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Epstein on Witkin

A Conversation with Norm Epstein about
his 15-Year Association with Bernie Witkin

Norman Epstein, who died in March of this year¹ at the age of 89, had a remarkable career. Four different governors (from opposing parties) appointed him to judicial positions, the pinnacle being Presiding Justice in the Second District Court of Appeal. Before entering the judiciary, Epstein served as the first General Counsel for the California State University System. He also had a term as Dean of the California Judicial College, was named “Jurist of the Year” by the Judicial Council of California, and received the Bernard E. Witkin Medal for Lifetime Distinguished Contribution to the Law from the State Bar of California.

But none of these achievements were the reason I asked, and he agreed, to meet me at his home in the Mar Vista neighborhood of Los Angeles, on a sunny but cool morning in late October, 2021. Instead, I wanted to know more about his 15-year collaboration and friendship with Bernie Witkin. Who was this person whose name Witkin chose to place next to his own as co-author on *California Criminal Law*, an offshoot of his monumental work: *Summary of California Law*? Joining us was Molly Selvin, legal historian and editor of the CSCHS Review, and Epstein’s neighbor.

¹ March 24, 2023.

“HE IS THE LAW IN CALIFORNIA”

If any one person could embody what being a lawyer meant in California from the 1970s through the mid-1990s, Witkin came the closest. He had served as California Reporter of Decisions, advised the Judicial Council of California, ceaselessly encouraged judicial education, spoke at innumerable bar meetings throughout California, and was the go-to person for journalists to comment on legal events in California. But it was Witkin’s writings that spurred superlatives. In a 1983 article in the *National Law Journal*, renowned appellate attorney Edward Lascher said of him: “My God, he is the law in California” and compared his works to that of Blackstone.²

Witkin self-published the grand-daddy of the treatises, *Summary of California Law*, in 1928. By the time of Lascher’s remark, it was in its 8th edition,

published by Bancroft-Whitney.³

Later, others accompanied it, published first by Banks Baldwin, then by Bancroft-Whitney: *California Procedure* (first published in 1954)⁴, *California Evidence* (1958)⁵, and lastly the two

“Norm Epstein’s work is excellent.”

— Witkin on Epstein’s writing

criminal treatises, *California Crimes*⁶ and *California Criminal Procedure* (both in 1963)⁷. The courts paid attention. Bancroft-Whitney claimed that by 1990, California courts had cited Witkin as authority “more than 20,000 times—at least once in every six opinions.”⁸ About that time, Court of Appeal Justice George Nicholson estimated that if the unreported cases and trial judge decisions were added in, “such citations must number in the hundreds of thousands.”⁹

It would be difficult to overestimate the effect that his works had on California jurisprudence. But some tried. For instance, when asked to describe how judges viewed Witkin’s treatises, retired Court of Appeal Justice Robert S. Thompson said in 1981 that: “I am absolutely convinced that when Bernie characterizes an aspect of case law in his treatises, thereafter that

² Janice Fuhrman, “A ‘Walking Bible’: Bernard E. Witkin is The Blackstone of Berkeley,” *The National Law Journal* (Aug. 8, 1983), p. 1.

³ B. E. Witkin, *Summary of California Law* (Oakland, 1928).

⁴ B. E. Witkin, *California Procedure* (Bender-Moss, S.F., 1954).

⁵ B. E. Witkin, *California Evidence* (Bender-Moss, S.F., 1958).

⁶ B. E. Witkin, *California Crimes* (Bender-Moss, S.F., 1963).

⁷ B. E. Witkin, *California Criminal Procedure* (Bender-Moss, S.F., 1963).

⁸ Patricia Rogero, “Witkin Completes Summary of California Law,” *CEB Forum* (University of California, Berkeley, Fall 1991), p. 1.

⁹ George Nicholson, “A Tribute to the Master: Bernard E. Witkin, Esq.,” *Justice, Journalism, and the Future* (Sacramento Bar Assn., Oct. 28, 1993), presentation materials, p. 1.

characterization is more apt to become the law than what the court said.”¹⁰ When I asked Epstein about the validity of Thompson’s claim, he reluctantly confessed that it “has maybe some value.”¹¹

For Witkin, keeping up with the regimen of writing, public speaking, and advising the courts must have been an overwhelming task. By 1968, when Chief Justice Roger Traynor appointed him as advisor to the Judicial Council, Witkin realized that he needed help. Around that time, Witkin met Jack Leavitt, a lawyer and mystery writer, who had worked at one time for Bancroft-Whitney. Witkin and Leavitt hit it off, and Witkin hired him to work on the supplements for *California Evidence* and the criminal law treatises. The arrangement would last throughout the 1970s.

That decade was a personally tumultuous one for Witkin. Hank Robinson, one of his closest friends from his law school days at Berkeley, died in January 1973. Three years later, at the age of 71, Witkin suffered his first heart attack; his wife Jane nursed him back to health. But she, too, was ill with the lung cancer that would kill her the following year. In 1978, Witkin remarried to Alba Kuchman, the widow of Carl Kuchman, a prominent Sacramento lawyer who was himself a legal treatise writer.¹² And as the decade ended, Witkin and Leavitt’s collaboration ended acrimoniously.¹³

As the 1980s dawned, Witkin was entering his third quarter century of life and had already survived a significant health scare. It would be understandable that he was contemplating how his life-long work could be produced during his remaining years, and beyond that. He would soon enter into discussions with his publisher that would lead to its establishing a department of editors whom Witkin would personally train to work on his treatises.

But with Leavitt gone, Witkin’s most pressing need was to find someone who could work with him on his criminal law treatises, a topic that had undergone massive changes through the prior two decades. Despite Witkin’s general reputation for being a neutral observer on the law, on criminal law he had strongly and publicly taken a stand against what he saw as court-created innovations that were both ungrounded in prior law and unbalanced in favoring criminal defendants. Witkin needed a great writer with recognized expertise in criminal law, who could serve as a counter-weight to Witkin’s public presentments on the court’s criminal jurisprudence. He made a few phone calls to trusted friends. One name came back: Norm Epstein.

¹⁰ Don J. DeBenedictis, “Profile: Bernard E. Witkin,” *The Los Angeles Daily Journal*, p. 9.

¹¹ Interview with Norman Epstein (October 26, 2021), CSCHS Oral History Project, p. 7.

¹² Carl Kuchman, *California Administrative Law and Procedure* (Colman Law Book Co., S.F., 1953).

¹³ Letter from Jack Leavitt to Bernie Witkin, November 13, 1979, Witkin Archive, California Judicial Center Library.

HIS LAUGH WAS HIS SIGNATURE

That they recommended Epstein is, at first glance, more than a bit puzzling: Epstein had never practiced criminal law. After graduating from UCLA Law School in 1962, his practice instead focused primarily on education law, first at the California Attorney General's office, then as the first general counsel to the California State College (later the California State University) System. It wasn't until 1975, when Governor Ronald Reagan appointed him to the Los Angeles Municipal Court, that he had any experience with criminal matters – and then as a judge.

Epstein recognized his weakness on this topic and decided to build his knowledge on his own. He began reading, analyzing, and writing up summaries of every newly reported California criminal case. Continuing Education of the Bar (CEB) published his summaries as the *Digest of California Criminal Cases*, starting in 1977.¹⁴ The *Digest* grew to five volumes in just three years. In 1979, he began writing a monthly *Case and Commentary* on criminal law for the California Judges Association (CJA), in which he covered both California and U.S. Supreme Court criminal decisions.

It is not known when Epstein first came to Witkin's attention, but it was likely through their mutual association with the Judicial College. CJA founded the college in 1967 to educate judges, then in 1974 it partnered with the Judicial Council to form the Center for Judicial Education & Research (CJER) to administer it. CJER was Witkin's brainchild, and he would be deeply involved in its operations for the remainder of his life. In 1975, when Witkin served as Dean of the College, Epstein attended as a new municipal court judge. Epstein would later teach at the college and in 1979, taught criminal law at the CJER Criminal Law Institute. In 1980, Epstein was appointed Assistant Dean of the College, which meant that he would be Dean the following year.

Epstein's earliest memory of Witkin was from a Judicial College reception at U.C. Berkeley at which Witkin and Bernard Jefferson was present. Jefferson was a Court of Appeal Justice, co-founder of the Judges College, and author of the *California Evidence Benchbook*,¹⁵ a widely respected treatise published by CEB. By June 1980, Jefferson had announced that he was retiring from the bench to enter into a potentially more lucrative private practice. The event that stuck in Epstein's memory was likely a retirement party held in Jefferson's honor.

¹⁴ N. Epstein, *Digest of California Criminal Cases* (CEB, 1977-80, published semi-annually).

¹⁵ Bernard Jefferson, *Jefferson's California Evidence Benchbook*, (CEB, 1972, published annually).

Epstein told me that “the most wonderful thing that happened to me during my career” was his association with “the two great Bernies: Bernie of the north and Bernie of the south” (Witkin hailed from Berkeley, Jefferson from Los Angeles).¹⁶ It was therefore not surprising that Epstein’s recollection would involve both and that it would be marked by Witkin’s characteristic humor:

Bernie Witkin went up to Bernie Jefferson. I still remember how he greeted him. ‘Are you making any money!?’ Bernie Jefferson, who was African American, kind of turned red and he stuttered out something or other, but I still remember that. Bernie could pronounce it with an elevated voice, but not shouting, and it was kind of his signature, his laugh.¹⁷



Justice Bernard Jefferson, left hand on chin (Center), with Witkin and Epstein to his immediate left, circa 1980; Bernard E. Witkin Papers, MSS 0701; box8, folder 37; California Judicial Center Library. Photographer unknown. Others unknown.

¹⁶ Epstein interview (2021), p. 7.

¹⁷ Epstein interview (2021), p. 7.

DO NOT INTERRUPT

About this time, a friend told Epstein to expect to hear from Witkin. “[Witkin] called and said ‘I’m going to talk for 15 minutes. Do not interrupt. When I finish, you can say anything you want.’ So he spoke for exactly 15 minutes.” Witkin told Epstein that he wanted Epstein to work with him on the criminal law treatises, and concluded with: “All right, now you can say whatever you want.” Epstein was flabbergasted. “I was so overwhelmed even though I was tipped off about it. I never would have imagined that I could be a co-author with him.” He and Witkin agreed to meet a few weeks later to discuss the arrangement.¹⁸

Epstein’s other obligations at the time were immense. Just a few months earlier, Governor Jerry Brown had appointed Epstein to the Los Angeles Superior Court. He also had commitments to the Judicial College and CJA. Epstein admitted to me some apprehension about Witkin’s proposal: “but I figured I could do it. I remember talking to my wife about it, that this is going to take some time, but aside from the compensation, it is really a signal thing in my career. If I didn’t accept this, I’d be disappointed in myself, I think, for the rest of my life.”¹⁹

Epstein and his wife Ann then went to Berkeley to spend a weekend with Witkin and Alba at their home for the weekend. He recalled the event:

I remember buying a bottle of wine, once I got to Berkeley, to take to the house. I don’t know what I got, but it was an okay wine. Bernie was holding it with both arms as though this were the winner of the grand prize. Then he took me into his home in Berkeley. He had a room built a little below the main part of the house, which was like a vault. It was a walk-in, more like a large closet with fireproof doors. All his material, the transcripts, everything was kept in there. Upstairs at a little office, he had an Underwood typewriter, nothing electric, and just typed away.²⁰

After the house tour, Witkin and Epstein were left alone to discuss their new arrangement.

[Bernie] indicated what he wanted and what he expected me to do. It sounded fine to me. Just about anything he might have said, I think, probably would have sounded good unless it was something

¹⁸ Epstein interview (2021), p. 1.

¹⁹ Epstein interview (2021), p. 7.

²⁰ Epstein interview (2021), p. 5. It was a grey Royal Touch Control with Magic Margin. Witkin owned three of them: one was donated to the Judicial Center Library where it is on display, one was given by Alba Witkin to Curtis Karplus, who gave it to me, and the location of the last one is unknown.

²¹ Epstein interview (2021), p. 7.

extraordinary. There was nothing like that. There was no weird thing in the way the contract was written up or any of that, it was just fine, plain, and clear. I was honored to be able to do it.²¹

Epstein acknowledged that he became aware that Witkin and his previous contributor ended their collaboration in conflict. I asked if Epstein if that concerned him. “As I indicated, he had somebody who was working...well, a number of people who were working for him. This guy apparently wanted to be a co-author and wanted this and that. Bernie just wasn’t going in that direction.”²² Epstein decided to take a different approach. “To my mind, if there was any kind of a disagreement, Bernie of course, had the copyright. It’s Bernie’s book. What I wanted was to do the best I could to produce something that would work.”²³ In the end, Epstein said that he and Witkin “never, in all the years, had a disagreement, or had any problem or issue arise between us.”²⁴

GETTING IT RIGHT

Three years before Epstein and Witkin hashed out their agreement, in October 1977, the California District Attorneys Association held its Second Annual National Homicide Symposium featuring Witkin as its keynote speaker. Witkin proclaimed in a speech he entitled “The Second Noble Experiment Of the Twentieth Century” (later published as an article) that the criminal law decisions of the U.S. Supreme Court under Chief Justice Earl Warren were based on “bad social doctrine and bad constitutional law.”²⁵ In particular, he held out the cases of *Mapp v. Ohio*, which extended the exclusionary rule, and *Miranda v. Arizona*, requiring the reading of rights before interrogation, as examples of a court placing unwarranted burdens on arrest, evidence and trial. By doing so, the courts “have lost sight of the primary objective of the criminal law.” According to Witkin:

Now none of us needs to be reminded that a system of criminal justice exists not just for the protection of the innocent, but for the punishment of the guilty; and that only by consistent apprehension and conviction of the murderer, the burglar, the arsonist, the rapist, the drug peddler, and the other sub-human predators that infest our society, can the system justify itself in the eyes of our people.²⁶

²² Epstein interview (2021), p. 7.

²³ Epstein interview (2021), p. 6.

²⁴ Epstein interview (2021), p. 5.

²⁵ B. E. Witkin, “The Second Noble Experiment Of the Twentieth Century,” *Prosecutor’s Brief* (Sep-Nov 1977), p. 42.

²⁶ *Ibid.*

Fortunately, according to Witkin, the current “weird and wonderful solicitude of thin majorities of our highest court of the Warren era for the professional and nonprofessional criminal,” need not endure, as the court has a habit of changing its mind. “When that day comes we may see the glittering pseudo-sense of some constitutional doctrines exposed as patent nonsense [and] rediscover the precept that the law is not a game but a search for truth[.]”²⁷

The speech was a sensation, both among those prosecutors there to hear it and others who read about it throughout the state. Court of Appeal Justice George Paras from Sacramento, responding to an article about the symposium, privately praised Witkin for possessing “a degree of sanity with regard to criminal law which is lacking in those who habitually occupy seats on the Supreme Court.”²⁸ Witkin would go on to give the speech at a number of forums across the state to both lawyers and the general public, including at San Francisco’s Commonwealth Club in December, 1978.

But others took exception. The Los Angeles Times editorialized that Witkin had made a “little side trip into the realm of hyperbole” that was unjustified. It continued: “It is an exercise of singular intellectual and moral myopia to argue that a scrupulous regard for the fair administration of justice blocks proper and efficient law enforcement.”²⁹ Santa Clara County Public Defender Sheldon Portman wrote to Witkin to express that he found it “very troubling that California’s ‘leading legal authority’ espouses this kind of ‘ends-justifies-the-means’ philosophy.”³⁰

Did Witkin’s avowed views on criminal law affect the reception of his criminal law treatises? Edward Lascher thought so. In the same article in which lauded Witkin, Lascher criticized them as being “too partisan, and are therefore not cited much.” As a result, he considered those treatises to be Witkin’s “least successful writing.”³¹ Yet Portman, who did not care for Witkin’s views, demurred, stating: “[Witkin] simply does not allow his personal philosophy to be reflected in anything he writes.”³²

Epstein thought Portman was correct: the criminal law treatises did not reflect the views of a partisan. According to Epstein, “Bernie wanted to get it right and legally correct. While his personal views on what ought to be differed

²⁷ “The Second Noble Experiment,” p. 45.

²⁸ Letter from G. Paras to B.E. Witkin (October 31, 1977), Witkin Archive, California Judicial Center Library.

²⁹ “The Warren Court-For Justice,” *Los Angeles Times* (October 30, 1977), as reprinted in *Prosecutor’s Brief* (Sep-Nov 1977), p. 46.

³⁰ Letter from Sheldon Portman to Bernie Witkin (December 2, 1977), Witkin Archive, California Judicial Center Library.

³¹ Walking Bible, National Law Journal, p. 26.

³² *Ibid.*

³³ Epstein interview (2021), p. 11.

from that, his principal objective was to get it right. And he did that.”³³ He acknowledged, however, that Witkin would express in writing his opinion about the quality of legal reasoning in a decision.

Bernie Witkin would do so occasionally, but he was very careful about it, where he thought a case was wrongly decided and is still out there. He wouldn’t use the word wrong, but it’s pretty clear what he had in mind and he was very cautious and very careful about doing it.³⁴

But Epstein thought that taking such a position could be necessary for the treatise to forthrightly address those few cases that warrant such a treatment.

If I think that this view is just not correct, it’s out of sync, I don’t think it’s wrong or out of line to indicate what the better reasoned view would appear to be. But that’s very rare and only comes up a couple times over the course of the book. But where it comes up, I think it’s appropriate for the author to indicate what both positions are and rarely, but sometimes, to indicate what the better reasoned position appears to be.³⁵

Was the Witkin who spoke out on these issues, and the Witkin who compiled and wrote about California law in his treatises, in essence two different people? Epstein thought so. “I think that’s the way it has to be.”³⁶

ON THE SPINE

Sometime after they met in Berkeley, Epstein and Witkin entered into an agreement under which Epstein would act as consultant to Witkin on the supplements for *California Crimes* and *California Criminal Procedure*, and receive an acknowledgement on the title page of the 1983 and 1985 supplements. In the meantime, Bancroft-Whitney created its dedicated Witkin Department to produce Witkin’s treatises.

In his first meeting with the Bancroft-Whitney editors in September, 1981, Witkin described for them Epstein’s role on the criminal publications:

Norm Epstein’s work is excellent. He is our sole expert consultant in this tremendous field of crimes and criminal procedure, and he will be able to give us expert guidance from the point of view of a practicing judge who participated in the legislative and the rule creations and who has digested the material for the judges over a period of years.³⁷

³⁴ Epstein interview (2021), p. 23.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Transcript of video recording (September 9, 1981) from Witkin’s personal papers.

Witkin explained that for *Crimes*, Epstein would provide his discussions of the cases and the editorial staff would then put them into the proper form and place them within the supplement. For *Criminal Procedure*, the editors were to create the original draft of the supplement, and Epstein would review the material to determine whether the writing was too academic and failed to understand the practice implications. Epstein described for me the process as he recalled it:

I would get the material and write a proposed draft, and Bernie would edit it. I think someone on the [publisher's] staff reviewed it to make sure that nothing I was citing had been depublished, and that I hadn't missed something. I don't recall that actually occurring, but it might have. But basically, I was the one writing it, subject to Bernie's approval. I'm sure Bernie read it all, and while I can't remember any edits he made, I'm sure he made some.³⁸

A few years later, Witkin described to journalist Charles Rosenberg his evolving approach to preparing his criminal publications while using the Bancroft-Whitney editorial staff and Epstein.

Witkin: I try to scrutinize the work myself when it comes through and query uncertain or unclear material, but where substantive matters are concerned, and I am not running the particular substantive matter with total know-how, I try once in a while to get consultants. The principal field now is criminal law and procedure. If I keep criminal law and procedure up to date, I'll never get any of the other work done. That's the field in which I've done the most delegation. The original book I'm proud of. I enjoyed writing it. It was very difficult. A lot of things of value in there. But the developments are so voluminous and so complicated. I have one very talented [Bancroft-Whitney] editor who's working on it now, with Norm Epstein as consultant. But do you know Norm?

Rosenberg: I know who he is, but I don't know him personally.

Witkin: Well, he is the top in criminal law in this state and I feel safe in letting him scrutinize all of the final material to see how it fits into a knowledgeable judge's comprehension of the criminal process in this state.³⁹

By 1985, the existing treatises were overdue for a new edition. That May, Epstein and Witkin entered into a new contract under which Epstein would

³⁸ Epstein interview (2021), p. 8.

³⁹ Transcript of interview with Witkin by Charles Rosenberg (June 23, 1984) from Witkin's personal papers. Portions of this interview appeared in Charles B. Rosenberg, "Bernard E. Witkin: Interview with an Iconoclast," *Los Angeles Lawyer*, Sept. 1984, 13-21.

be responsible for the treatises' organization and content, and have approval authority of the final copy. Responsibility for the writing now fully rested with the editors, except for any chapters that Epstein decided to write. In return, Witkin would pay Epstein \$30,000 per year, and "if the profits from these new works justify it" Epstein could share in those profits in an amount Witkin determined. It was now Witkin, not Epstein, who would act as consultant "as appropriate with respect to editorial decisions."⁴⁰

Although intended for release in 1986, the new 6-volume work experienced delays, and finally made its debut in September, 1988. Instead of two treatises, *California Criminal Law 2d* combined them into one work. And a new author was on the spine – it now read "Witkin and Epstein." Epstein insisted that this was done solely at Witkin's direction: "I never asked him to do that, but that's what Bernie wanted to do."⁴¹ During this time, Epstein and Witkin would occasionally see each other, principally at judicial functions, and he characterized their relationship as "very professional."⁴² As he explained: "We were at conferences together. He was at my son's wedding. Things like that."⁴³

TORCH BEARER

By 1990, Epstein began to receive the long-anticipated royalty payments for one-half of the net profits from sales of the bound volumes and supplements. The following year, Witkin raised Epstein's annual compensation to \$36,000. Witkin would continue to retain the copyright to all of the work, but as he explained in a letter agreement in February, 1992, he considered himself and Epstein to be "partners in this venture."⁴⁴

In November 1995, Epstein and Witkin entered into a new contract. Absent was talk of Witkin and Epstein being partners – instead the agreement describes Epstein as being the "torch bearer for the Work."⁴⁵ That was Witkin's language, Epstein recounted, and reading that phrase humbled him. "That's how Bernie was. He could be so generous with things that he said, but he was absolutely honest. If he said something, he meant it. If he put an explanation point by it, it was justified. He knew what he was doing and he always tried to do the right thing."⁴⁶ A month later, Witkin was dead.

⁴⁰ Letter from B. Witkin to N. Epstein to confirm agreement made May 24, 1985 and amend earlier agreement of July 23, 1980, from Witkin's personal papers.

⁴¹ Epstein interview (2021), p. 8.

⁴² Epstein interview (2021), p. 21.

⁴³ Epstein interview (2021), p. 30.

⁴⁴ Letter from B. Witkin to N. Epstein dated February 8, 1992 to confirm agreement made August 1991 and operative September 1, 1999, from Witkin's personal papers.

⁴⁵ Letter from Witkin to Epstein dated November 9, 1995, from Witkin's personal papers.

⁴⁶ Epstein interview (2021), p. 26.

After Witkin's death, the writing process went on essentially as before, with the publisher's staff preparing the initial draft and Epstein having overall responsibility for the content. The 1995 contract also provided that after Witkin died, Epstein was to consult with Winslow Small. Small had worked at CJER, and knew both Epstein and Witkin from his time there. In fact, Small had recommended Epstein to Witkin back in 1980. After Small retired from CJER, Witkin hired him to assist on publishing matters, a role that he would continue to play after Witkin's death. As Epstein explained, "I can say that Winslow was fully trusted by Bernie and by me. He's an outstanding individual. Absolutely honest, ethical, willing to do whatever it takes to get the thing done, and fair... [Bernie] and Win had full confidence in each other."⁴⁷

RECEIVING CALLS

As already noted, the California Supreme Court and Court of Appeal decisions regularly cited Witkin as authority for legal propositions. The practice was so commonplace that, in a quote Epstein attributed to Seth Hufstedler, a former state bar president: "Bernie never became a judge, but no appellate case is decided without him."⁴⁸ But what about "Witkin and Epstein?" Did judges call Epstein to ask him to opine on a particularly difficult point of criminal law, based on what Epstein had written? He reluctantly acknowledged that they did: "I have received calls. 'And what do you think of this? What do you think of that?' If it's a colleague I try to give them the best answer that I can. But that goes on."⁴⁹ Epstein admitted that he too would cite to Witkin and Epstein as authority in his own decisions. "Every time I did that I kind of swallowed. But there it was. For a long time I tried to avoid citing Witkin and Epstein. Because it sounds, you know... [B]ut occasionally I really had to, so I did cite it and finally I think I may have overcome some of that."⁵⁰

RESPECT

Witkin was not the only California legal luminary for whom Epstein wrote. Bill Rutter⁵¹ asked Epstein if he would consider writing as a co-author on his newest guide, *Civil Trials and Evidence*, which would be published in 1995. Epstein agreed.

⁴⁷ Epstein interview (2021), p. 25.

⁴⁸ Epstein interview (2021), p. 26.

⁴⁹ Epstein interview (2021), p. 24.

⁵⁰ Epstein interview (2021), p. 18.

⁵¹ William A. Rutter founded The Rutter Group in 1979, which published "how to" guides for lawyers which it sold as a package with seminars. In an echo of Witkin, Rutter found publishing success in transforming his law school notes into a saleable form, in Rutter's case the Gilbert Law Summaries. <https://www.legacy.com/us/obituaries/ladailynews/name/william-rutter-obituary?id=52166954> (last accessed Aug. 9, 2023).

I was very impressed with Rutter, with what he was doing, and the publications that he had. I was honored to be asked. I don't think Bernie Witkin had anything to do with it, but he knew, and certainly had no objection to it. Obviously, Rutter was familiar with the work that I was doing for Bernie Witkin.⁵²

Epstein insisted that Witkin did not see The Rutter Group as competition, or a threat, but that Witkin and Rutter admired each other: “[Bernie] respected Rutter, and Rutter’s work, and Rutter certainly respected Bernie Witkin.”⁵³ And it was not the case that Epstein had sought to take on more writing with Witkin, but had been rebuffed. According to Epstein, “I never tried to get involved in the other treatises. I was very happy with what I was doing.”⁵⁴

SEND THE MEDIA TO SCHOOL

June, 1980 not only saw the launch of the writing collaboration between Witkin and Epstein. It was also when a seminal event occurred that would both broaden and deepen their association. The location, too, was in Berkeley, at the gathering of state court judges who had assembled to hear from the Chief Justice about how they were going to incorporate television cameras into their courtrooms. But it was Witkin who got all the attention. For decades, Witkin had warned that California’s legal system was in dire need of reform, but that lawyers and judges would be unable to make any substantive changes in the absence of a popular movement.

The brilliant studies of legal scholars, the bold, forward looking programs of our legal institutes, councils and commissions, will gather dust until something happens outside the profession. The courts and the bar will move when public sentiment and interest justify the move, when efficiency and economy in the judicial process are demanded, when proposals for change are viewed with understanding and not suspicion. It takes lawyers to reform the law, but it takes layman to make reformers out of lawyers. In this mildly paradoxical sense, you, who can’t form the law, must be the real court reformers.⁵⁵

⁵² Epstein interview (2021), p. 18.

⁵³ Epstein interview (2021), p. 19.

⁵⁴ Epstein interview (2021), p. 14.

⁵⁵ Speech by BEW to City Commons Club of Berkeley, January 11, 1957, from Witkin’s personal papers.

Meanwhile, another voice emerged calling for dramatic change. In 1969, John P. Frank gave a series of lectures at U.C. Berkeley, which was then compiled into a book entitled *American Law: The Case for Radical Reform*.⁵⁶ Frank's work would soon become a regular part of Witkin's stump speech on reform. He particularly liked to quote Frank's argument for a reconstruction of legal institutions, based on these four points, which Witkin would regularly cite: (1) "American civil justice has broken down," (2) "the collapse is now," (3) "the curve is down; the situation is getting worse," and (4) there is "no generally accepted remedy [nor] a generally accepted program for discussion."⁵⁷ Frank's conclusion (which Witkin would later approvingly declaim) was that: "We must be prepared to reconstruct the institutions of the law and remodel our lawyers and judges, even our buildings."⁵⁸

Who was Frank? According to Witkin, this "male Cassandra from Phoenix" was virtually anonymous: "In my frequent appearances on the frozen entree circuit of bar luncheons and dinners, I have met few lawyers or judges who have heard of him, and fewer who have read his enlightening and frightening book."⁵⁹ Frank, however, was not quite so unknown as Witkin made out. A former law professor at Yale, he moved to Arizona and represented Ernesto Miranda in the case that resulted in the "Miranda Doctrine" requiring the reading of an accused's rights before interrogation. Witkin would later decry this decision for how it "virtually eliminates the most effective and most widely used of all means of criminal investigation—prompt interrogation of the suspect."⁶⁰ Frank was also deeply involved in the *Brown v. Board of Education* case as an advisor to Thurgood Marshall, and in leadership roles with the American Law Institute, an organization that Witkin knew well.⁶¹

But it wasn't until the public witnessed the spectacle of a California Supreme Court at war with itself that its general indifference with respect to the courts and reform was shattered. Governor Jerry Brown had appointed Rose Bird as Chief Justice in 1977, a controversial choice in part due to her gender and her lack of judicial experience. The vote from the Commission on Judicial Appointments of her appointment split in her favor, and the public

⁵⁶ Frank, John P., *American Law: The Case for Radical Reform* (Macmillan, Toronto, 1969), p. 182.

⁵⁷ E.g., Witkin, B. "California's Top Legal Scholar Takes a Look at Law Reform," *The Recorder* (May 1, 1979). There is a fifth point: "our talents are required to develop a new agenda for discussion and for action" which Witkin often dropped in his speeches.

⁵⁸ *Ibid.*

⁵⁹ Witkin, B., Speech at the 50th Anniversary Celebration of the State Bar of California (November 18, 1977)

⁶⁰ Witkin, B., "Freedom and Security: the Judicial Creation of Fundamental Rights (delivered May 17, 1983)" published in *Vital Speeches of the Day* (Vol. XLIX No. 19), p. 595.

⁶¹ Entin, Jonathan L., "In Memoriam: John P. Frank," *Case Western Reserve Law Review* (2002) 53:1, Article 8. Citations to ALI's Restatements of the Law were a regular feature of Witkin's treatises.

confirmation election in November, 1978 was equally contentious. On the morning of the election, the *Los Angeles Times* published an article accusing the California Supreme Court of withholding its decision in *People v. Tanner*,⁶² which would decide the constitutionality of a popular anti-crime measure, to improve her chances of retention. Bird won in a close election and called for the Commission on Judicial Performance to investigate the charge. It did just that, resulting in an exhaustive public airing throughout the first half of 1979 of the justice's personalities, communications, and conflicts with one another. There had never been anything like it in California. Eventually, Justice Stanley Mosk brought a suit challenging the investigation and the California Supreme Court, composed entirely of Court of Appeal Justices elevated just for this vote, shut down the public hearings. In November 1979, the investigation disbanded without producing findings.⁶³

It was against this background that the CJA held a "Media Workshop on California Courts" for its members, state court judges located throughout California. Chief Justice Bird would address the gathering at a Friday luncheon and Witkin the next day. The conference focused on the Judicial Council approving a one-year pilot program to permit television cameras in the courtroom, which

“Saturday’s luncheon featured our Messiah, Bernie Witkin, who enthralled a capacity audience with his novel suggestion that journalists would be well advised to develop a core of experts whose knowledge about, and comment on, law and the court would benefit the professions and public alike.”

— CJA Newsletter on Witkin’s “Media Speech”

was to begin a few days after the workshop. But the event’s subtext was what the California Supreme Court, and its Chief Justice, had been enduring in the media over the past few years. According to Epstein, “Rose Bird was a very controversial person. The courts were under a lot of pressure. I was aware of that, you really couldn’t serve and not be aware of it.”⁶⁴

⁶² 23 Cal.3d 16 (1978).

⁶³ Harry N. Scheiber, “The Liberal Court: Ascendancy and Crisis, 1964-1987,” in Harry N. Scheiber, ed. *Constitutional Governance and Judicial Power: The History of the California Supreme Court*, (Univ. of Cal., Berkeley, 2014), pp. 450-456.

⁶⁴ Epstein interview (2021), p. 27.

The Chief Justice’s speech for the conference was reprinted as the lead story in the CJA newsletter.⁶⁵ In it, she understatedly acknowledged that “the past few years have not marked the most cordial of times in the relationship between the courts and the press” and that there existed an “inherent tension” between the courts and the media. She also managed to criticize the event’s co-chairs on the wording of a letter they sent to attendees of the meeting, saying that it “suggests a defensiveness more typical of an adversary system than a cooperative experiment.” In spite of all this, she urged the judges to cooperate with the media through this new initiative.

The next day was Witkin’s turn. “Witkin Wows Them” ran the article caption. And if any doubt remained as to whether Bird’s or Witkin’s speech was better received, the opening paragraph removed it. “Saturday’s luncheon featured our Messiah, Bernie Witkin, who enthralled a capacity audience with his novel suggestion that journalists would be well advised to develop a core of experts whose knowledge about, and comment on, law and the court would benefit the professions and public alike.”⁶⁶

In his speech (the “Media Speech”), Witkin argued that to get popular support behind the needed reforms, the people must be convinced that it is necessary, which requires a trained media that can articulate where the downfalls of the system are. Typically, the media becomes interested only when something startling occurs that it deems newsworthy, and does not require much effort to explain. The recent public investigation of the charges, and the revelations of internecine battles between the justices on the Supreme Court, was just such an event: “[S]urely, no one will question the maxim that when a judge bites a judge, that’s news.”⁶⁷ The media should instead be trained to discuss legal developments, much like sports commentators understand how to play the game. For reform to occur, according to Witkin, the media “must engage in a nationwide effort to shake public confidence in legal institutions as they now operate,” and expose the underlying defects of the legal system so that public opinion will force legislators and electors to make the needed changes.⁶⁸ He would continue to give this speech at Bench and Bar media conferences over the next several years.

George Nicholson later credited Witkin, and the Media Speech, as being “early catalysts for preliminary work on Proposition 8 [the Victim’s Bill of

⁶⁵ “Chief Justice Discusses Media-Court Relations,” *California Courts Commentary* (Sept. 1980), 20:5, p. 1.

⁶⁶ Allison Rouse, “Press Meet the Judges: Good Time Had By All,” *California Courts Commentary* (Sept. 1980), 20:5, p. 5.

⁶⁷ B. E. Witkin, “A Plan to Send the Media to School,” *Los Angeles Daily Journal* (July 3, 1980). The article states that it “is adapted from a speech Witkin delivered at the Media Workshop on California Courts held last weekend in Berkeley.”

⁶⁸ *Ibid.*

Rights]”⁶⁹ for which Nicholson was the leading proponent, and which passed in 1982. Witkin, although critical of Proposition 8’s contents (calling it a “strange package” of provisions that were full of “baffling uncertainties”), saw it as an encouraging example of the people taking ownership over the law: “[I]ts adoption by more than two and one-half million voters carried a loud and clear message to our high courts: If existing law and practice cannot give our People reasonable security, they are ready, able and willing to change that law.”⁷⁰

A LIFE’S WORK

In 1986, Bird was defeated at her retention election, along with two other justices. Three months later, Malcolm Lucas was sworn in as Chief Justice. In 1992, the calls for reform culminated in the creation of the Commission on the Future of the California Courts which would investigate and recommend changes to the court system to create a preferred vision of a court system in the year 2020. The following year, in October 1993, Witkin’s contribution to reform was honored in a presentation co-sponsored by the Futures Commission and the Sacramento County Bar Association entitled, “Justice, Journalism and the Future” to discuss the speech and its impact. Bernie and Alba Witkin both attended as honored guests.

Epstein spoke on the Media Speech, in remarks entitled “Witkin and the Millennium,” which were later published.⁷¹ After describing Witkin’s proposal to “send the media to school,” Epstein confessed that (1) “we still have no pilot, much less a full-fledged flight” and (2) “the system has not quite collapsed.”⁷² But Witkin’s Media Speech was successful in other ways, according to Epstein. First, its underlying thesis that a justice system requires a citizenry with more than a superficial knowledge of how the system works, and that we depend on the media to do this, remains true. Second, reforms have been instituted by the legislature and the courts. Implementation by the courts of a fast-track program, and the Futures Commission initiated by Chief Justice Malcolm Lucas, are two examples of this. The people themselves, through the initiative process, have addressed some of the excess that Witkin spoke about by enacting Proposition 8 in 1982 and Proposition 115 (“The Crime Victim’s Justice Reform Act”) in 1990.

⁶⁹ G. Nicholson, “Victims’ Rights, Remedies, and Resources: A Maturing Presence in American Jurisprudence,” 23 Pac. L.J. 815, 818.

⁷⁰ B. E. Witkin, “Freedom and Security: the Judicial Creation of Fundamental Rights (delivered May 17, 1983),” *Vital Speeches of the Day*, Vol. XLIX, No. 19, p. 597.

⁷¹ N. Epstein, “The Media Meets The Justice System: A Learned Update On Witkin’s Analysis of the Encounter,” Docket (Sacramento County Bar Assn.) (February, 1994), pp. 12-17.

⁷² “The Media Meets The Justice System,” p. 12.

“Bernie was right,” Epstein concluded, in both pointing out the need for reform and the centrality of the media in creating demand for it.

Proposing it reflected a significant insight. It was typical of Bernard Ernest Witkin, a man whose works, written and otherwise, represent the best of the legal profession. He is a treasure and he is our treasure. There surely is no one like him in California, or anywhere.⁷³

Witkin was delighted. After reading Epstein’s article, he scribbled a note to himself: “Epstein’s understanding of my life’s work, his article on the media speech. Few people understand it as well.”⁷⁴

Looking back on both the Media Speech and his 1993 article, Epstein sought to explain why Witkin’s media proposal was never enacted and his program of reforms was left wanting. According to Epstein, it was “[b]ecause the effort and energy had not been expended to bring it about. It’s not easy to do, but those principles are there. The adherence to them is there. And sometimes it’s hard and sometimes it takes a long time. And rarely is the reaction unanimous. Sometimes, but rarely.”⁷⁵ As to whether the Futures Commission under Chief Justice Lucas ended up fulfilling what Witkin had recommended, Epstein was doubtful.

I think it did make some contributions of real merit, but beyond that I’m just not sure. I had a feeling from the beginning, and I still kind of think it, that the Futures Commission sounds too ambitious. The title implies that we have to turn everything around. That may not have been intended, and is an inaccurate characterization. But that kind of phrasing tends to lend itself to that.⁷⁶

Epstein was encouraged that Chief Justice Tani Cantil-Sakauye had picked up the mantle of reform since Witkin’s death. “I think the Chief Justice is acting in that direction, is trying very hard, and I think doing a very fine job. I think she’ll continue to do what is needed.”⁷⁷

PLUGGING FOR NORM

In May, 1987, Witkin was in Riverside, California for a speaking engagement. While there, he met with James D. Ward, former president of the Riverside County Bar Association and future Court of Appeal justice. Following that

⁷³ Id. at 17.

⁷⁴ B. Witkin, handwritten page, Witkin Archive, California Judicial Center Library.

⁷⁵ Epstein interview (2021), p. 31.

⁷⁶ Epstein interview (2021), p. 32.

⁷⁷ Epstein interview (2021), p. 32.

meeting, Ward wrote to Witkin thanking him for recommending potential elevations to the Court of Appeal, and promising Witkin that “[w]e will keep plugging for Norm.”⁷⁸ A few days later, Witkin called Epstein and requested a biographical summary. He also communicated with Marvin Baxter, a former President of the Fresno Bar Association, who then served as Governor George Deukmejian’s Legal Appointments Secretary. Witkin had known Deukmejian since at least 1963, when Deukmejian was a first-term member of the Assembly from Long Beach and Witkin testified to a joint committee on reforming the California Penal Code.⁷⁹

At Baxter’s suggestion, Witkin drafted a letter to Deukmejian expressing his “deep conviction that the appointment of Judge Norman L. Epstein to the California Court of Appeal will have a significant effect on the court’s decision-making in the area of criminal law administration.”⁸⁰ In it, Witkin pointed out that:

In the next decade the California reviewing courts will frequently be called upon to reexamine precedents in the law of crimes and criminal procedure, and the Court of Appeal will play a major role in calling attention to questionable doctrines, thereby laying the foundation for reconsideration by the Supreme Court. I know that many members of the California trial and appellate bench share my view that the selection of Judge Epstein to fill any vacancy on the Court of Appeal will bring to that Court a strong and persuasive advocate for needed reform in this area.⁸¹

He sent the letter to Baxter, with a cover letter expressing the hope that it would have the “desired effect.”⁸² Fewer than three weeks later, in a letter addressed to “Bernie” and signed “George,” Deukmejian responded that “I value your recommendation and would take it into consideration when I review this appointment.”⁸³

Witkin’s efforts did not end with his letter to the governor. He also spoke with Riverside District Attorney Grover Trask II, who dutifully sent a letter to Baxter on his own, touting Epstein as having received “high marks” from career prosecutors in Los Angeles. According to Trask: “[Epstein’s] intellectual capacity to understand the complexity involved in the criminal

⁷⁸ Letter from James D. Ward to B.E. Witkin, May 4, 1987, Witkin Archive, Judicial Center Library.

⁷⁹ Hearing Transcript, “Joint Legislative Committee for the Revision of the Penal Code” held in San Francisco, September 24 and 25, 1963.

⁸⁰ Letter from B.E. Witkin to George Deukmejian, June 1, 1987, Witkin Archive, Judicial Center Library.

⁸¹ *Ibid.*

⁸² Letter from B.E. Witkin to Marvin Baxter, June 1, 1987, Witkin Archive, Judicial Center Library.

⁸³ Letter from George Deukmejian to B.E. Witkin, June 18, 1987, Witkin Archive, Judicial Center Library.

justice quagmire is exceptional.”⁸⁴ In September, after a conversation with Witkin, George Nicholson (then a superior court judge) also wrote to Deukmejian pointing out that “Epstein has, for a long while, correctly applied and interpreted various of Proposition 8’s provisions solely on his own, individual analysis. He and Bernie, both lacking articulable biases, have been steadfast and reliable Proposition 8 commentators.”⁸⁵



Judge Ronald Tochterman, Justice George Nicholson, Bernie Witkin, and Justice Norman Epstein (L to R) in 1993; Bernard E. Witkin Papers, MSS 0701; box 8, folder 36; California Judicial Center Library. Photograph by Karen Langer.

The impetus for all of these efforts was the upcoming retirement of Justice James Hastings, of which Witkin likely received advance notice, quite possibly from the Justice himself. The retirement would leave a vacancy on the Second District Court of Appeal, Epstein’s home district. In September, Justice Hastings sent Witkin a copy of his resignation letter and expressed harmony with Witkin’s plan to have Epstein elevated. “Good luck on your endeavor,” he wrote. “Norm would be an excellent appointment.”⁸⁶

⁸⁴ Letter from Grover Trask II to Marwin Baxter, June 12, 1987, Witkin Archive, Judicial Center Library. In the letter, Trask acknowledged that he had “discussed this matter in some detail with Bernard Witkin.”

⁸⁵ Letter from George Nicholson to George Deukmejian, September 27, 1987, Witkin Archive, Judicial Center Library. In the letter, Nicholson mentioned that he had learned of Judge Epstein’s being considered for elevation “while I was visiting with Bernie in Santa Monica.”

⁸⁶ Letter from James Hastings to Bernie, September 30, 1987, Witkin Archive, Judicial Center Library.

Despite Witkin's efforts in 1987, Epstein was not appointed to the Court of Appeal to replace Hastings. According to Epstein, he was not even invited to meet with the governor.⁸⁷ But the wheels were in motion and the elevation occurred less than three years later. As Epstein explained, “[e]ssentially it’s not something where you go up and down and up and down. If you are up, you stay there during the term of governor unless you get some kind of a word that ‘no, it ain’t gonna happen.’ Which I didn’t, and it happened.”⁸⁸

GREAT DAY FOR A GREAT COURT

In the early part of 1990, there were two openings on the Second District Court of Appeal. This time, Deukmejian’s appointments secretary Terry Flanigan (Deukmejian had appointed Baxter to the Fifth District Court of Appeal in 1988) invited Epstein to meet with the Governor. According to Epstein, Flanigan told him that Deukmejian would be interviewing about ten candidates, and that Epstein was the first one. After Epstein arrived at the Governor’s office, Flanigan instructed Epstein that “you’re not going to hear anything now, but you will in due time.”⁸⁹ With that, he brought Epstein into Deukmejian’s office. Epstein recalled:

I was interviewed by the Governor, the only people in the room were the Governor, Flanigan, and me. I remember we were talking about what was happening at the California State University, because there was a very problematic chancellor. There was difficult stuff going on, and he had some questions about it, and I answered it as much as I could and indicated that there were some aspects that I couldn’t.⁹⁰

That discussion concerned Chancellor W. Ann Reynolds and charges that she had improperly increased salaries substantially for herself and her top administrators.⁹¹ They then got back to the topic at hand.

At the end of the conversation, the governor said, ‘I’d like to appoint you to the Court of Appeal. We have two openings, in division three and division four. Which one would you like?’ And Flanigan almost fell out of his chair. He still hadn’t interviewed anybody else at this point. He still had nine more people to go through.⁹²

⁸⁷ Epstein interview (2021), p. 41.

⁸⁸ Epstein interview (2021), p. 39.

⁸⁹ Epstein interview (2021), p. 40.

⁹⁰ *Ibid.* As mentioned previously, Epstein had served as the CSU’s first general counsel.

⁹¹ Larry Gordon, “Cal State Chief Resigns Under Fire Over Raises,” *Los Angeles Times* (April 21, 1990).

⁹² Epstein interview (2021), p. 40.

In Division Three, Deukmejian had recently elevated Armand Arabian to the Supreme Court, and in Division Four, Eugene McClosky had announced his retirement after nearly a decade on the court.

I remember telling them that I'd be honored by either one. I know the people in each division, they are fine people, and I'd be pleased to work with them. I didn't give an answer. So we're outside, and Flanagan says, "Which one do you want?" That's what happened. I went up there and picked up my shingle, and it was signed by the Governor, and I was sworn in.⁹³

Epstein chose Division Four, where he would remain as associate justice until 2004, when Governor Arnold Schwarzenegger would appoint him Presiding Justice of that division.

Back in 1987, Nicholson had urged Epstein's appointment, in part because of how fairly he felt Epstein (and Witkin) had covered Proposition 8 in *Criminal Law*. But according to Epstein, the issue of Proposition 8 was not raised during his 1990 appointment process. There were still a couple of concerns expressed, however. As Epstein explained:

As I recall, I had two deficiencies. One, I had not taken a public position on the death penalty. And the other was whether there had ever been any disciplinary charge. No, there wasn't, and I got a letter from the Commission on Judicial Performance that no, there had never been. And I did, and do, support the death penalty under limited circumstances. It has to be very careful and all of that, not the way they apparently do it in Texas. But I said so in a public forum. Those were the only two questions that I had.⁹⁴

Judicial nominations must be confirmed by the Commission on Judicial Appointments consisting of the Attorney General, the Chief Justice, and the most senior Presiding Justice of the Court of Appeal of the affected district. The nominee can name speakers for the hearing to opine on the candidate's qualification, and Epstein took full advantage. Speaking on Epstein's behalf would be Robert Feinerman, Presiding Justice of Division 5 of the Second District Court of Appeal; Skip Byrne, L.A. Superior Court Judge and the latest contribution of the legendary Byrne family to the California judiciary;⁹⁵ Margaret Morrow, who would later become a U.S. District Court Judge; and Witkin. Each would be limited to four minutes for remarks.

⁹³ Ibid.

⁹⁴ Epstein interview (2021), p. 42.

⁹⁵ Adam Dawson, "Family Law: In the History of the California Bench, There's Never Been Anything Quite Like the Byrne Dynasty," *Los Angeles Times*, (Nov. 12, 1989).

Epstein couldn't remember the speech Witkin gave on his behalf on April 12, 1990, except that it was powerfully delivered. "Bernie could be very, very good. The way he talks, his gestures, and the sincerity that goes into the message. But as to literally what he said, I don't recall. It was just a remarkable experience."⁹⁶ Witkin, however, kept his speaker's notes, in his typical manner: a typewritten speech with words underlined to emphasize, and forward slashes between phrases to tell him when to pause. Witkin began his remarks by congratulating the court on its good fortune.

This is a great day for a great court and for a new member to lend his superlative talents to the performance of the court's judicial functions; and I deeply appreciate the opportunity to say a few words about a gentleman, a scholar and a judge of good law.⁹⁷

The California Court of Appeal of today, Witkin continued, "is the largest, most competent and most productive in its history." But while the range of new issues it must face are "constantly expanding" so is its enormous caseload of appeals. The Supreme Court can only do so much – it is the Court of Appeal that must produce the precedential decisions with are urgently needed to resolve the state's major problems. According to Witkin, "that is why the appointment of an appellate justice of outstanding qualifications is such good news."

Witkin then recounted Epstein's professional career, noted the criminal law synopsis he wrote for the CJA, and ended with their collaboration on the new edition of *Criminal Law*, which he said was "a rewarding experience for both of us." The mentioning of these accomplishments was the warm-up for Witkin's underlying thesis: dramatic change is needed in the court system, and Epstein can deliver that change. The citizens of California have been demanding changes as to how criminal law is administered in the state, as shown by both polls and ballot propositions. It is now up to the judiciary to respond:

"If I didn't accept this, I'd be disappointed in myself, I think, for the rest of my life."

— Epstein on Witkin's offer to co-author *Criminal Law*

⁹⁶ Epstein interview (2021), p. 43.

⁹⁷ B. E. Witkin, "Remarks at confirmation hearing on appointment of Judge Norman L. Epstein to the Court of Appeal, Second District (April 12, 1990)," Witkin Archive, California Judicial Center Library.

We must convince the electorate that it is possible to have both effective law enforcement and equal justice for civil and criminal litigants; that the complex legislative and initiative measures raising questions of constitutionality, interpretation and implementation will be considered by justices with the necessary background in criminal law and procedure; and that workable rules of practice will be devised to make criminal trials and appellate review speedy, efficient, and, in a reasonable time, final in their determination of the issues of guilt and punishment.

Witkin concluded that, thanks to Epstein’s knowledge, experience, dedication, and productive capacity, Epstein will have a “significant impact” on the Court’s decisions.

AN AFFIRMATIVE ROLE

Why did Witkin so strongly support Epstein’s appointment? The question is particularly pertinent because a close review of his personal papers do not reveal him playing such an active part with respect to any other judicial candidate.⁹⁸ Moreover, his efforts on behalf of Epstein contradict an espoused refusal in 1982 “to play any affirmative role in the selection process,” which he thought improper due to his “close association with judges of all the courts and with lawyers throughout the state.”⁹⁹ According to Witkin: “I have made my position clear to many friends seeking judicial appointment during the past three decades.” What was different about Epstein? Some possible explanations:

1. Witkin knew of the quality of Epstein’s writing due to their association on *Criminal Law*. Because a superior court judge is a trial judge, who doesn’t write opinions, Witkin would have no way of knowing whether a candidate for elevation would possess this critical ability. This would naturally make Witkin reticent to put his reputation at stake for an unknown quality.
2. Witkin understood Epstein to share his views on the role of justices and judicial decisions. One of Witkin’s complaints regarding criminal law decisions was that they ignored or overruled decades of contrary authority, and that the courts had overreached vis-à-vis the legislature. Epstein, like Witkin, believed a proper understanding of the judiciary’s role involved acknowledging its limitations. Epstein described his views this way:

One of the things that is so encouraging, is when you see someone who comes from a very right-wing or left-wing background, or whatever it is, and gets on the court, but does what is honest and what the law truly indicates. Particularly

⁹⁸ That Epstein was the only candidate for which Witkin affirmatively lobbied was confirmed to me by Marvin Baxter in an interview conducted on November 19, 2021.

⁹⁹ Letter from B.E. Witkin to George Nicholson, December 26, 1982, Witkin Archive, California Judicial Center Library.

when they're dealing with basic standards and precepts. Even though they don't like it, or they don't like the result, or wish it could have been otherwise, nevertheless they uphold as paramount the limited role of the judiciary.

It is a very significant role, but it is a limited role. We're not a legislature. We can't make law in that sense. We're not an executive branch where we carry out all kinds of things and whatever. But we're honest to our principal charge. That's the core. If we get away from that, I don't see any real hope until it's restored.¹⁰⁰

3. Witkin believed that Epstein understood the reforms that Witkin wanted to accomplish and would carry out that program.

4. Epstein's elevation could not help but enhance the reputation of their co-authored publication.

For his part, Epstein denied ever discussing with Witkin who was qualified or not for a judicial appointment, who ought to be appointed, and what Witkin's criteria might be for whether he would recommend somebody.¹⁰¹ Epstein also said that he and Witkin never discussed Witkin's opinion of current justices. "I can't say for sure that we didn't, but I think I would have remembered that sort of thing. There were some matters that, as close as I was to Bernie, he didn't talk about and I would not ask."¹⁰² And as for whether Epstein thought his tenure on the court lived up to Witkin's praise in his nominations hearing, he would only say that he tried to do so. "It's for others to say."¹⁰³

THE WITKIN MEDAL

As Witkin approached his 90th year, the State Bar of California sought to do something to honor him. They approached him with an idea for an oral history project, in which an interviewer would spend time with Witkin and write a book about his life. He refused to participate. Epstein then explained:

So I came up with the idea of the State Bar through its Board of Governors awarding a medal to an academic or a jurist or a practicing attorney to recognize a body of distinguished service, occupying essentially a career. And it would be a physical medal and a citation that goes with it. So I presented that idea to the then president of the State Bar and he accepted it. The State Bar Board of Governors voted it. The first medal was bestowed on Bernie.¹⁰⁴

¹⁰⁰ Epstein interview (2021), p. 30.

¹⁰¹ Epstein interview (2021), p. 38.

¹⁰² Epstein interview (2021), p. 45.

¹⁰³ Epstein interview (2021), p. 43.

¹⁰⁴ N. Epstein, California Appellate Court Legacy Project—Video Interview Transcript: Justice Norman Epstein (July 20, 2016), 2:30:20, p. 52.

Epstein kept his involvement in the project a secret from Witkin, who was awarded the medal at the annual meeting of the State Bar in 1993. Epstein recalled: “Bernie was so taken by that, I think he went to bed wearing the medal that night.” Epstein would himself receive the Medal in 2001.¹⁰⁵



Norm Epstein, Bernie Witkin, and Irwin Nebron (L to R) at the California Judges Association annual meeting, 1993; Bernard E. Witkin Papers, MSS 0701; box 8, folder 23; California Judicial Center Library. Photographer unknown.

PERSON OF THE YEAR

In 1994, the Metropolitan News Enterprise, one of the two legal newspapers in Los Angeles, awarded Epstein its “Person of the Year” honor. According to Epstein, the Met News was not the dominant of the two among lawyers, but it was influential with the judiciary. “All the judges read the Met News carefully. It’s a good paper.”¹⁰⁶

The president of the Met News reached out to Witkin to ask him to speak: “we would appreciate about five minutes of anecdotal reflections of your experiences with Justice Epstein over your years of working together.”¹⁰⁷

¹⁰⁵ Other recipients of the medal include Bill Rutter (in 1996), Bernard Jefferson (in 1997), and Seth and Shirley Hufstедler (jointly awarded in 2002).

¹⁰⁶ Epstein interview (2021), p. 43.

¹⁰⁷ Letter from Jo-Ann W. Grace to Bernard Witkin, December 19, 1994, Witkin Archives, California Judicial Center Library.

Based on Witkin's notes that he kept of his remarks, he talked of the work they did on the criminal law supplements, Epstein's co-authorship of *Criminal Law*, and the efforts to get Epstein on the appellate bench. Witkin concluded by alluding to what Witkin saw as their shared crusade:

Dear Young Epstein: I will soon reach my cabin in the sky. Not so long afterwards you will arrive on your bicycle -- 10 speed? More likely 50 speed -- your room will be prepaid. Till then may you continue to pursue our joint efforts: to preserve the rule of law and the free enterprise system of this great western democracy as our own treasure and an inspiration to other nations and groups. Your reward and mine will be the knowledge that we fought the great battle on the right side -- and left enduring signposts for the guidance of our successors. I'm glad that I lived long enough to know you.¹⁰⁸

In 2021, when asked if he also viewed himself as engaged in a "great battle," Epstein responded, "I don't know that I would use that term. But these things don't fall out of the sky."¹⁰⁹

A LEGENDARY CONTRIBUTION

In December 1995, when Epstein was in Washington D.C. for the American Law Institute, he got a call from Alba Witkin that Bernie Witkin had died.

I remember being utterly shocked. She was obviously in shock and I was just shaking my head. The man was such a monument, and as I said a few hours ago, there has never been anyone like him in California. ... The man, as short as he was, was absolutely a giant.¹¹⁰

Epstein was present at the memorial reception held a few weeks after Witkin died, and spoke at the memorial session of the California Supreme Court on December 3, 1996, at which he called Witkin the "Justinian of California." The following year, the California Legislature passed, and Governor Wilson signed, a bill renaming the state law library for Witkin. The statute states that the legislature:

[H]ereby finds and declares that Bernard E. Witkin's legendary contributions to California law are deserving of a lasting tribute and an expression of gratitude from the state whose legal system he, more than any other single individual in the 20th century, helped to shape.¹¹¹

¹⁰⁸ Witkin, B.E., handwritten notes attached to program for event: "Metropolitan News-Enterprise honors 'Person of the Year' Norman Epstein" (1994).

¹⁰⁹ Epstein interview (2021), p. 44.

¹¹⁰ Epstein interview (2021), p. 47.

¹¹¹ Cal. Educ. Code §19328(a).

Epstein was once again at the dedication to speak about Witkin’s legacy.

I asked Epstein if he thought that statement in the education code was still warranted, and whether Witkin’s contribution to California’s legal system was greater than that of Chief Justices Phil Gibson or Roger Traynor. “Well, they’re different, but yes,” he responded. He then explained why:

Bernie did make a major contribution, and as time goes on and people look back at the era that he was in, and particularly look at his history, and what he came from, and what influenced him, and what he tried to do, and how he tried to do it, they will recognize the value of his contribution. We’ve not had anybody in the history of California who is similar to Bernie. I guess Roger Traynor may be close, but that would be it. Bernie was a great man and there are very few who were, or are, as great as he, or who made the contributions that he did. That’s why I so treasure my relationship with Bernie.¹¹²

EPILOGUE

With that, Epstein and I concluded our conversation about his time as Witkin’s friend and collaborator. He then showed me the room in which he wrote *Criminal Law*, and framed photos from that time. Despite the passage of more than 25 years since Witkin’s death, Epstein’s continued affection and admiration for him was palpable. That evening, Epstein invited me to dinner at a local restaurant, and insisted on paying. It was the last time we saw each other.

★ ★ ★

About the Author



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¹¹² Epstein interview (2021), p. 48.