

California Penal Code § 270.1: A Constitutionally Impermissible Attempt to Combat Truancy

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Introduction

Despite current California truancy laws, school absences have remained a largely unsolved problem. According to the California Department of Education, over 1.5 million students were truant in the 2008–2009 school year.¹ This number represents almost one quarter of the California student body, with nearly forty percent of these truants being elementary school students.² This problem intensifies after examining the correlation between truancy and juvenile delinquency and the subsequent costs on society. In 2008, the Center for Social Organization of Schools at John Hopkins University found that poor elementary school attendance is one of the most reliable predictors of who will drop out in high school.³ In California, this is particularly worrisome considering three-fourths of prison inmates are high school dropouts.⁴ A 2009 report, published by the University

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1. *Data Quest*, CAL. DEP'T OF EDUC., <http://dq.cde.ca.gov/dataquest/Expulsion/ExpReports/StateExp.aspx?cYear=2008-09&cChoice=ExpData1&Pageno=1> (last visited Nov. 14, 2011).

2. *Id.*

3. KIM NAUER ET AL., CENTER FOR NEW YORK CITY AFFAIRS, THE NEW SCHOOL, STRENGTHENING SCHOOLS BY STRENGTHENING FAMILIES: COMMUNITY STRATEGIES TO REVERSE CHRONIC ABSENTEEISM IN THE EARLY GRADES AND IMPROVE SUPPORTS FOR CHILDREN AND FAMILIES 5 (2008), available at <http://www.newschool.edu/milano/nyc affairs/documents/StrengtheningSchoolsReport.pdf>.

4. SENATE COMM. ON PUB. SAFETY, 2009–10 REG. SESS., S.B. 1317 BILL ANALYSIS 7 (Cal. Apr. 20, 2010).

of California at Santa Barbara California Dropout Research Project, estimates “the annual juvenile crime loss associated with high school dropouts at \$1.1 billion.”⁵ Clearly, truancy is a serious problem that leads to negative future consequences for a child and society at-large.

Truancy is not just a “California” problem. Across the country, numerous cities and counties have begun criminally prosecuting parents of truant children in an effort to address the problem.⁶ In 2010, California affirmatively joined this movement statewide by enacting Senate Bill 1317—legislation solely and explicitly aimed at criminally prosecuting the parents of truant students.⁷ The new law, Penal Code section 270.1, makes parents criminally liable for the chronic truancy of their elementary school children. While it is indisputable that some form of action is necessary, it is less certain whether punishing parents is the correct policy and action for the state to take.

Most people point the finger at parents when a child is delinquent. One study found that sixty-nine percent of respondents believe parents are most responsible when a teenager commits a crime.⁸ Some argue that if parents become more involved in their

5. Clive R. Belfield & Henry M. Levin, *High School Dropouts and the Economic Losses from Juvenile Crime in California*, UNIV. OF CAL., SANTA BARBARA, CAL. DROPOUT RESEARCH PROJECT abstract (Sept. 2009), http://www.cbse.org/media/download_gallery/Clive%20researchreport16.pdf.

6. See, e.g., *Mom held on truancy charges*, SPOKANE DAILY CHRON., Nov. 19, 1980, at 10, available at http://news.google.com/newspapers?id=aGVOAAAAIIBAJ&sjid=S_kDAAAAIIBAJ&dq=truancy%20arrest&pg=6289%2C5000594; *Parents Arrested on Truancy Charges*, WAYCROSS JOURNAL-HERALD, Feb. 8, 1988, at 9, available at <http://news.google.com/newspapers?id=g15aAAAAIIBAJ&sjid=2kwnAAAAIIBAJ&dq=truancy%20arrest&pg=5335%2C5029699>; *15 Parents of ‘Habitual Truants’ Arrested*, NEWS4 JAX.COM (May 6, 2008), <http://www.news4jax.com/education/16175110/detail.html?treets=jax&taf=jax>; Tristan Smith, *Parents of Truant Kids Can Face Jail Time*, CNN.COM (Oct. 24, 2008), <http://www.cnn.com/2008/CRIME/10/24/truancy.arrests/index.html?iref=allsearch>; Mary Schuken, *Alaska Targets Truancy to Boost Rural Student Performance*, EDUC. WEEK (Sept. 1, 2010), http://blogs.edweek.org/edweek/rural_education/2010/09/alaska_targets_truancy_to_boost_rural_student_performance.html; *45 People Arrested in Truancy Warrant Roundup*, YOURCLEVELANDNEWS.COM (Aug. 6, 2010), http://www.yourhoustonnews.com/cleveland/news/article_c590402f-d0c5-5523-a34a-7de30262ac47.html.

7. Prior to S.B.1317, criminal liability for minors’ truancy was only possible under California Penal Code section 272, a general parental responsibility statute that has existed for some time, but does not allow for straightforward prosecution of parents of truants. Section 270.1 introduces an explicit focus on penal punishment for chronic truancy. See *infra* notes 53–55 and accompanying text.

8. Eve M. Brank & Victoria Weisz, *Paying for the Crimes of Their Children: Public Support of Parental Responsibility*, 32 J. CRIM. JUST. 465, 469 (2004) (68.7 percent of

child's life or exert greater control over their child, then the child will be less delinquent.⁹ Parental responsibility laws are an attempt by the state to make parents take such action.¹⁰ Despite this logical step, the same study also found that respondents appeared "less willing to support blaming or punishing the parents."¹¹ While the study did not explore reasons for the decline in support, one possible explanation is that people recognize parenting is a difficult task, and that parents should be allowed some freedom to raise their children as they see fit, despite possible mistakes or blunders.

This notion of freedom or autonomy in childrearing is focal to the continuous debate over state versus parental authority to govern a child's educational upbringing. Some scholars argue that vouchers and charter schools are positive signs that parents are winning this debate.¹²

respondents answered "parents" when asked "when a teenager commits a crime, which of the following is most responsible, in addition to the teenager?").

9. See *infra* note 11.

10. See, e.g., Leslie Joan Harris, *An Empirical Study of Parental Responsibility Laws: Sending Messages, but What Kind and to Whom?*, 2006 UTAH L. REV. 5, 7–8 (2006) ("The laws' explicit premise is that much teenage lawbreaking and troublemaking is attributable to parents' failure to exert appropriate control over their children. The laws implicitly assume that an appropriate way to motivate parents is direct state intervention that defines reasonable parenting and imposes sanctions on parents who fail to meet this standard."); Naomi R. Cahn, *Pragmatic Questions About Parental Liability Statutes*, 1996 WIS. L. REV. 399, 409–10 (1996) (The legislators' goals with parental liability statutes include "involving parents in their child's life, affixing personal responsibility for criminal behavior, and attempting to decrease escalating rates of juvenile crime. By holding parents responsible for their child's actions, these laws seek improved parental control over their child. . . . The underlying and highly questionable assumption of such laws is that parents can control their child.").

11. See Brank & Weisz, *supra* note 8, at 473. Also, after the school shootings in Littleton, Colorado, CNN conducted a Gallup poll. Of the 659 adults surveyed, 51% placed a great deal of blame on parents for the events that occurred. Parents only came second to the availability of guns, on which 61% of respondents placed a great deal of blame. Only 53% of American parents believed the government and society could take effective action to prevent such an event, even though a stronger majority reported fearing for the safety of their children at school. *Poll: More Parents Worried About School Safety*, CNN/USA Today/Gallup Poll, (Apr. 22, 1999, 12:23 AM), <http://edition.cnn.com/ALLPOLITICS/stories/1999/04/22/school.violence.poll/>.

12. See Emily Buss, *The Adolescent's Stake in the Allocation of Educational Control Between Parent and State*, 67 U. CHI. L. REV. 1233, 1235–36 (2000) ("In 1983, the National Commission on Excellence in Education reported to Congress that public schools reflected a 'rising tide of mediocrity that threaten[ed] our very future as a Nation and a people.' At the same time, schools were coming under increasing attack by organizations associated with religious conservatives for their secular humanist teachings, and their promotion of 'tolerance,' which was viewed as antithetical to many religious teachings. Together, these attacks . . . inspired parents to demand greater control over educational choices affecting their children. Policymakers have been increasingly responsive to these

On the other hand, it seems that local and state policymakers have successively been chipping away at parental autonomy by exerting greater control over school attendance through parental responsibility laws.¹³

Although the Supreme Court recognizes that the parent-child relationship encompasses parents' fundamental right to autonomy in childrearing, the State's interest in protecting the welfare of children keeps the Court from applying strict scrutiny to cases that infringe upon that right. What results is a balancing test wherein the court weighs the reasonableness of a parent's childrearing decision and the reasonableness of the state's infringement on parental autonomy. This note will argue that under the Court's balancing test, section 270.1 is invalid.

Part I of this paper will explain the state of California truancy laws, and Part II will detail the political underpinnings of section 270.1. Part III will present the historical development of the Supreme Court's jurisprudence on parental autonomy in childrearing, and discuss the competing interests at stake. Part IV will present an analysis of the Court's jurisprudence on the parent-child relationship, so as to better ascertain the Court's standard of review. Part V will apply the Court's standard to section 270.1. Lastly, Part VI will discuss viable options to combat truancy.

I. California Truancy Laws

The California Education Code identifies stages of truancy that carry corresponding levels of state intervention and punishment. The truancy stage of a student correlates to the number of unexcused absences the student accumulates during a school year.¹⁴ An unexcused absence occurs whenever a student is tardy or absent for more than thirty minutes without a valid excuse.¹⁵ Prior to enactment

demands."); *see also id.* at 1237–38 (discussing vouchers and charter schools is a reaction to parental demands).

13. *See supra* note 7 and accompanying text.

14. CAL. EDUC. CODE § 48260(a) (West 2011) (the definition of truancy limits accumulation of unexcused absences to those absences that occur in one school year).

15. *Id.* A valid excuse includes the following: illness; quarantine under the direction of a county or city health officer; for medical, dental, optometric or chiropractic services; attending the funeral of an immediate family member; jury duty; illness or medical appointment of a child when the student is the custodial parent; and for justifiable personal reasons when the student's absence is requested in writing by the parent and approved by an appropriate school official, such as observance of a religious holiday or attendance at an educational conference offered by a nonprofit organization. *Id.* § 48205(a).

of Senate Bill 1317, there were two truancy stages: truancy and habitual truancy.

A. Truancy

Any student with three unexcused absences is a truant, and will be reported to the attendance supervisor or superintendent of the school district.¹⁶ After the student is labeled a truant, the school district must mail a letter to inform the parent of the student's truancy.¹⁷ This letter must also inform the parent of alternative educational programs, their right to meet with school personnel to discuss solutions, and possible legal ramifications for both the student and the parent if the student continues to miss class.¹⁸ Upon subsequent unexcused absences, a school may assign a student to an afterschool or weekend study program.¹⁹

Once a student is labeled a truant, the governing board of a school district may investigate and refer the parent to a school attendance review board ("SARB").²⁰ If the parent "continually and willfully fails to respond to directives of the SARB or services provided, the SARB shall direct the school district to make and file in the proper court a criminal complaint."²¹ The parent will be guilty of an infraction, and fined up to \$100 upon first conviction, up to \$250 upon second conviction, and up to \$500 for all subsequent convictions.²² In lieu of fines, participating counties have the option of allowing the court to order the parent to participate in an education or counseling program.²³ It should be noted, however, that this option is only available in counties where these programs exist.

16. EDUC. § 48260(a)

17. *Id.* § 48260.5.

18. *Id.* § 48260.5(c)-(g).

19. *Id.* § 48264.5(b).

20. See *Truancy*, CAL. DEP'T OF EDUC., <http://www.cde.ca.gov/ls/ai/tr/> (last visited Nov. 4, 2011). SARBs are "composed of representatives from various youth-serving agencies, [and] help truant or recalcitrant students and their parents or guardians solve school attendance and behavior problems through the use of available school and community resources." *School Attendance Review Boards*, CAL. DEP'T OF EDUC., <http://www.cde.ca.gov/ls/ai/sb/> (last visited Nov. 4, 2011).

21. EDUC. § 48291 (alteration in original).

22. *Id.* § 48293(a)(1)-(3).

23. *Id.* § 48293(a)(3).

B. Habitual Truancy

After the student accumulates five unexcused absences and a school employee has made a conscientious effort to meet with the parent and student, the student is deemed a habitual truant.²⁴ Once labeled a habitual truant, the student may be referred to a SARB or the county probation department.²⁵ After referral is made, the parent must be notified in writing of the following: 1) the name and address of the relevant SARB; 2) the reason for referral; and 3) the requirement of the parent and student to attend a hearing.²⁶

The SARB or the county probation department may order the student to participate in a community service program.²⁷ However, this option is only available in the counties that provide such programs.²⁸ If none are available or the student previously failed to participate in such a program, the student can be referred to a probation officer or district attorney mediation program (if the county provides one) where the parent and student meet with an officer or attorney to discuss the possible legal consequences and solutions.²⁹

If the student misses school again (i.e., accumulates six unexcused absences), the student is deemed to be within the jurisdiction of the juvenile court.³⁰ The juvenile court may adjudge the pupil to be a ward of the court and order one or more of the following: 1) twenty to forty community service hours; 2) a fine of \$100 or less; 3) attendance at a court-approved truancy prevention program; and 4) a one-year suspension or delay of the student's driver's license.³¹

At the same time the student falls within the jurisdiction of the juvenile court, the parent can be held criminally liable under Penal Code section 272.³² If the parent *causes* or *encourages* a student to have six or more unexcused absences—either through positive action or failure to exercise reasonable care, supervision, protection, and control—then the parent is guilty of a misdemeanor punishable by a

24. *Id.* § 48262.

25. EDUC. § 48263.

26. *Id.*

27. *E.g., id.*

28. *E.g., id.*

29. *E.g.,* EDUC. §§ 48264.5(c), 48263.

30. *Id.* § 48264.5(d).

31. *Id.* § 48264.5(d)(1)–(4).

32. *See infra* note 34.

fine of up to \$2,500 or imprisonment in county jail for up to a year.³³ Thus, section 272 holds parents of habitual truants criminally liable for contributing to the truancy of their children.

If the parent is charged with a misdemeanor, then the parent can ask to waive their right to a trial and be considered for a diversion program.³⁴ The probation department will investigate the parent's eligibility, and make a recommendation to the court.³⁵ If approved, the parent may be ordered to pay the cost of the program.³⁶ Upon completion of the program, the arrest will be wiped from the parent's record.³⁷

C. Chronic Truancy Under Section 270.1

Despite the breadth of the aforementioned truancy provisions, school absences remained a largely unsolved problem.³⁸ Considering the negative consequences of truancy for a child's future and society at-large,³⁹ policymakers took action and drafted section 270.1.

On September 30, 2010, Senate Bill 1317 was passed,⁴⁰ and subsequently, went into effect on January 1, 2011.⁴¹ It identified yet another truancy stage: chronic truancy.⁴² A student can become a chronic truant if "absent from school without a valid excuse for 10 percent or more of the school days in one school year."⁴³ Senate Bill

33. CAL. PENAL CODE § 272(a)(1) (West 2011) ("Every person who commits any act or omits the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of 18 years to come within the provisions of Section 300, 601, or 602 of the Welfare and Institutions Code . . . is guilty of a misdemeanor . . ."). The Welfare and Institutions Code section 601(b) includes students with four or more trancies. Also, the California Supreme Court has held that under Penal Code section 272(a)(2), parents "have the duty to exercise reasonable care, supervision, protection, and control . . ." Therefore, "parents violate section 272 when they omit to perform their duty of reasonable 'supervision' and 'control' and that omission results in the child's delinquency." *Williams v. Garcetti*, 853 P.2d 507, 512 (Cal. 1993).

34. PENAL § 1001.70-72. However, the parent must not have previously been diverted or failed to complete a probation or parole sentence.

35. *Id.* § 1001.72(a).

36. *Id.* § 1001.73.

37. *Id.* § 1001.75(a).

38. *See supra* notes 1-2 and accompanying text.

39. *See supra* notes 4-6 and accompanying text.

40. Senate Bill 1317, 2010 Leg., 2009-10 Reg. Sess. (Cal. 2010) [hereinafter S.B. 1317].

41. *See Overview of Legislative Process*, OFFICIAL CAL. LEGISLATIVE INFO., <http://www.leginfo.ca.gov/bil2lawx.html> ("Most bills go into effect on the first day of January of the next year."). Senate Bill 1317 was passed on September 30, 2010.

42. *Id.*

43. EDUC. § 48263.6.

1317 also created a new misdemeanor offense for parents of chronic truants in kindergarten through eighth grade—section 270.1.⁴⁴ It holds parents of chronic truants criminally liable if they fail to reasonably supervise or encourage their child’s attendance.⁴⁵

Despite the mainly punitive aspect of section 270.1, there are two guaranteed safeguards. First, the parent cannot be held criminally liable under both Penal Code section 272 and section 270.1.⁴⁶ Second, the parent must be offered language accessible support services prior to being charged.⁴⁷ Additionally, the code incorporates a third possible protection to parents from state encroachment: A deferred entry of judgment program.⁴⁸ The list of required elements of this program include: 1) a dedicated court calendar; 2) leadership by a judge; 3) periodic meetings with school district representatives; 4) service referrals for parents, including case management, mental and physical health services, parenting classes, substance abuse treatment, and child care and housing; 5) a clear statement that if the parent complies with the program, charges will be dropped; 6) a clear statement that if the parent fails to comply, judgment will be entered; and 7) an explanation of the parent’s rights in relation to their criminal record and the program.⁴⁹ Unfortunately, section 270.1 does not require a county to offer the program,⁵⁰ and even if the county chooses to do so, it is barred from using any state money to fund the program.⁵¹ Therefore, section 270.1’s deferred entry of judgment program—the only aspect that does not focus on prosecution to

44. PENAL § 270.1; *see generally* S.B. 1317.

45. PENAL § 270.1(a) (“A parent or guardian of a pupil of six years of age or more who is in kindergarten or any of grades 1 to 8, inclusive, and who is subject to compulsory full-time education or compulsory continuation education, whose child is a chronic truant as defined in Section 48263.6 of the Education Code, who has failed to reasonably supervise and encourage the pupil’s school attendance, and who has been offered language accessible support services to address the pupil’s truancy, is guilty of a misdemeanor punishable by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment.”).

46. *Id.* § 270.1(d).

47. *Id.* § 270.1(a).

48. *Id.* § 270.1(b).

49. *Id.*

50. *Id.* (“A superior court *may* establish a deferred entry of judgment program”) (emphasis added).

51. *Id.* § 270.1(c) (“Funding for the deferred entry of judgment program pursuant to this section shall be derived solely from nonstate sources.”).

reduce truancy—is not guaranteed or financially encouraged by the state.

It is important to note that prior to the enactment of section 270.1, a parental liability law for parents of habitual truants already existed in section 272. It is unclear how section 270.1 will produce better or different results than section 272. There are a few possible explanations. First, section 270.1 could allow for easier prosecution of parents. District attorneys have reported difficulty using section 272 against parents of truants because it requires a heightened burden of proof and school district documentation is not always complete.⁵² As explained by Alameda County Deputy District Attorney, Teresa Drenick, section 270.1 will give district attorneys “more teeth and more tools.”⁵³

Second, section 270.1 could be an effort to establish a statewide, uniform system for addressing serious elementary school truancy. The Senate Committee on Public Safety’s review of Senate Bill 1317 revealed a lack of cohesion in judicial responses when parents of truants are charged under section 272:

Some courts take a punitive approach that may levy a fine or jail time on the parent, but may not result in the return of the child to school, while others may not take these charges seriously, given the gravity of other criminal offenses being addressed, and may throw out the cases with no changed circumstances for the child.⁵⁴

While it is unclear how the punitive approach taken by section 270.1 will result in the return of children to school, section 270.1 explicitly puts parental responsibility for truancy in the penal code and is a clear legislative mandate of the state’s intention to prosecute parents.

II. Political Underpinnings of Section 270.1

Senate Bill 1317 was authored by Senator Mark Leno, Chair of the Senate Public Safety Committee, and sponsored by San Francisco

52. *A Review of California’s Compulsory Education Laws*, LEGISLATIVE ANALYST’S OFFICE (Feb. 2004), http://www.lao.ca.gov/2004/compulsory_ed/020304_compulsory_education_laws.htm.

53. Katy Murphy, *California Truancy Bill Would Crack Down on Parents of Truant Schoolchildren*, OAKLAND TRIB. (Aug. 18, 2010), <http://www.kamalaharris.org/news/718>.

54. SENATE COMM. ON PUB. SAFETY, 2009–10 REG. SESS., S.B. 1317 BILL ANALYSIS 9 (Cal. June 22, 2010).

District Attorney Kamala Harris.⁵⁵ According to Kamala Harris, Senate Bill 1317 was inspired by her successful Chronic Truancy Reduction Initiative (“CTRI”).⁵⁶ In 2008, Harris initiated CTRI in San Francisco, and in January of 2010, she published a white paper describing CTRI and documenting its results.⁵⁷ The paper also assessed the need for similar reform on the state level, and recommended that the state use CTRI as a model.⁵⁸

According to Harris’ paper, CTRI consists of a “three-stage pyramid approach” of widespread education, intervention, and prosecution.⁵⁹ In partnership with the school district, the widespread education effort includes posters, local media, school-wide forums, letters to every parent at the beginning of the school year, and a hotline for parents that is advertised on public buses.⁶⁰ The intervention strategy includes identification by the school district of students whose “attendance is beginning to fall off,” and a subsequent mediation with the parent, school administrators, and prosecutors.⁶¹ The purpose of these mediations is for parents to understand the consequences of their child’s absence, and for all parties to work together to build solutions.⁶² Counselors and service providers are also on hand to offer support.⁶³

Lastly, prosecution is directed toward the parents of children whose attendance has not improved after the intervention and who have missed twenty or more school days.⁶⁴ It should be noted,

55. Kamala Harris, *State Should Follow San Francisco Example on Truancy Prevention*, San Jose Mercury News, Sept. 16, 2010, at Opinion.

56. *See id.*

57. KAMALA D. HARRIS, S.F. DIST. ATTORNEY’S OFFICE, PAY ATTENTION NOW OR PAY THE PRICE LATER: HOW REDUCING ELEMENTARY SCHOOL TRUANCY WILL IMPROVE PUBLIC SAFETY AND SAVE PUBLIC RESOURCES (Jan. 2010), available at <http://www.scribd.com/doc/27838796/Pay-Attention-Now-or-Pay-the-Price-Later-How-Reducing-Elementary-School-Truancy-Will-Improve-Public-Safety-and-Save-Public-Resources>.

58. *See id.* at 3–4 (“[W]e need to get serious about getting our young children in school. . . . I joined with the San Francisco Unified School District to begin a comprehensive initiative focused on elementary school truancy. . . . Our strategy has worked.”).

59. *Id.* at 9.

60. *Id.* at 9–10.

61. In Harris’s own words, “[t]hese mediations work. Without hauling a single parent to court, we saw attendance at one school improve 40 percent among the students whose families participated in the mediation sessions.” *Id.* at 11.

62. *Id.*

63. *Id.*

64. *Id.*

however, that prosecution is not the only focus even in the prosecution stage. According to Harris,

We do not simply require these parents to pay a fine and send them home. We recognize that for parents of severely chronic truants simply paying a fine will not likely result in improved attendance. Instead, we developed formal working relationships with the school district, Child Protective Services, and children and family service providers to compel these parents to address the underlying problems resulting in chronic truancy.⁶⁵

Parents are given three options in Truancy Court:⁶⁶ plead guilty and pay the fine, plead guilty and enter a deferred entry of judgment program, or plead not guilty.⁶⁷ According to Harris, most choose the deferred entry of judgment program.⁶⁸

CTRI was very successful among elementary students. In 2009, student truancy in elementary schools in the San Francisco Unified School District dropped by twenty percent.⁶⁹ Unfortunately, there are several differences between section 270.1 and CTRI. First, section 270.1 does not implement an education campaign. There is no hotline for concerned parents, and parents do not receive a letter at the beginning of the school year emphasizing the importance of school attendance and the legal consequences of truancy. Second, mediation is essential in CTRI, but under current truancy laws, it is only available to parents located in counties that possess such programs.⁷⁰ Section 270.1 did nothing to require or ensure its provision. Lastly, while CTRI provides the deferred entry of judgment option to all parents, under state law, this option is only available to parents in counties that voluntarily create and finance the program. Therefore, while section 270.1 was inspired by a successful multi-pronged approach, it fails to implement many integral pieces of that approach. Instead, it implements only one stage—prosecution.

According to the Public Counsel Law Center, who argued in opposition to Senate Bill 1317, prosecution is the most harmful stage

65. *Id.* at 11–12.

66. The Truancy Court of San Francisco is a specialized court “that combines close court monitoring with tailored family services.” *Id.* at 4.

67. *Id.* at 12.

68. *Id.*

69. *Id.* at 5.

70. EDUC. §§ 48263, 48264.5(c).

for the parent and community.⁷¹ This intrusion into parental autonomy in childrearing—a fundamental right under the United States Supreme Court’s substantive due process doctrine—calls for an assessment of section 270.1’s validity under constitutional doctrine.

III. Historical Development of the Constitutional Doctrine on the Parent-Child Relationship

Prior to the late nineteenth century, “state involvement in the family was minimal,” and parents enjoyed broad autonomy.⁷² With the Progressive Movement of the late nineteenth and early twentieth centuries came more state involvement, including child labor and compulsory education laws.⁷³ Due to this newfound state involvement, a need arose to clarify the proper role and authority of parents versus the state in childrearing.⁷⁴ The Supreme Court played a major role in developing the framework that governs this area of law, starting with the establishment of parental autonomy in childrearing as a fundamental right under the Due Process Clause of the Fourteenth Amendment.⁷⁵

Typically, strict scrutiny is the standard of review when a statute is challenged as infringing on a fundamental right such as parental autonomy.⁷⁶ However, the Court has consistently departed from this standard of review in parent-child relationship cases,⁷⁷ mainly due to a

71. SENATE COMM. ON PUB. SAFETY, 2009–10 REG. SESS., S.B. 1317 BILL ANALYSIS 15 (Cal. June 22, 2010) (“The sole purpose of imposing fines as high as \$2,000 and sentences as long as one year in county jail is to punish, rather than help the parent or guardian achieve better parenting, which would help both the parent and the community.”). The Public Counsel Law Center also said Senate Bill 1317 would “increase court involvement for poor families and creates contentious relationships between parents and schools.” *Id.* at 21.

72. IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 1128 (5th ed. 2010).

73. *Id.*

74. *See id.* at 1127 (“[F]ederal constitutional law has played a major role in delineating the proper roles and authority of parents versus the state in the lives of children.”).

75. *See id.* at 1129 (“In response to the trend of expanded state involvement in the family, the U.S. Supreme Court clarified that parental autonomy in childrearing is protected by the Due Process Clause of the Fourteenth Amendment.”).

76. CALVIN R. MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 471 (3d ed. 2009) (“Contemporary substantive due process proceeds on two tracks. Courts first determine whether a claimed right is a fundamental liberty. If so, a law infringing upon the right will be subjected to strict scrutiny.”).

77. As David D. Meyer notes, the first family privacy cases do not articulate a strict scrutiny standard of review, but the cases also predated the Court’s doctrine on strict

concern for the welfare of children.⁷⁸ The Court recognizes the need for state intervention at times to protect the well-being of children, and allows for such in its doctrine.⁷⁹ Unfortunately, the Court has never clarified the exact standard under which to assess the competing interests of parents and the state.⁸⁰ On the one hand, it propounds and reveres the role and autonomy of parents in childrearing. While on the other hand, it firmly asserts state authority to protect child welfare.⁸¹

What results from the Court's jurisprudence is an undefined form of heightened scrutiny that falls short of strict scrutiny.⁸² Some scholars argue that "the Court seems to apply a more free-form 'reasonableness' test to government actions that impede a parent's child-rearing authority, implicitly calibrating the level of scrutiny in each case to match the particular degree of intrusion upon the parents' interests."⁸³ Another approach adjusts the Court's standard of review based on whether or not it agrees with parents' child-

scrutiny. David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 544 (2000). Subsequently, "[t]he Court has used the familiar language of strict scrutiny—'compelling' interest and 'narrow tailoring'—in only a few of its cases dealing with the rights of parents. . . . In a much greater number of cases, the Court seems to apply a more free-form 'reasonableness' test to government actions that impede a parent's child-rearing authority" *Id.* at 546.

78. *See id.* at 545–46 ("In recent decades, the Court has stated repeatedly that a parent has a 'fundamental liberty interest' in 'the companionship, care, custody, and management of his or her children.' And yet the Court in those cases, still torn between the competing metaphors of family as haven and as hell, stops short of embracing strict scrutiny as the governing standard.")

79. ELLMAN ET AL., *supra* note 72, at 1127 ("[T]he state monitors the parent-child relationship and may intervene when such intervention is deemed necessary to the state's *parens patriae* interests in protecting and promoting the welfare of children. The state may also restrict parental autonomy in order to promote societal interests (i.e. its police power goals), such as helping children grow into well-educated and productive citizens.")

80. Meyer, *supra* note 77, at 545 ("In large part, the Court's parental-rights cases remain profoundly murky regarding the balance they strike between private and communal interests in childrearing because they rest uncomfortably upon two competing and *as-yet-unreconciled* metaphors: the family as a 'private refuge' from a brutal or indifferent community and the state as 'protector' of children from a brutal or indifferent family.") (emphasis added). *See also* David D. Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 UCLA L. Rev. 1125, 1163 (2001) (while the Court is moving toward a middle-ground standard of review in family privacy cases, "the cases are anything but explicit about what that new ground should look like").

81. *See* Meyer, *supra* note 78.

82. Meyer, *supra* note 77, at 545–46 ("Subsequent cases have made it clear that the Court regards some form of heightened scrutiny as appropriate whenever the state intrudes significantly upon a parent's basic decision concerning child rearing.")

83. Meyer, *supra* note 77, at 546.

rearing decisions, affording heightened protection to those decisions to which it agrees.⁸⁴

This article argues that the above approaches are not incompatible. Combined, they reflect a desire by the Court to balance the competing interests at stake by comparing the reasonableness of the parent's child-rearing decision to the reasonableness of the government's infringement on parental autonomy. What results is a type of childrearing partnership that balances parental autonomy and the interests of the state based on considerations of reasonableness.

IV. Case Law Balancing Parental Autonomy with State Interests

In *Meyer v. Nebraska*,⁸⁵ the Supreme Court first articulated parental autonomy in childrearing as a fundamental liberty interest under the Due Process Clause of the Fourteenth Amendment.⁸⁶ The Court stated that the liberty guaranteed by the Fourteenth Amendment denotes "the right of the individual to . . . establish a home and bring up children."⁸⁷ At issue was a Nebraska law that barred all elementary teachers from teaching in any language other than English.⁸⁸ According to the Court, the decision of a parent to educate a child in another language was a reasonable decision within the realm of a parent's right to bring up children.⁸⁹ The law unduly infringed this right, and was therefore invalid.⁹⁰

Next, the Court in *Pierce v. Society of Sisters*⁹¹ addressed an Oregon law that required all children to attend public school—denying parents the choice to send their children to nonpublic schools. According to the Court, the act "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and

84. Meyer, *supra* note 77, at 547 n.102.

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

86. *Id.* at 399 (The liberty guaranteed by the Fourteenth Amendment "denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children . . .").

87. *Id.*

88. *Id.* at 397.

89. *See id.* at 403 ("No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed.").

90. *See id.*

91. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

education of children under their control.”⁹² In effect, the parental decision to send a child to a non-public school was reasonable, and state denial of that decision was unreasonable. Consequently, the law was overturned.⁹³

The result was the opposite in *Prince v. Massachusetts*,⁹⁴ where the Court upheld a Massachusetts child labor law. The Court acknowledged that its prior case law “respected the private realm of family life which the state cannot enter,” but admitted that this realm is not wholly beyond regulation by the state.⁹⁵ It argued that when “[a]cting to guard the general interest in youth’s well being, the state as *parens patriae* may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor and in many other ways.”⁹⁶ In essence, the Court reasoned that child labor is such an unreasonable or unacceptable parenting decision that prohibiting such a decision is a reasonable state intrusion on parental autonomy.

Subsequently, in *Wisconsin v. Yoder*,⁹⁷ the Court upheld the right of Amish parents to withdraw their children from school after the eighth grade despite a Wisconsin compulsory education law that required all children to attend school until sixteen years of age.⁹⁸ The Court asserted that “a State’s interest in universal education . . . is not totally free from a balancing process when it impinges on fundamental rights and interests”⁹⁹ In conducting this balancing process, the Court acknowledged that the Amish were a long-standing and accepted religious people who historically exhibited high moral standards and good citizenship despite their withdrawal from school after the eighth grade.¹⁰⁰ Supported by this track record, the

92. *Id.* at 534–35.

93. *Id.* at 536.

94. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

95. *Id.* at 166.

96. *Id.*

97. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

98. *Id.* at 234.

99. *Id.* at 214.

100. *See id.* at 225 (“The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable and highly self-sufficient community for more than 200 years in this country. In itself this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief.”).

decision by Amish parents to withdraw their children from school after the eighth grade was seen by the Court as reasonable.¹⁰¹

The Court also assessed the reasonableness of the compulsory education law's intrusion into parental autonomy. According to the Court, compulsory education laws are an important state interest, one that is typically viewed as reasonable.¹⁰² Nonetheless, the Court found that "the evidence adduced by the Amish in this case [was] persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve [the state's] interests."¹⁰³ In effect, the evidence did not support a showing that the state's infringement on parental autonomy would serve the state's interest; consequently, the infringement was unreasonable.¹⁰⁴ Following from this, the Court upheld the parent's decision.¹⁰⁵

As evidenced by the *Yoder* Court, the reasonableness of a state's intrusion on parental autonomy likely turns on whether the law serves the state's interest.¹⁰⁶ The *Prince* Court followed the same analysis despite the unreasonableness of the parental decision to allow child

101. *See id.* at 228–29 (“In these terms, Wisconsin’s interest in compelling the school attendance of Amish children to age 16 emerges as somewhat less substantial than requiring such attendance for children generally.”).

102. *Id.* at 213 (“There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. Providing public schools ranks at the very apex of the function of a State.”).

103. *Id.* at 222 (alteration in original).

104. *See supra* note 103 and accompanying text; *see also Yoder*, 406 U.S. at 233–34 (“To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens. But in this case, the Amish have introduced persuasive evidence undermining the arguments the State has advanced to support its claims in terms of the welfare of the child and society as a whole. . . . [W]e cannot accept a *parens patriae* claim of such all-encompassing scope and with such sweeping potential for broad and unforeseeable application as that urged by the State. For the reasons stated we hold, with the Supreme Court of Wisconsin, that the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16.”).

105. It should also be noted that the presence of infringement on religious freedom in this case combined with the infringement on parental autonomy led the Court to apply a comparatively heightened level of scrutiny. *Yoder*, 406 U.S. at 233 (“[W]hen the interests of parenthood *are combined with a free exercise claim* of the nature revealed by this record, more than merely a ‘reasonable relation to some purpose within the competency of the State’ is required to sustain the validity of the State’s requirement *under the First Amendment*.”) (emphasis added).

106. *See supra* notes 103–104 and accompanying text.

labor. It asserted that the child labor law was “within the state’s police power” because it was “*appropriately designed* to reach such evils” as child labor.¹⁰⁷ To be appropriately designed the law need not be perfectly tailored to the state’s interest.¹⁰⁸ According to the *Prince* Court, it can regulate more than is necessary and fail to address all instances of the conduct it is attempting to obviate, at least to a certain degree.¹⁰⁹

In summary, in parental autonomy cases the Court acknowledges the fundamental autonomy of parents in childrearing, but also acknowledges the fundamental interest of the state to protect the well-being of children.¹¹⁰ The Court balances these competing interests by weighing the reasonableness of the parent’s childrearing decision and the reasonableness of the state’s infringement on parental autonomy. Despite the reasonableness of the parent’s decision, the reasonableness of the state’s infringement turns on an evidential inquiry into whether the infringement is appropriately designed to address the state’s interest. If the state law is not designed to do so, then it is unreasonable.

If presented with a reasonable parenting decision and an unreasonable state infringement, such as in *Meyer*, *Pierce*, and *Yoder*, the Court will uphold the parent’s right to autonomy. On the other hand, if presented with an unreasonable parenting decision that threatens the welfare of a child and a reasonable state intrusion—one that is appropriately designed to address the state’s interest—the Court will uphold the state’s infringement, as in *Prince*.

107. *Prince v. Massachusetts*, 321 U.S. 158, 168–69 (1944) (emphasis added).

108. *Id.* at 169.

109. *Compare id.* (“The case reduces itself therefore to the question whether the presence of the child’s guardian puts a limit to the state’s power. That fact may lessen the likelihood that some evils the legislation seeks to avert will occur. But it cannot forestall all of them.”), *with id.* at 170 (“Massachusetts has determined that an absolute prohibition, though one limited to streets and public places and to the incidental uses proscribed, is necessary to accomplish its legitimate objectives. Its power to attain them is broad enough to reach these peripheral instances in which the parent’s supervision may reduce but cannot eliminate entirely the ill effects of the prohibited conduct.”). *See also Yoder*, 406 U.S. at 234 (“[W]e cannot accept a *parens patriae* claim of such all-encompassing scope and with such sweeping potential for broad and unforeseeable application as that urged by the State.”).

110. *See* Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 937 (1996) (“For its part, the Supreme Court has adhered to its . . . pronouncement . . . that parents have a constitutional right to direct and control the education of their children. . . . Nor has it clarified the terms on which this right coexists with what the Court has also declared to be the state’s fundamental interest in ensuring that children are educated to be productive individuals and responsible citizens.”).

V. Analysis of Section 270.1 Under the Court's Balancing Framework

In opposition to Senate Bill 1317, the California Public Defenders Association, Public Counsel Law Center, and the American Civil Liberties Union all argued that the legislation was an infringement on parental autonomy and detrimental to the relationship between parents and the state.¹¹¹ Since section 270.1 intrudes on parental autonomy, it must be evaluated under the balancing framework described above. Under this framework, it is first necessary to determine the reasonableness of the parent's childrearing decision at issue.

A. Reasonableness of Parents' Childrearing Decision

In regard to section 270.1, the parental decision at issue is whether or not parents choose to reasonably supervise or encourage their child's school attendance. Since the Court has expressed that education of children—at least until the eighth grade—is an important governmental interest, a parental decision to not reasonably supervise or encourage their child's attendance is most likely unreasonable. While it is comparatively more reasonable than refusing to send a child to school or actively encouraging a child to skip school, it still threatens the welfare of the child and society at-large.

The discussion becomes more nuanced when examining the parental decision at issue compared to those in the Court's prior jurisprudence on the parent-child relationship. Those decisions include sending a child to a nonpublic school, receiving instruction in languages other than English, performing child labor, or withdrawing from school.¹¹² They all reflect an affirmative expression or action on the part of the parent, which evidences their decision. Implicit in these prior cases is the assumption that the child will be effected by or act according to the parent's childrearing decision. Otherwise, the state and the Court would not be concerned with protecting the child

111. See *supra* note 71 and accompanying text; see also SENATE COMM. ON PUB. SAFETY, 2009–10 REG. SESS., S.B. 1317 BILL ANALYSIS 15 (Cal. May 12, 2010) (“Instead of creating a new crime that will clog the courts with parents who are surely going to lose the few jobs that are still held, the Legislature should refocus priorities in ways that help rather than hurt working class single parents, including safe passage to schools for elementary school children and universal extended care before and after school.”).

112. These are the decisions present in *Pierce v. Society of Sisters*, *Meyer v. Nebraska*, *Prince v. Massachusetts*, and *Wisconsin v. Yoder*, respectively.

from the decision. It is unclear whether this link can be established between a parent's decision to not reasonably supervise or encourage a child's school attendance and a child's truancy.¹¹³

Research shows that truancy is a complex problem that stems from a variety of factors. The factors contributing to truancy occur along a continuum of personal, family, and school issues. These include social skills, cognitive skills, health problems, learning disabilities, emotional disorders, socioeconomic status, parenting skills, family social support, child abuse, child neglect, homelessness, transportation difficulties, unsafe school environments, victimization at school, low expectations of students, unsupportive teachers, inappropriate academic placement, and the presence of delinquent peers, street gangs, and interracial tensions. Due to the multiplicity of contributing factors, a direct link between a parent's failure to reasonably supervise or encourage attendance and truancy is improbable.

The link between a parent's failure to reasonably supervise or encourage attendance and truancy becomes more attenuated when examining the effects of parental involvement on truancy. One study based on the National Educational Longitudinal Study published in 1999 examined the correlation between parental involvement and truancy, dropout, and academic achievement in over 11,000 students from eighth grade forward.¹¹⁴ Parental involvement was measured as parent-child discussion,¹¹⁵ parental involvement in the parent-teacher organization ("PTO"),¹¹⁶ monitoring,¹¹⁷ and educational support strategies, such as visiting the school and talking with teachers.¹¹⁸ According to the study, greater parent-child discussion reduced the likelihood of truancy for white students only, PTO involvement reduced it for whites and blacks, and monitoring reduced it for whites

113. There is a dearth of empirical research that directly examines this question because it is difficult to conduct a study on the effects of inaction or inexpression. Instead this paper will survey the research on the causes of truancy and how affirmative parental involvement and control affect truancy.

114. See generally, Ralph B. McNeal Jr., *Parental Involvement as Social Capital: Differential Effectiveness on Science Achievement, Truancy, and Dropping Out*, 78 SOC. FORCES 117 (Sept. 1999); see also *id.* at 127 ("The final sample consists of 11,401 cases.").

115. *Id.* at 124.

116. *Id.* at 125.

117. *Id.*

118. *Id.* at 126.

and Hispanics.¹¹⁹ For single-headed households, parent-child discussion had no correlation to reducing truancy.¹²⁰

Furthermore, educational support strategies did not significantly improve achievement or reduce problematic behavior for any students.¹²¹ “In fact, the few significant findings that do exist indicate that higher levels of educational support strategies are associated with slightly higher levels of truancy.”¹²² The author concluded that parental involvement only resulted in beneficial gains to advantaged students—namely white, middle- to upper-class students from intact households.¹²³ While this study examined the effects of parental involvement, not disinvolvement, it still reflects a lack of correlation between parental supervision or encouragement and the school attendance of disadvantaged children.

Lastly, there is no general agreement among experts as to whether parents can control the behavior of their children.¹²⁴ At the very least, experts do seem to agree that children of certain, easier temperaments will respond positively to traditional parental discipline.¹²⁵ Nonetheless, one study showed that high levels of perceived parental strictness result in greater child delinquency than medium levels.¹²⁶ This means that, at times, increased or harsh parental control can lead to greater truancy. Clearly, the effects of parental control on a child’s school attendance are not uniform and, consequently, are difficult to ascertain or apply broadly.

On the whole, the aforementioned research indicates that different children are affected differently by varying levels of parental

119. See *id.* at 131 (“Parent-child discussion significantly reduces the likelihood of truancy and dropping out only for white students, while there are nonsignificant relationships for blacks, Hispanics, and Asians. The beneficial influence of PTO involvement is evident only for whites and blacks, not for Hispanics and Asians; the beneficial influence of monitoring is evident only for whites when examining truancy and dropping out and for Hispanics when examining truancy.”).

120. *Id.* at 133.

121. *Id.* at 136.

122. *Id.*

123. *Id.* at 134 (“In many circumstances, what were presumed to be positive influences of social capital persisted only for members of traditionally advantaged sections of the population, namely white students, those of middle to upper socioeconomic status, and those from intact households.”).

124. Judith G. McMullen, “*You Can’t Make Me!*”: *How Expectations of Parental Control over Adolescents Influence the Law*, 35 LOY. U. CHI. L.J. 603, 627 (2004).

125. *Id.* at 640.

126. L. Edward Wells & Joseph H. Rankin, *Direct Parental Controls and Delinquency*, 26 CRIMINOLOGY 263, 273 (1988).

involvement and control. In the Court's prior jurisprudence on the parent-child relationship, the causal connection between the parent's affirmative decision and the child's resulting action is strong. It could well be assumed there that the child acted according to the parent's decision. Here, the same assumption cannot be made. While some children will increase their school attendance based on a parent's reasonable supervision or control, it is unclear how many children will do so. For this reason, the causal connection between a parent's failure to reasonably supervise or encourage school attendance and a child's resulting truancy is tenuous. The parent's decision is still most likely an unreasonable decision, but the Court should consider the tenuous causal connection. In my opinion, it reduces the unreasonableness of the parental decision at issue because the possible resulting harm to the child is not uniform or broadly applicable.

B. Reasonableness of the State's Infringement on Parental Autonomy

Despite an unreasonable parental decision, the Court's balancing framework requires a determination of the reasonableness of the state's infringement. If the evidence shows that the law is appropriately designed to address the problem—as in *Prince*—then the state infringement is reasonable.¹²⁷ Here, that requires a showing of evidence that section 270.1 is appropriately designed to increase school attendance. Unfortunately, there is a lack of definitive empirical research as to whether a parental responsibility law will serve the state's interest in increasing school attendance.¹²⁸ One statistic published by the Office of Juvenile Justice and Delinquency Prevention (“OJJDP”) on a truancy program in Pima County, Arizona, indicates that the threat of prosecution reduces truancy.¹²⁹

127. See *supra* note 107 and accompanying text.

128. Tami Scarola, *Creating Problems Rather Than Solving Them: Why Criminal Parental Responsibility Laws Do Not Fit Within Our Understanding of Justice*, 66 *FORDHAM L. REV.* 1029, 1045 (1997) (“Little direct statistical analysis is available to show the effectiveness of the newly-enacted criminal parental responsibility laws. Available statistics, however, suggest that the laws are not entirely effective in reducing the juvenile crime rate.”).

129. See MYRIAN L. BAKER, JANE NADY SIGMON & M. ELAIN NUGENT, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *TRUANCY REDUCTION: KEEPING STUDENTS IN SCHOOL 5* (Sept. 2001), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/188947.pdf>.

According to OJJDP, “the threat of prosecution prompted 61 percent of parents or guardians to take corrective action.”¹³⁰

The OJJDP determined this by comparing the number of advisory letters, which threatened criminal prosecution of parents of truants, with the number of parents subsequently referred to a social service center due to further absences.¹³¹ While the threat of criminal prosecution certainly played a role in stemming truancy for some children, it should be noted that the advisory letter was sent after only one unexcused absence.¹³² It can be reasonably inferred that this was the first time many parents were informed of their child’s absence, and that some parents took action upon learning of the absence, regardless of the threat of prosecution. Also, some children might miss one day of school, while never missing more or intending to be a chronic truant. Therefore, it is unclear what impact the threat of prosecution had on the students who stopped missing school after receipt of the letter.

CTRI also threatened parental prosecution, and it produced extremely positive results among elementary students in San Francisco. However, CTRI was also a three-stage pyramid approach to combating truancy with prosecution being only one of those stages. The other two stages—widespread education and intervention through mediation—played a fundamental role. In Kamala Harris’ own words, “[t]hese mediations work. Without hauling a single parent to court, we saw attendance at one school improve 40 percent among the students whose families participated in the mediation sessions.”¹³³ Unfortunately, section 270.1 does not provide for widespread education or intervention through mediation, so CTRI’s success in increasing school attendance cannot be translated into section 270.1.¹³⁴

Researchers and criminologists, such as Peter Greenwood, director of criminal justice research at RAND, and Barry Krisberg, president of the National Council on Crime and Delinquency, are

130. *Id.*

131. *Id.*

132. *Id.* at 4.

133. HARRIS, *supra* note 57, at 11.

134. It should be noted, however, that Harris implemented these stages in San Francisco under current California truancy laws. So, a county can voluntarily adopt and implement all of CTRI. If California focused its efforts on assisting each county to implement a three-stage approach resembling CTRI with the added prosecutorial threat under section 270.1, then the probability of seeing the same, positive results is greatly strengthened. This paper will discuss viable options further in section VI.

skeptical that parental responsibility laws bring about their desired results.¹³⁵ Meager research on parental responsibility laws provides some support for this skepticism. For example, in 1979, Oregon passed a law making the parents of children who shoplift civilly liable. Parents were held liable for actual damages and the retail value of the merchandise, along with an additional penalty of between \$100 and \$250.¹³⁶ Afterward, incidents of shoplifting in Portland, Oregon, increased from 2,910 in 1979 to 3,844 in 1980, and increased again to 4,116 in 1981.¹³⁷ Furthermore, in 2008, the County Solicitor General of a Georgia county that prosecuted around three hundred parents of truants in a two-year period acknowledged minimal results—a mere two to three percent increase in school attendance.¹³⁸

Slightly more convincing are results from a federally mandated study that indicate punitive parental consequences do not increase a child's school attendance. In July of 1987, the State of Wisconsin enacted "Learnfare," a law that would deny some welfare benefits to families if their dependent child either failed to enroll in school or had excessive absences.¹³⁹ In this case, excessive absences meant over twenty days missed in one semester.¹⁴⁰ The United States Department

135. Harris, *supra* note 10, at 9–10 (“[C]riminologists and legal professionals tend to be skeptical about parental responsibility laws, at best. Commenting on the state of these laws enacted during the 1990s, Peter Greenwood . . . said, ‘I’ve never seen any studies to show that [parental responsibility laws] work,’ while he commented favorably about teaching parenting skills early. During the same time period, Barry Krisberg . . . sharply criticized the laws:

Most of these laws are a complete waste of time. . . . It’s country club criminology. It sounds good in the suburbs but in reality it’s an empty threat because if you carry it out you just further endanger and pull apart families. . . . We have a serious juvenile-crime problem no one wants to confront, so we end up in an endless search for the delinquency solution of the month. . . . One month it’s tough love. Then it’s boot camp. Now it’s parental responsibility.”).

136. Kenneth Alvin Kalvig, Comment, *Oregon’s New Parental Responsibility Acts: Should Other States Follow Oregon’s Trail?*, 75 OR. L. REV. 829, 844 (1996).

137. *Id.*

138. Tristan Smith, *Parents of Truant Kids Can Face Jail Time*, CNN (Oct. 24, 2008), http://articles.cnn.com/2008-10-24/justice/truancy.arrests_1_anti-truancy-programs-parenting-classes-school-engagement?_s=PM:CRIME.

139. JOHN PAWASARAT, LOIS QUINN & FRANK STETZER, UNIV. OF WISCONSIN-MILWAUKEE, THE EMPLOYMENT AND TRAINING INST., EVALUATION OF THE IMPACT OF WISCONSIN’S LEARNFARE EXPERIMENT ON THE SCHOOL ATTENDANCE OF TEENAGERS RECEIVING AID TO FAMILIES WITH DEPENDENT CHILDREN 4 (Feb. 5, 1992) (submitted to the Wisconsin Department of Health and Social Services and United States Department of Health and Human Services), available at <http://www4.uwm.edu/eti/reprints/Learnfare92.pdf>.

140. *Id.* at 5.

of Health and Human Services charged the Employment and Training Institute of the University of Wisconsin-Milwaukee with determining the Learnfare experiment's impact on the school attendance of the middle and high school students receiving the benefits.¹⁴¹ The attendance records over a seven-year period of over 24,000 eighth grade students¹⁴² were studied to see if eighth grade attendance improved under Learnfare.¹⁴³ Not only did attendance not improve,¹⁴⁴ absences actually *increased*.¹⁴⁵ In one school, the percent of eighth graders missing more than twenty days rose from twenty to twenty-five percent from the 1988-89 school year to the 1990-91 school year.¹⁴⁶ It is important to note, however, the differences between Learnfare and section 270.1: Learnfare monetarily sanctions parents while section 270.1 provides for both fines and jail time, and Learnfare applied only to eighth graders while section 270.1 applies to kindergarten through eighth grade. Due to these differences, this research is not conclusive on the effects of section 270.1, but the results generally indicate that the threat or enforcement of parental punishment does not increase school attendance.

Perhaps the best indicator of 270.1's potential failure to address truancy is the fact that a law imposing criminal liability on parents of habitual truants—section 272—has been in existence since 1979,¹⁴⁷ and yet truancy has remained a rampant problem in California. By definition, chronic truants are habitual truants. Therefore, parents liable under section 270.1 can also be held liable under section 272. Since section 272 has not addressed truancy, it seems unlikely that a similar law will accomplish the opposite. However, as discussed above, some district attorneys report difficulty prosecuting parents

141. *Id.* at 1–2.

142. Because few seventh graders were monitored under the Learnfare policy, the eighth grade was used to track attendance over time for middle schools. *Id.* at 5.

143. *See id.* at 2 (“School records were collected from the six school districts for all teens from the community in the study population who were enrolled in school for one or more semesters. In Milwaukee this population included 32,561 high school students and 24,178 middle school students enrolled from 1984–1985 through 1990–1991. Individual student records were collected on 5,926 high school and middle school students enrolled from 1985–1986 through 1990–1991 in the five other school districts studied.”).

144. *Id.* at 19–20 (“Neither district showed improvement in attendance for teens under the Learnfare requirement . . .”).

145. *Id.* at 20 (“The Milwaukee middle school analysis showed an increase rather than decrease in absences attributable to the presence of the Learnfare requirement The School A middle school analysis showed an increase rather than decrease in absences . . .”).

146. *Id.* at 6 (table Middle School Attendance in School A).

147. *See Williams v. Garcetti*, 5 Cal. 4th 561, 508 (1993).

under section 272, and believe section 270.1 will allow for greater prosecution.¹⁴⁸ If low prosecution rates lessened section 272's effects on truancy and 270.1 will increase prosecution, then section 270.1 might better address the problem.

In summary, the evidence is inconclusive on whether section 270.1 alone will address the problem of truancy, but it tends to indicate a low likelihood. Since the Court does not require that the state's infringement be perfectly tailored to combating truancy, an inquiry into degree is relevant. One could argue that section 270.1 is appropriately designed to address the state's interest since the law is limited in application to parents of young children who have accumulated excessive absences. In essence, the law is aimed at eliminating the worst cases of truancy in kindergarten through eighth grade. However, the research did not indicate a variance of success depending on the level of truancy targeted. In fact, the study on Learnfare only examined those students with excessive absences, and it found that school absences *increased* after Learnfare. Thus, it seems that section 270.1, regardless of narrow design, will not sufficiently address the problem of truancy to be deemed a reasonable infringement.

While the Court's prior jurisprudence on the parent-child relationship does not include a situation with an unreasonable parental decision and an unreasonable state infringement, I argue that section 270.1 is impermissible for several reasons. First, the unreasonableness of the parent's childrearing decision rests on a tenuous link. It is unclear whether and to what degree the decision to not supervise or encourage school attendance will harm a child. Second, the evidence points to the fact that 270.1 will not produce its desired results, and yet it is a severe intrusion on parental autonomy. Lastly, parental autonomy is a fundamental right protected under the Constitution. These factors weigh in favor of overturning section 270.1.

VI. Viable Options

Since truancy is still a serious problem in California, the state should explore other options. Statistics from CTRI tend to indicate that CTRI would adequately serve the state's interest in increasing school attendance. Compared to section 270.1, CTRI presents a much stronger argument for warranting intrusion into parental

148. See *supra* notes 52–53 and accompanying text.

autonomy, but each stage of the approach must be implemented—not just the prosecution stage.

Nevertheless, any approach that focuses on criminally prosecuting parents can result in removing a parent from the home—in this case, for up to a year. This is a serious consequence, and one should consider the impact of this on the child, to whom the law is ultimately trying to help. Opinions from the legal community reflect the negative impact that removing a parent from the home can have on a child. According to a publication from the American Bar Association Standing Committee on Substance Abuse, Truancy, Literacy and the Courts, “removing a parent from the home in order to impress on them the importance of parenting is absurd.”¹⁴⁹ The members of the California Justice Department seem to agree, as the legislature’s prior attempt to hold parents responsible for their child’s delinquency—section 272—has mainly been used for rehabilitative purposes rather than punishment.¹⁵⁰

Furthermore, in a 2004 review of compulsory education laws by California’s Legislative Analyst’s Office (“LAO”), LAO reported that “many of the district attorneys we spoke with stated that the focus of the court is not to penalize the parent with fines or to incarcerate the parent but to provide opportunities for the parent to change the negative behavior pattern for which they are being prosecuted.”¹⁵¹ This resistance to parental prosecution is not unique to California district attorneys; a study on enforcement of Oregon parental responsibility laws showed the same aversion.¹⁵² Viewed in this light, CTRI may not be the best approach, even if it will increase school attendance.

149. AM. BAR ASS’N, STANDING COMM. ON SUBSTANCE ABUSE, TRUANCY, LITERACY AND THE COURTS: A USER’S MANUAL FOR SETTING UP A TRUANCY INTERVENTION PROGRAM 1 (2001), available at <http://www2.americanbar.org/BlueprintForChange/Documents/Truancy%20Literacy%20and%20the%20Courts.pdf>.

150. Howard Davidson, *No Consequences—Re-examining Parental Responsibility Laws*, 7 STAN. L. & POL’Y REV. 23, 27 (1996) (“There appears to have been sparing application of this California law, although one early 1995 report indicated that in 1994 the Los Angeles City Attorney’s Gang Unit, which helped craft the statute, had sent 1,000 parents to counseling or classes (presumably, under the threat of possible prosecution); only two parents who refused to cooperate with the Unit were actually prosecuted.”).

151. *A Review of California’s Compulsory Education Laws*, LEGISLATIVE ANALYST’S OFFICE (Feb. 2004), http://www.lao.ca.gov/2004/compulsory_ed/020304_compulsory_education_laws.htm.

152. Harris, *supra* note 10, at 23 (“Formal prosecution for violation of parental responsibility laws was very uncommon; fourteen of the twenty-six district attorneys said that they never prosecute, and another six said that they prosecute only one to three times per year. The remaining six said that they prosecute four to eleven times per year.”).

Options that do not provide for parental liability do exist. In 2008, the Washington legislature directed the Washington State Institute for Public Policy to study truancy, leading to the publication of a 2009 report on evidence-based intervention and prevention programs for truancy among middle and high school students.¹⁵³ Overall, the institute reviewed 877 school, court, and law enforcement agency programs and over 460 publications.¹⁵⁴ The institute found that only three types of intervention have been proven to improve student attendance and enrollment: alternative educational programs,¹⁵⁵ behavioral programs,¹⁵⁶ and school-based mentoring.¹⁵⁷ In addition, the institute also found that alternative educational programs not only improve attendance and enrollment, but also lead to fewer dropouts, higher test scores and grades, and higher graduation rates.¹⁵⁸ Alternative educational programs are defined as “[p]rograms involving a group of students in a traditional school (e.g., school-within-a-school) that usually offer small class size, more individualized instruction, and/or different instructional methods and material (e.g., vocational curriculum).”¹⁵⁹ This approach to combating truancy, which does not result in parental prosecution, has shown positive academic results along with reducing truancy.

Considering the numerous factors that lead to truancy, a solution that works in one location may not work in another due to different school or community environments. For this reason, the best option may be to initiate pilot programs, such as CTRI or alternative

153. WASH. STATE INST. FOR PUB. POLICY, WHAT WORKS? TARGETED TRUANCY AND DROPOUT PROGRAMS IN MIDDLE AND HIGH SCHOOL 1 (June 2009), available at <http://www.wsipp.wa.gov/rptfiles/09-06-2201.pdf>.

154. *Id.* at 3.

155. Alternative educational programs are defined as “[p]rograms involving a group of students in a traditional school (e.g., school-within-a-school) that usually offer small class size, more individualized instruction, and/or different instructional methods and material (e.g., vocational curriculum).” *Id.* at 6.

156. Behavioral programs are defined as “[t]argeting students’ school behaviors by helping them analyze and problem-solve negative behaviors, and/or by establishing a system of contingencies (rewards, punishments) for desirable and undesirable behaviors.” *Id.*

157. Mentoring is defined as “[p]roviding students with positive role models, who help with specific academic issues (e.g., homework), advocate for the student in the school system, and connect them to other services (e.g., social services).” Exhibit two, titled *Effects of Truancy and Dropout Programs for Middle and High School Students on School Outcomes*, shows that these three programs are the only three to have a positive effect on truancy. *Id.*

158. *Id.*

159. *Id.* (alteration in original).

educational programs. These programs can be studied to determine which responses to truancy work and where they work. Then, the state can formulate an approach that will be effective at combating truancy statewide while serving its interest and respecting parental autonomy.

While pilot programs may be expensive, the expense can be diverted from other truancy mandates. For example, the funds spent prosecuting or imprisoning parents of truants under section 270.1 might be better spent developing pilot programs. Also, the funds spent on sending truancy notification letters to parents under current laws could instead be used on pilot programs. In 2010 alone, LAO estimated the annual cost of sending these notification letters at \$25 Million.¹⁶⁰ LAO has already recommended dispensing with notification letters because they are “broadly duplicative of other requirements” and do “little to increase parental involvement or reduce dropout rates.”¹⁶¹ Therefore, the state may want to reassess where funds are needed most, and sacrifice current futile policies in order to divert those funds to truancy approaches that show promise.

Conclusion

According to the Supreme Court’s jurisprudence, parental autonomy in childrearing is a fundamental right, but the state’s interest in protecting the welfare of children keeps the Court from applying strict scrutiny to cases that infringe this right. What results is a balancing test where the court weighs the reasonableness of a parent’s childrearing decision and the reasonableness of the state’s infringement on parental autonomy.

With regard to section 270.1, a parent’s decision to not properly supervise or encourage a child’s attendance is most likely unreasonable, but the causal connection between the decision and the resulting action is tenuous. On the other hand, the reasonableness of the state’s infringement is determined by whether evidence shows the law is appropriately designed to serve the state’s interest. The evidence is inconclusive here, but indicates that section 270.1 will not adequately increase school attendance. This, coupled with section 270.1’s severe infringement on parental autonomy and the

160. LEGISLATIVE ANALYST’S OFFICE, EDUCATION MANDATES: OVERHAULING A BROKEN SYSTEM’ 16 (Feb. 2010) available at http://www.lao.ca.gov/reports/2010/edu/educ_mandates/ed_mandates_020210.pdf.

161. *Id.*

fundamental right at issue, weighs in favor of overturning section 270.1.

Other viable options do exist, such as CTRI and alternative educational programs, and these options should be considered in light of the harmful effect parental prosecution could have on the child. The best option for increasing school attendance is to initiate and study pilot programs, such as alternative educational programs, to determine which programs produce positive results without risking further harm to the child, and to implement these programs based on measurable results.

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