COMMENTARY

IS THIS REALLY NECESSARY?

ADMINISTRATIVE PROCEDURE ACT REFORM

The way we regulate California's licensed professionals and tradespersons makes little sense. We license people —whether they are accountants, morticians, doctors, or lawyers—because we believe that such licensees who are dishonest or incompetent will cause irreparable harm. We tell people they cannot become an accountant, mortician, doctor, or lawyer unless they pass through an "entry barrier" and assure us in advance of their likely honesty and competence. We impose this "prior restraint," generally disfavored in the American model, because of the consequences of dishonesty or incompetence to the public.

It is ironic that in the two areas where the potential for irreparable harm from dishonesty or incompetence is most easily acknowledged—the medical and legal professions—the initial licensing barriers to entry imposed by the state do not address it effectively. As to honesty, the screening process is of little use—very few practitioners are eliminated on this basis. Dishonesty is best dealt with by license revocation and the deterrent punch of criminal prosecution. It is not easily predictable, and its absence cannot be reliably assured by a written examination or a criminal record check at the age of 25. As to competence, the state grants a very basic license enabling a lawyer or physician to practice in any aspect of the profession. A person may be able to pass a general bar examination in torts, contracts, and civil procedure, but know virtually nothing about bankruptcy, immigration, tax, divorce, or other area of specific practice. If a consumer goes to an attorney for a bank-ruptcy, tax, or other specific matter, the fact that the practitioner has passed a general bar exam at the age of 25 may be a sign of general intelligence or understanding of legal vocabulary, but it does not relate directly to competence or knowledge in the area of actual practice, upon which the consumer relies.

The same lack of nexus holds true for physician licensing. As far as the California Medical Board is concerned, a licensed physician may perform as a neurosurgeon, radiologist, proctologist, anesthesiologist, or dermatologist. Neither doctors nor lawyers are licensed or tested in their specialty.

This initial failure is baffling since each area of law or medicine is separate and distinct; persons cannot competently practice in more than one or two areas, and the skills and information required for each are quite different. Yet, as far as the state is concerned, one may practice in any or all areas. After this abdication, doctors and lawyers are not at any point retested or required to demonstrate their competence in their actual area of practice for the thirty to fifty years they practice. In addition, neither the legal nor medical regulatory systems require malpractice insurance, or otherwise provide for the assured recovery of damages from incompetence that may be suffered by consumers. In other words, although the rationale for intrusive "prior restraint" licensing of lawyers, physicians, and other professions is the prevention of irreparable harm flowing from incompetence, the applicable regulatory systems do not seriously address it.

The failure to assure honesty or competence at point of entry arguably imposes a special burden to provide that assurance through *post*-licensure discipline. Where dishonesty or incompetence occurs *post facto*, the *raison d'etre* of regulation is manifest, and decisive, quick public protection, including license revocation or restriction, is compelled.

Where there is cause to believe that licensed physicians or other professionals are dishonest or incompetent, the discipline systems work under standard procedures dictated by an Administrative Procedure Act (APA) common in most states, including California.[1] These acts are designed to afford due process by specifying procedures for administrative adjudicative hearings and for their judicial review. Unfortunately, this process has evolved into a series of confused hearings and review where unqualified people make inconsistent decisions, which are then purportedly reconciled by review in yet another series of dilatory steps. While this seven- to eleven-year minuet is danced, interim remedies to suspend, restrict, or review licenses to protect the public are nonexistent or ineffectual. The obligation to assure honesty and competence implicit in a decision to license is betrayed by an impotent and irrational Rube Goldberg procedure. Let's review how it works.

Our Adjudicative System

(1) The Discipline Hearing. First, there is an evidentiary hearing on the agency level. The presiding officer is usually a professional administrative law judge (ALJ), either from the independent Office of Administrative Hearings within state government or one employed directly by the agency performing the administrative enforcement itself. Sometimes (but rarely) an agency head or board will decide to hear a case and judge it directly itself. When the agency does this, it will use an ALJ to make legal rulings, but the agency head or licensing board (or a committee thereof) makes the decision (findings of fact, conclusions of law, and punishment).

Where the agency itself hears the case, the panel of "judges" is usually a board, commission, or committee of appointed officials who direct the agency. Although the ALJ who rules on objections and evidence is generally a professional with a legal background, the findings of fact and the actual discipline, *i.e.*, the adjudicatory order, will be entered by the commission, board, committee, or agency director, not by the ALJ.

(2) Agency Review. Most often, however, an ALJ working alone presides over the disciplinary hearing. The extreme part-time format of most state commissions and boards compels the use of ALJs to handle the initial hearing. However, under the APA as it exists in most states, the board, commission, or agency may then review this decision; indeed, the ALJ's opinion is merely a "proposed" decision to the agency. The agency may adopt the proposed decision, reject it, or modify it. To alter the decision, the agency may have to afford an opportunity for oral argument, but the part-time commission or board may alter it as it sees fit. In its review of the ALJ's proposed decision, the agency,

board, commission, or director does not hear the evidence directly. It revises a decision based on a review of the record, written briefs, and several minutes of oral argument.

(3) Judicial Review: Superior Court. Perhaps because of a lack of confidence in the agency's adjudication, the APAs in virtually every state allow for judicial review by a superior court of agency final decisions. Any one of a large number of possible superior courts may review the hearing transcript (and may take additional evidence in unusual or extraordinary cases) and re-evaluate the entire matter on an "independent judgment" basis. That is, where a "vested right" is at issue—almost always the case in discipline matters—the court looks at the record and is required to "substitute its judgment" in interpreting and applying the facts. The court may uphold the agency decision, reject it, or remand the case to the agency for further proceedings.

(4) Judicial Review: Court of Appeal/Supreme Court. In California, the matter may then be appealed to one of six district courts of appeal. There, it will be reviewed under a "substantial evidence" test, *i.e.*, the decision of the superior court will be upheld if it is supported by substantial evidence (and includes no critical legal errors). It then may be reviewed by petition to the California Supreme Court.

This process has serious problems. First, it takes anywhere from seven to eleven years. There is little opportunity for interim suspension of an accused licensee during this entire period.[2]

These individual proceedings have their own respective deficiencies:

(1) The Discipline Hearing. If the hearing is conducted by an ALJ, it is usually one from a centralized Office of Administrative Hearings. These judges lack the prestige, independence, or trappings of the judiciary. They often lack expertise in the subject matter at hand. While the ALJ has knowledge of administrative law and administrative law precedents, he/she may be assigned in fragmented fashion to liquor license cases, occupational health and safety cases, water rights cases, complex discipline cases, *et al.*, across a panoply of subject areas. ALJs from such centralized offices do not know of each others' decisions (which are generally not reported formally), and lack consistency and predictability in their decisions.

Where the administrative law judge is, however, not from a centralized ALJ office, but is a creature of the agency, we encounter the problem of the agency/prosecutor hiring, promoting, and supervising the judge. That is, the accuser and the judge are the same entity. How fair can a hearing be if the judge feels some responsibility for the decision to prosecute and is part of the prosecution team, especially when the judge also functions—as here—as the jury?

The initial hearing is the one forum where live testimony is most likely and observing the demeanor of witnesses is critical. It is where the "on-the-scene" factfinding function of the adjudicator takes place. It is here where the quality hearing should be held. Is it possible to have a defined group of persons in a given agency who have requisite judicial independence, judicial and legal skills, knowledge of precedents, and required expertise? The answer is yes, as we discuss below. But that is not what we have.

(2) Agency Review. Although the licensing agency (*i.e.*, the board, commission, or director) does not hear the evidence or make the initial recommendation, it reviews a proposed opinion and is authorized to make the final decision. The review process by this part-time group of practitioners (with perhaps some public members) generally involves a partial review of the record by some members of the board (sometimes a task assigned to one member for a given case), written briefs, and oral argument often lasting five to ten minutes.[3]

In most states, the governing boards which regulate trades and professions generally consist of people who are currently practicing the very trade or profession being regulated. The bias resulting from this derivation may cut unjustly in either of two directions. The member of the profession may be so offended by the behavior of one of his/her peers that the punishment imposed may be excessive. More likely, the natural rationalizing process leads us to filter facts in sympathy with those with whom we identify. This bias will lead the colleague of the person accused into a more sympathetic frame of mind about his/her wrongdoing and its appropriate sanction.

Perhaps more important than bias is the question of the competence of these decisionmakers. As noted above, members of these boards and commissions at the state level are volunteer part-timers. They meet once a month or, in some cases, once every three months. They are not professional adjudicators; as noted above, they are usually members of the profession or trade regulated by that board. In their review function, they do not directly see the witnesses or the evidence. They make their decisions with little knowledge of agency precedent, and little knowledge of court decisions reviewing similar judgments. They themselves are not schooled in the rules of evidence. In our court system, and for a good reason, criminal sentences and civil penalties are decided not by a jury, but by a court, applying rules of law and attempting to impose a consistency which is the hallmark of an equitable judicial system, *i.e.*, people who commit similar transgressions are treated similarly.

Amazingly, the power of this commission or board to review and overturn, in a radical fashion, the ALJ who was on-the-scene and who has at least some legal training, is without the traditional limitations of an appeal; the agency has complete discretion to rewrite the ALJ's decision.[4]

One reported justification for allowing the agency board or commission this discretion rests with its purported substantive "expertise". However, this "expertise" is not necessarily on point. Most discipline cases do not involve esoteric questions of professional practice. Persons disciplined have often committed offenses such as child molestation, drug dealing, and violent acts against their patients or clients. Subtle knowledge about the optimum surgical procedure is not required to pass judgment as to the factual issues normally in dispute. However, in the occasional case where a technical matter is in dispute, the expertise of the board or commission rendering final review is very unlikely to be "on point." The fact that a physician who practices neurosurgery is on a regulatory board does not assure competent expertise on a technical question involving violation by a psychiatrist, internist, or even an orthopedic surgeon.

In summary, the final administrative decision is made by a group of persons with a vested interest in the profession, and perhaps in the practices being disputed; very little knowledge of court precedent reviewing related decisions; very little knowledge of legal proceedings, including rules of evidence; and who did not observe the witnesses directly.

(3) Superior Court Review. The agency's "final decision" is then subject to a writ of mandate procedure, usually

involving "independent judgment" review by one of over 1,000 superior court judges. Here we have a reconsideration by someone schooled in the law, precedent, and the rules of evidence. However, the superior court judge lacks expertise in the subject matter and familiarity with the policies of the agency. Rather than delegating review to an identified body of adjudicators who may have both substantive and legal expertise and who handle all cases emanating from a major agency, the system scatters review to any one of hundreds of superior court judges whose calendars are full of probate, criminal, and other non-administrative matters.[5]

Although it is possible for the superior court judge to hear additional (or repetitive) evidence, this is usually not the case. Rather, the superior court judge exercises his/her "independent judgment" in reviewing the transcript of the proceedings before the administrative law judge and the entire "administrative record." This means that the superior court judge is being asked to substitute his/her judgment for the judgment of the administrative law judge and, as with the agency review, without seeing the demeanor of the witnesses or directly confronting the evidence. That such a course is dangerous and antithetical to basic principles of judicial resolution should be obvious.

(4) Court of Appeal. Once again, perhaps because the previous series of procedures is not considered trustworthy, the respondent has the opportunity to appeal the matter yet again to any one of six different courts of appeal. Any number of three-judge panels sitting on a rotating basis in any one of these courts of appeal will receive the case and review it under a "substantial evidence" test. Because different panels in different courts of appeal sometimes disagree on the application of standards and rules of law, it is often necessary for the Supreme Court to grant a petition for review in order to reconcile them.

A Reform Proposal

The end result? The adjudicator in this five-step system—which consumes between seven and eleven years—lacks expertise, independence, or both. However, it is possible to design a system with a quality hearing and a quality review—in two steps, consuming less than eighteen months, conducted by persons who are both expert and independent. It is also possible to create a system which offers both *on point* legal and substantive expertise from a group of independent, competent adjudicators who render consistent decisions, who know each others' decisions, and who are capable of issuing interim orders while the litigation is proceeding to protect the public (*e.g.*, to suspend a license or to impose supervision or other restrictions).

We have proposed such a system concerning the discipline of attorneys, who are generally not within the APA rubric. California attorneys have accepted that system, and it is now successfully operating through SB 1498 (Presley) (Chapter 1159, Statutes of 1988). We have proposed a somewhat similar system to revise the APA-governed discipline of physicians in California, through SB 2375 (Presley). Using physician discipline as an example, our model works as follows:

First, one of three designated expert ALJs appointed to a Medical Quality Panel (MQP) within the centralized Office of Administrative Hearings would preside over the disciplinary hearing. The MQP ALJs would hear all medical discipline cases. Hence, they would become expert in the subject matter, familiar with each others' decisions, and able to render a consistent and predictable outcome. Each would be knowledgeable in administrative law issues and familiar with court precedents. They would also have at least one year of education in basic medical courses—a working knowledge of pharmacological and medical terminology. Replicating this example in other fields, similar specialized panels or (where only a small number of cases is likely) an assigned judge with some expertise in an agency's specific subject matter could be created within a centralized Office of Administrative Hearings.[6]

Next, our proposal calls for the ALJs to have available to them panels of expert witnesses. These persons may be called by the ALJ himself/herself to answer questions, clarify matters, or comment on the testimony of other expert witnesses. The contribution of these expert witnesses would be "on the record" and fully subject to cross-examination by all parties.

The advantage of such an expert panel and its use by the ALJ should be obvious. Where esoteric questions are at issue, both sides usually call expert witnesses to testify. But it is sometimes difficult for a trier of fact to achieve complete understanding simply from the testimony of vigorously contending expert witnesses hired by both sides. The notion that two partisan presentations —each excluding a substantial truth which hurts their conclusion—leads directly to the revelation of optimum truth is a theory belied by human experience. However, where the adjudicator has not only knowledge of the rules of evidence, but of the basic terminology and subject matter in dispute, *and* where he/she is able to call an impartial expert witness to answer questions, a more informed decision is likely.

Our reform then provides for a "substantial evidence" judicial review by a single assigned panel of appellate court judges. The state Judicial Council (*i.e.*, the Supreme Court) would direct these cases consistently to the same group of judges. Hence, rather than having to reconcile decisions among various courts of appeal, the Supreme Court would have to intervene only if there were error in the first instance. Further, the assignment to a single panel would enhance consistency and predictability, and would lead to greater expertise by the reviewing court.

Our recent reforms enacted under SB 1498 (Presley) in California for the State Bar have created a twelve- to eighteen-month system. We removed the initial evidentiary hearing from the hands of 450 volunteer practicing attorneys and put it in the hands of full-time, independent State Bar Court Judges appointed directly by the California Supreme Court. The administrative appeal is now referred to a full-time three-judge panel also appointed by the Supreme Court. The system now produces a high-quality hearing and a high-quality review, consistency, predictability, and adjudication by people with both independence and expertise. It is a system which should be the model for APA state reform in general.

The ABA Model Under Discussion: Heading the Wrong Way

The American Bar Association's Administrative Law Section and others have been considering a number of proposals for model APA reform.[7] On at least one point, the ABA's still-pending recommendation for a model APA includes some counterproductive features. It is the position of some scholars, especially those with federal administra-

tive law background, that ALJs should be within the control of the agency conducting the decisionmaking process, that they should make recommended decisions, and that these decisions should be reviewed by the commission or board with absolute discretion to alter—*i.e.*, the current failed model. The reason for this position taken by those in the ABA section is puzzling.

The ABA's tentative position is based on the following theory: agencies "make policy" in two ways—through rulemaking (the adoption of generic standards applicable to all licensees), and through adjudication (the formulation and application of rules on an individual, case-by-case basis). The distinction between rulemaking and adjudication is a difficult one. In fact, adjudications are often a vehicle for policy change. A very broad statute or rule which is adjudicated may establish a rule of law. Hence, to the extent that the agency controls rulemaking and performs that quasi-legislative function, it must also control the adjudicators—by controlling its ALJs and by reviewing their decisions to implement its policies.

Such a picture is interesting, but is much divorced from the reality of state administrative law. It suffers from the following defects:

(1) The first problem is a conceptual one. Would those proposing such a system agree that criminal cases should be appealed for final resolution to the judiciary committees of the state legislature (or of the U.S. Congress where federal prosecutions are involved)? Certainly, criminal prosecutions often involve interpretations of the reach and nature of the criminal statutes enacted by these legislative bodies. However, few scholars would ever seriously recommend such an alteration. This is because there is, in fact, some qualitative difference between quasi-legislative and quasi-adjudicative functions in government. It is simply *not* the job of legislators to adjudicate. They are not good at it and they are not constituted to do it. Many of the same reasons leading us to that conclusion also apply in the administrative law arena to agency commission and board members, except that the reasons here are even more pronounced, as discussed below.

(2) It is unclear why the proponents feel so strongly that the agency must be in control of these adjudications, where under the current system of judicial review, the entire matter is then transferred to a superior court judge who will exercise his/her independent judgment as an adjudicator. The agency does not have the last word anyhow.

(3) The picture presented by the "agency-in-control-of-adjudications" theorists is marred by a factual flaw. The proponents assume that large numbers of adjudications involve serious policy questions. This is not the case at the state level. Certainly there are such adjudications, and these may properly lead to changes in legislation or rulemaking where the adjudicative results contravene legislative or regulatory intent—as is normally the case. But the vast majority of adjudications are just that: adjudications. They attempt to determine whether a standard or rule or statute, which is reasonably well defined, was violated by the respondent (accused licensee). The function of these adjudications is not to establish policy so much as it is to determine (a) what happened, and (b) the appropriate punishment. These judgments require skilled factfinding, knowledge of the rules of evidence, some expert knowledge where appropriate, and consistency and predictability in judgment.

These are critical decisions involving public protection and the livelihood of a licensee whose future is at stake. They are sobering decisions commanding serious and effective procedures. The people making them should know what they are doing. They should should know how to make them, and they should have the independence to justify the confidence of the public and the accused. If one were to sit in on the many adjudications occurring at the state level, one would see that the issues raised and skills required are not suited to legislators, but to adjudicators in a traditional sense.

(4) The ABA also overlooks the nature of the decisionmakers on the state level. Those in the ABA Administrative Law Section who advocate agency control of adjudication are well familiar with the federal system—where the agencies, boards, or commissions are run by professional full-time persons subject to congressional oversight and high visibility.[8] At the state level, these conditions are generally not present. Instead, state agency decisionmakers are usually current members of the trade or profession being regulated. They operate out of the visibility of media attention or public scrutiny, and they are volunteers without legal or judicial experience. Although they may have a vested profit-stake interest in the profession, they may or may not have any expertise in the subject matter of a particular adjudication. We may want (with hesitation) to vest these people with some quasi-legislative power. Part-time amateur legislatures are part of the American tradition. But when it comes to the adjudication of someone's right to practice, their possible incarceration, or the imposition of a civil or criminal fine, we turn to professional adjudicators for good reason.

There are others who object to the reforms we have proposed. Chiefly, they consist of those from the industries and trades which may be affected. These "special interests" argue for maximum "due process," the weakening of discipline and the interim remedy powers of any entity, and control of adjudications by practitioners who are politically active in the state, preferably operating at the local level in "peer review."

These persons seek a kind of "medieval guild" where the members of the profession or trade determine who is in it and how they are to be treated. These proponents have largely determined the system currently in effect. Decisions are made by persons who are colleagues or competitors of the accused—in either case, an unacceptable bias in a serious adjudication. We have a process where there is no expertise/independence combined, and where expertise—to the extent it does exist—is rarely relevant to the issues in a given adjudication. We have a system which lasts anywhere from seven to eleven years (where resisted by a respondent). We have no entity with the experience, expertise, self-confidence, or authority to issue interim suspension orders or other license restrictions to protect the public as litigation proceeds.

The end result of the current system is a fraud on the public. It is a system of purported public protection pursuant to state APAs which are actually a cartel recipe for inaction. The output of state agency discipline systems, even those regulating professions where irreparable harm is a very real danger (*e.g.*, medicine), is pathetic. In 1987 (the last year for which such figures are available), the national average of state disciplinary actions per 1,000 doctors in the United States was 2.78. California is an example of the failure of the APA process. In California during 1987-88 (the last year for which this statistic is available), 715 physicians suffered malprac-

tice judgments or agreed to malpractice settlements in excess of $30,000. These are not merely accusations or cases filed: they are substantial judgments and/or settlements—many of them in the millions of dollars. The level is a record number, up 50% from two years before. Also in 1987-88, the hospital privileges of 249 physicians were revoked for incompetence. During that same time period, the number of physicians publicly disciplined by the Medical Board for incompetence —either by public reprimand, suspension, or revocation—amounted to 12.

Litigation of the average discipline case takes over seven years from the act giving rise to discipline to final resolution. And during this interim, the number of physicians subject to interim suspension over the last three years? Trivial. In California, that number is three—approximately one per year.

The number of complaints flowing into the physician discipline system continues to increase. After initial filtering, those with facial merit and within the jurisdiction of the Medical Board amounted to 4,800 in 1989. The number anticipated for this year? Over 6,000. One does not have to be a sophisticated mathematician or actually review the failure of the system in microcosm, as those of us at the Center have done on many occasions, to see the complete failure of the current system of detection, investigation, and APA adjudication. Nor does the minor tinkering proposed by the ABA Administrative Law Section address the issue squarely, or with the appropriate diagnosis or prescription.

The creation of a system which works is not that difficult, absent the political power of the cartels manipulating the current celebration of impotence. It is not an arrangement over which reasonable persons should be differing. The reforms needed should be supported by scholars, responsible professionals, and the public in order to fulfill the promise and purpose of the regulation of our trades and professions: the protection of the public and the discipline, restriction, or excision of those who, because of their dishonesty or incompetence, threaten irreparable harm to the consuming public.

FOOTNOTES

1. Government Code § 11500 *et seq.* Some professions, including attorneys, have generally created their own administrative procedures separate from the generic administrative procedure acts of the various states, but most of these *sui generis* systems have defects similar to those described in this commentary.

2. In APA-governed administrative proceedings, interim suspension is normally obtained by a separate motion for temporary restraining order (TRO) or preliminary injunction to one of a large number of superior court judges rotating through the law and motion departments of the superior courts of our counties. These judges have heavy caseloads, know little about the trade or profession, and receive few cases involving interim suspension of an occupational license in general. They are extremely hesitant to interim suspend or to otherwise limit practice for public protection, and years of lack of success have led to abandonment of the attempt. For example, the California Medical Board obtains approximately one interim suspension order each year against a practicing physician.

3. During argument, board or commission members frequently ask questions inappropriate for a legal argument—including factual questions which are often answered on a hearsay basis by counsel who are not under oath.

4. A normal appeal consists of written briefs and oral argument to a reviewing court, which decides whether there are "errors of law" or whether there is "substantial evidence" to support findings. However, the agency review of an ALJ's decision is without limitations. The ALJ's decision is only "proposed" to the agency, and it may change it even if there is substantial evidence in support of the ALJ's findings and no errors of law. A change may require opportunity (albeit brief) for written and oral argument, but the agency's director, board, or commission may and often does alter these decisions without directly hearing the evidence.

5. As noted in note 2, *supra*, this large group of undifferentiated superior court adjudicators is also relied upon for interim suspension decisions.

6. This option is superior to the assignment of these cases to ALJs within the control of the agency itself. There is no reason why an independent Office of Administrative Hearings cannot assign panels or individual judges to hear all of the cases in a particular subject area for consistency and expertise purposes. The outcome for such an arrangement combines both independence and expertise.

7. *See, e.g.*, Asimow, *Updating California Administrative Law, California Regulatory Law Reporter* Vol. 9, No. 3 (Summer 1989) at 1.

8. Note that federal agency adjudications also involve more policy-laden issues. A stark example is the Federal Trade Commission, where cease and desist orders (adjudications) and trade regulation rules interplay in defining a very broad statute prohibiting "unfair" business practices (section 5 of the Federal Trade Commission Act). In general, state adjudications take place in a substantially more defined legal setting, where the rule or policy is not seriously in dispute or altered by the process.

THE PROBLEM WITH PROPOSITIONS

At the outset, we must understand the difference between a constitution and our statutes. The former is designed to define the basic rules of the game. Included in those rules are measures to protect minorities from the abuses of a tyrannical "majority". Termed "ochlocracy" by political scientists, this abuse occurs where a "mob-like" majority imposes its will unfairly on a powerless minority. The constitutional structure's check impedes the majority governing the legislative and executive branches from trammeling the basic rights of a minority. Yes, the majority governs, but there are some limits. To go beyond those limits, one must alter the very fabric of the rules of the game: the constitutional document. Since a constitution is, then, a document preserving core rights from popular abridgment and delineating the checks and balances precluding tyranny, it should be altered only *in extremis.*

In California and in many other states, the constitution may be altered by a vote of the people, either proposed by the legislature or directly by a petition initiative. Statutes may also be enacted or altered by the same basic process: an initiative proposed by petition and voted upon directly by the electorate. This initiative-by-petition option is considered by many to be an important escape valve, a popular check against the cor-

ruption of majoritarian rule in the legislature. If special interests control the legislature contrary to the will of the People, the People can act directly. There is little doubt but that institutional corruption of state legislatures, including California's, justifies a check in the form of democratic redress directly to the People. However, what is happening in California is the use of this mechanism to bypass the state legislature in many problem areas where the legislative process is designed to produce—at least in theory—a more considered result. And the initiative process is increasingly used in the rewriting of the very basic constitutional document itself.

A great deal of legislation and constitutional amendment has occurred through direct vote of the people. The November 1988 election included over twenty initiatives. Five separate propositions covered alternative prescriptions for insurance/tort reform. One of them was 120 pages long. We outline below some of the problems with initiatives. We conclude that it is too *difficult* for the majority to win in the legislative process—whether through initiative or act of the legislature—and too *easy* for the populace to change the constitution. The survival of a democracy depends upon an uncluttered, clear constitutional fabric which is not easy to change, but which guarantees the proper functioning of the institutions reflecting the popular will, subject to specific constitutional protections. What has happened, instead, is that the legislature has fallen into the hands of special interests and, in order to overcome that roadblock, citizen groups have sought legislative and extensive constitutional revision by ballot. However, they have done so in a process fraught with error and excess. And they now do so in an environment where access to this "citizens' forum" increasingly depends upon the same kind of special interest money domination now corrupting the legislature.

Constitutional Change Is Too Easy

In 1990, changing a statute by initiative requires 372,678 valid petition signatures. A constitutional change requires 595,485 signatures. Those signatures are no longer gathered by volunteers in the field, but by professionals paid by those proposing the initiatives, *i.e.*, those with sufficient money to hire the signature gatherers. The difference between a statutory initiative and a constitutional change, in practical terms, is $400,000 instead of $600,000. Once the signatures are gathered and the proposal put to the electorate, a majority vote enacts a statutory or constitutional change. The cost difference, then, represents the delineation between the majoritarian legislative function and constitutional alteration.

The direct result of making the constitution this easy to amend is a long series of silly provisions. Is it really necessary that the California Constitution provide for the continuation of rights for Stanford University and the Huntington Library and Art Gallery (Article IX, Sections 9 and 15)? Why do we sandwich between a guarantee that the state constitution shall include, on its own basis, the federal bill of rights (Article I, Section 24) and the admonition that the words of the constitution are mandatory (Article I, Section 26) a constitutional right to fish on public land (Article I, Section 25)? Is it really necessary to include the authority to issue securities for public parking (Article XVI, Section 15)? Although we gratefully acknowledge the repeal of provisions requiring the regulation of wrestling, development of the San Joaquin River, and money related to crustacean sales, is it really necessary that provisions relating to our alcoholic beverage regulatory system (Article XX, Section 22), our horse racing regulatory system (Article IV, Section 19), street car companies (Article XIII, Section 19), or, for heaven's sake, tax exemptions for Cogswell Polytechnical College (Article XIII, Section 4) clutter our state constitution? There are many examples, but we offer these to illustrate what has become of what is supposed to be a ringing document—the architecture of our democracy—the exultation of our republic.

Moreover, once subject matter becomes introduced into the constitution, its alteration then depends upon constitutional amendment. Hence, the constitution increasingly becomes the forum for what should be legislative discourse. And changing it becomes a practical necessity to update and adjust it to different conditions and needs. That necessity requires convenient ease of process. Ease of process opens the document to threats to its basic protections—where it reposes our most cherished values.

Legislation: Too Hard to Enact

A lot of bills are introduced in Sacramento—over 5,000 bills per session at the current rate. There are 800 full-time, professional lobbyists representing profit-stake interests there as well—six for every legislator. These persons are well paid by over 2,000 major trade associations. The existence of campaign contribution corruption and the honoraria debacle are part of the problem. The money now flowing in Sacramento buys access, and access—particularly at the early stage of a proposal—wins an early commitment. Legislators, like most other people, do not like changing their minds publicly. The early commitment often prevails. Legislators, at least indirectly, respond to money.

Money governs in Sacramento: it is able to stop most serious reform, and is often able to perpetrate its own affirmative corruption. The People have, in a real sense, lost their legislature.

The loss of the legislature has been assisted ably by its own fragmented structure, allowing members and party leadership to evade responsibility for their nonfeasance. Members of the legislature are truly not held responsible for their failure to vote in committee—and a failure to vote counts as a "no" vote. Low legislative pay, the committee structure, excessive flow of bills (many trivial or insincerely offered), uncertain attendance at committee meetings where critical votes occur, and lack of accountability all coalesce to magnify the effect of money.

A significant contributing factor is the failure of California's media to cover its own government. In late 1989, the last television/radio journalists pulled out of Sacramento. Oh, one crew returned when a Sacramento landlady was discovered with grisly bodies in her back yard. But allocation of the state's $53 billion in tax monies and action on laws determining criminal justice, environmental protection, consumer rights, child health, education, medical care and welfare? Well, those have taken third seat as media journalists rush to copy each other's bizarre story selection biases...rock star Billy Idol falls off a motorcycle, Cher's newest boyfriend, and Zsa Zsa Gabor.

Accountability is sure to be missing when the media fails. Our journalists have turned the six o'clock news into a combination of "Lifestyles of the Rich

and Famous" and "That's Incredible." Our newspapers (what few are left) restrict *any* non-Sunday commentary to 750 words...that's right...750 words *period*. Even that is deep thought for television—which operates on the assumption that the citizenry's attention span cannot possibly exceed ten seconds.

But beyond money corruption, lack of accountability, and media abdication is an even more basic infirmity: a structural requirement for a two-thirds vote to prevail over special interests in critical areas! There is a two-thirds vote requirement for any appropriation, including any measure which might involve a minimal additional expenditure by local government. While it is inappropriate for the state to continue to demand services by local government without allocating revenues for their provision, it is also ridiculous to require a two-thirds vote for every measure which has only an ancillary and trivial fiscal impact. Yet, if one wishes to change, *e.g.*, a misdemeanor offense to a felony, the California legislative counsel will invariably advise that it may have a fiscal impact and thus require a two-thirds vote.

Further, the two-thirds vote requirement applies to the elimination of a tax loophole. The theory here is that the elimination of a tax loophole involves someone who must now pay more taxes. Hence, to that person, there has been a tax increase. And since there is a tax increase, it is a revenue matter requiring a two-thirds vote. Since special interests have achieved *numerous* loopholes enabling them to receive public services while the rest of us pay the bill, they are quite happy that this protection from majoritarian rule protects them.

Problems With Initiatives

The lack of public control over our own legislature contributes to the proliferation of both legislative and constitutional provisions by initiative. But the proposition process carries with it common flaws. First, none of the propositions proposed may be changed midstream. The initiative is drafted; submitted to the Attorney General to draft a summary statement; and then, in whatever form originally drafted, is circulated for petition and submitted to voters. No matter how ridiculous a provision, no matter how unconstitutional a clause, no matter how much its sponsors agree and would want to change or amend the measure, it is locked in exactly as drafted.

Few initiatives ever proposed or enacted by California voters, or by the legislature, have been optimally formulated in their first draft. Almost all measures reaching the legislature are legitimately and properly altered in the legislative process. Certainly there are bad changes too—and documents accommodating too many interests often emerge as meaningless pap. But the other extreme has comparable abuse: an oversight, mistake, or ambiguity which cannot be corrected even where all concerned will it. The drafters of an initiative, whether it be an ambiguous provision in Proposition 103 or the obviously unconstitutional structure of Proposition 13, are locked into their originally-submitted draft version for all time.

Second, the "single subject rule," which requires that an initiative concern a single subject, is now defined so broadly by the Supreme Court that virtually anything can be packaged with anything else.[1] Hence, special interests may attack disfavored groups such as attorneys or loggers, and use jabs at them to enact distantly related provisions attractive to the special interest sponsor. For example, the insurance industry in its 1988 Proposition 104 advertised a "no-fault" system, attacking excessive attorney fees and promising quicker claim settlements. But less than 10% of the 120-page initiative even addressed no-fault. The remainder would have accomplished quite different objectives (including ensconcing the industry's exemption from federal and state antitrust law such that a two-thirds legislative vote would be required to subject them to meaningful competition).

Third, and perhaps most important, a dangerous game is now being played. Statewide initiatives are proposed not from volunteer effort, but are hired out for money. One drafts an initiative to raise substantial money, whether it be an increased tax on a disfavored item or a commitment from existing general fund monies. Then the proponent goes to groups who want that additional money. These prospective beneficiaries are asked: "If you contribute X amount of money to the gathering of signatures, we can leverage it into much more money from the public trough for your group." Hence, from this process, those who are able to afford $100,000-300,000 in contributions obtain the promise of millions (even hundreds of millions) of dollars of public monies through the initiative process.

The current constitutional (Gann) limit on state spending only accentuates likely misallocation from this mechanism. For a constitutional initiative is now required to *waive* that limit for extra money, or to reserve a given percentage of existing general fund money for a designated beneficiary (as with 1988's Proposition 98 designating 40% of the state budget for education).

Some groups who are the most deserving are unable to ante up any money to finance signatures. For example, preschool children whose health and safety is in disrepair in California have no representatives to buy a piece of the initiative pie. This "bidding" for the spoils of a money-generating initiative is the newest game in town. Ironically, it is a game those who are without special interest influence may be compelled to play. Undesirable as it is, an initiative may be the only way to raise money for the politically (financially) weak. As noted, the legislature's general fund is constricted by the Gann initiative, limiting the total amount of money which may be spent by the state. For those in need, there is no choice but to either climb above the Gann limit through an initiative, or submit to the legislative process for limited money—against 800 lobbyists with honking beaks like young robin chicks in the nest.

The generation of any substantial money through the legislature to solve a serious problem of the powerless means affirmatively taking public funds from existing powerful recipients. This is because prior propositions and commitments reserving tax revenues for predetermined purposes now lock up the vast majority of the state budget (education, special funds, criminal justice, Medi-Cal, *et al.*). The initiative process is increasingly limited to those with money for signature-gathering to qualify the measure. But the legislative process demands even greater financial contributions for a piece of the highly competitive and limited state general fund.

The proposition campaigns themselves are frenzied exercises in "big lie" demagoguery. Ads involve only simplistic sloganeering and attempts to associate the other side with reviled occupations or symbols. Here, the media is at its brain-dead worst—taking money to purvey deceit, spouting the first amendment, and examining, puncturing, or covering very little of it—beyond the *de rigeur* horserace polling stories about

who is ahead. [An exception has been Harvey Rosenfield. But Harvey's publicity stunt genius is the exception proving the rule. He demonstrates what one has to do to raise a substantial issue. Regrettably, the media does not have room for more than one Harvey.]

What we have in the end is a mess. We have a constitution which is cluttered with trivia. We have too many attempts to alter the constitution. The more the attempts succeed, the more future societal change must come from constitutional revision. As to the citizen's initiative check on the legislature, monied interests are now poised to capture that mechanism as well; it is increasingly less likely to produce redress for the People, and more likely to produce an unjust or unworkable result.

The solution must be to confine our initiatives and to focus our energies on constitutional restructuring to make the legislature a real legislative body. It should represent a majoritarian interest (that is what it is designed to do), and respond on the merits based on facts and defensible human values—not in vector-like fashion to money. It must be able to accomplish insurance and tort reform, restore tax equity, rewrite physician discipline procedures, resolve pressing child health and safety issues, and make other tough choices on behalf of diffuse or powerless interests and against the economic interests of the powerful. The constitutional changes that are needed to create a neutral and responsible legislature are included, albeit in a somewhat compromised format, in the Clean Government Initiative now being circulated for voter signature. This initiative bans honoraria, creates public financing of campaigns with spending limitations, and momentously limits the influence of the political action committees. This provision doesn't go quite far enough, but it goes a long way. It is the kind of provision which *must* be in our constitution, and which can only get there through citizen action, given the conflicts of interest paralyzing legislative self-reform. A defensible proposition should set ground rules to ensure that the majoritarian organs of government function as intended. Once such a legislature is in place, the citizenry need not vindicate its grievances through the initiative process; the legislature will do the job properly. Then the People will be well justified in summarily rejecting attempts to legislate—and especially to alter the constitution—by initiative, and a sensible constitutional balance may be restored.

FOOTNOTES

1. The recent upholding of Proposition 105 is an illustration of the extent to which the law has gone in allowing flexibility in initiative proposals. Here, we have a proposition whose only binding glue is the "consumer's right to know." The proposition requires disclosure of information concerning toxic chemicals in food, investments in South Africa, and other information totally unrelated substantively or by any policy commonality. In upholding it, the courts have called into question any remaining viability to the "single subject" restriction.