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A nonsensical tax system

By DAN WALTERS
SACRAMENTO BEE

What happened – or, more accurately, what didn't happen – to Senate Bill 30 this year is a perfect illustration of the California Legislature's endemic disconnection from real life.

Real life is that hundreds of thousands, if not millions, of California homeowners lost their homes to foreclosures and short sales when the housing bubble burst and a severe recession gripped the state.

Technically, mortgage debts that are forgiven are income to the ex-homeowners, but Congress recognized that taxing that phantom income would be wrong and created an exemption.

The Legislature followed suit vis-à-vis state income taxes, but the temporary state exemption expired at the end of 2012 and SB30 would have reinstated it for an extra year.

(The bill was being carried, it should be noted, by state Sen. Ron Calderon, who is now embroiled in a federal bribery investigation. But that doesn't taint this particular bill.)

SB30 had no opposition and sailed through the Senate 36-0, but only after the Senate's leadership inserted a "poison pill" into the measure. It declared that SB30 could take effect only if another measure, Senate Bill 391, was enacted.

SB391 did have opposition, principally from the California Association of Realtors. It would impose fees on real estate transactions to raise money for low-income housing.

The poison pill's practical effect was to stop action on both bills in the Assembly. Thus, distressed homeowners will most likely be hit with income-tax bills for 2013, estimated at about \$50 million in all.

Ultimately, playing political games was more important than doing the right thing by families that had lost their homes, and that's shameful.

It is, however, just one – albeit major – component of an even larger issue, the increasingly wide gap in how federal and state income-tax systems calculate income and deductions.

Once, as Gina Rodriguez, vice president of the California Taxpayers Association, points out in a recent online article, the Legislature took great pains to align the two tax systems as much as possible for the convenience of taxpayers.

Typically, the Legislature would enact an omnibus "conformity bill" each year, but that practice ended about two decades ago and since then, tax conformity has been a hit-and-miss proposition and the systems have gotten out of alignment.

Thus, the disconnect that's very evident on the treatment of phantom income on distressed homes is much more of a systemic shortcoming, and the Legislature is making life much more difficult for millions of California taxpayers than it should be.

SENATE BILL 30

The California Senate passed the California Association of Realtors-sponsored tax relief bill without a single "no" vote on June 20. The bill, authored by Montebello Democratic Sen. Ron Calderon, was aimed at protecting homeowners from having to pay income tax on a short sale.



ERWIN CHEMEKINSKY
REGISTER COLUMNIST



REGISTER PHOTO

Evangelina Vargas has lived in the gang-injunction area near Main Street and Tustin Avenue in Orange for the past five years. Speaking to the Register on Nov. 6, she said she does not see violent crime in her neighborhood.

WHERE, HOW MANY?

There are 12 injunctions against criminal gangs in eight Orange County cities: Anaheim, Fullerton, Garden Grove, Orange, San Clemente, San Juan Capistrano, Santa Ana, Stanton.

LONG-OVERDUE LIMITS ON GANG INJUNCTIONS

Court of appeals rules correctly, in favor of due process.

On Nov. 5, the 9th U.S. Circuit Court of Appeals properly rebuked and ruled against Orange County District Attorney Tony Rackauckas and imposed long-overdue limits on gang injunctions. The appellate court held that some process is required to determine who is covered by a gang injunction.

This is a result supported not only by the requirements of due process of law, but also by basic fairness and just common sense.

For more than 25 years, district attorneys in California have been obtaining injunctions to limit the activities of street gangs and gang members. Dozens have been obtained in Los Angeles alone.

In 2009, the Orange County District Attorney's Office filed a public nuisance action in Superior Court against the Orange Varrio Cypress criminal street gang and 115 named individuals. The Superior Court issued an injunction that limited conduct within a 3.78-square-mile area in the city of Orange.

The injunction prohibited, among other things, "stand[ing], sit[ting], walk[ing], driv[ing], bicycl[ing]" or "gather[ing] or appear[ing]" with any other enjoined parties, including family members; "confront[ing], intimidat[ing], annoy[ing], harass[ing], threat[ening], challeng[ing], provok[ing], assault[ing] or batter[ing]" anyone; using unlawful drugs; possessing a gun; drinking alcohol; wearing any clothes or communicating by words or physical gestures or hand signs that refer to the gang. It prevented gang members from being in any public place or business establishment, subject to exceptions, between 10 p.m. and 5 a.m.

These are only some of the restrictions imposed. They clearly interfere with freedom of association, freedom of speech and freedom of movement. Under the terms of the gang injunctions, two brothers who were reputed to be gang members could not walk down the street together. The 9th Circuit's opinion, though, did not focus on the constitutionality of such a broad injunction, including of legal behavior. Rather, the appellate court focused on the procedures that must be followed to determine who is subject to the injunction.

In the context of this case, the District Attorney's Office initially obtained an injunction against 115 people who it said were

members of the Orange Varrio Cypress gang. When dozens of these individuals went to court to deny that they were members of the gang, the District Attorney's Office dismissed them from the lawsuit. The district attorney then went before the same judge and sought, and received, an injunction against the gang as a whole. The district attorney and the Orange Police Department then began enforcing the injunction against the same people who had been dismissed from the lawsuit after contesting that they were members of the gang.

The 9th Circuit held that this practice violated the Constitution: Individual liberty was restricted without any semblance of due process. The Orange Police Department and the District Attorney's Office had no established procedures for determining who was a member of the gang. At the trial in federal district court, police witnesses testified that Orange police "lacked clear standards for determining on whom to serve the Order" and that there was "no fixed list or set criteria to determine whether an individual was an active participant of OVC."

Nor is it enough that the District Attorney's Office created a procedure for individuals to get themselves removed from the list of gang members.

Under this procedure, a panel of two senior deputy district attorneys and a Probation Department representative may review an individual's request to be removed from the injunction. But this leaves it entirely to law enforcement, not a neutral judge, to decide whether liberty should be restricted. Moreover, under the procedure, the burden is on the individual to demonstrate that he or she is not an active gang member; proving a negative is difficult.

Perhaps most importantly, the city of Orange admitted at trial that the exclusion process "had never been implemented with regard to OVC or any of the five other injunctions the OCDA had obtained."

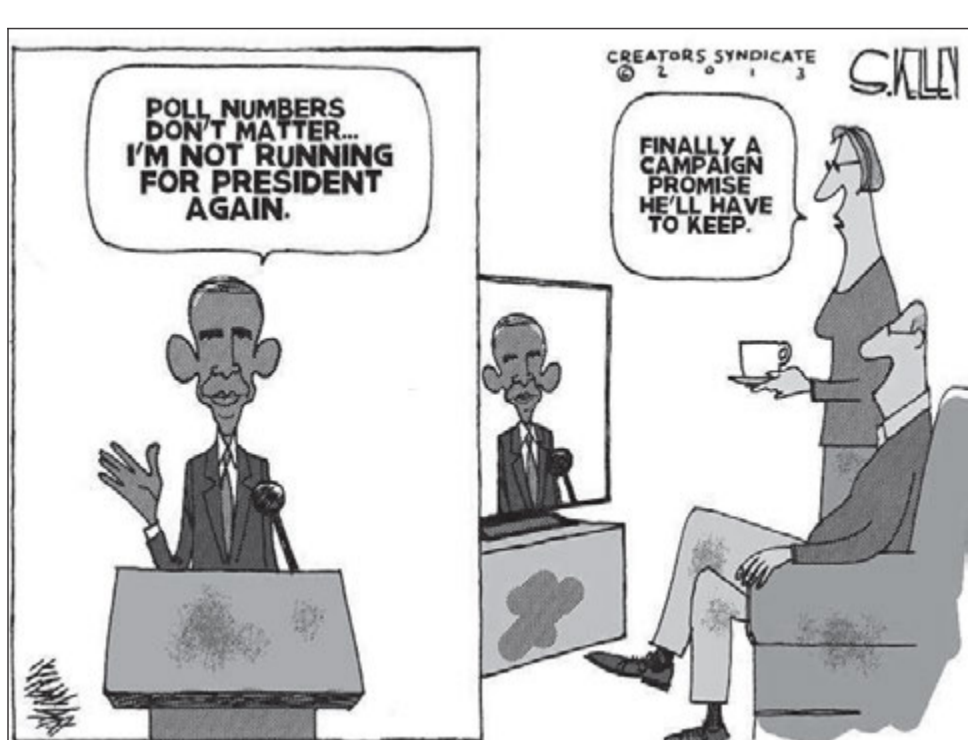
The 9th Circuit simply held there must be a procedure for determining who is a gang member and, thus, is covered by an anti-gang injunction. This is clearly correct. The anti-gang injunction restricts basic freedoms, and no one's liberty can be restricted without due process of law.

The 9th Circuit's opinion in *Vasquez v. Rackauckas* is an important step to applying the Constitution to gang injunctions. Hopefully, it is just the first step, and courts will become more involved in limiting the sweep of these injunctions, which are inconsistent with basic constitutional principles.

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