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Judges As Legislators?: The Propriety of Judges Drafting Legislation

Joshua M. Dickey*

I. INTRODUCTION

In 1994, the California legislature passed the Three Strikes law which creates a mandatory twenty-five year to life sentence for the commission of a third felony.¹ Three Strikes engendered controversy from its inception. For instance, commentators criticized the break down in the political process which resulted in Three Strikes being rammed through the legislature.² Many people, including some prosecutors, claim that the law is over-broad because non-violent felons may be sentenced to life in prison.³ Another point of contention is the huge cost Three Strikes imposes on the state of California.⁴ The fact that three judges, including a California appellate court judge, were involved in promulgating this legislation adds to this controversy. [and raises the issue of whether it is appropriate for judges to draft legislation.]

In a 1994 debate concerning Three Strikes, Mike Reynolds, the father of a murder victim and chief proponent of Three Strikes, asserted that three judges drafted the law.⁵ Subsequently, the judges acknowledged their involvement in promulgating

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1. CAL. PENAL CODE § 667 (West 1996).

2. It is beyond the scope of this Comment to provide an in-depth analysis of California's Three Strikes legislation. Rather, this Comment uses Three Strikes as a springboard to examine the propriety of judges participating in the drafting of legislation. For an excellent critique of Three Strikes, see Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395 (1997).

3. See Dwayne Bray, *Theft Case at Center of '3 Strikes' Controversy*, L.A. TIMES, July 18, 1994, at B1 (describing a case in which a defendant who stole eighteen bottles of drugstore cologne faced a possible life prison term under Three Strikes); see also Stone Phillips, *NBC Nightly News: California's 'Three Strikes' Law Comes Under Fire*, (NBC television broadcast, Aug. 30, 1994) (discussing a case in which a defendant who had two prior felony convictions of robbery and attempted robbery, may face life in prison for stealing a piece of pizza from a group of children at a pizza parlor).

4. See Adam Entous, *'Three Strikes' Law Puts California in a Fiscal Bind*, COM. APPEAL, Nov. 25, 1994, at 4A (stating that Three Strikes will cause an "explosion" in the prison population which will increase costs and require the construction of more prisons); see also *id.* (citing a Department of Corrections estimate that Three Strikes will require the construction of 20 to 25 new prisons and citing a Rand Corporation estimate of a 5.5 billion dollar annual cost for Three Strikes).

5. Dan Morain, *California Elections/Proposition 1984; Sponsor Says Judges Helped Write '3 Strikes'; Legal Experts Say Such Jurists Should Be Disqualified from Cases Involving the Sentencing Measure. Mike Reynolds Refuses to Identify Those Who Helped Him*, L.A. TIMES, Oct. 19, 1994, at A3.

Three Strikes.⁶ The extent of judges's involvement in developing Three Strikes remains unclear.⁷ Although it remains unclear whether the judges actually put pen to paper in participating in the development of Three Strikes, the scenario raises an interesting questions regarding not only whether such an action is proper, but also whether such action is desirable.

Throughout our nation's history, both legislators and judges have called for a more interactive relationship between the legislature and the judiciary.⁸ In 1921, Justice (then Judge) Cardozo advocated the creation of an agency to bridge the gap between the legislative and judicial branches of the government.⁹ Many modern judges, legislators, and commentators urge an increased interaction between these two branches.¹⁰ The focus of this Comment will be upon the propriety of judges drafting legislation, an example of interaction taken, perhaps, to an extreme.

This Comment will begin by addressing the separation of powers doctrine as it relates to judges drafting legislation. Subsequently, judicial ethics will be examined. This Comment then will analyze a judge's First Amendment rights and conclude that the government's interest in maintaining the legitimacy of the judicial institution outweighs an individual judge's First Amendment right to draft legislation. This Comment then argues that a judge's role, as defined by the type of legislation and the judge's purpose in becoming involved with the legislation, determines the propriety of this type of action. Finally, this comment concludes that, regardless of the type of legislation, it is unnecessary for any individual judge to *draft* legislation.

6. Dan Morain, *Judge Admits His Role in '3 Strikes' Law: James A. Ardaiz of Fresno State Appellate Panel Says He Helped Author the Legislation. He had Planned to Recuse Himself from 'Substantive' Legal Questions Involving the Issue*, L.A. TIMES, Nov. 3, 1994, at A3.

7. See, e.g., Louis Galvan, *Judges Defend Role in '3 Strikes'*, FRESNO BEE, Oct. 26, 1994, at B1 (representing that the judges acknowledged that they helped write Three Strikes but noting that many other individuals, who were not judges, gave their input before the final draft was approved). The act of helping another individual write legislation may encompass little more than the contribution of an idea. It does not necessarily imply the actual drafting of the legislation.

8. Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1176 (1996).

9. Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 114 (1921).

10. Geyh, *supra* note 8, at 1176-77; see *id.* at 1177 (giving the following reasons for the modern call for the increased interaction between the judiciary and the legislature: (1) The need to sensitize legislators to the effect their actions have on an overburdened judiciary; (2) the special expertise of judges; and (3) the need to enlighten the judiciary about legislative constraints through participation in the legislative process).

II. SEPARATION OF POWERS

A. General Theory Behind the Separation of Powers Doctrine

Judges have unique training which makes them particularly qualified to assess legislation critically.¹¹ First, they are trained lawyers familiar with the intricacies of the law. Second, judges apply the law on a daily basis. Therefore, judges become familiar with the substantive shortcomings of particular legislation and recognize common drafting errors that may lead to future problems. Thus, involving judges in the drafting of legislation arguably would improve the quality of the legislation as well as save valuable resources which would otherwise be wasted on poorly drafted legislation.¹² However, efficiency must give way to the Constitution: "[T]he fact that a given law or procedure is efficient, convenient and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."¹³

The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.¹⁴ Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control for *the judge* would then be *the legislator*.¹⁵

These concerns regarding the concentration of power gave rise to the doctrine of separation of powers. Despite the importance of separation of powers to the framers, they failed to express the theory in the Constitution. Rather, the doctrine is embedded in the structure of the Constitution.¹⁶ It ensures that one branch of govern

11. See CAL. CODE OF JUD. ETHICS, Canon 4(B) advisory committee commentary (stating that "[a]s a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law"); MAEVA MARCUS & EMILY FIELD VAN TASSEL, JUDGES AND LEGISLATORS TOWARD INSTITUTIONAL COMITY: JUDGES AND LEGISLATORS IN THE NEW FEDERAL SYSTEM, 1789-1800 43 (quoting a letter from Representative Robert Goodloe Harper to Justice Paterson in which Goodloe sought the "views" of the justices of the Supreme Court regarding the Judiciary Act of 1789 stating that "no persons can be so competent to that task as judges"); see also Deanell Reece Tacha, *Judges and Legislators: Renewing the Relationship*, 52 OHIO ST. L.J. 279, 294 (1991) (stating that judges' professional experiences enable them to develop valuable and practical views regarding legislation).

12. See Tacha, *supra* note 11, at 279-80 (arguing that increased communication between the legislative and judicial branches on the "Biden Bill" would have avoided misunderstanding and facilitated a more efficient development of the law).

13. *INS v. Chadha*, 462 U.S. 919, 944 (1983).

14. FEDERALIST NO. 47, at 139 (James Madison) (Roy P. Fairfield, 2d ed., 1981).

15. *Id.* at 141.

16. See U.S. CONST. art. I-III (specifying the legislative, the executive, and the judicial branches of government and enumerating their powers); see also *Springer v. Government of the Philippine Islands*, 277 U.S. 189, 201-02 (1928) (stating that the United States Constitution does not expressly mandate separation of powers; rather it is implicit from the structure of the Constitution); Kristen L. Timm, Note, "The Judge Would Then Be the Legislator": Dismantling Separation of Powers in the Name of Sentencing Reform—*Mistretta v. United States*, 65 WASH. L. REV. 249, 250 (1990) (noting that the Constitution does not express the doctrine of separation of powers).

ment will not impermissibly interfere with the constitutional mandate of another branch of government.¹⁷ By separating governmental powers, the Framers intended one branch of government to check the other branches of government and to protect the individual from oppression.¹⁸

Nevertheless, separation of powers is not constitutionally mandated for state legislatures.¹⁹ However, all fifty states recognize the separation of powers doctrine.²⁰ California's Constitution expressly provides for the separation of powers.²¹

Despite the importance of the separation of powers doctrine, it does not mandate an absolute separation.²² The United States Constitution provides for significant overlap between the branches of the government. For instance, judges are appointed by the executive branch;²³ the legislative branch may impeach the president;²⁴ and the judiciary may strike down both executive and legislative actions should they violate the Constitution.²⁵ Thus, the Constitution requires an *interdependence* without which governance would be impossible.²⁶ Indeed, a modern view of the separation of powers doctrine perceives the branches as dependent upon one another: In most instances, at least two branches of the government must work together in order to accomplish anything that may prejudice individual rights.²⁷

See generally LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 2-1 (1978) (noting that the basis of the theory was a concern for the individual, yet the means chosen to protect the individual were mechanical and stating that "structure would thus serve substance, in a framework ultimately supervised by a disinterested judiciary").

17. Jordan Fried, Essay, *The Constitutionality of the U.S. Sentencing Commission: An Analysis of the Role of the Judiciary*, 57 GEO. WASH. L. REV. 704, 704 (1989).

18. TRIBE, *supra* note 16, at § 2-1.

19. See, e.g., *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902) (holding that a state is free to determine whether or not to recognize the separation of powers doctrine).

20. See Robert M. O'Neil, *The Separation of Powers in a Federal System*, 37 EMORY L.J. 539 (1988).

21. See CAL. CONST. art. III, § 3 ("The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution"); see also 1 B.E. WITKIN, *SUMMARY OF CALIFORNIA LAW*, *Constitutional Law* § 107 (noting that the California Constitution expressly adopted the doctrine of separation of powers).

22. See *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (observing that the Framers of the federal Constitution rejected the idea of an absolute separation of powers). Indeed, in Federalist number 47, James Madison was arguing against opponents of the Constitution who felt that the Constitution did not adequately separate the powers of the government. He argued that separation of powers did not mean that the branches of government "ought to have no *partial agency* in, or no *control over*, the acts of each other." Rather, the doctrine of separation of powers was concerned with one branch of the government exercising the "whole" power of another branch. See also FEDERALIST No. 47, at 140 (James Madison) (Roy P. Fairfield, 2d. ed., 1981).

23. See U.S. CONST. art. II, § 2, cl. 2 (declaring that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court").

24. See U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments").

25. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 87, 110-113 (holding that the courts determine whether a statute is constitutional); see also *id.* at 111 (declaring that "[i]t is, emphatically, the province and duty of the judicial department, to say what the law is").

26. See *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (stating that the nation would not be able to effectively govern itself without interdependence between the separate branches of government).

27. One commentator has summarized our constitutional structure as an "institutional interdependence rather than functional independence that best summarizes the American idea of protecting liberty by fragmenting power." TRIBE, *supra* note 16, at 17; see *id.* at 16 (demonstrating the notion that branches must cooperate with an example

In addition to the constitutionally mandated institutional interplay between the branches of government, in the past, individuals have functioned in more than one "branch" of the government. For example, judges often lobbied individual members of Congress for statutory changes and improvements.²⁸ Federal judges often informally advised Congress during the formative years of our country.²⁹ Several Supreme Court Justices worked with a congressional committee in amending the Judiciary Act;³⁰ Two Justices even submitted their own versions of the bill.³¹ Indeed before adopting the final version of the Judiciary Act of 1789, members of Congress sought the advice of several Justices before they settled upon the final version of the bill.³²

Many of these incidents occurred shortly after the inception of the United States.³³ One can explain these occurrences in one of two ways. Either the Framers were willing to look the other way out of necessity, or the Framers did not consider these activities as intruding upon the separation of powers doctrine.³⁴

As these examples illustrate, "separation of powers" does not require an absolute separation. The Framers envisioned a violation of separation of powers only where "the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department."³⁵ Thus, whether a judge's active role in the drafting of legislation violates the separation of powers doctrine requires analysis of the powers of each branch of government.

of a federal law: Passage of a law requires approval by the legislature, the agreement of the executive branch who otherwise can veto the legislation, and the cooperation of the judiciary and the executive branch to enforce the law).

28. See Geyh, *supra* note 8, at 1174-76 (stating that the Administrative Office of the United States Courts, which is in control of the Judicial Conference, lobbies Congress urging support of positions taken by the Judicial Conference); see also *id.* at 1172 (noting that the Judicial Conference is composed entirely of federal judges); Tacha, *supra* note 11, at 286-88 (giving examples of judges lobbying members of Congress).

29. Tacha, *supra* note 11, at 286 (1991); see MARCUS & VAN TASSEL, *supra* note 11, at 41 n.30 (stating that President Washington often sought the advice of Chief Justice John Jay on a personal basis).

30. MARCUS & VAN TASSEL, *supra* note 11, at 43; see *id.* (recounting that the Supreme Court Justices worked openly with a committee responsible for creating a new Judiciary Act).

31. *Id.* The two justices were William Patterson and Bushrod Washington. *Id.*

32. *Id.*; see *id.* (noting that after the committee responsible for drafting the Judiciary Act had done so, Representative Robert Goodloe Harper wrote to Justice James Paterson seeking the Paterson's opinion on the bill and suggesting that other justices examine the bill); see also Geyh, *supra* note 8, at 1168-69 (stating that, from our country's inception, federal judges have participated in the legislative process when proposals have affected federal court procedure).

33. See *supra* notes 28-32 and accompanying text (providing examples of judges involving themselves with legislation).

34. See MARCUS & VAN TASSEL, *supra* note 11, at 35-36 (stating that the original justices of the Supreme Court recognized the somewhat competing needs of an independent judiciary versus the desire to "make use of the talents of eminent men" and began to formulate a policy to accommodate both interests).

35. FEDERALIST NO. 47, at 140 (James Madison) (Roy P. Fairfield, 2d. ed., 1981).

B. Judicial and Legislative Functions

The United States Constitution defines the powers of each branch of the government.³⁶ Article I of the United States Constitution enumerates the powers of the legislative branch and grants Congress the power to “make all Laws which shall be necessary and proper” to carrying forth its enumerated powers.³⁷ Congress enjoys sole power within this realm.

Article III defines the judicial power,³⁸ limiting the judiciary to hearing only “cases and controversies.”³⁹ In *Muskraat v. United States*,⁴⁰ the United States Supreme Court found that legislation passed for the sole purpose of granting specific individuals standing to challenge the validity of legislation concerning the distribution of Native American land allotments was invalid.⁴¹ The Court found that the lawsuit failed the “case and controversy” requirement of the United States Constitution because no actual controversy existed between the plaintiffs and the government.⁴² Rather, the sole purpose of the legislation was to “settle the doubtful character of the legislation in question.”⁴³ The adjudication required the Court to give an advisory opinion, a power not granted to the judiciary.⁴⁴ Thus, the enumerated powers of the court limited judicial action to adjudicating actual disputes.

California’s Constitution also prohibits the promulgation of advisory opinions.⁴⁵ Moreover, California’s Constitution expressly requires the separation of powers⁴⁶ and also defines the powers of each branch of government.⁴⁷ The power to legislate has been defined as the power to “make, alter, and repeal laws.”⁴⁸ This includes the power to define criminal offenses and prescribe punishment for those crimes.⁴⁹ The

36. See U.S. CONST. art. I-III (enumerating the powers of the legislative, executive, and judicial branches of the federal government); see also CAL. CONST. art. IV-VI (documenting the powers of the legislative, executive, and judicial branches of California’s government).

37. U.S. CONST. art. I, § 8, cl. 18; see *Springer v. Government of the Philippine Islands*, 277 U.S. 189, 202 (1928) (stating that the legislative power is the authority to make laws).

38. U.S. CONST. art. III.

39. U.S. CONST. art. III, § 2, cl. 1-2.

40. 219 U.S. 346 (1911).

41. *Muskraat*, 219 U.S. at 363.

42. *Id.* at 361.

43. *Id.* at 361-62.

44. *Id.* at 362.

45. *People ex rel. Lynch v. Superior Court*, 1 Cal. 3d 910, 912, 464 P.2d 126, 127, 83 Cal. Rptr. 670, 671 (1970); see *id.* (declaring that “[t]he rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court”); see also *People v. Bird*, 212 Cal. 632, 640, 300 P. 23, 26 (1931) (defining the judicial power as the power “to hear and determine controversies between adverse parties and questions in litigation”).

46. CAL. CONST. art. III, § 3 (“The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.”).

47. See CAL. CONST. art. IV (defining the legislative power); *id.* art. VI (defining the judicial power).

48. 13 CAL. JUR. 3D § 110, at 251; see *In re Lasswell*, 1 Cal. App. 2d 183, 188-89, 36 P.2d 678, 680 (1934) (stating that it is the “purpose, right, and duty” of the legislature to enact legislation).

49. 13 CAL. JUR. 3D § 110, at 252.

judicial power can be defined as the power to “declare the law and determine the rights of parties to a controversy before the court.”⁵⁰ Accordingly, the legislature possesses the power to define criminal conduct before any wrong is committed; the judiciary is limited to enforcing the law as it applies to particular instances of conduct as defined by the legislature.⁵¹

In addition to the judiciary’s adjudicatory powers, case law has recognized that the courts possess other non-adjudicatory powers.⁵² For example, the power of the courts to promulgate housekeeping rules is well established.⁵³ In *Mistretta v. United States*, the Court declared that the legislative branch could delegate nonadjudicatory functions to the judicial branch as long as those functions did not “trench [sic] upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary.”⁵⁴ Thus, at least the federal courts have been open to the idea of the judiciary performing functions that are traditionally nonadjudicatory.

C. Modern Separation of Powers Test

1. Functional Approach

In *Mistretta v. United States*, a criminal defendant challenged federal sentencing guidelines as violating the separation of powers doctrine.⁵⁵ The Supreme Court stated that separation of powers violations are defined by “encroachment and aggrandizement.”⁵⁶ Provisions of law that “accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch[es]” violate the Constitution.⁵⁷

First, the Court examined whether the Act aggrandized power in the judicial branch. The Court began by recognizing that members of the judicial branch could conduct some nonadjudicatory functions in addition to deciding cases and controversies.⁵⁸ The Court then reasoned that the power of the judiciary was not expanded because judges traditionally evaluated the same factors on an individual basis under

50. 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 109 (1988).

51. 13 CAL. JUR. 3D § 109, at 249.

52. *Mistretta v. United States*, 488 U.S. 361, 386 (1989).

53. *Id.* at 388; *see Sibbach v. Wilson*, 312 U.S. 1, 9-10 (1941) (holding that Congress possesses the authority to prescribe rules of pleading and practice in the federal courts and further holding that Congress may properly delegate this authority to the United States Supreme Court).

54. *Mistretta*, 488 U.S. at 388.

55. *Id.* at 370.

56. *Id.* at 382; *see id.* (“It is this concern of encroachment and aggrandizement that has animated our separation of powers jurisprudence.”).

57. *Id.*

58. *Id.* at 386. In particular the court focused upon the generally accepted principle that judges can make judicial rules. *Id.* at 386-87. *See supra* note 53 and accompanying text (discussing the judiciary’s authority to make “housekeeping rules”).

the regime of indeterminate sentencing.⁵⁹ Therefore, the Act did not unconstitutionally expand the powers of the judiciary.

Second, the Court considered whether the Sentencing Reform Act encroached upon the judicial function. Encroachment occurs where the judiciary's authority and independence are undermined.⁶⁰ The Court looked to the history of judges performing extrajudicial duties and concluded that the separation of powers doctrine does not prohibit judges from participating in extrajudicial service.⁶¹ The Court also concluded that the judge's participation on the committee did not undermine the judiciary's impartial appearance because sentencing is traditionally a judicial function.⁶² Thus, because judges traditionally made sentencing decisions, the Sentencing Commission was acting within the Judiciary's power.⁶³ Therefore, the Court found that the placement of the Sentencing Commission in the judicial branch and the participation of federal judges on the Commission did not undermine the independence or integrity of the judiciary.

2. California

The California Constitution provides that "[p]ersons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."⁶⁴ However, California courts have failed to articulate a clear test to determine a violation of separation of powers.⁶⁵ The essence of the doctrine in California seems to be that one branch of the government cannot deny another branch of the government an exclusive power.⁶⁶

59. *Mistretta*, 488 U.S. at 395. "In sum, since substantive judgment in the field of sentencing has been and remains appropriate to the Judicial Branch, and the methodology of rulemaking has been and remains appropriate to that Branch" the location of the Sentencing Commission within the judicial branch does not violate the principle of separation of powers. *See id.* at 396-97.

60. *Id.* at 382; *see id.* at 407 (noting that the legitimacy of the judiciary hinges upon its impartial appearance).

61. *Id.* at 398-400; *see id.* at 401 (stating that "Our 200-year tradition of extrajudicial service is additional evidence that the doctrine of separated powers does not prohibit judicial participation in certain extrajudicial activity"); *id.* at 404 (declaring that the Constitution "does not forbid judges to wear two hats; it merely forbids them to wear both hats at the same time").

62. *Id.* at 404; *see id.* at 407-08 (stating that the Judicial Branch was not participating in the making of law by determining what acts should be criminalized or participating in the enforcement of the law; rather the Commission was merely promulgating rules for "the exercise of the Judicial Branch's own business"); *id.* at 407 (declaring that sentencing "has been and will continue to be performed exclusively by the Judicial Branch").

63. *Id.* at 407-08.

64. CAL. CONST. art. III, § 3.

65. *See* 13 CAL. JUR. 3D § 100 at 222-23 ("The separation of powers doctrine has throughout its history been the subject of much conflict in judicial opinions relating to its application . . . the courts have struggled to maintain the doctrine in its pristine rigor, while laboring to devise novel theories to permit government to function in spite of it.") (footnotes omitted).

66. CAL. CONST. art. III, § 3; *see* 13 CAL. JUR. 3D § 101 at 224 (stating that the "chief qualification of the separation requirement has been by way of denying the exclusive nature of any governmental power or function other than the basic or ultimate power or authority" of any particular branch of government).

In *Butt v. California*,⁶⁷ the California Supreme Court held that a lower court violated the separation of powers doctrine when it approved the diversion of emergency loan funds, that the Legislature intended for other purposes, from appropriations.⁶⁸ The court reasoned that the lower court's order impinged on the legislature's constitutional power to enact appropriations;⁶⁹ emergency loans must be specifically appropriated to the district by the legislature.⁷⁰ Therefore, because the funds were earmarked for purposes entirely distinct from an emergency loan to a school district, the lower court infringed upon the legislative power by approving the loan.⁷¹

In a concurring and dissenting opinion, Justice Kennard criticized the majority for applying a formalistic conception of separation of powers in which particular powers can be categorized as falling within the exclusive realm of one of the three branches of government.⁷² Justice Kennard argued that the majority's formalistic classification was inconsistent with the modern understanding of separation of powers.⁷³ Justice Kennard relied on *Mistretta v. United States*⁷⁴ and on *Nixon v. Administrator of General Services*⁷⁵ in support of her position.⁷⁶ Moreover, Justice Kennard argued that separation of powers is meant to prevent one branch of government from exercising the complete power of another branch of government, not to prohibit appropriate action which incidentally duplicates the power of another branch of government.⁷⁷

The majority in *Butt* refuted Justice Kennard's argument by stating that adherence to precedent is not rigid or formalistic.⁷⁸ The majority worried that Justice Kennard's approach would give the judiciary "unchecked power"⁷⁹ and would

67. 4 Cal. 4th 668, 842 P.2d 1240, 15 Cal. Rptr. 2d 480 (1992).

68. *Butt v. California*, 4 Cal. 4th 668, 674, 842 P.2d 1240, 1243, 15 Cal. Rptr. 2d 480, 483 (1992).

69. *Id.* at 698, 842 P.2d at 1260, 15 Cal. Rptr. 2d at 500.

70. *Id.* at 701, 842 P.2d at 1262, 15 Cal. Rptr. 2d at 502.

71. *Id.* at 701-02, 842 P.2d at 1263, 15 Cal. Rptr. 2d at 503.

72. *Id.* at 707 (Kennard, J., concurring and dissenting), 842 P.2d at 1266-67, 15 Cal. Rptr. 2d at 506-07.

73. *Id.* at 707 (Kennard, J., concurring and dissenting), 842 P.2d at 1267, 15 Cal. Rptr. 2d at 507.

74. *Mistretta v. United States*, 488 U.S. 361 (1989).

75. 433 U.S. 425 (1977).

76. See *Butt*, 4 Cal. 4th at 707-08 (Kennard, J., concurring and dissenting), 842 P.2d at 1267, 15 Cal. Rptr. 2d at 507 (arguing that the California Supreme Court should employ the same analysis as that employed by the United States Supreme Court).

77. *Butt*, 4 Cal. 4th at 709, 842 P.2d at 1267-68, 15 Cal. Rptr. 2d at 507-08; see *Younger v. Superior Court*, 21 Cal. 3d 102, 117, 577 P.2d 1014, 1024, 145 Cal. Rptr. 674, 684 (stating that the purpose of the separation of powers doctrine "is to prevent one branch of government from exercising the complete power constitutionally vested in another; it is not intended to prohibit one branch from taking action properly within its sphere that has the incidental effect of duplicating a function or procedure delegated to another branch") (citations omitted).

78. *Butt*, 4 Cal. 4th at 702, 842 P.2d at 1263, 15 Cal. Rptr. 2d at 503; see *id.* (arguing that the precedent the court relied on in making its decision was a "practical, sensitive, and principled balance between the legislative and judicial power over appropriations").

79. *Id.*

“elevate” the judiciary above the other branches of government in violation of the separation of powers doctrine.⁸⁰

Because Justice Kennard relied upon *Mistretta* in her objection to the majority opinion, the majority may have implicitly rejected the separation of powers analysis adopted by the federal courts.⁸¹ Therefore, California may apply an analysis similar to that advocated by Justice Scalia in his dissent in *Mistretta*.⁸² Justice Scalia argued that the Constitution is the framework wherein the Framers themselves considered how much commingling between the branches was acceptable.⁸³ If the commingling is not expressly approved in the Constitution, a violation of separation of powers results.⁸⁴ Indeed, the California Constitution supports a more rigid analysis because it explicitly mandates the separation of powers.⁸⁵ Such an explicit command provides much less leeway for theoretical arguments that stretch the concept of separation of powers.⁸⁶ Thus, California courts may be more willing to apply a rigid, formal analysis to separation of powers issues.

Therefore, the applicability in California of the functional approach is suspect. Insofar as the California Supreme Court has not definitely resolved its position, this Comment will explore both a formal analysis and a functional analysis to determine whether a judge violates the separation of powers doctrine by drafting legislation.

3. Drafting Legislation

a. Formal Analysis

Under a formal view of separation of powers, the powers of the three branches of government are compartmentalized.⁸⁷ A violation of the separation of powers

80. *Id.* at 703, 842 P.2d at 1264, 15 Cal. Rptr. 2d at 504.

81. *See id.* at 703-704, 842 P.2d at 1264, 15 Cal. Rptr. 2d at 504 (rejecting Justice Kennard’s argument calling for an analysis similar to that applied in the federal courts). *See also id.* at 707-08, 842 P.2d at 1266-67, 15 Cal. Rptr. 2d at 506-507 (Kennard, J., concurring and dissenting) (arguing that federal authority should govern the analysis of separation of powers issues).

82. *See Mistretta v. United States*, 488 U.S. 361, 426 (Scalia, J., dissenting) (arguing that a case-by-case analysis of potential separation of powers violations is wrong).

83. *Id.*

84. *See id.* (declaring that “to treat the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much—how much is too much to be determined, case-by-case, by this court” is wrong; instead the Constitution should be viewed as a prescribed structure for the conduct of government).

85. CAL. CONST. art. III, § 3.

86. *Id.*; *see id.* (stating that “[p]ersons charged with the exercise of one power may not exercise either of the others except as permitted by this constitution”); *see also* 13 CAL. JUR. 3D § 110, at 251 (defining the legislative power as the power to “make, alter, or repeal laws”); *id.* § 109, at 249 (defining the judicial power as the power to “declare law and determine the rights of parties”).

87. *See Butt v. California*, 4 Cal. 4th 668, 709, 842 P.2d 1240, 1267, 15 Cal. Rptr. 2d 480, 507 (Kennard, J., concurring and dissenting) (stating that a rigid classification of government powers views those particular powers as being exclusive to one branch of government respectively).

doctrine occurs where a particular branch of the government exceeds its constitutionally enumerated powers by exercising the power of another branch of the government.⁸⁸ In California, the legislative power is defined as the power to "make, alter, and repeal" laws,⁸⁹ whereas the judicial power is defined as the power to declare the law and determine the rights of the parties before the court.⁹⁰ Thus, the legislature defines criminal offenses and punishment for those offenses prior to the alleged criminal activity whereas the judiciary applies the laws articulated by the legislature to the particular defendant before the court.⁹¹

Drafting legislation does not fall within the judiciary's power to adjudicate legal rights and determine legal controversies.⁹² Therefore, under a formal analysis, the judges' participation in the drafting of legislation may violate the doctrine of separation of powers.

Moreover, neither the United States Constitution nor the California Constitution permits the judiciary to propound advisory opinions.⁹³ Judges have a duty to uphold the Constitution.⁹⁴ Pursuant to this duty, judges determine the validity of legislation when it comes before them as a case and controversy.⁹⁵ However, prior to the enactment of legislation, there is no case or controversy because nobody can be harmed by a particular piece of legislation that does not exist.⁹⁶ Thus, a judge acts beyond his

88. See *id.* at 707, 842 P.2d at 1267-68, 15 Cal. Rptr. 2d at 506-07 (Kennard, J., concurring and dissenting) (characterizing the majority's interpretation of separation of powers as being formalistic and describing the formalistic approach as characterizing functions and assigning them exclusively to one of the three branches of government).

89. 13 CAL. JUR. 3D § 110 at 251 (citing *People v. Seymour* 16 Cal. 332 (1860) in support of this proposition).

90. See 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 109 (summarizing the judicial powers).

91. See *In re Lasswell*, 1 Cal. App. 2d 183, 188-89, 36 P.2d 678, 680 (1934) (stating that "the courts have no voice in the policy nor in the wisdom of legislative action; they construe the language of the statute and determine its constitutional status"); *In re Shrader*, 33 Cal. 279, 283 (1867) (declaring that "[l]egislative power prescribes rules of conduct for the government of the citizen or subject, while judicial power punishes or redresses wrongs growing out of a violation of rules previously established"); see also 13 CAL. JUR. 3d § 109, at 249 (making the same distinction).

92. See CAL. CONST., art. VI (vesting the judicial power in the Supreme Court, courts of appeal, superior courts, and municipal courts); *People v. Bird*, 212 Cal. 632, 640, 300 P. 23, 26 (1931) (defining the judicial power as the power "to hear and determine controversies between adverse parties and questions in litigation" and noting that this power consists of adjudicating legal rights). See, e.g., U.S. CONST., art. III (limiting the judicial power to deciding "cases and controversies").

93. See *supra* notes 38-45 (reviewing authority prohibiting the judiciary from furnishing advisory opinions).

94. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 87, 111-13 (declaring that judges have a duty to follow the Constitution); see also *id.* at 112-13 (quoting the judicial oath of office:

I do solemnly swear, that I will administer justice, without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as —, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States").

Id. (emphasis added).

95. *Muskat v. United States*, 219 U.S. 347, 361-62 (1911).

96. See *id.* at 357 (stating that "case and controversy" implies the existence of adverse parties "whose contentions are submitted to the court for adjudication").

or her constitutional power when the judge comments upon the validity of legislation prior to the existence of a true case and controversy.⁹⁷

By drafting legislation, a judge implicitly asserts that the legislation is valid.⁹⁸ Given the judge's duty to uphold the constitution, we must assume the judge thought that the legislation was valid—otherwise the judge would not have drafted it. Therefore, a close analogy can be drawn between a judge drafting legislation and a judge rendering an impermissible advisory opinion.

Even under a rigid analysis, courts have traditionally distinguished actions undertaken by a judge while acting as a judge and actions undertaken by a judge while acting as an individual.⁹⁹ Only actions of the judiciary as an institution were subjected to review under the separation of powers doctrine.¹⁰⁰ Shortly after the inception of the United States, Supreme Court Justices participated in activities, such as the formulation of legislation, that could be considered a violation of separation of powers.¹⁰¹ Indeed, some justices even drafted legislation themselves and submitted it to congressional committees.¹⁰² This conduct by judges, who were charged with a duty to uphold the constitution, so proximate to the founding of our country, combined with the lack of any authority finding a separation of powers violation for individual conduct supports the proposition that, so long as judges act as individuals, they do not violate the separation of powers doctrine.

Using the Three Strikes scenario, did the judges who helped promulgate Three Strikes act as individuals or did they act as judges? Mike Reynolds, the driving force behind the Three Strikes law, is a family acquaintance of one of the judges.¹⁰³ Reynolds asked for to help in drafting the legislation shortly after Reynolds' daughter was murdered in 1992.¹⁰⁴ Mr. Reynolds did not petition the court for action but rather approached the judges in an individual capacity. The judges did not invoke any judicial powers. These facts strongly suggest that the judges acted as individuals. Moreover, the fact that the judges' participation in the drafting of Three Strikes

97. See *id.* at 361 (declaring that the court cannot declare legislation valid or invalid absent the existence of a true case or controversy).

98. See Timm, *supra* note 16, at 264 (arguing that when a judge participates in the promulgation of sentencing guidelines, the judge "symbolically places a judicial seal of approval" on the legislation).

99. MARCUS & VAN TASSEL, *supra* note 11, at 36-37; see *id.* (noting that the Supreme Court Justices developed the distinction in response to events taking place in the 1790s); see also Geyh, *supra* note 8, at 1172 (stating that judges historically communicated with the legislature on an individual basis and continue to do so today).

100. MARCUS & VAN TASSEL, *supra* note 11, at 36 (describing the distinction enunciated by the Supreme Court as one wherein the court as an institution would "adhere scrupulously" to the separation of powers doctrine while the justices as individuals were free to participate in activities that would otherwise appear inappropriate for the judiciary as an institution).

101. See *supra* notes 28-32 and accompanying text (recounting examples of extra-judicial activity by Supreme Court Justices early in the formative years of the United States).

102. See *supra* note 32 and accompanying text (detailing the example of Supreme Court Justices drafting versions of the Jud. Act of 1789).

103. Morain, *supra* note 5, at A3.

104. *Id.*

remained unknown shows the individual nature of the action because institutional actions would be more public.¹⁰⁵ Therefore, it appears that the judges acted as individuals and their actions did not violate the separation of powers doctrine under a rigid analysis.

b. Functional Analysis

In *Mistretta*, the United States Supreme Court stated that separation of powers violations are defined by encroachment and aggrandizement.¹⁰⁶ It declared that a violation will only be found where one branch of the government impounds powers to itself which should be spread between the branches of government or where the actions of one branch of the government undermine the authority or independence of that branch of government.¹⁰⁷

i. Does the drafting of legislation by a judge accrete power to the judiciary which is more appropriate to the legislative branch?

Although "making law" is hard to define, examples taken from the legislative process shed light on the meaning of this phrase. For instance, members of the legislature do not hold a monopoly upon drafting legislation. Legislative staff and legislative counsel are key participants in the drafting function yet these participants are not considered law makers in a government powers context. In addition, lobbyists, who are private citizens, often submit legislation to members of the legislature to further their clients' interests. Private citizens also have been known to draft legislation and submit it to the legislature.¹⁰⁸

The activities of the Judicial Conference are, perhaps, most relevant to this analysis. The Administrative Office of the United States Courts drafts legislation to implement proposals of the Judicial Conference and submits this legislation to members of Congress for introduction as bills.¹⁰⁹ The Judicial Conference, which is made up entirely of federal court judges,¹¹⁰ controls the Administrative Office.¹¹¹ Thus, in essence, the federal judiciary submits drafts of legislation to Congress on a regular

105. See *id.* (reporting that one of the judges acknowledged his participation in the promulgation of Three Strikes long after the proposed legislation became known to the public).

106. See *Mistretta v. United States*, 488 U.S. 361, 382 (1989) (declaring that separation of powers violations are defined by encroachment and aggrandizement).

107. *Id.*

108. Mike Reynolds is a private citizen who was involved with three judges in drafting the Three Strikes legislation in California. See Morain, *supra* note 5, at A3 (stating that Mike Reynolds collaborated with the judges to "write a measure aimed at imprisoning repeat offenders").

109. Geyh, *supra* note 8, at 1174-75. The Judicial Council of California provides a strikingly similar analog wherein judges, through the Council, participate in creating legislation dealing with court administration, practice, and procedure. See CAL. CONST. art. VI, § 6.

110. Geyh, *supra* note 8, at 1172.

111. *Id.* at 1174.

basis. Despite the judiciary's involvement with drafting legislation, nobody has challenged this practice as a violation of separation of powers. If these actions are considered "making law," this practice violates the separation of powers doctrine because the judiciary would be accreting legislative power to itself. However, the Court has never found fault with this practice, implying that judges do not "make law" by drafting legislation.

The legislature's ability to pass legislation seems to define the power to make law. As discussed above, numerous people who are not legislators often draft legislation. Yet the legislature, alone, enjoys the power to breathe life into legislation.¹¹² Thus, the essence of "making law" appears to be the power to give pending legislation legal force, which is done through approval of the legislature.¹¹³ Three Strikes did not become law when the judges drafted the legislation. Only when the legislature approved Three Strikes did it become law—the judges did not interfere with the making of the law because the judges played no role in the legislative approval. Therefore, the judge's participation in drafting the statute did not inappropriately divert power to the judiciary.

In addition, sentencing traditionally is an aspect of the judicial function.¹¹⁴ In *Mistretta*, the United States Supreme Court upheld placement of the United States Sentencing Commission in the Judicial Branch of the government and upheld the participation of federal judges on that commission.¹¹⁵ The court reasoned that because sentencing is a function "peculiarly shared" among the branches of government, judicial participation did not improperly accrete power to the judiciary.¹¹⁶ Since Three Strikes enhances the penalties for repeat offenders of violent crimes,¹¹⁷ it may be appropriately characterized as a sentencing measure. According to reasoning in *Mistretta*, judges would not have been acting outside their judicial role by involving themselves in activity concerning sentencing. Therefore, involvement in drafting criminal sentencing legislation would not violate separation of powers.

112. See CAL. CONST. art. IV, § 1 (declaring that the Senate and the Assembly are vested with the legislative power); see also *In re Lasswell*, 1 Cal. App. 2d 183, 188-89 (1934) (stating that the legislative power consists of enacting legislation). But see CAL. CONST. art. II, § 8 and § 9; *id.*, art. IV, § 1 (granting the people the power to make and repeal law through the initiative and referendum process). It should be noted that the making of laws by the people involves no government power and is distinct from the separation of powers issue. The legislature remains the sole branch of government that holds the power to give ideas the force of law.

113. See FEDERALIST NO. 78, at 270 (James Madison) (Roy P. Fairfield, 2d ed., 1981) (stating that the judiciary is the weakest branch of the government and that the judiciary cannot really do anything to jeopardize liberty without the aid of one of the other two branches of government). Here, the bill drafted by three judges did not become law until the valid actions of the legislature made it law.

114. See *Mistretta v. United States*, 488 U.S. 361, 396 (1989) (stating that "substantive judgement in the field of sentencing has been and remains appropriate to the Judicial Branch"). But see *supra* note 51 and accompanying text (declaring that in California the power to define crimes and prescribe penalties is a legislative power).

115. *Mistretta*, 488 U.S. at 390.

116. *Id.* at 390-91; see *id.* at 391 (analogizing the participation of the judiciary in promulgating sentencing guidelines to the promulgation of rules of procedure by the courts under the enabling acts).

117. See CAL. PENAL CODE § 667(e)(2) (West Supp. 1996) (imposing a prison term of 25 years to life imprisonment for individuals convicted of a third felony).

ii. *Does the Drafting of Legislation by a Judge Encroach Upon the Judicial Function?*

Where actions encroach upon the judicial function, a violation of separation of powers will be found.¹¹⁸ Encroachment occurs where the judiciary's authority and independence are undermined.¹¹⁹ The impartial appearance of the judiciary is critical to the integrity and legitimacy of the judicial branch¹²⁰ because the judiciary's legitimacy derives from the public perception that the judiciary is impartial and independent.¹²¹ Public cynicism towards the judicial system jeopardizes the authority of the judicial branch and magnifies the need for the appearance of an impartial judiciary.¹²²

Separating the judiciary from politics preserves this appearance of impartiality.¹²³ By drafting legislation, a judge participates in a function typically considered legislative and thus political.¹²⁴ Therefore, by participating in drafting legislation, judges surrender their politically impartial appearance. Moreover, when judges draft legislation, they implicitly assert that the legislation is valid.¹²⁵ This apparent approval suggests that the judge has decided the legislation is valid and will not be impartial when he or she decides a challenge to the legislation. Drafting legislation is analogous to pretrial statements of a judge. If a judge, prior to a particular defendant's trial, announced to the press that she thinks that the defendant is guilty, common sense weighs against the conclusion that the judge could decide the case in a neutral manner.¹²⁶ When a judge drafts legislation, the appearance of partiality is arguably worse.

118. *Mistretta*, 488 U.S. at 382; *see id.* (stating "[i]t is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence"); *see also id.* at 383 (articulating the following two dangers that concern the court where the Judicial Branch is specifically involved: (1) That the Judicial Branch does not perform tasks more appropriate to other branches (aggrandizement) and (2) that the institutional integrity or the Judicial Branch remains intact (encroachment) (citations omitted)).

119. *Id.* at 382.

120. *See Timm*, *supra* note 16, at 264 (stating that impartiality is key to judges' ability to decide cases effectively).

121. *Fried*, *supra* note 17, at 729.

122. *See Geyh*, *supra* note 8, at 1167 (suggesting that the public views the judiciary cynically and citing the dissatisfaction with the verdicts in the O.J. Simpson and Rodney King trials as examples of public frustration with the judiciary); *see also id.* (stating that the judiciary's increased role in statutory reform has increased the public cynicism with the judicial branch of the government).

123. *Timm*, *supra* note 16, at 263-64.

124. *See id.* at 264 (condemning the participation of federal judges on the United States Sentencing Commission because such participation involves the judiciary in political functions).

125. *See id.* (arguing that when a judge participates in the promulgation of sentencing guidelines, the judge "symbolically places a judicial seal of approval" on the legislation).

126. *See J. Clark Kelso*, *Time, Place, and Manner Restrictions on Extrajudicial Speech by Judges*, 28 *LOY. L.A. L. REV.* 851, 857 (1995) (posing a similar hypothetical); *id.* at 864-65 (stating that a judge's claim that she can remain neutral despite her pretrial statements is analogous to a judge's claim that he or she can remain neutral when judging a statute that he or she drafted: both assertions "def[y] common sense and experience").

Ordinarily, the text and the intent of an independently drafted statute impose a buffer between a judge's opinion and the result reached by that judge. However, where a judge sits in judgment of a statute he or she drafted, the buffer imposed by the text and intent of the legislation is removed. The judge sits in judgment of his or her own creation that the judge already determined was valid.

Moreover, one judge's participation in the drafting of legislation may influence the decision of other judges who hear a challenge to the legislation at another time.¹²⁷ Other judges may be more willing to give the legislation the benefit of the doubt or assess the legislation less critically when another judge drafted the legislation.¹²⁸

The federal analysis of separation of powers issues is supposed to provide a more flexible, case-by-case approach to these issues which, in turn, allows for greater interaction between the branches of government.¹²⁹ Ironically, however, the emphasis on the appearance of impartiality in the federal analysis calls into doubt this type of interaction.¹³⁰ Arguably, judges who draft legislation could possibly convey the appearance of partiality and, therefore, such activity could encroach upon the judicial function by undermining the authority and independence of the judiciary.

Advocates of an increased role for judges in the legislative process distinguish between the judge's personal views and the judge's ability to apply established law objectively in the courtroom.¹³¹ This argument presupposes the estrangement of a judge's personal views from the law. But when a judge participates in the drafting of legislation, his or her personal views become intertwined with the proposed legislation.¹³² This casts doubt upon the impartiality of the judge and, in turn, conjures the specter of a separation of powers violation.

127. See Fried, *supra* note 17, at 727 (asserting that judges may be "swayed" by the participation of another judge in the articulation of sentencing guidelines and therefore the judge may not be able to give an impartial adjudication); Timm, *supra* note 16, at 264 (stating that judicial participation in an arguably legislative arena could predispose other judges in favor of the rule or law).

128. Timm, *supra* note 16, at 264; *see id.* (citing respect for a colleagues' judgment as the source of bias in favor of the law).

129. See *Mistretta v. United States*, 488 U.S. 361, 381-83 (1989) (recognizing that the United States Constitution does not require a "hermetic division among the Branches" and accepting commingling so long as no encroachment or aggrandizement exists); *see also* Butt v. California, 4 Cal. 4th 668, 707-08, 842 P.2d at 1267-68, 15 Cal. Rptr. 2d at 507-08 (recognizing the federal approach as flexible and approving commingling so long as complete aggrandizement does not occur).

130. See *supra* notes 124-28, and accompanying text (discussing the appearance of partiality conveyed by the judiciary participating in the drafting of legislation).

131. See Kelso, *supra* note 126, at 852 (recognizing that judges can argue that their personal views outside the courtroom do not interfere with their application of the law in the courtroom to circumvent Canon 4 of the Model Code of Judicial Conduct, which prohibits extrajudicial activities which cast doubt on a judge's ability to act impartially).

132. See Timm, *supra* note 16, at 264 (noting that when judges draft legislation they implicitly assert the legislation is valid). Thus, the judge asserts his or her own personal view that the substance of the legislation is beneficial or desirable and that the legislation is legally valid. *But see* *Mistretta*, 488 U.S. at 406-07 (stating that a judge's participation on the sentencing commission, which promulgates sentencing guidelines, does not affect a judge's ability to impartially adjudicate sentencing issues).

Conversely, arguments exist against the conclusion that the participation of judges drafting legislation conveys the appearance of impartiality. First, in *Mistretta* the United States Supreme Court reasoned that by participating in the promulgation of sentencing guidelines, judges were merely participating in a traditional function of the judiciary.¹³³ Because Three Strikes arguably can be described as a sentencing law, the judiciary may merely be participating in a traditional judicial function.¹³⁴ Tradition tends to cloak the judge with the air of legitimacy.

Second, recusal and disqualification serve to mitigate the appearance of impartiality. When a lawyer believes a judge cannot adjudicate the controversy, the lawyer may seek to disqualify the judge.¹³⁵ Similarly, when a judge doubts his or her ability to adjudicate a controversy impartially, the judge must recuse himself or herself.¹³⁶

Despite its apparent promise, recusal may not overcome the problem of partiality because only the judge who drafted the legislation would be subject to recusal. However, the judge's participation may influence the decisions of other judges.¹³⁷ Therefore, recusal would not entirely solve the problem of partiality.¹³⁸

In summary, although the answer remains unclear whether a judge who drafts legislation violates the separation of powers doctrine, such an action raises serious questions. To begin, a judge may cross "the line" into the legislative sphere of power when the judge drafts legislation, thus resulting in a violation of separation of powers.¹³⁹ Moreover, such an act tends to impugn the impartiality and integrity of the judiciary which may, by itself, constitute a violation of the separation of powers doctrine.¹⁴⁰ Conversely, courts traditionally draw a distinction between individual and institutional action when determining whether a judge's actions comprise a violation of separation of powers.¹⁴¹ In such circumstances, individual action does not violate separation of powers. Yet, this distinction appears artificial when one considers that a judge is equally capable of harming the authority and independence of the judiciary while acting as an individual or as a judge. Recognizing the artificiality of this

133. *Mistretta*, 488 U.S. at 407.

134. See *supra* note 117 and accompanying text (stating that Three Strikes enhances the criminal penalties for repeat offenders and concluding that, therefore, Three Strikes can be characterized as a sentencing statute).

135. "A judge shall be disqualified if . . . (C) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." See, e.g., CAL. CIV. PROC. CODE § 170.1(a)(6) (West Supp. 1997).

136. "A judge shall be disqualified if . . . (A) the judge believes his or her recusal would further the interests of justice, [or] (B) the judge believes there is a substantial doubt as to his or her capacity to be impartial." See, e.g., CAL. CIV. PROC. CODE § 170.1(a)(6) (West Supp. 1997).

137. See *supra* notes 129-30 and accompanying text (noting that other judges may be biased by the authorship of another judge).

138. See Timm, *supra* note 16, at 264 (stating that the disqualification of judges will not diminish the effects on other judges).

139. See *supra* note 124 and accompanying text.

140. See *supra* notes 126-30 and accompanying text.

141. See *supra* notes 99-100 and accompanying text.

distinction, ethical guidelines for judges do not distinguish between official and individual action.

III. JUDICIAL ETHICS

The California Code of Judicial Ethics which was adopted to enhance public confidence in the judiciary,¹⁴² recognizes that a fair, competent, and independent judiciary is central to our justice system.¹⁴³ The Code of Judicial Ethics is binding upon judges.¹⁴⁴ In order to promote public confidence in the impartiality of the judiciary,¹⁴⁵ the Code requires judges to preserve the "integrity and independence" of the judiciary.¹⁴⁶

The Code of Judicial Ethics, unlike the separation of powers doctrine,¹⁴⁷ makes no distinction between official judicial conduct versus individual conduct.¹⁴⁸ Because public confidence is immensely important to the judiciary,¹⁴⁹ judges must expect constant public scrutiny.¹⁵⁰ Therefore, the Code of Judicial Ethics mandates that judges accept greater restrictions upon their conduct than other members of the community.¹⁵¹

The Code of Judicial Ethics requires that judges act with integrity and impartiality.¹⁵² Canon 2 requires judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."¹⁵³ Canon 4 mandates that a judge's extrajudicial activities shall not "cast reasonable doubt on the judge's capacity to act impartially"¹⁵⁴ or compromise the integrity or independence of the judiciary.¹⁵⁵ The test to determine whether a judge acted in an improper man-

142. CAL. CODE OF JUD. ETHICS, Preamble.

143. *Id.* Canon 1; *see* *Mistretta v. United States*, 488 U.S. 361, 407 ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship"); *Fried*, *supra* note 17, at 729 (stating that judicial legitimacy derives from the impartial and independent public perception of the judiciary); *see also id.* at 725 (stating the judiciary's adjudicatory legitimacy depends upon the judiciary's independent judgment); *Timm*, *supra* note 16, at 264 (arguing that judges need to be impartial in order to decide cases effectively).

144. CAL. CODE OF JUD. ETHICS, Preamble, advisory committee commentary.

145. *Id.* Canon 1; *see id.* (stating that violations of the Code diminish public confidence in the judiciary which, in turn, undermines the American system of government under law).

146. *Id.*

147. *See supra* notes 99-100 and accompanying text (stating that when judges act as individuals, they do not violate the separation of powers doctrine).

148. *See* CAL. CODE OF JUD. ETHICS, Preamble (stating that the Code of Judicial Ethics "establishes standards for ethical conduct of judges on and off the bench").

149. *See id.* Canon 1 (noting that irresponsible or unfair judicial conduct undermines the American system of government).

150. *Id.* Canon 2.

151. *Id.*

152. *See id.* Preamble, Canon 1, Canon 2, & Canon 4.

153. *Id.* Canon 2.

154. CAL. CODE OF JUD. ETHICS, Canon 4.

155. *Id.*; *see also id.* Canon 5 (requiring a judge to avoid political activity that may create an impartial or improper appearance).

ner is whether a "person aware of the facts might reasonably entertain doubt that the judge would be able to act with . . . impartiality."¹⁵⁶

The Code of Judicial Ethics raises serious questions regarding the propriety of judges drafting legislation because that participation possibly conveys the appearance of partiality.¹⁵⁷ First, when a judge drafts legislation, the judge appears to have made up his or her mind before the statute is challenged.¹⁵⁸ Second, the judge's participation directly calls into question the judge's impartiality regardless of appearances.¹⁵⁹ Third, a judge who drafts legislation may influence the decisions of other judges raising the specter of improper influence on their decisions.¹⁶⁰ Finally, depending upon the content of the legislation, the judge's activity may impart the appearance of political bias prohibited by Canon 5.¹⁶¹ Thus, whether a judge acted as an individual or as a judicial officer when drafting the legislation, such activity appears to violate the Code of Judicial Ethics' prohibition against conduct casting doubt upon the impartiality of the judiciary.

Conversely, the Code of Judicial Ethics allows judges to participate in activities designed to improve the law.¹⁶² The Code provides that, subject to the other requirements contained in the Code, a judge "may speak, write, lecture, teach, and participate in activities concerning legal . . . subject matters."¹⁶³ In addition, the Code encourages judges to participate in the revision of substantive and procedural law.¹⁶⁴

The primary reason for allowing judges to participate in improving the law is that judges are in a unique position to improve the law because of their experience and

156. *Id.* Canon 2.

157. *See supra* notes 123-32 and accompanying text (discussing the problems of impartiality that arise when judges draft legislation).

158. *See supra* notes 125-26 and accompanying text.

159. *See supra* note 125 and accompanying text (arguing that when a judge drafts legislation the judge's personal views become intertwined with that legislation rendering an impartial adjudication impossible).

160. *See supra* notes 127-28 and accompanying text.

161. *See* CAL. CODE OF JUD. ETHICS, Canon 5 (stating that judges shall "avoid political activity that may create the appearance of political bias or impropriety").

162. *See Id.*, Canon 4(C)(2) (permitting judges to participate on committees or commissions concerned with improving the law or the legal system); *see also id.* Canon 5(D) (allowing for judicial participation in political activities designed to improve the law or the legal system in general).

163. *Id.*, Canon 4(B); *see* Mark Scott Bagula & Judge Robert C. Coates, *Trustees of the Justice System: Quasi-Judicial Activity and the Failure of the 1990 ABA Model Code of Judicial Conduct*, 31 SAN DIEGO L. REV. 617, 620 (1994) (calling for judges to protect, defend, and repair the justice system so long as their activities uphold the dignity of the courts).

164. CAL. CODE OF JUD. ETHICS, Canon 4(B) advisory committee commentary; *see id.* (authorizing a judge to contribute to improving the law individually or as a member of a group concerned with improving the law). Indeed, in a 1987 law review article, Justice Ginsburg called for the creation of statutory revision commission consisting of legislators and retired judges in order to correct imperfections in the law. Active judges would play a role in identifying problems and bringing them to the committee's attention. *See also* Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1433 (1987).

education.¹⁶⁵ Other reasons for encouraging quasi-judicial activity¹⁶⁶ include increased judicial efficiency, independence, impartiality, vitality, and public image.¹⁶⁷

When a judge drafts legislation the judge participates in activities concerning a legal subject matter. Thus, the judge's activity appears to fall within the protections afforded quasi-judicial activities by Canon 4. However, Canon 4 subordinates a judge's quasi-judicial activity to other requirements of the Code¹⁶⁸ whereas the provisions of the Code of Ethics that explicitly mandate the appearance of impartiality do so unconditionally.¹⁶⁹

Even if a judge acts in a quasi-judicial manner the judge may violate the Code of Ethics by appearing impartial through his or her activities; acting in a quasi-judicial function and conveying a partial appearance are not mutually exclusive.¹⁷⁰ Drafting a controversial statute provides an excellent example of a situation where a reasonable person could possibly view a judge as appearing partial. Both the form and the substance of Three Strikes engenders much controversy.¹⁷¹ By participating in the drafting of this controversial statute, a judge may make his or her views known, arguably implying partiality in favor of the controversial statute.¹⁷²

A reasonable person test does not provide much guidance for judges in complying with the Code of Judicial Ethics. Judicial participation in the drafting of controversial statutes exemplifies the risk of a biased appearance that the Code of Judicial Ethics seeks to guard against. But what about less controversial statutes? What about the valid role of judges in improving our laws? It is not enough to categorize legislation as controversial or benign in making these determinations.¹⁷³ Even the participation of judges in drafting seemingly non-controversial legislation may raise the specter of bias or partiality because of the political nature of the act.¹⁷⁴

165. CAL. CODE OF JUD. ETHICS, Canon 4(B) advisory committee commentary; see Bagula & Coates, *supra* note 163, at 630 (1994) (stating that judges are "uniquely suited" to identifying and resolving problems with the legal system).

166. See CAL. CODE OF JUD. ETHICS, Canon 4(B) (listing, under the heading of "Quasi-judicial and Avocational Activities," speaking, writing, lecturing, teaching, and participating in other activities); see also Bagula & Coates, *supra* note 170, at 632 (stating that quasi-judicial activity includes teaching the law, writing, and reforming legislation).

167. Bagula & Coates, *supra* note 163, at 632.

168. CAL. CODE OF JUD. ETHICS, Canon 4(B).

169. See *id.*, Canon 1, Canon 2(A), & Canon 4(A).

170. See Erwin Chemerinsky, *Is It the Sirens Call?: Judges and Free Speech While Cases are Pending*, 28 LOY. L.A. L. REV. 831, 838 (1995) (noting that a judge's quasi-judicial activities, such as making statements about the law, may undermine the judge's appearance of impartiality).

171. See *supra* notes 1-4 and accompanying text (detailing the controversy surrounding Three Strikes).

172. See, e.g., Dan Morain, *Judge Admits His Role in '3 Strikes'*, L.A. TIMES, Nov. 3, 1994, at A3 (purportedly quoting an unnamed judge who asserts that the law is very prosecution oriented).

173. See Dan Morain, *Judge Admits His Role in '3 Strikes'*, L.A. TIMES, Nov. 3, 1994, at A3 (quoting Jerome Falk, the head of the California Academy of Appellate Attorneys, who argued that the judges' participation in the drafting of Three Strikes did not violate the canons of judicial conduct and asserted that it is difficult to differentiate mundane and controversial issues).

174. See Geyh, *supra* note 8, at 1167 (recognizing that the judiciary's increased role in statutory reform has increased the public cynicism regarding the judiciary).

Given the ambiguity of the Code of Judicial Ethics, a judge should think hard about participating in such activities and the nature of his or her participation because, as the Code of Judicial Ethics recognizes, an individual judge's actions reflect upon the judiciary as a whole.¹⁷⁵ At the same time, the ambiguous "reasonable person" test contained in the Code of Judicial Ethics provides little guidance to a well-meaning judge seeking to contribute to society. Judges and society would benefit from a more definite standard.

When a judge chooses to participate in the drafting of a statute that imperils the impartial appearance of the judiciary, the government needs to limit the judge's participation through the ethics codes or through a separation of powers analysis. This raises the question of whether the government may constitutionally limit a judge's actions in promulgating legislation.¹⁷⁶

IV. RESTRICTIONS ON A JUDGE'S FIRST AMENDMENT RIGHTS

The United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech or of the press."¹⁷⁷ The First Amendment promotes a market place of ideas wherein individuals, not the government, determine the truth or values of such ideas.¹⁷⁸ The promotion of political speech underlies much of the First Amendment protections.¹⁷⁹ Drafting legislation also embodies political expression. Therefore, the drafting of legislation falls squarely within the protections of the First Amendment.

Despite its uncompromising language, the First Amendment does not provide absolute protection for expressive activities.¹⁸⁰ The government employs judges and, therefore, a judge's speech may be examined in the context of a public employee.¹⁸¹

175. CAL. CODE OF JUD. ETHICS, Canon 1(A); *see id.* (stating that "a judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved") (emphasis added). "Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility." *See also id.* Canon 1(A), advisory committee commentary (emphasis added).

176. *See* discussion *infra*, Part IV (discussing First Amendment limitations on the government's ability to curtail a judge's speech).

177. U.S. CONST. amend. I.

178. *See, e.g.,* *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting) (referring to the purposes of the First Amendment as a "free trade in ideas" and championing the "competition of the market").

179. *See* ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT*, in ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM*, 27 (1965) (stating that "[T]he principle of the freedom of speech springs from the necessities of the program of self-government"); *see also id.* at 24-28 (providing the example of a town meeting and arguing that free speech is a political necessity in our system of government); *cf.* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27-31 (1971) (concluding that the sole purpose of free speech is political).

180. *See, e.g.,* *Konigsber v. State Bar of California*, 366 U.S. 36, 49-50 (1961) (rejecting the view "that freedom of speech and association . . . , as protected by the First and Fourteenth Amendments, are 'absolutes'" and recognizing that "the constitutionally protected freedom of speech is narrower than an unlimited license to talk").

181. *See generally* *Rankin v. McPherson*, 483 U.S. 378 (1987); *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Scott v. Flowers*, 910 F.2d 201 (5th Cir. 1990).

The government's interest in promoting efficient public service may outweigh an individual employee's interest in commenting upon public matters.¹⁸² This rule arises from the recognition that the government plays a dual role as both an employer and as a governmental entity subject to the constraints of the First Amendment.¹⁸³ A government employee's speech must touch upon a matter of public concern to invoke this balancing test.¹⁸⁴

In determining whether a public employee commented upon a matter of public interest, the courts examine the content, form, and context of a given statement.¹⁸⁵ Absent a reference to political, social, or other concerns of a community, the courts will not consider the statement a "public statement."¹⁸⁶ Based upon the above criteria, the United States Supreme Court, in *Connick v. Myers*¹⁸⁷ held that a questionnaire distributed by an assistant district attorney to fellow employees regarding employment conditions was not a matter of public concern.¹⁸⁸ The court reasoned that if the questionnaire were released to the public, the public merely would be apprised that one of the assistant district attorneys was upset about a situation at work.¹⁸⁹

The drafting of Three Strikes stands in stark contrast to the situation in *Connick*. The content, form, and context of the statements in the Three Strikes legislation scream public concern. The content deals with enhancing punishment for crimes, an obvious matter of public concern. The judge's expression took the form of a public law. In addition, Three Strikes is a reaction to the perception that criminals run

182. *Rankin*, 483 U.S. at 384 (1987); see, e.g. *Connick v. Myers* 461 U.S. 138 (1983) (holding that a District Attorney's interest in maintaining office relationships and an efficient work environment outweighed an employees right to free expression in surveying colleagues for their opinions regarding the internal office policies of the District Attorney's Office).

183. *Rankin*, 483 U.S. at 384 (1987); see *Connick*, 461 U.S. at 143 (noting that "government offices could not function if every employment decision became a constitutional matter").

184. *Rankin*, 483 U.S. at 384 (1987). Where a government employee's speech does not touch upon a matter of public concern the courts are reluctant to second guess the decisions of the government in responding to the actions of one of its employees. *Id.* at 386, n.7.

185. *Connick*, 461 U.S. at 147-48.

186. *Id.* at 146. Where a public employee comments upon matters of personal interest rather than on matters of public interest, the courts generally will defer to the judgment of the employer regarding the restrictions on a public employee's speech. See *id.* at 147.

187. 461 U.S. 138 (1983).

188. *Connick*, 461 U.S. at 148-50. The Court did in fact hold that the question regarding whether assistant district attorneys felt pressured to work on political campaigns touched upon a matter of public concern. Therefore, the court continued the public employee speech analysis regarding this question. See *id.* at 149-50.

189. *Id.* at 148; see *id.* (noting that Myers was not seeking to inform the public that the District Attorney's Office was not performing its duties or that the district attorney's office committed any wrongdoing; rather, Myers' questionnaire was merely designed to give Myers' more ammunition to confront her superiors with).

rampant in our society.¹⁹⁰ In this context, Three Strikes clearly is an issue of public importance involving both social and political issues.¹⁹¹

Where speech involves matters of public concern, the court must balance the government's interest as an employer in promoting efficient service against the interests of the individual citizen in commenting upon matters of public concern.¹⁹² The state bears the burden of proving, "on legitimate grounds," that its interest outweighs that of the individual citizen.¹⁹³ In *Rankin v. McPherson*,¹⁹⁴ a clerical worker at a Constable's office challenged her dismissal for a statement she made in response to the assassination attempt on President Reagan.¹⁹⁵ Specifically, McPherson stated that "if they go for him again, I hope they get him."¹⁹⁶ Soon thereafter, the Constable fired McPherson because of her statement.¹⁹⁷ The Supreme Court found that McPherson's statement did not interfere with the effective functioning of the Constable's office.¹⁹⁸ Therefore, the Supreme Court declared the Constable's termination of McPherson unconstitutional.¹⁹⁹

The Fifth Circuit Court of Appeals applied the government/employee analysis to limitations upon judges' freedom of expression. In *Scott v. Flowers*,²⁰⁰ the Texas Commission on Judicial Conduct reprimanded Scott, a justice of the peace, for a public letter he wrote to the Board of Supervisors.²⁰¹ Scott's letter criticized the district attorney's office and the county court at law for dismissing or severely reducing fines for traffic violations for those individuals who appealed their fines to the county court of law.²⁰² The Commission alleged that Scott's conduct only served to discredit

190. See, e.g., Adam Entous, 'Three Strikes' Law Puts California in Fiscal Bind, COM. APPEAL (Memphis), Nov. 25, 1994, at A4 (noting that Three Strikes was "prompted by a public outcry over violent crime and revulsion at the murder of 12-year-old Polly Klaas").

191. The extensive media coverage of Three Strikes clearly demonstrates the public nature of this topic. The search "California and 'three strikes' w/20 prison w/20 life" in the LEXIS News Library, revealed 800 stories.

192. *Rankin v. McPherson*, 483 U.S. 378, 384 (1987); see *Pickering v. Board of Education*, 391 U.S. at 568 (noting that the problem in government/employer speech cases is "to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees").

193. *Rankin*, 483 U.S. at 388.

194. 483 U.S. 378 (1987).

195. *Id.* at 381.

196. *Id.*

197. *Id.* at 382.

198. *Id.* at 388-89; see *id.* at 389-90 (reasoning that McPherson was not terminated based upon her work performance, her effect upon other employees, or her discrediting of the office in the eyes of the public); see also *id.* at 390-91 (declaring that "where an employee serves no confidential, policy making, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal").

199. *Id.* at 392.

200. 910 F.2d 201 (5th Cir. 1990).

201. *Id.* at 204.

202. *Id.* at 203-04; see *id.* (recounting Scott's concern that this practice unfairly allowed a few individuals who knew to appeal their cases to suffer no consequences while less sophisticated individuals were penalized).

the judiciary in the eyes of the public.²⁰³ Scott challenged the reprimand as violation of his constitutional rights.²⁰⁴

After determining that Scott's statements touched upon matters of public concern, the court weighed the state's interest in regulating judicial speech against the judge's interest, as a citizen, in making statements of public concern.²⁰⁵ The court noted that Scott, as a justice of the peace, was a public official.²⁰⁶ The court then declared that the state may restrict elected judges speech more than ordinary elected officials because the state must preserve the integrity and impartiality of the judiciary.²⁰⁷ However, the state failed to present any evidence showing that Scott's statements interfered with the impartiality and efficiency of the judiciary. Thus the state failed to prove that its interests outweighed Scott's interests in speaking on a matter of public concern.²⁰⁸

In applying the balancing test to situations wherein judges draft legislation the results arguably weigh in the government's favor. The judiciary plays a central role in our American scheme of justice,²⁰⁹ and the legitimacy of the judiciary depends upon the judiciary appearing fair and impartial.²¹⁰ When judges draft legislation, they do not appear impartial, thereby imperiling the foundation of our justice system.²¹¹ The government enjoys a strong interest in preserving an institution designed to protect all individuals. Such an interest may overcome a judge's constitutional right to freedom of speech when the government presents evidence that the speech in question interferes with the impartiality and integrity of the judiciary.²¹² Thus, it

203. *Id.* at 204.

204. *Id.* at 205.

205. *Id.* at 211; see *Rankin v. McPherson*, 483 U.S. at 388 (articulating the following factors to consider in assessing the government's interest as an employer: Whether the statement (1) impairs supervisors in disciplining employees; (2) infringes upon harmony in the work place; (3) erodes close working relationships in which loyalty and confidence are necessary; (4) thwarts the speaker's ability to adequately perform his or her duties; and (5) hinders the enterprise in its regular operation). Interestingly, the court stated that the state had a "very difficult burden" to carry in showing that its interests outweighed that of Scott. See *Scott*, 910 F.2d at 212. The court derived this statement from *Rankin* wherein the *Rankin* court asserted that the state must prove, "on legitimate grounds," that its interests outweighed those of the individual. *Id.*, n.7 (citing *Rankin*, 483 U.S. at 388). Neither *Pickering*, *Connick*, nor *Rankin* impose a "very difficult burden" standard on the government. Thus, it is unclear whether the Fifth Circuit was imposing these conditions on its own or whether it was merely describing the nature of the burden encompassed in the above Supreme Court cases.

206. *Scott*, 910 F.2d at 211-212.

207. *Id.*

208. *Id.* at 213.

209. See *supra* note 143 and accompanying text.

210. See CAL. CODE OF JUD. ETHICS, Canon 1, advisory committee commentary (stating that irresponsible or unfair conduct of judges undermines the American system of government).

211. See *supra* notes 119-28 and accompanying text (describing how judges undermine the authority and legitimacy of the judiciary by drafting legislation).

212. *Scott*, 910 F.2d at 213. Other elected officials are elected based, in part, upon particular results or policies they seek to implement. Conversely, judges must remain impartial in order to properly fulfill their duties. Therefore, judicial statements regarding the furtherance of particular results interfere with a judge's ability to properly fulfill the judge's duties. Accordingly, the government may restrict the speech of elected judges more than that of other elected officials.

appears that the government may be able to limit a judge's speech to protect the legitimacy of the judiciary.

Despite the arguable validity of such action, California has failed to provide clear guidelines to address this situation and to protect the legitimacy of the judiciary. The participation of judges in drafting California's controversial Three Strikes law combined with the vagaries of California's Code of Judicial Ethics, argue for more definite standards of judicial conduct to prevent the erosion of the judiciary's legitimacy. The absence of clear guidance mandates a high level of caution on the part of judges who act in this manner.

V. MAINTAINING APPEARANCES WHILE IMPROVING THE LAW

This Comment does not urge that the legislature and the judiciary return to the "proud and silent isolation" lamented by Justice Cardozo.²¹³ While judicial participation in the drafting of legislation poses risks to judicial integrity and impartiality, judges have much to offer in improving our legal system.²¹⁴ A legitimate balance must be found between judges acting as "passive machines" and judges acting as "zealous reformers."²¹⁵ The problem lies in capitalizing upon the special expertise and experience of the judiciary in order to improve our laws without jeopardizing the judiciary's integrity and impartiality.

Although ethical codes provide guidance in this area, judges are left to speculate about what the ubiquitous but elusive "reasonable person" would think of the judge's actions. Yet a "reasonable person" test fails to instruct a well intentioned judge where, in the vast abyss between clearly reasonable and clearly unreasonable, his or her contemplated actions lie.

The preservation of the impartiality and integrity of the judiciary should guide judges' actions when they contemplate drafting legislation. Although the individual conduct of judges does not violate the separation of powers doctrine,²¹⁶ two kinds of problems arise when judges draft legislation. The first problem is issue specific; it involves the judiciary's ability to neutrally adjudicate legislation authored by a fellow judge. This problem includes such concerns as an individual judge's neutrality and the effect one judge's actions may have on another judge's ability to assess a particular issue neutrally.²¹⁷ The second problem involves governmental structure and its

213. Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 114 (1922).

214. See CAL. CODE OF JUD. ETHICS, Canon 4(B), advisory committee commentary (noting that judges are especially qualified to identify and correct problems with legislation).

215. Bagula & Coates, *supra* note 163, at 630 (quoting Herman Lum, *Our Role as Judges in Modern Society*, CT. REV., Winter 1987 4, 6).

216. See *supra* notes 99-100 and accompanying text.

217. See *supra* notes 127-28 and accompanying text (explaining that one judge may be influenced by the fact that another judge authored a particular piece of legislation).

effect on the impartiality and integrity of the judiciary.²¹⁸ The judiciary's participation in politics lies at the heart of this category.²¹⁹ These concerns may be dependent upon the nature of the legislation and the judge's role in participating in its development.

In order to evaluate the propriety of his or her participation in drafting legislation, a judge must assess his or her contemplated action in light of the above two concerns. A judge should consider both the nature of the legislation and his or her role in participating in its creation. This Comment proposes that a judge who participates in the legislative process acts in one of three roles according to the type of legislation. First, a judge may be acting as a "housekeeper," seeking to maintain and improve the administration of justice. Typically, such actions would involve procedural issues facing the court such as the time within which to respond to a particular motion. Courts historically have enjoyed the power to make "housekeeping" rules.²²⁰ Tradition tends to cloak this type of action with an air of legitimacy.

Second, a judge may be acting as a "mechanic" by attempting to correct problems with the underlying legislation. In this role the judge does not sit in judgment of his or her own creations, nor does the judge sit in judgment of another judge's creation.²²¹ Rather, the judge merely seeks to effectuate the intent of the underlying legislation and to minimize any attendant problems with the legislation. The judge's lack of a personal agenda regarding the legislation serves to mitigate the questionable appearance that he or she might otherwise convey. Moreover, the statute the judge seeks to "repair" may not be political or controversial.²²² Therefore, the risks of appearing partial appear minimal.

However, other considerations may convey the appearance of impartiality. A statute's political or controversial nature may taint a judge's action.²²³ Additionally, there is always the risk that the public may perceive the judge as furthering his or her own personal political agenda.

Finally, there is the role of the judge as a "substantive policy maker." In this role, the judge seeks to create new law that shapes the policy of our nation. Of the three roles, this role is the least legitimate because the judge acts, or appears to be acting, in a manner reserved for the legislative branch of the government. The Constitution envisions the legislature as the policy maker for the nation. By drafting legislation,

218. See Geyh, *supra* note 8, at 1167 (noting that the judiciary's legitimacy derives from its independent judgment); Timm, *supra* note 16, at 263-64 (arguing that separating the judiciary from politics preserves the impartiality and integrity of the judiciary).

219. Timm, *supra* note 16, at 264.

220. See *Hannah v. Plumer*, 380 U.S. 460 (1965).

221. See *supra* note 127-28 and accompanying text (arguing that a judge participating in the drafting of legislation jeopardizes the integrity and impartial appearance of the judiciary because the resulting legislation may be challenged before that judge or that judge's colleagues).

222. See Ginsberg & Huber, *supra* note 164, at 1431-32 (stating that many statutes in need of repair are not political in the "partisan sense").

223. See *id.* at 1433-34 (asserting that their proposed law revision committee, which contains at least one judge, should refrain from participating in the clarification of politically controversial or complex legislation).

a judge enmeshes the judiciary in politics contrary to the judiciary's constitutional mandate.

Due to the partial appearance a judge may convey when acting as a "mechanic" or a "substantive policy maker," a judge risks the integrity of the judiciary when he or she acts as anything other than a "housekeeper." Accordingly, judges who wish to participate in the drafting of legislation should do so only when the legislation involves non-controversial administration of justice issues. Indeed, even then an individual judge who drafts legislation may appear to be stepping beyond the institutional bounds of the judiciary. Given the risks involved with this type of activity, perhaps judges should ask themselves whether it is necessary for them to individually draft legislation.

Although judges have much to offer in improving our legal system, "improvement" does not necessarily demand judicial participation in the drafting of legislation.²²⁴ By drafting legislation, judges place the "judicial imprimatur" on that particular statute, closely associating the judicial with the legislative.²²⁵ Such action erodes the judiciary's appearance of impartiality.²²⁶ Because the judiciary's sole source of legitimacy derives from its appearance of impartiality and integrity, judges should be particularly mindful of the shadow their actions may cast on judicial legitimacy.²²⁷

In response to our increasingly complex society, courts have become more apt to blur the traditional lines separating the three branches of government.²²⁸ However, no general need exists for judges to draft legislation. Lawyers, law professors, politicians, and many other individuals are capable of drafting legislation.²²⁹ Yet, judges do possess special knowledge regarding the operations of the court. Effective procedural and "housekeeping" legislation demands judicial involvement because of the judiciary's expertise in these areas. Indeed, the judiciary historically has enjoyed the power to establish its own housekeeping rules.²³⁰ Therefore, although drafting legislation itself is arguably a political act, judicial rulemaking in this arena does not present the same risks as in other areas.

When judges become too closely linked with a particular piece of non-housekeeping legislation, they jeopardize the integrity and impartial appearance of

224. See CAL. CODE OF JUD. ETHICS, Canon 4(B), advisory committee commentary (noting that judges are especially qualified to identify and correct problems with legislation).

225. Kelso, *supra* note 126, at 864.

226. See *supra* notes 120-28 and accompanying text (articulating how judges jeopardize the impartial appearance of the judiciary by drafting legislation).

227. See generally Fried, *supra* note 17 (discussing sources of judicial legitimacy).

228. See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (declaring that the Court's separation of powers jurisprudence "has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives").

229. See Kelso, *supra* note 126, at 864 (suggesting that other individuals are equally capable of drafting legislation).

230. *Mistretta*, 488 U.S. at 388; *Sibbach v. Wilson*, 312 U.S. 1, 9-10 (1941).

the judiciary. This proposition leads directly to a proposed solution: if judges wish to improve society by participating in the creation of legislation, they should distance themselves from its actual creation. A judge may distance himself or herself from legislation by ensuring that his or her contributions are “filtered” through other non-judicial persons. This filter separates the judge from an arguably political act and maintains the integrity and impartiality of the judiciary while allowing for valuable judicial contributions to society. For instance, a judge may testify before the legislature, participate on independent committees, write, speak, and perform other activities that do not directly associate the judge with the legislative process as does drafting legislation.²³¹ By pursuing reform in this manner, a judge contributes an idea which other persons may mold into legislation.²³²

In addition, judges could participate on commissions that seek to improve the legal infrastructure of our society. Participation in some type of committee dealing with administration of justice matters mitigates the risks posed by the independent actions of a judge or members of the judiciary. Such committees are generally made up of individuals other than judges.²³³ By acting as a member of an independent commission, the drafts of legislation appear to “represent the collected wisdom of an independent, public spirited commission, rather than the work . . . of arguably self-interested judges” even where the draft was in fact drafted by a particular judge.²³⁴ Even then, judges should pay particular attention to the type of legislation the committee or commission seeks to cure. Participation on committees or commissions that are in the public eye or that deal with controversial legislation still jeopardizes the integrity and impartiality of the judiciary, whereas participation on commissions or committees dealing with the administration of justice do not.²³⁵ Thus, participation on certain commissions or committees serves to protect the appearance of impartiality and integrity of the judiciary by deflecting the attention away from a particular judge and towards the commission.²³⁶

The above considerations demonstrate that room exists for judicial input in the creation of legislation. However, applying these considerations to the actions of the

231. See Kelso, *supra* note 126, at 863 (approving of judges writing articles or speaking before legal groups as a means of contributing to legal development).

232. *Id.*

233. See Ginsburg & Huber, *supra* note 164, at 1433 (proposing that a statutory revision commission should be made up of four legislators, a fully retired federal judge as chairman, and four to six presidential appointees). Note, however, that Justice Ginsburg’s proposal fails to include an acting federal judge on the committee. *Id.*

234. Geyh, *supra* note 8, at 1227.

235. See *id.* at 1227-28 n.314; Ginsburg & Huber, *supra* note 164, at 1431-32 (asserting that the proposed law revision commission should refrain from participating in the clarification of politically controversial or complex legislation because of the appearance such activity conveys); see also *supra* notes 229-30 and accompanying text (explaining why judicial activity in the arena of administration of justice does not jeopardize the integrity and impartiality of the judiciary).

236. Geyh, *supra* note 8, at 1227. But see CAL. CODE OF JUD. ETHICS, Canon 4(C)(2) (prohibiting judges from accepting an appointment to a government commission or committee concerned with non-judicial factual or policy matters).

judges who participated in the drafting of Three Strikes demonstrates that such conduct should not be repeated. First, the judges were, to some extent, involved in the writing of a highly controversial piece of political legislation, appearing as anything but “neutral arbiters” of our country’s laws. Second, through their involvement, the judges became too closely associated with the controversial legislation. If they felt compelled to contribute to the creation of Three Strikes, they should have done so in a more indirect manner so as to ensure the judiciary’s appearance of integrity and impartiality.

VI. CONCLUSION

As both the Separation of Powers Doctrine and codes of judicial ethics recognize, our governmental system depends on the integrity and impartiality of the judiciary. When judges become too closely associated with a particular piece of legislation, they compromise the judiciary’s role as a neutral arbitrator of our country’s laws. Arguably, the distinctions between the different types of actions in the legislative arena are distinctions of degree, not substance. However, where the very legitimacy of one branch of our governmental system depends on the public’s perception, appearances are critical. Accordingly, judges should be particularly mindful that any shadow their actions may cast will not be long enough to stain the integrity and impartiality of the judiciary. A judge who wishes to participate in the improvement of our country’s laws may do so in a plethora of less controversial ways. Risking the integrity of the judiciary is not necessary. Simply put, “judges should not moonlight as legislators.”²³⁷

237. Kelso, *supra* note 126, at 865.

