the videotape would capture the witness's physical behavior. However, the statute does not specify whether the hypnotist must inquire about the witness's recall prior to the hypnotic session.[91] Because the hypnotist must receive a written record of the witness's recollection prior to the hypnotic session,[92] the hypnotist may not inquire about the witness's recollection in

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84. CAL. EVID. CODE § 795(a)(3)(D) (amended by Chapter 67).

85. *Id.* § 795(b) (amended by Chapter 67).

86. *See supra* notes 23-25 and accompanying text (stating that hypnosis may make an otherwise hesitant witness appear confident thereby changing that witness's appearance).

87. *See* CAL. EVID. CODE § 795 (amended by Chapter 67) (requiring the proponent of the evidence to establish the reliability of the testimony by clear and convincing evidence).

88. *Id.* § 795(a)(3)(A) (amended by Chapter 67).

89. *See* Rozzano, *supra* note 1, at 677-83 (discussing a defendant's constitutional right to confront a witness).

90. CAL. EVID. CODE § 795 (a)(3)(C) (amended by Chapter 67).

91. *See id.* (failing to specify that a hypnotist must inquire about the witness's recall in the pre-hypnosis interview).

92. *Id.* § 795(a)(3)(A) (amended by Chapter 67).

the pre-hypnosis interview. This scenario leaves open the possibility that no visual recordation of the witness's pre-hypnotic recollection will be available. Accordingly, California should specifically require some type of visual recordation of the witness's pre-hypnotic recall so that the fact-finder can truly assess whether memory hardening has occurred. As a further safeguard, the statute should include factors to help determine whether the hypnosis caused memory hardening.[93]

V. CONCLUSION

California law goes a long way in balancing the utility of hypnosis with the dangers of its usage by not allowing post-hypnotic testimony. Assuming California law adequately protects a defendant from the problems associated with hypnotically enhanced testimony, Chapter 67 makes necessary changes to ensure that pre-hypnotic testimony of a witness hypnotized by an MFCC is still admissible. However, problems regarding memory hardening and the right of a defendant to cross-examine a witness may still exist if a witness is allowed to testify about his or her pre-hypnotic recollections without further protections against memory hardening.

APPENDIX

Code Section Affected

Evidence Code § 795 (amended).

AB 2296 (Gallegos); 1996 STAT. Ch. 67

93. *See, e.g.*, People v. Tunstall, 468 N.E.2d 30, 34 (N.Y. 1984) (listing the following considerations adopted by the New York Court of Appeals to determine whether a defendant's right to cross-examination has been prejudiced by memory hardening: (1) The amount of confidence the witness had in his or her pre-hypnotic recollection, (2) the extent of his or her belief that hypnosis yields the truth, (3) the degree he or she was hypnotized, (4) the length of the session, (5) the nature and type of questioning employed, (6) the effectiveness of hypnosis in finding additional details, and (7) any other factors the court deems important).

Technology and the Best Evidence Rule

Sean Allen

I. INTRODUCTION

Technology is changing the way people communicate and interact. The law must adapt and grow with these changes or risk becoming obsolete and ineffective. The best evidence rule maintains it is better for the trier of fact to view the full original[1] of a writing[2] than a copy purporting to represent that writing which may have been tampered with or that may present only a portion of the relevant evidence.[3] In 1983, an exception to the best evidence rule was enacted to allow printed representations of the information contained on computers.[4] California has now added exceptions for images stored on video tape and digital medium[5] in recognition of developing law enforcement methods and technology.[6]

II. BACKGROUND

Chapter 345 is sponsored by the Sacramento Police Department.[7] They are currently in the final stages of testing a new method of crime scene investigation using digital technology and want to ensure any evidence they capture with the new methods will be admissible in court.[8] While prior law was designed to, and would likely, cover the new technology, the Sacramento Police Department wanted to ensure no challenges would develop.[9]

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1. *See* CAL. EVID. CODE § 255 (West 1995) (defining "original" as the writing itself or any counterpart intended to have the same effect by the person executing or issuing it); *see also* FED. R. EVID. 1001(3) (providing the same definition of original as found in California Evidence Code § 255).

2. *See* CAL. EVID. CODE § 250 (West 1995) (defining "writing" as "handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols or combinations thereof"); *see also* FED. R. EVID. 1001(1) (defining "writings" as "letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electrical recording, or other form of data compilation").

3. *See* CAL. EVID. CODE § 1500 (West 1995) (stating that the best evidence rule requires that no evidence other than the original of a writing is admissible to prove the content of that writing); *see also* 2 B.E. WITKIN, CALIFORNIA EVIDENCE, *Documentary Evidence* § 922 (3d ed. 1986) (explaining that there is an opportunity for fraud or misrepresentation unless the original of a writing is produced).

4. CAL. EVID. CODE § 1500.5(b) (West Supp. 1997).

5. *Id.* § 1500.6 (enacted by Chapter 345).

6. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2897, at 2 (July 7, 1996).

7. *Id.*; *see id.* (noting that the Sacramento Police Department sponsored Chapter 345 due to the development of new technologies in law enforcement).

8. *Id.* at 2-3; *see id.* (explaining the new method of recording crime scenes utilizing digital technology that records images to a computer disc instead of standard film).

9. *Id.* at 3.

At a time when budgetary considerations are granted the highest priority, inexpensive and reliable methods made possible by new technologies are extremely valuable to local, state, and national public entities.[10] Therefore, it seems safe to assume other law enforcement agencies will follow the example of the Sacramento Police Department in the coming years. Consequently, the threshold issue of the admissibility of video and digital evidence is arguably of national importance.

III. ANALYSIS

The best evidence rule was designed to minimize the possibilities of misinterpretation and misrepresentation of "writings" by requiring the production of the original writings themselves.[11] The definitions of what constitute "writings" and "originals" far exceed the normal everyday meaning of the words.[12] As technology and the means of recording information have developed, the definitions have expanded to include more than just the hand or typewritten word.[13] "Writing" and "original" now encompass virtually every form of nonverbal communication to protect against the introduction of fraudulent evidence.[14] Unfortunately, the rule can also be a burden upon the court system. In a technology-driven age, it can be much more efficient to allow the use of representations of an original which are easier to understand and produce than the original itself.[15]

Chapter 345 was enacted to provide an exception to the best evidence rule for images stored on video and digital mediums identical to that contained in the California Evidence Code for computer information.[16] However, while the Advisory

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10. *See id.* at 2-3 (explaining that digital and video technology is cheaper and faster than existing methods of crime scene recordation).

11. 7 Cal. L. Rev. Comm. Reports 1, 277 (1965).

12. *See supra* notes 1-2 (defining "writing" and "original"); *see also* Jones v. City of Los Angeles, 20 Cal. App. 4th 436, 440 n.5, 24 Cal. Rptr. 2d 528, 530 n.5 (1993) (stating that a videotape is a "writing").

13. *See supra* note 12 (providing authority for the expanded definition of "writing").

14. *See supra* notes 1-2 (setting forth every major form of nonverbal communication utilized in the United States); *see also* WITKIN, *supra* note 3, § 922 (stating there is an opportunity for fraud unless the original is produced as evidence).

15. *See* CAL. EVID. CODE § 1500.5 (West Supp. 1997) (allowing printed representations of the information stored on a computer instead of requiring submission of the computer itself which would be meaningless to most triers-of-fact without further time-consuming explanation).

16. *See id.* (providing similar language to that found in California Evidence Code § 1500.6). California Evidence Code § 1500.5(a)-(c) reads as follows:

> [A] printed representation of computer information or a computer program which is being used by or stored on a computer or computer readable storage media shall be admissible to prove the existence and content of the computer information or . . . program.
>
> Computer recorded information . . . shall not be rendered inadmissable by the best evidence rule.
>
> Printed representations of computer information and computer programs will be presumed to be accurate representations . . . . This presumption, however, will be a presumption affecting the burden of producing evidence only. If any party to a judicial proceeding introduces evidence that such a printed representation is inaccurate or unreliable, the party introducing it into evidence will have the burden of proving, by a preponderance of evidence, that the printed representation is the best available evidence

Committee on the Federal Rules of Evidence acknowledged that the need for a best evidence rule is substantially decreased with the increased latitude in discovery procedures, it is important to note there are no similar exceptions in the Federal Rules of Evidence.[17] The Federal Rules of Evidence preserve the best evidence rule because of a few limited circumstances.[18] In addition, the federal rules were written to take into account new technologies such that videotapes and mechanical or electronic recordings fall within the best evidence rule.[19] Thus, by creating an exception for those types of evidence, California is at the cutting edge of revisions to the best evidence rule. These revisions may later be followed by the Federal Rules of Evidence as they have already acknowledged the primary purpose of the rule has dissipated with enhanced discovery procedures.[20]

A. *Videotapes*

Several states and the Federal Rules of Evidence consider videotapes to be writings for purposes of the best evidence rule.[21] California, however, created an exception for videotapes and allows a party to submit images from a tape, instead of the entire tape.[22] Thus, the images stored on videotape are now considered the same as those stored on motion picture film where every frame is considered a writing in its own right.[23] The addition is logical because the images stored on any type of film are simply captured light. There is no reason to treat them differently because of the type of film they are recorded upon.

However, opponents of Chapter 345 were concerned that it would abrogate the decision in *People v. Enskat*.[24] In that case, police officers took pictures of a film being shown in a theater and attempted to have those pictures introduced as

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of the existence and content of the computer information or computer programs that it purports to represent.

Id. § 1500.5(a)-(c) (West Supp. 1997).

17. FED. R. EVID. 1001 advisory committee's notes.

18. *Id.; see id.* (setting forth that discovery of documents from outside the courts, jurisdiction, unanticipated documents, and differing discovery rules in criminal cases are sufficient reasons to maintain the best evidence rule).

19. *See* FED. R. EVID. 1001(1), (2) (providing definitions of "writings" and "photographs" for the best evidence rule).

20. *See id.* advisory committee's notes (setting forth the history of the best evidence rule and explaining that discovery rules have lessened its importance).

21. *See, e.g.*, FLA. STAT. ANN. § 90.951 (West 1979) (defining "videotape" as a "writing" under the best evidence rule); GA. CODE ANN. § 24-5-26 (1995) (same); MONT. CODE ANN. § 26-10-1001 (1995) (same); N.C. GEN. STAT. § 8C-1001 (1992) (same); FED. R. EVID. 1001(2) (same); DEL. R. EVID. ANN. 1001 (same); MINN. R. EVID. 1001 (same); N.H. R. EVID. 1001 (same); OH. EVID. R. 1001 (same); R.I. EVID. R. 1001 (same); TENN. R. EVID. § 1001 (1996); VT. R. EVID. § 1001 (1983).

22. CAL. EVID. CODE § 1500.6 (enacted by Chapter 345).

23. *See* People v. Enskat, 20 Cal. App. 3d Supp. 1, 3, 98 Cal. Rptr. 646, 647 (1971) (stating each individual frame of a motion picture is a writing in and of itself).

24. 20 Cal. App. 3d Supp. 1, 98 Cal. Rptr. 646 (1971); SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2897, at 2 (July 7, 1996).

evidence.[25] The court determined that the film itself, and not the pictures, was the proper evidence.[26] To prevent abuses of this type, the legislation includes provisions specifically stating Chapter 345 does not abrogate the decision in *Enskat*.[27] Thus, Chapter 345 enables the direct use of single images stored on videotape, but does not allow other representations of those images.[28]

B. Digital Medium

The exception for digital images is the most natural extension of the exception for computer information contained in California Evidence Code § 1500.5.[29] Digital imaging relies upon special equipment which records images directly to a computer disc.[30] Those images are very clear and provide law enforcement agencies much greater flexibility in their use of the images in addition to eliminating some of the costs associated with standard photography.[31]

Opponents of the digital imaging technology are concerned that it will be easy to manipulate and alter, thus defeating the purpose of the best evidence rule.[32] Proponents argue that the new technology is no easier to alter than standard photographs and negatives.[33] The ultimate conclusion to this question shall be revealed through experience sometime in the future, but until then, the proponents' argument may be presumed correct because their beliefs prevailed in the legislature.[34] Regardless, there are safeguards built into Chapter 345 and existing law which make abuses of the new medium, or videotape evidence, highly unlikely.

Chapter 345 contains provisions stating the party attempting to introduce the video or digital images must prove by a preponderance of the evidence that the images are accurate representations of the whole.[35] This guarantees that if any dispute regarding the accuracy of the images does arise, the aggrieved party can be assured the judge will view the entire recording, or at least its relevant portions. While this may result in trial delays, juries will not be given tainted evidence unless the court fails in its duty. If the jury does receive tainted evidence, an appeal is available. In the long run, Chapter 345 will save valuable docket time by freeing the trier of fact from being forced to endure full presentations when a more simple showing will suffice.

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25. *Enskat*, 20 Cal. App. 3d Supp. at 3, 98 Cal. Rptr. at 647.
26. *Id.* at 3-4, 98 Cal. Rptr. at 647-48.
27. CAL. EVID. CODE § 1500.6(b) (enacted by Chapter 345).
28. *Id.* 1500.6(a) (enacted by Chapter 345).
29. *See id.* § 1500.5 (West 1995) (setting forth the exception to the best evidence rule for computer data).
30. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2897, at 1 (July 7, 1996).
31. *Id.* at 2-3.
32. *Id.* at 3.
33. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2897, at 4 (June 25, 1996).
34. *See* CAL. EVID. CODE § 1500.6 (enacted by Chapter 345). The passage of the legislation indicates the arguments of the proponent carried more weight with the legislature.
35. *Id.*

In addition, trial courts have tremendous discretion on what to allow into evidence.[36] The best evidence rule itself is extremely flexible in allowing the courts to exercise this discretion.[37] Courts are to consider the chance of inaccuracy, the importance of the evidence, and the difficulty of producing a full original before determining whether to require production of an original.[38] Thus, while in many cases, the digital or video images could be admitted prior to Chapter 345, even with it, the images may not be the best evidence.[39] In this respect, Chapter 345 will have very little effect on existing law.

IV. CONCLUSION

Chapter 345 is a logical and natural extension of existing exceptions to the best evidence rule. The courtroom must maintain pace with the rest of society, and that means adapting to new and innovative technologies. The videotape exception shows that the legislature realizes there is little or no difference between the types of film an image is stored upon. The digital exception is probably already contained in existing law as well because it utilizes a computer disc. However, as a newer technology, there may be possible undiscovered potentials for abuse. These unknown potential abuses will likely amount to nothing. To the extent the medium can be tampered with, the discretion of the court along with the available procedures to demand production of the full recording should prevent any abuses. Nonetheless, if the safeguards prove to be insufficient, the legislature can remove the exception as easily as it included it.

APPENDIX

Code Section Affected

Evidence Code § 1500.6 (new).

AB 2897 (Bowler); 1996 STAT. Ch. 345

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36. *See* People v. Johnson, 39 Cal. App. 3d 749, 762, 114 Cal. Rptr. 545, 565 (1974) (noting that a trial court has wide discretion in determining what evidence to admit).

37. People v. Mastin, 115 Cal. App. 3d 978, 985, 171 Cal. Rptr. 780, 783 (1981).

38. *Id.; see id.* (discussing the factors a trial court is to consider in utilizing its discretion on the submission of evidence); *id.* (listing as factors the importance of the original and the difficulties involved in producing the original).

39. *See Johnson*, 39 Cal. App. 3d at 763, 114 Cal. Rptr. at 554 (stating an eyewitness will always be the best evidence over any recorded representation).