ARTICLES

March is the Cruelest (Cruellest) Month

This year T. S. Eliot's opening line in *The Waste Land* is a month late. Justice Norman Epstein passed away on March 24. But April is both a cruel and a positive month for me. It is cruel because of our loss, but positive because it is my opportunity to remember and celebrate with you the remarkable life of my colleague and friend, Justice Norman Epstein.

Dateline–the day after Labor Day, September 1975, that was only… (gulp) nearly 48 years ago, the day I first met then Municipal Court Judge Norman Epstein, hereinafter Norm, where I was assigned to the Los Angeles Municipal Traffic Court, alleged to be the largest traffic court in the world. Pardon the informality, but even with his impressive credentials and awards, he was Norm to his friends and colleagues. For the most part, I will employ the same informal reference to other judges mentioned in this tribute as I do to Justice Epstein... I mean, Norm. Inside tidbit for loyal readers–many judges do form close friendships. I won't hazard a guess about who, if any, are buddies on the United States Supreme Court. I bet … never mind.

Short historical digression for younger readers puzzling over what is a municipal court. Norm would approve this aside but would write a comprehensive scholarly exegesis on the subject. Once there were municipal courts throughout the State of California, including the County of Los

Angeles. Back in 1975, if memory serves me correctly (lately it has been falling down on the job), the Los Angeles Municipal Court had jurisdiction over misdemeanor criminal matters and civil cases with a jurisdictional limit of $5,000. Over the years the limit increased to $25,000. In 1998 voters passed a constitutional amendment that gave voters in every county the option to unify the municipal and superior courts into a single unified superior court.

As the Dean and teacher at the California Judges College, Norm was instrumental in assuring that California maintains its preeminence as the outstanding and most influential judiciary in the nation.

Within the next few years, all 58 counties in the state voted for unification. This automatically "elevated" all municipal court judges to the superior court. The judges in the photo were already superior court judges when the measure passed. I leave it up to the reader to guess how most of the then municipal and superior court judges voted on the issue.

So getting back to the day after Labor Day, 1975, the first day that then Judge Elwood Lui, now Administrative Presiding Justice Lui (I mean, Elwood), and I met, and the first time we both met Norm. Norm was then Governor Ronald Reagan's last appointment to the California bench. It occurred on Reagan's last day in office. Norm, having the entirety of constitutional law at his fingertips, wished to avoid a *Marbury v. Madison* situation and flew to Sacramento to make sure Governor Reagan signed the appointment before midnight.

I don't think he had anything to worry about. I bet Governor Jerry Brown would have appointed Norm if the order had not been signed before midnight. Norm was, to the best of my knowledge, always a Democrat. Governor Reagan appointed him to the municipal court; Governor Brown appointed him to the Los Angeles Superior Court; Governor George Deukmejian appointed him to the Court of Appeal; and Governor Arnold Schwarzenegger appointed him to the position of Presiding Justice of Division 4 of the Court of Appeal. Norm was a judge for all seasons and all parties.

After all, the Chief Justice of our nation's highest court reminded us that "We don't work as Democrats or Republicans." A discussion of whether this dictum (or is it a wish?) is valid in our high court I leave for another day. But

it is universally accepted that Norm is an example of Chief Justice Robert's apothegm. Wondering about the last word of the previous sentence? It's Norm looking over my shoulder as I write and speaking to me. "Go ahead, Art, do it."

So where were we? Oh, yes, for the second time, the day after Labor Day, 1975. Francis Rothschild had been sworn in approximately two weeks earlier. Norm was by then a veteran having served on the traffic court for approximately seven months. On that first day Norm and now Presiding Justice Rothschild, hereinafter Fran, took us to lunch at the furniture mart, a wholesale showroom of furniture with a restaurant upstairs open to the public. During lunch Norm and Fran discussed the joy they took in comparing notes over Cal.3d and Cal App.3d while Elwood and I picked at our salad niçoise. At that time Elwood and I were trying to figure out if the left turn was safe. After that lunch we almost turned in our resignations.

This photograph was taken almost a half century ago, at the formal swearing in on October 23, 1975, at the County Courthouse in Los Angeles. From left to right is now Administrative Presiding Justice Elwood Lui, Court of Appeal, Second Appellate District, State of California, and Presiding Justice Arthur Gilbert, Division Six, Presiding Justice Norman Epstein, Division Four, and Presiding Justice Francis Rothschild, Division One, all of the Court of Appeal, Second Appellate District, along with Judge Loren Miller, Superior Court, County of Los Angeles. (This photograph was provided by Justice Gilbert. Judge Miller died on December 5, 2011. Presiding Justice Epstein died March 24, 2023.)

Norm became an avid bicyclist. I could have used "biker," but somehow that term just doesn't seem to fit Justice Epstein, I mean Norm. He and his sidekick Superior Court Judge David Jaffe would spend vacations cycling the back roads of America. Even while on these special trips away from the court, Norm's logical brain was alert. One time while peddling along a rural road in what I think could have been a southern state, the "bikers" noticed they were being chased by a ferocious pit bull. One quick look over his shoulder, and Norm made no attempt to pedal faster. His biking companion yelled, "How can you be so calm? The dog is gaining on us!" Norm replied with insouciance, "The dog has a chicken in his mouth. That's a prize he will not give up."

At judge's meetings, in fact, at any gathering, when Norm spoke, everyone listened. I remember the first municipal court judge's meeting I attended. Norm spoke and silence fell upon the room. He used the word "insouciance." Thereafter I brought a dictionary and thesaurus to future meetings.

Norm's updates on criminal and civil appellate opinions were a must for everyone in the legal profession. His lectures were packed, and it was an ideal forum for me to learn what I meant in opinions I authored. The redoubtable Bernie Witkin told me how pleased he was to have Norm working with him on the Witkin treatises. As the Dean and teacher at the California Judges College, Norm was instrumental in assuring that California maintains its preeminence as the outstanding and most influential judiciary in the nation.

So, Norm, it is not truly goodbye. You stay with us, and your influence continues to inspire.

(This article first appeared in the Los Angeles Daily Journal on April 3, 2023. Republished by permission.)

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About the Author

Arthur Gilbert has been a judge for almost a half century. He is presiding justice, Court of Appeal, Second Appellate District, Division Six, State of California. He was appointed to the court as an associate justice in December 1982. He was elevated to presiding justice in 1999. He began his legal career in the Los Angeles City Attorney's Office, as a deputy city attorney trying cases in the Criminal Division. He entered private practice a year later and practiced law for a decade. He was appointed to the Los Angeles Municipal Court in 1975. He was elevated to the Los Angeles Superior Court in 1980. In his private life, he is a writer and a musician. He regularly writes for Los Angeles Daily Journal, California's largest legal newspaper. He is a concert pianist and is the lead pianist with the Los Angeles Lawyers Philharmonic Orchestra..

JOHN R. WIERZBICKI

Epstein on Witkin

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

Norman Epstein, who died in March of this year[1] 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.

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[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 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]

"Norm Epstein's work is excellent."

— Witkin on Epstein's writing

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

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[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.

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[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.

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[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

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[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]

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[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

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[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]

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[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?
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> 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

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[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.

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[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 Rutter[51] 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.

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[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]

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[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

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[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] Within, 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 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]

"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"

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[62] 23 Cal.3d 16 (1978).

[63] Harry N. Scheiber, "The Liberal Court: Ascendency 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

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[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.

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[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

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[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

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[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 Hasting, 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]

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[84] Letter from Grover Trask II to Marvin 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 Flanagan 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]

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[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.

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[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

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[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

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[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.
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> 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]

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[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]

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[105] Other recipients of the medal include Bill Rutter (in 1996), Bernard Jefferson (in 1997), and Seth and Shirley Hufstedler (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]

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[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.

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About the Author

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[112] Epstein interview (2021), p. 48.

TODD SPITZER* AND GREG TOTTEN**

Did *Brown v. Plata* Unleash a More Dangerous Genie?

Every society gets the kind of criminal it deserves. What is equally true is that every community gets the kind of law enforcement it insists on.

– Robert F. Kennedy

In 2002, former San Diego County District Attorney Paul Pfingst, along with Gregory Thompson and Kathleen Lewis, authored a law review article entitled *"The Genie's Out of the Jar": The Development of Criminal Justice Policy in California*.[1] Their premise that the "Genie is out" referred to the public's use of California's initiative and judicial election process to address legislative and judicial decisions that failed to support public safety. Faced with the legislature's failure to approve tougher laws and numerous harmful judicial decisions, prosecutors, law enforcement, and crime victim organizations went to the voters through multiple initiatives and elections to improve justice for crime victims and impose meaningful consequences on offenders.

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** Greg Totten is the chief executive officer of the California District Attorneys Association (CDAA). He assumed that role in January 2021 after retiring as the district attorney of Ventura County where he was elected five times by voters. He is a founding member of the Golden State Communities and member of its Board of Directors. He is a member of the National District Attorneys Association, the National Association of Prosecutor Coordinators, and serves on the Crime Survivors Council for the Crime Survivors Resource Center.

[1] Pfingst, et al., *"The Genie's Out of the Jar": The Development of Criminal Justice Policy in California* (2002) 33 McGeorge L. Rev. 717.

These collective efforts produced results that expanded the criminal justice system's traditional focus on offenders to include improved treatment of victims and greater protection of the public from dangerous criminals:

- In 1982, the voters approved Proposition 8, *The Victims' Bill of Rights*, which created statutory and constitutional rights for crime victims and increased punishment for repeat offenders.
- In 1986, three justices who had repeatedly overturned capital murder convictions and/or death sentences were removed from the California Supreme Court by voters.
- In 1990, the voters approved Proposition 115, *The Crime Victims Justice Reform Act*, which expanded the definition of first-degree murder, established a new crime of torture, and made other procedural reforms affecting discovery, the grand jury, and hearsay evidence at preliminary hearings.
- In 1994, the voters approved Proposition 184, *The Three Strikes Sentencing Initiative*, which created a 25-years-to-life sentence for offenders who had committed two or more serious or violent felony offenses and then committed a third felony offense.
- In 2000, voters approved Proposition 21, *The Gang Violence and Juvenile Crime Prevention Act*, which expanded the ability to try juveniles who had committed violent offenses as adults.
- Finally, in 2008, six years after the publication of the "*Genie's Out of the Jar*" article, California voters approved Proposition 9, *Marsy's Law*, which extended and recodified the statutory and constitutional rights of crime victims provided in 1982 by Proposition 8.

These new tools were used extensively by prosecutors and have been widely credited for precipitous reductions in crime and more respectful treatment of crime victims in our court system. Regardless of the debate over the effectiveness of these new tools in reducing crime, there is no debate that more criminals went to prison and crime fell. But instead of the legislature embracing the will of the people, they refused to fund the criminal justice system, resulting in a shortage of prison space.

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[2] "The massive 750% increase in the California prison population since the mid-1970s is the result of political decisions made over three decades, including the shift to inflexible determinate sentencing and the passage of harsh mandatory minimum and three-strikes laws, as well as the state's counterproductive parole system. Unfortunately, as California's prison population has grown, California's political decision-makers have failed to provide the resources and facilities required to meet the additional need for space and for other necessities of prison existence." (*Schwarzenegger v. Plata* (2009) Three Judge Panel Order, Aug. 4, 2009).

Brown v. Plata

For years, California prisons remained overpopulated as the state declined to build more institution space.[2] Two class action lawsuits, one on behalf of inmates with mental disorders and one on behalf of inmates with serious medical conditions, went before a three-judge panel of the federal Ninth Circuit Court of Appeals, which ordered implementation of a two-year project to reduce California's burdened prison system to 137 percent of its capacity. The state appealed the authority of the panel to the U.S. Supreme Court. In *Brown v. Plata*,[3] Justice Kennedy, writing for the majority, chronicled a history of California's 80,000 prison beds at double their capacity for the prior 11 years. The Court found this overcrowding exceeded capacity so egregiously that it concluded the current levels of incarceration in California's prisons violated the Eighth Amendment against cruel and unusual punishment. The majority opinion agreed with the three-judge panel that the only means to reduce the prison population to meet the required capacity was through the release of inmates. The named defendant in the lead lawsuit was Governor Jerry Brown.

Brown had moved into the governorship in 2011 after serving as the California State Attorney General. Brown's staff when he was Attorney General had furiously fought against the three-judge panel and the prison reform movement. And Brown, personally an ardent death penalty opponent, had also defended the state's death penalty law in his capacity as Attorney General, thus fulfilling his constitutional duty "to see that the laws of the state are uniformly and adequately enforced.[4] During his tenure as Attorney General, he did not defend all laws that were challenged. But now Brown was governor, and the stage was set for major policy changes that would be claimed to be needed to meet the demands of *Plata*, and for the selective enforcement of laws in California.

In response to *Plata* (or at least blamed on *Plata*), the pendulum began to swing back as a new generation of criminal justice reformers focused on eliminating or weakening many of the so-called "tough on crime" measures previously approved by voters through the initiative process. This movement focused its sights and policy arguments on overcrowded state prisons, historical racial disparities in the criminal justice system, and the goals of

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[3] *Brown v. Plata* (2011) 563 U.S. 493.

[4] Cal. Const., Art. V, sec. 13.

offender rehabilitation and reform. *Plata* made it easy to ignore the successes of the "tough on crime" laws, and the federal court's decision provided the excuse to upend the criminal justice system. *Plata* gave politicians and activists cover to change the focus of criminal reform.

By contrast, in the 1990s and into the 2000s, California's criminal justice initiatives were supported largely by the grassroots efforts of people with family members who were victims of crime, including Mike Reynolds,[5] Marc Klaas,[6] and Dr. Henry T. Nicholas, III.[7] However, the next generation of criminal justice reforms received substantial funding by billionaire investors, corporate executives, and celebrities. We detail many of these measures in this article, but the three hallmarks of this movement are Governor Jerry Brown's prison realignment in AB 109, which shifted a large number of felony prison inmates to local jails administered by county sheriffs which was claimed to be in response to *Plata*; Proposition 47, *The Safe Neighborhoods and Schools Act*, which redefined many drug and theft offenses from felonies to misdemeanors; and Proposition 57, *The Public Safety and Rehabilitation Act*, which allowed "early release" to countless state prison inmates.

Over the last decade it has become increasingly clear that these new reformers have been largely successful in their policy goals of reducing prison populations, shortening sentences, and weakening many laws that once enjoyed broad public support. One of the most troubling criticisms of the criminal justice system from these reformers has centered on concerns about systemic racism and the system's disproportionate impact on people of color and those living in disadvantaged communities. However, it is equally clear that their efforts to address these impacts have not made Californians safer and more secure, nor have they lessened the disproportionate impact of crime on disadvantaged communities or on people of color.

In this article, we first discuss some of the foundational elements and definitional considerations that undergird this new reform movement. Second, we chronicle several of the most significant initiative and legislative changes that the movement's efforts have produced. Finally, we look at the impact of these changes both in the context of the crime data and anecdotal

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[5] Mike Reynolds's daughter Kimber was murdered in 1992.

[6] Marc Klaas's 12-year-old daughter Polly was murdered in 1993.

[7] Dr. Henry Nichols's sister Marsy was murdered in 1983; she is the namesake for Marsy's Law, California's Victims' Bill of Rights, enacted by voters as Proposition 9 in 2008.

examples. As the inevitable policy debate surrounding criminal justice continues, it is important to understand the impact of these changes on the rights afforded to victims of crime, whether these changes helped or hurt Californians, and whether they increased or reduced the effectiveness and fairness of our system of justice.

DEFINITIONS, NAMES, AND TITLES

Before we explore the full scope and impact of these criminal justice reforms, we must examine measurement nomenclature and definitions. If we define a "successful reform" as one that reduces crime, we should clarify what we mean by "reducing crime." For example, if reducing crime refers to a reduction in state prison commitments, then creating legislation that reduces the number of felony crimes can create a false perception that crime has declined. Similarly, reducing the number of felony offenses eligible for state prison commitment can be used to claim crime is going down.

We must be equally clear when we discuss rehabilitation. If our definition of "rehabilitation" is completing probation or parole without a violation, cutting the period for probation or parole (e.g., from three years to one year) significantly impacts data results and ultimately undermines the comparative value of the current data. If "successful rehabilitation" definitionally tolerates committing new offenses as long as the new offense is less "serious," that also increases the likely success of the "rehabilitation."

Recidivism

The definition of recidivism, as used to describe successes in recent years, has been substantially changed. Assembly Bill No. 1050, enacted in September 2013, required the Board of State and Community Corrections (BSCC), in consultation with the Secretary of CDCR and others, to develop definitions of key criminal justice terms, including recidivism "to facilitate consistency in local data collection, evaluation, and implementation of evidence-based programs."[8]

BSCC defines recidivism as "conviction of a new felony or misdemeanor committed within three years of release from custody or committed within three years of placement on supervision for a previous criminal conviction." Thus, beginning in 2016, CDCR shifted its primary measure of recidivism

[8] *https://www.cdcr.ca.gov/research/recidivism-reports/* [as of Oct. 18, 2023].

from the three-year *return-to-prison rate* to the *three-year conviction rate* consistent with the statewide definition of recidivism.

As a result, measuring recidivism rates of inmates released due to Proposition 47, Proposition 57, and Assembly Bill No. 109 does not use *arrest* as a criterion for recidivism. Instead, it uses *conviction within a three-year period* as a determinate of recidivism. Under this definition, an offender who commits a new offense two years after release and then has their criminal case concluded 13 months after the offense date would not be considered a recidivist. Generally, more serious criminal offenses with heavier potential sentences, like homicide and child sexual assault, take longer to move through the criminal justice system; therefore, getting a conviction for an offense that occurs within the three-year period is not always feasible, and thus, such an offense would not count as recidivism in CDCR data collection.

"Serious" and "Violent" Crimes

One way to re-frame criminal justice is to talk about what is legally covered under the serious or violent category. California uses separate code sections to define serious[9] and violent[10] felonies. There may be some crossover between the two terms, but there are many felonies most people would consider to be "serious" and/or "violent" that do not meet the Penal Code's definition of those offenses. For example, under the Penal Code, rape may be both a serious and violent felony, while other types of sexual assault, such as sodomy, oral copulation, and sexual penetration of an intoxicated person, are considered serious but not violent offenses under California law. Similarly, domestic violence is unquestionably a crime of violence, but it does not constitute a serious or violent felony under California statutory law. And there are many more examples: assault with a deadly weapon, vehicular manslaughter, and certain gang crimes for example, do not meet the violent felony definition.

INITIATIVES

Understanding the Initiative Process

In California, new laws and constitutional change occur through either the legislature or the initiative process. The initiative process allows voters to impose change that bypasses resistance from their elected legislative

[9] Pen. Code, § 1192.7(c).

[10] Pen. Code, § 667.5.

representatives, goes directly to the People, and has three stages. First, proponents of the measure submit written language to the Attorney General for a "title and summary"—a brief description of the initiative and its costs that will appear on the ballot. Then, proponents must obtain sufficient signatures of registered voters to qualify the measure for the ballot. The Secretary of State reviews the signatures to ensure the required number has been obtained. The third step involves voters approving the measure at an election.

However, the "title and summary" process has become somewhat controversial in recent years. The broad authority granted to the Attorney General has been the subject of numerous lawsuits—from both liberals and conservatives—claiming the Attorney General used his or her authority to manipulate voter impressions of the measures. For those who feel the Attorney General's title and summary are biased, filing a suit in Sacramento County is the only recourse available. But courts historically have been hesitant to alter the title and summary as the courts have created a presumption in favor of the Attorney General's decision (which nowhere appears in the legislative implementation of the initiative process). The power becomes greater when competing measures exist.[11] In 2020, the Attorney General was sued six times over title and summary issues, a record since 2008.[12] There have been unsuccessful efforts to move this authority to non-partisan parts of the government. Such a neutralized process exists in other states[13] as well as in California for measures proposed by the Attorney General.[14]

Criminal Justice Reform Initiatives

Proposition 36: The *Three Strikes Reform Act* (2012)

Proposition 36, The Three Strikes Reform Act, was the first significant reform initiative that lessened the consequences for crime. This measure amended Proposition 184, the Three Strikes Law in California that was passed in 1994 on the heels of the murder of Polly Klaas, a 12-year-old girl kidnapped from her Petaluma home and murdered by Richard Allen Davis. At the time of

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[11] Christopher S. Elmendorf and Douglas M. Spencer, *Are Ballot Titles Biased? Partisanship in California's Supervision of Direct Democracy* (2013) 3 U.C. Irvine L. Rev. 511.

[12] Christopher, *Critics demand fairer prop ballot labels and summaries, but lawsuits tend to flame out*, Cal Matters (Aug. 7, 2020).

[13] *Id.*

[14] Elec. Code, § 9003.

[15] *Richard Allen Davis' Life of Crime*, SFGate (Aug. 6, 1996).

the crime, Davis, a habitual offender, was out of custody after serving half of a 16-year sentence for an earlier kidnapping.[15] Under Proposition 184, offenders with two or more serious or violent felonies who committed a third felony offense of any kind could have been subject to a minimum penalty of 25 years to life.

Still, while the Three Strikes Law may have been effective in removing hard-core criminals from society, there were instances where an offender's third strike involved a relatively minor offense. Such instances became key arguments for supporters of Proposition 36, as did California's overcrowded prison system and the decision in *Plata*. Los Angeles County District Attorney Steve Cooley and San Francisco County District Attorney George Gascón supported revamping the Three Strikes Law to require that the third strike be a serious or violent felony as defined in California law.[16]

Opponents of Proposition 36—including the majority of prosecutors, law enforcement, and victims' groups—highlighted the fact that the law would result in resentencing those already deemed to be so dangerous they received a 25-years-to-life sentence.[17] They also countered the instances of abuse by pointing out courts already had the authority to remove the imposition of a strike prior, if the interest of justice so dictated.[18] Finally, they noted the initiative impacted not only future offenders; it also meant resentencing offenders convicted under the Three Strikes Law where the third strike was neither serious nor violent. While not defined under California law as "serious" or "violent" offenses, there were many crimes, such as a felon in possession of a firearm, aggravated assault, domestic violence, and trafficking narcotics, that members of the public would certainly consider serious.

Proposition 47: *The Safe Neighborhoods and Schools Act* (2014)

Perhaps no initiative has brought more focus on the "title and summary" debate than 2014's Proposition 47, *The Safe Neighborhoods and Schools Act*. The initiative, which passed by overwhelming support—58 percent of the voters—caused a massive restructuring of California's sentencing system.

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[16] Ballot Pamp., Gen. Elec. (Nov. 6, 2012), argument in favor of Prop. 36.
[17] Ballot Pamp., Gen. Elec. (Nov. 6, 2012), argument against Prop. 36.
[18] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

On the heels of *Brown v. Plata*, reformers drafted the initiative to address prison overcrowding.[19] They sought to reduce many theft and narcotic offenses from felonies to misdemeanors, arguing that offenses previously eligible for sentencing to California's prison systems would now only be eligible for sentences served in local county jail facilities. Thus, even if the same number of offenses were committed post-enactment, California's state prison population would automatically go down because the offenses would no longer qualify for a prison sentence. This approach of moving offenders from the state-run prison facilities to local incarceration became a key tool in the effort to decrease state prison population and meet the requirements set by the three-judge panel in *Plata*.

Focusing on "non-serious felonies," Proposition 47 reduced many narcotics-possession felony offenses under Health and Safety Code sections 11350 and 11377 for hard drugs, like heroin, cocaine, and methamphetamine to misdemeanors. (And while not an issue at the time, Proposition 47 has the same impact on possession of fentanyl today.) Proposition 47 also increased the former dollar amount that qualified for felony theft offenses from $400 to $950. With this change, an offender who steals less than $950 may only be prosecuted as a misdemeanant. The initiative also eliminated the ability to charge repeated thefts as a felony. So, under this initiative, an offender who, for example, commits 10 unrelated thefts of less than $950 over several months can only be prosecuted with a misdemeanor violation.

Like Proposition 36, Proposition 47 operated not just prospectively but retroactively as well, thus authorizing numerous convicted state prison inmates to seek resentencing according to the new standards. There were, however, exceedingly narrow limitations on this resentencing for those previously convicted of certain violent offenses or certain sex offenses.

Where are the benefits for schools in *The Safe Neighborhoods and Schools Act?* The language of the initiative stated that the savings created by the reduced prison population were to be taken from the General Fund and placed into a Safe Neighborhoods and Schools Act fund, 25 percent of which was to go to truancy reduction. As for safe neighborhoods, the remainder of the savings was to be spent largely on drug rehabilitation programs and mental health programs.

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[19] Lynn, *Prop 47 Five years Later,* LA Progressive (Aug. 12, 2020).

The title and summary of Proposition 47 written by the Attorney General made the initiative's sweeping changes seem insignificant.[20] And the proponents raised $10,976,491 for the initiative.[21]

The opposition focused on the release of criminals back into society. Democratic U.S. Senator Dianne Feinstein stood out as one of the strongest opponents of Proposition 47, arguing that the crimes impacted by Proposition 47 were not minor offenses. Stealing a firearm, stealing livestock, stealing from commercial merchants, forgery, and fraud offenses would all constitute misdemeanor crimes unless the value stolen was over $950. Further, Feinstein pointed out that resentencing of convicted felons

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[20] The summary for Proposition 47 reads as follows:

> Criminal Sentences. Misdemeanor Penalties. Initiative Statute.
> - Requires misdemeanor sentence instead of felony for certain drug possession offenses.
> - Requires misdemeanor sentence instead of felony for the following crimes when amount involved is $950 or less: petty theft, receiving stolen property, and forging/writing bad checks.
> - Allows felony sentence for these offenses if person has previous conviction for crimes such as rape, murder, or child molestation or is registered sex offender.
> - Requires resentencing for persons serving felony sentences for these offenses unless court finds unreasonable public safety risk.
> - Applies savings to mental health and drug treatment programs, K–12 schools, and crime victims.
>
> Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:
> - Net state criminal justice system savings that could reach the low hundreds of millions of dollars annually. These savings would be spent on school truancy and dropout prevention, mental health and substance abuse treatment, and victim services.
> - Net county criminal justice system savings that could reach several hundred million dollars annually.

The text of Proposition 47 listed as its findings and declarations:

> The People enact the Safe Neighborhoods and Schools Act to ensure that prison spending is focused on violent and serious offenses, maximize alternatives for non-serious, nonviolent crime, and invest the savings generated from this Act into prevention and support programs in K-12 schools, victim services, and mental health and drug treatment. This Act ensures that sentences for people convicted of dangerous crimes like rape, murder, and child molestation are not changed.

It went on to state the purpose and intent of the Act:

> In enacting this Act, it is the purpose and intent of the people of the State of California to:
> 1. Ensure that people convicted of murder, rape, and child molestation will not benefit from this Act.
> 2. Create the Safe Neighborhoods and Schools Fund with 25% of the funds to be provided to the Department of Education for crime prevention and support programs in K-12 schools, 10% of the funds for trauma recovery services for crime victims, and 65% of the funds for mental health and substance abuse treatment programs to reduce recidivism of people in the justice system.
> 3. Require misdemeanors instead of felonies for non-serious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes.
> 4. Authorize consideration of resentencing for anyone who is currently serving a sentence for any of the offenses listed herein that are now misdemeanors.
> 5. Require a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety.
> 6. This measure will save significant state corrections dollars on an annual basis. Preliminary estimates range from $150 million to $250 million per year. This measure will increase investments in programs that reduce crime and improve public safety, such as prevention programs in K-12 schools, victim services, and mental health and drug treatment, which will reduce future expenditures for corrections.

[21] California Proposition 47, Reduced Penalties for Some Crimes Initiative (2014), Ballotpedia.

would occur unless they fell under a very narrowly tailored definition of dangerousness.[22] That standard required a court to find that the defendant would not only re-offend, but would re-offend by committing a handful of violent offenses, often referred to as super-strikes.[23] Thus, a Three Strikes defendant who had committed a series of robberies that were qualifying prior strike offenses, followed by a multitude of "an assault likely to commit death or great bodily injury," would be eligible for resentencing and would not meet the dangerous standard even if the defendant admitted to the court they planned to commit a series of similar assaults upon being released.

Proposition 47 also created a new Penal Code section called shoplifting, which punishes a defendant who enters a commercial establishment during business hours and commits theft of a value of under $950 with a misdemeanor.[24] That offense could previously be charged as second-degree burglary, a felony if it could be shown that they entered the structure with the intent to commit theft, regardless of value. In short, seemingly small changes—shoplifting and the dollar value change—created huge opportunities for the criminally inclined. While Proposition 47 may have created a lesser crime of shoplifting for the first-time offender,[25] it eliminated second-degree burglary as a potential charge for the repeat offender intent on entering open businesses to steal items of less than $950.

Proposition 47 also imposed the $950 minimum requirement for forgery. Prior to its passage, forging a check was a wobbler, an offense punishable as either a felony or misdemeanor. Proposition 47 required a felony forgery to involve passing a forged document worth $950 or more. A forger can now write millions of dollars in forged checks and only face misdemeanor consequences, so long as the value of each check remains under $950. In *People v. Hoffman*, the defendant was convicted of seven separate counts of writing forged checks.[26] The value of each check was less than $950, but the total aggregated value exceeded $950.[27] Hoffman entered her plea prior to the passage of Proposition 47 and petitioned for resentencing. The trial court denied the resentencing because the total aggregate value of the checks exceeded $950. The Court of Appeal reversed the trial court's

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[22] *Prop. 47 Will Make Californians Less Safe: Dianne Feinstein*, Los Angeles Daily News (Oct. 15, 2014, Aug. 28, 2017).

[23] Pen. Code, § 667(c)(2)(e)(iv).

[24] Pen. Code, § 459.5.

[25] Prior to Proposition 47, a prosecutor could already elect to charge a first-time offender with a misdemeanor offense of petty theft [Pen. Code, § 484/488 or 490.5].

[26] *People v. Hoffman* (2015) 241 Cal.App.4th 1304.

[27] *Id.* at 1307. The check amounts were $325, $400, $280, $350, $325, $350, and $175.

decision because no legal basis exists to aggregate the forged checks.[28] The opinion references the concerns about the issue expressed in the Voter Information Guide: "California has plenty of laws and programs that allow judges and prosecutors to keep first-time, low-level offenders out of jail if it is appropriate. Prop. 47 would strip judges and prosecutors of that discretion … [T]here needs to be an option besides a misdemeanor slap on the wrist."[29] The Court of Appeal issued a similar opinion in *People v. Salmorin*, holding that even if the forged checks were part of a single count, the trial court could not aggregate the value of the checks.[30]

With *Plata* as a backdrop of impending doom, the arguments made by Proposition 47 supporters were too much for California voters to resist. As the *New York Post* said, voters were deceived by:

> … activists and politicians who tricked them into thinking they were voting for greater public safety. … The authors named the proposed law The Safe Neighborhoods and Schools Act. It promised to save money on costly incarceration and spend the savings on mental health and education programs. With a favorable ballot description written by then-Attorney General Kamala Harris, it passed 60% to 40%. Under Proposition 47, property thefts valued at less than $950 became an automatic misdemeanor, even if the stolen item was a handgun. The measure also made incarcerated felons eligible for resentencing and release if their past crimes retroactively qualified as misdemeanors. Californians quickly discovered that the promised "Safe Neighborhoods" generate a lot of car break-ins.[31]

Proposition 57: *The Public Safety and Rehabilitation Act of 2016*

Emboldened by their success, in 2016, the reformers—including then-Governor Jerry Brown—set out to completely revamp sentencing with Proposition 57. Titled *The Public Safety and Rehabilitation Act of 2016*, its stated purposed and intent was to:

1. Protect and enhance public safety.
2. Save money by reducing wasteful spending on prisons.
3. Prevent federal courts from indiscriminately releasing prisoners.
4. Stop the revolving door of crime by emphasizing rehabilitation,

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[28] *Id.* at 1308.

[29] Id. at 1311.

[30] *People v. Salmorin* (2018) 1 Cal.App.5th 738, 745.

[31] Shelley, *LA's smash-and-grab epidemic: Voters helped break California's justice system*; New York Post, Opinion, (Aug. 26, 2023, Aug. 27, 2023).

especially for juveniles.[32]

5. Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court.

The measure again focused on the protection and enhancement of public safety by reducing state prison populations. It focused on the so called "wasteful" spending on prisons and referenced *Plata* by claiming federal courts were the ones indiscriminately releasing prisoners. Proposition 57 greatly expanded conduct credits to offenders and reduced the overall length of many sentences. Proposition 57 also granted eligibility for early release to any inmate convicted of a "non-violent" offense. These inmates become eligible for parole after completing the full term of their primary offense. According to the Legislative Analyst's Office, 30,155 inmates were eligible for early release under this Act; an additional 16,038 would be eligible after completing their primary term.[33] Finally, Proposition 57 granted broad discretion to the California Department of Corrections and Rehabilitation (CDCR) to create its own rules regarding prisoner release by awarding increased conduct credits to nearly all inmates, including violent rapists and murderers. This unfettered discretion resulted in numerous instances of offenders receiving early release with little justification, and then committed violent offenses.[34]

As stated in an August 2023 piece in the *New York Post* entitled "Voters helped break California's justice system," when it came to Proposition 57,

> [Then Attorney General] Harris wrote another favorable ballot description and Brown led a campaign that outspent opponents by roughly 15 to 1. [¶] It turned out that the list of crimes considered "nonviolent felony offenses" includes rape of an unconscious person, supplying a firearm to a gang member, hostage-taking, human trafficking, domestic violence with trauma, and attempting to explode a bomb at a hospital or school.[35]

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[32] This article does not delve into a discussion of the myriad changes in juvenile law. We discuss the topic of juveniles only as it applies to adult offenders characterized as juveniles for the purpose of juvenile parole.

[33] Under California Penal Code section 1170, et seq., California sentencing involves a mix of indeterminate and determinate term sentencing. Most felony crimes require the court to impose either the low, middle, or upper term of sentence for a given crime. Where an offender commits multiple crimes with determinate sentences, the court imposes sentences for those crimes to run either concurrently or consecutively. Where the sentence is imposed consecutively, the court imposes one-third of the middle term for that offense, unless special rules apply.

[34] Watts, "*Secret" Prop. 57 prison credits: Are most felons really "earning" early release?*, CBS News Sacramento (Oct. 10, 2022, Oct, 11, 2022); Walters, *Tricky measure allows release of violent felons*, CalMatters (Dec. 6, 2022).

[35] Shelly, *LA's smash-and-grab epidemic: Voters helped break California's justice system*; New York Post, Opinion (Aug. 26, 2023, updated Aug. 27, 2023).

Proposition 64: *The Adult Use of Marijuana Act* (2016)

The Adult Use of Marijuana Act is notable not because it legalized marijuana for personal use, but for the huge market it created for illicit marijuana growers and sellers. Under the initiative, large-scale illegal marijuana transportation into California now faces minimal penalties. While Proposition 64 regulated the sale of marijuana, it also reduced the penalties for individuals selling marijuana outside of regulated marijuana businesses. The crime of possession for sale of marijuana is largely now a misdemeanor[36] as is the transportation for sale of marijuana. There are no enhancements based on weight limits of marijuana. Those who import truckloads of marijuana into California face only misdemeanor charges.[37]

These four initiatives—Propositions 36, 47, 57, and 64—caused the resentencing of countless inmates, dramatically reduced the consequences for crime, and gave almost unfettered discretion to CDCR to release inmates, seemingly at will.

LEGISLATION

As demonstrated above, *Plata* gave politicians cover to enact changes that were never dreamed of. After watching the successes of initiative after initiative, this new generation of reformers next went to work enacting significant changes in the California Legislature. Indeed, more than 50 reform bills have been approved by the legislature since 2010. We now turn to some of the more significant legislative changes.

Assembly Bill No. 109: The California Public Safety Realignment

Using prison overcrowding as a backdrop, the California Legislature shifted the burden of housing inmates from the state to local jurisdictions. A key strategy in reducing state prison population involved housing more offenders at a local level. California had an offense known as petty theft with a prior[38] that elevated a petty theft to a felony if the offender had previously been convicted of petty theft, thus enhancing punishment for repeat offenders. In 2010, Assembly Bill No. 1844 (Fletcher) modified the applicable statute, Penal Code section 666, to require three or more prior convictions of theft before an offender would face the enhanced punishment.[39] In 2014, Proposition

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[36] Cal. Health & Saf. Code, § 11359. *Note:* Those who meet the requirements of subdivision (c) may be charged with a felony.

[37] Cal. Health & Saf. Code, § 11360(a)(2).

[38] Pen. Code, § 666.

[39] *Id.*

47 changed this section again by making it only apply to those with certain qualifying offenses.[40]

In 2011, Assembly Bill No. 109, *The California Public Safety Realignment Act*, allowed non-violent, non-serious offenders to be housed and supervised at a county level.[41] This legislation came out of the Budget Committee and moved quickly through the legislative process. (The bill was introduced on January 10, 2011, and by April 4, had already been approved by the legislature and signed into law by the Governor.) CDCR heralded the bill as enabling California to "close the revolving door of low-level inmates cycling in and out of state prisons."[42] What CDCR failed to mention was that now those same offenders would become part of the revolving door in county jail facilities. This additionally reduced the burden on state parole and shifted it instead to Post Release Community Supervision (PRCS), now handled by county probation departments. With fewer parolees, there would be fewer violations and the consequences of violations would be different, depending on whether an offender was on state parole or PRCS. Prior to Assembly Bill No. 109, parole violators faced a return to prison. Under Assembly Bill No. 109, violating PRCS would no longer result in a return to a state prison facility; instead, the violator would face short term "flash" incarceration in local jail, electronic monitoring, or community service.[43]

Defendants sentenced on many felony offenses are now punished by "imprisonment" in the county jail,[44] but Assembly Bill No. 109 failed to account for the already overflowing county jail populations. County jail facilities that previously held convicted offenders for a year at most on their misdemeanor sentence, now found themselves tasked with holding inmates with sentences that measured in years. In addition, county jails had to accommodate defendants awaiting trial for misdemeanor and felony offenses, convicted misdemeanor offenders, and convicted felony offenders who had been granted probation.

The new law also placed caps on the combined length of a jail sentence and the post-incarceration period of supervision. So, for example, a felony

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[40] Voter Information Guide for 2014, General Election (2014).

[41] Assembly Bill No. 109 directed the state to give counties a portion of sales tax and vehicle license fee revenue to fund the new responsibilities realigned from the state to the counties. To receive the funding, counties are required to have a Community Corrections Partnership (CCP) that creates and oversees an Assembly Bill No. 109 Realignment Implementation Plan, which identifies those programs that address the responsibilities for realigned offenders going through the local justice continuum.

[42] California Department of Corrections and Rehabilitation Fact Sheet (Dec. 19, 2013).

[43] Pen. Code, § 3455.

offender who faced a maximum sentence of three years, who received an actual sentence of one year, would only be subject to community supervision for two years. Under pre-existing law, this offender would have been subject to a five-year probation period after completing the one-year jail sentence.

Diversion Programs

Another tactic to reduce inmate populations involves reducing criminal convictions by diverting offenders out of the criminal justice system. Diversion programs are not new. Since 1972, drug diversion has existed for low-level drug possession and under-the-influence offenses.[45] Diversion also existed for other offenses, such as domestic violence, but that was repealed in 1996.[46] Under the diversion arrangement, an offender's plea of guilty would be entered in the system, but no sentencing would occur for a period; the offender would waive his or her speedy trial rights, and the offender's case would be continued. During that time, the offender could complete a program specified by the court. Upon successful completion of the program, the matter would be dismissed. As part of criminal justice reform, the Legislature instituted a series of diversion programs. A key component of some of these programs is the institution of a pre-plea diversion program. This type of program does not require offenders to plead guilty prior to joining the program. And offenders who fail to complete the terms of diversion, are returned to the same point in the criminal justice system that they were prior to entering the program. When the case is prosecuted months, and in some cases years, later, memories have often faded, evidence has degraded, and inevitably, the likelihood of a successful prosecution is reduced.

In 2018, Assembly Bill No. 1810, an omnibus health trailer budget bill, created Mental Health Diversion for All Criminals, a pretrial diversion program for individuals who could demonstrate their criminal activity was linked to a mental disorder and that disorder served as a significant factor in the commission of the charged offense.[47] In 2022, Senate Bill No. 1223 (Becker) created a presumption in Penal Code section 1001.36 that the mental health disorder "was a significant factor in the commission of the offense."[48] (Antisocial personality disorder, borderline personality disorder, and pedophilia are excluded as qualifying mental disorders.[49]) The Mental

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[44] Pen. Code, § 1170(h).
[45] Pen. Code, § 1000.
[46] Sen. Bill No. 169 (1995-1996 Reg. Sessions), c. 641 (Oct. 5, 1996).
[47] Pen. Code, § 1001.36(b).
[48] Sen. Bill No. 1223 (Becker), 2001-2022 Session.
[49] Pen. Code, § 1001.36(b)(1).

Health Diversion program applies to all felonies and misdemeanors except a small handful of offenses.[50] If a court finds that the defendant meets the criteria for mental health diversion, the defendant waives his or her right to a speedy trial and is then given a series of terms and conditions with which to comply. Upon "substantial" compliance, the court can order the matter dismissed and the arrest is removed from the defendant's record.[51] A defendant need not *completely* comply; *substantial* compliance, as determined by the court is sufficient.[52] Defendants granted mental health diversion are released into the community where they may commit additional offenses, including murder.[53] Mental health diversion addresses, in part, one of the concerns of *Plata*, namely, treatment for those with mental health disorders. The diversion program, however, occurs at a local level without incarceration, prior to entry of a plea, and results in complete dismissal of the charges.

Military diversion was created in 2014 as a part of Senate Bill No. 1227 (Hancock). It authorized a defendant to waive his or her speedy trial rights on a misdemeanor charge and permits a court to place the defendant in a pretrial diversion program for a misdemeanor if the defendant either was or is in the military and suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems resulting from his or her military service.[54] After receiving treatment for a period not exceeding two years, the defendant's matter is dismissed and his or her record of arrest removed.[55] Two of the most common misdemeanor offenses involve domestic violence and driving under the influence. Misdemeanor diversion did not appear to exclude either offense. In 2017, Senator Jackson successfully sought to amend Penal Code section 1001.80 with Senate Bill No. 725 to clarify that driving under the influence would not be excluded from military diversion, although the Department of Motor Vehicles retained the authority to restrict or suspend a driver's license for such a violation.[56]

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[50] The excluded offenses include murder or voluntary manslaughter, a registrable sex offense (excluding indecent exposure), rape, lewd or lascivious act on a child under 14 years of age, assault with intent to commit rape, sodomy, or oral copulation, commission of a rape or sexual penetration in concert with another person, continuous sexual abuse of a child, and a violation of subdivisions (b) or (c) of Penal Code section 11418. (Pen. Code, § 1001.36(d).)

[51] Pen. Code, § 1001.36(h).

[52] *Id.*

[53] Melugin and Pandolfo, *Innocent LA Father killed after DA Gascon gives violent career criminal multiple diversions*, Fox News (May 3, 2023).

[54] Pen. Code, § 1001.80.

[55] Pen. Code, § 1000.80(i).

[56] Pen. Code, § 1000.80(l)

Assembly Bill No. 208 (Eggman), also signed into law in 2017, brought about an extended pretrial diversion program for individuals who lacked any prior conviction for controlled substance offenses, where the charged offense involved no violence, and where the defendant's record does not indicate probation or parole had have been revoked without being completed and the defendant had not previously been granted diversion or had been convicted of a felony within five years. Under this program, the defendant would waive his or her speedy trial rights and enter a drug treatment program for up to 18 months. This program differed from the existing diversion program in that it no longer required a defendant to enter a plea of guilty prior to entering the program.[57]

In 2019, the Legislature passed Senate Bill No. 394 (Skinner), Diversion for Primary Caregivers of Minor Children.[58] This allowed primary caregivers to receive pretrial diversion for *any* offense—felony or misdemeanor—so long as the offense was not a serious or violent felony.[59] Once again, upon successful completion, the offense would be dismissed.

Accordingly, mental health diversion, veteran's diversion, and primary care diversion all remove an individual from the criminal justice system prior to a plea. Failure to complete the terms of probation merely brings their cases back into the criminal justice system, and the prosecution still bears the legal burden months or years later.

While diversion provides opportunities for some low-level offenders to avoid a criminal record, the broad sweeping paths for diversion create loopholes for more hardened criminals to avoid prosecution and remain to prey on the public. These programs remove individuals from the criminal justice system, thus impacting statistical reviews of the system that are based upon convictions or incarcerations in state prison.

Restructuring the Competency Process

California law prohibits a defendant from being convicted or punished while he or she is mentally incompetent,[60] and provides an alternative for those who are not competent to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.[61] This differs from a lack of competency at the time of the commission of the

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[57] Assem. Bill No. 208 (2017-2018 Reg. Sessions), c. 778 (Oct. 14, 1997).

[58] Sen. Bill No. 394 (2019-2020 Reg. Sessions), c. 593 (Oct. 8, 2019).

[59] Pen. Code, § 1001.83(d)(5).

[60] Pen. Code, § 1367.

[61] *Ibid.*; see also *People v. Webb* (1993) 6 Cal.4th 494.

offense. There is a separate statutory section for those defendants who are incompetent due to a mental disorder.[62] In the past, if a defendant was found mentally incompetent during the court process, criminal proceedings would be suspended. If, after a trial on the issue of competency, the defendant was found incompetent, the matter was suspended until the defendant became competent. Defendants found mentally incompetent would be sent to either a state hospital, a private or public placement facility, or outpatient treatment for competency training. If they regained competency within a period, generally three years, criminal proceedings would be reinstated. If they failed to regain competency, the court could initiate conservatorship proceedings and retain discretion to dismiss the case.

In 2017, the Legislature passed Senate Bill No. 1187 (Beall). This bill restructured the competency process in several major areas. First, it authorized the court to consider the defendant as a candidate for mental health diversion, which would last no more than two years. Second, the bill reduced the time to return a defendant to mental competency from three years to two years. Third, the bill provided that six months after sending the defendant for a competency evaluation, the court would receive a report from doctors indicating whether the doctors believe that the defendant could be returned to competency.[63]

In 2021, Senate Bill No. 317 (Stern) severely short-circuited the competency process for misdemeanor offenders. A misdemeanor defendant found incompetent to stand trial now must either receive misdemeanor diversion not to exceed one year, or have his or her case dismissed.[64]

Both bills resulted in a shorter amount of time to have a defendant regain mental competence as well as an earlier termination of services to the defendant. Once released from their criminal case—without additional treatment or consequence—these offenders end up back in the community unless a conservatorship is created.[65]

Redefining the Sentence

The term "life without the possibility of parole" would likely be interpreted by most members of the public as a sentence where the offender will never be paroled. After all, that is the plain meaning of "without the possibility

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[62] Pen. Code, § 1370.

[63] *Id.*

[64] Pen. Code, § 1370.01.

[65] Pen. Code, § 1370.

of parole." In California, however, that is not the case. "Life without the possibility of parole" does not actually mean "life without the possibility of parole." In 2016, Senate Bill No. 1084 (Hancock) was approved, which allows an individual who was a minor at the time of the offense and who was sentenced to life without the possibility of parole (LWOP) to request recall of their sentence after serving 15 years of that sentence.[66]

Most felony crimes in California are punished by a determinate sentence. A convicted defendant can be sentenced to one of three terms for their individual offense.[67] Historically, the court has broad discretion to sentence to the lower term, the middle term, or the upper term.[68] If a defendant committed multiple offenses, the court would impose sentence on the primary offense and then could impose sentence of any subordinate offenses either concurrently or consecutively.[69] Defendants who commit multiple offenses receive sentences for each of those offenses. If two offenses arose out of the same operative set of facts, they could be convicted of both offenses, but only punished under one offense. Penal Code section 654 required the court to impose the punishment for the most severe offense.

Recent legislation has markedly changed this process as well. Since Assembly Bill No. 518 (Wicks) was approved in 2021, the court may choose to impose a sentence on the less serious offense. Further, Senate Bill No. 567 (Bradford), also approved in 2021, now requires the court to impose no more than the middle term unless the circumstances in aggravation were stipulated to by the defendant or proven beyond a reasonable doubt at jury trial. This latter bill served to counteract changes made from the decision in *Cunningham v. California*, a 2007 case in which the United States Supreme Court ruled that California's determinate sentencing law is unconstitutional in that a court could impose an aggravated term based upon facts not determined to be true by a jury.[70] Following the Supreme Court's guidance, Senate Bill No. 40 (Romero) was passed in 2007 making the determination of an aggravated term discretionary with the court and not mandated by the pre-*Cunningham* rules. But Senate Bill No. 40 had a sunset provision of January 1, 2022.

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[66] Pen. Code, § 1170(d). *Note:* In 2023 Senate Bill No. 94 (Cortese) was introduced. This bill was not limited to minors; it proposed that anyone (with a few noted exceptions) whose offense occurred prior to June 5, 1990, and who served 25 years of their sentence could petition for recall and resentencing. Ultimately, the bill was placed on the inactive file, but it is likely to come up again 2024.

[67] Pen. Code, § 1170(b)(1).

[68] Cal. Rules of Court, rule 4.405(b).

[69] Pen. Code, § 669(a); Cal. Rules of Court, rule 4.425

[70] *Cunningham v. California* (2007) 549 U.S. 270.

Bradford's legislation (Sen. Bill No. 567) removed the model set in place by Senate Bill No. 40 and now requires a separate part of the trial to determine whether the circumstances in aggravation exist beyond a reasonable doubt.[71] Then in 2022, Assembly Bill No. 2167 (Kalra) made additional changes, requiring the court to consider alternatives to incarceration, including collaborative justice court programs,[72] restorative justice,[73] and probation. It set forth the legislature's intent that criminal cases be resolved using the least restrictive means available.[74]

Because of their severity, certain criminal offenses are ineligible for probation. But when the prohibition is removed, the court is allowed to consider probation for the offender. In 2021, Senate Bill No. 73 (Weiner) eliminated probation ineligibility for offenders who transported or possessed larger quantities—14.25 grams or more—of heroin or PCP. This provides a benefit, not to the low-level offender, but to mid-level drug traffickers. The bill also allowed a court to grant probation for these offenses to those who involved minors in their transportation, sale, or manufacture of the drug.[75]

Changes to Sentencing Enhancements

California law has long allowed enhancement of a sentence if certain aggravating circumstances exist. A *status* enhancement increases punishment if the offender has a history of certain criminal convictions, allowing for increased punishment for repeat offenders. *Conduct* enhancements increase a sentence based on certain conduct occurring during the commission of the offense.

One of the most common conduct enhancements involves the use of a firearm during the commission of the crime. For more than 30 years, courts did not have the discretion to dismiss this allegation regarding the use of a firearm, in large part because it is so serious, often leading to homicide. In 2017, however, Senate Bill No. 620 (Bradford) was signed to allow judges to determine on a case-by-case basis whether a 10-year, 20-year, or life-term enhancement is justified.

In 2017, Senate Bill No. 180 (Mitchell) eliminated the three-year enhancement for prior convictions for drug sales except for a prior conviction for a conspiracy to use a minor in the commission of drug sales.[76] Also in

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[71] Pen. Code, § 1170(b)(2).

[72] See *https://www.courts.ca.gov/programs-collabjustice.htm.*

[73] See *https://newsroom.courts.ca.gov/news/restorative-justice-healing-californias-youth.*

[74] Pen. Code, § 17.2(a).

[75] Pen. Code, § 1203.07.

[76] Health & Saf. Code, § 11370.1.

2018, Senate Bill No. 1393 (Mitchell) addressed the mandatory five-year prior enhancement term for each prior conviction of a serious felony and authorized the court to strike the five-year punishment for each prior serious felony conviction.[77]

In 2019, Senate Bill No. 136 (Wiener) eliminated the one-year enhancement for each prison term that the defendant had been previously sentenced, except if the prison term was for a sexually violent offense. For example, a defendant who had served five separate prison sentences for committing auto thefts and then committed a sixth auto burglary would not be subject to any enhancement of his or her sentence.

Finally in 2021, Senate Bill No. 81 (Skinner) broadly mandated that courts dismiss an enhancement if in the furtherance of justice, and further compelled the court to give great weight to the evidence offered by the defense as well as giving greater weight to specific mitigating circumstances[78] unless doing so would result in physical injury or serious danger to others.

Changes in Conduct Credits

State prison inmates can earn conduct credits toward reducing their sentence. Granting such credits is believed to encourage good conduct while in custody and participation in various rehabilitation programs. These credits are calculated according to statute. Altering the statute to increase credits or make credits more readily available to various classes of inmates creates a pathway to early release. Significantly, this type of sentencing reform avoids the public view. Starting with Realignment (Assembly Bill No. 109) in 2011, several measures increased the availability of credits for inmates:

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[77] Pen. Code, § 667.

[78] Under Pen. Code, § 1385, subdivision (c), proof of the presence of one or more of the following circumstances weighs greatly in favor of dismissing the enhancement:

(A) Application of the enhancement would result in a discriminatory racial impact as described in paragraph (4) of subdivision (a) of Section 745.

(B) Multiple enhancements are alleged in a single case. In this instance, all enhancements beyond a single enhancement shall be dismissed.

(C) The application of an enhancement could result in a sentence of over 20 years. In this instance, the enhancement shall be dismissed.

(D) The current offense is connected to mental illness.

(E) The current offense is connected to prior victimization or childhood trauma.

(F) The current offense is not a violent felony as defined in subdivision (c) of Section 667.5.

(G) The defendant was a juvenile when they committed the current offense or any prior juvenile adjudication that triggers the enhancement or enhancements applied in this case.

(H) The enhancement is based on a prior conviction that is over five years old.

(I) Though a firearm was used in the current offense, it was inoperable or unloaded.

- In 2013, Assembly Bill No. 752 (Jones-Sawyer) authorized persons serving felony offenses in local county jail facilities to engage in a work furlough program and earn the same credits as if they were incarcerated in a state prison facility.[79]
- Also in 2013, Senate Bill No. 76 was added into the budget bill. It lets a Sheriff add additional conduct credits to any inmate sentenced in county jail at the rate of one day of credit for every one day served.[80]
- In 2014, Assembly Bill No. 2499 (Bonilla) created the same conduct credits for a person on electronic detention or work release as persons serving time in jail.[81]
- In 2016, Senate Bill No. 759 (Anderson) changed the credits received by inmates in Security Housing Units, and in Administrative Segregation for discipline or security. Previously, these inmates were ineligible to earn credits. This bill allowed inmates who were in isolation because of their behavior to receive the same credits as those inmates complying with rules and regulations of CDCR.[82]

Changes to Probation, Parole, Supervision, and Release

A series of bills have made it easier for youthful offenders to obtain parole.

- In 2013, Senate Bill No. 260 (Hancock) created Penal Code section 3051, which approved early parole to offenders who committed their crimes before the age of 18. The only offenders eliminated from this option were those who were sentenced under the Three Strikes Law, those who were sentenced to life imprisonment without the possibility of parole, or those who violated Jessica's Law.[83]
- In 2015, Senate Bill No. 261 (Hancock) expanded the scope of youthful offender parole hearings for offenders sentenced to state prison for committing specified crimes when they were under 23 years of age.[84]
- In 2017, Senate Bill No. 394 (Lara) extended youthful offender parole to those convicted prior to age of 18 for an offense that was punished by life without the possibility of parole.[85]

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[79] Pen. Code, § 1208.

[80] Pen. Code, § 4019.1.

[81] Pen. Code, § 2900.5, 4019.

[82] Pen. Code, § 2933.6.

[83] Jessica's Law was passed by California voters in 2006 as Proposition 83, increasing the punishment for sex offenders and prohibiting probation for sex offenses.

[84] Pen. Code, § 3051.

[85] Pen. Code, §§ 3051 and 4801.

- Then in 2019, Assembly Bill No. 965 (Stone) accelerated the hearing date for persons eligible for youthful offender parole by adopting regulations that award custody credits towards their parole eligibility date.[86]

On the other end of the age spectrum, Assembly Bill No. 1448 (Weber) in 2017 altered the age for consideration of elderly parole.[87] In 2019, Assembly Bill No. 3234 (Ting) reduced the age from 60 years to 50 [to qualify for elderly parole] and reduced the minimum time of continuous incarceration from 25 years to 20 years.[88] As a result of these bills, defendants with either indeterminate or determinate sentences were eligible [for early parole] (except for Three Strikes defendants or defendants who had received a sentence of LWOP or a sentence of death).

The early 2020s brought a series of bills broadly impacting probation, parole, and release for all populations:

- In 2020, Assembly Bill No. 2147 (Reyes) created a pathway to having records expunged for those who worked in fire camps or county hand crews. Defendants convicted of most felonies had the ability to petition for such relief.[89]
- That same year, the Governor signed Senate Bill No. 118, a bill introduced by the Committee on Budget and Fiscal Review, which, among other things, expanded the resentencing for terminally ill inmates from six months to having 12 months to live. It also reduced from parole of two years or three years to as little as 12 months.
- Also in 2020, Assembly Bill No. 1950 (Kamlager) shortened probation length, thereby increasing the probability that defendants will not have time to successfully complete programming and altered the expungement section under Penal Code section 1203.4 to prohibit judges from considering victim restitution when deciding whether to grant or deny expungement.[90] This bill all but guarantees that defendants will get their convictions dismissed even though they still owe restitution to crime victims, notwithstanding the California Constitution's provision *guaranteeing* restitution to victims.[91]
- In 2021, Assembly Bill No. 1228 (Lee) created a presumption that parole violators be released on their own recognizance prior to a violation

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[86] Pen. Code, § 3051(j).
[87] Pen. Code, §§ 3041, 3046, and 3055.
[88] Pen. Code, § 3055.
[89] Pen. Code, §§ 1203.4b, 2933.6, 2900.5.
[90] Pen. Code, §§ 1203a and 1203.1.
[91] Cal. Const., Art. 1, section 28(b)(13).

hearing.[92] This allows an individual who received the benefit of probation and then violated that probation to remain out of custody pending their hearing.

- In 2022, Assembly Bill No. 960 (Ting) added Penal Code section 1172.2, making it easier for ill state prison and jail inmates to obtain release, regardless of how much of their sentence they have completed. It added a presumption favoring release that can only be overcome by a finding that they represent an unreasonable risk to public safety. The bill then defined this unreasonable risk as the risk that the defendant will commit one of a very narrow list of violent felonies found in Penal Code section 667(c)(e)(2)(C)(iv).

The Attack on Accomplice Liability

California Penal Code section 31 states:

> [A]ll persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, or persons who are mentally incapacitated, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed.

This means that the driver of a getaway vehicle is as equally culpable as the person who goes inside to rob the bank. Generally, aiders and abettors—often called accomplices—are liable for the natural and probable acts of the person directly committing the offense. This includes the crime of murder if it is a natural and probable consequence of the target criminal offense. Under such circumstances, the malice required for the crime of murder is imputed to the accomplice.

In 2018, Senate Bill No. 1437 (Skinner) dramatically changed accomplice liability, by stating that malice shall not be imputed to a person solely based on their participation of the crime.[93] Specifically, it amended Penal Code section 189 to restrict the ability to prove liability for murder under a theory of felony-murder. Murder liability for a participant in the commission of a

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[92] Pen. Code, §§ 1203.2 and 1203.25.

[93] Pen. Code, § 188(a)(3).

designated felony[94] when a death occurs can only be established if one of the following is proven: (1) the person was the actual killer; (2) the person acted with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree; or (3) the person was a major participant in the underlying felony and acted with reckless indifference to human life. The change applied not only prospectively, but retroactively as well.

Senate Bill No. 1437 also added Penal Code section 1170.95,[95] which established a procedure for permitting qualified persons with murder convictions to petition to vacate their convictions and obtain resentencing if they were previously convicted of felony murder or murder under the natural and probable consequences doctrine. This meant that *any defendant* convicted of murder could apply for resentencing and request judicial review of their conviction to determine if they were convicted under a theory of accomplice liability.[96] Even convicted murderers who were the sole participant in their offense were not prohibited from applying for consideration, subjecting family members of victims to the re-traumatization that the California Constitution sought to shield them from.

As more and more convicted murderers applied for these petitions a question arose whether the same qualifications necessary for accomplice liability under Senate Bill No. 1437 applied to crimes of attempted murder and manslaughter. In 2021, Senate Bill No. 775 (Becker) extended the murder-resentencing provisions in Penal Code section 1170.95 to both attempted murder and manslaughter.[97] It further required the appointment of counsel upon request if indicated in the petition. While courts had been allowed to make a preliminary determination of whether a defendant was properly qualified to bring the petition, Senate Bill No. 775 eliminated the ability of the court to determine whether a prima facie showing exists until after appointment of counsel and the filing of briefs by both sides.

Changes to Finality of Judgments

In 2021, Assembly Bill No. 1259 (Chiu) allowed defendants convicted at trial to have their convictions overturned on the grounds they did not understand the immigration consequences of their conviction.[98] Prior to that

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[94] Pen. Code, § 189(a).

[95] Renumbered as Penal Code section 1172.6 (Stats. 2022, Ch. 58, Sec. 10 (AB 200) Effective June 30, 2022).

[96] Pen. Code, § 1170.95.

[97] *Id.*

[98] Pen. Code, § 1473.7.

bill, defendants who had pleaded guilty had the ability to raise the lack of knowledge about the immigration consequences as a ground for overturning their plea. This inquiry was not something courts had routinely inquired about prior to Assembly Bill No. 1259.

In 2021, Assembly Bill No. 1540 (Ting) amended Penal Code section 1170(d) in 2021 to expand post-conviction resentencing. Historically, section 1170(d) allowed a court to resentence within 120 days of judgment or at any time at the request of CDCR for a limited purpose (i.e., sentencing error). Legislative amendments then expanded the scope of section 1170(d)'s authority by granting CDCR expansive powers and gave district attorneys and county correctional administrators the authority to also petition for resentencing. Assembly Bill No. 1540 then moved Penal Code section 1170(d)(1) resentencing provisions into new section 1170.03[99] and expanded them significantly by creating a presumption favoring resentencing; permitting resentencing even if a defendant is out of custody; requiring the court to apply any changes in the law that reduce sentences and authorize the exercise of judicial discretion even if a defendant's conviction was final before these new laws were effective; and requiring the court to consider if the defendant was under age 26 at the time of the crime, or experienced childhood trauma, or was a victim of domestic violence or human trafficking.

Also signed in 2021, Senate Bill No. 483 (Allen) invalidated the three-year enhancement for prior convictions for drug trafficking under Health and Safety Code section 11370.2, as well as Penal Code section 667.5(b). This change was fully retroactive, so that anyone currently serving a sentence could obtain a reduced sentence even though they were convicted prior to a change in the law.[100]

In 2022, Senate Bill No. 467 (Weiner) added an additional ground for habeas corpus petitions in that a "significant dispute has emerged" regarding expert testimony at trial such that it would have more likely than not changed the outcome at trial.[101]

Also in 2022, Senate Bill No. 1209 (Eggman) amended Penal Code section 1170.91 to expand military-trauma sentencing provisions beyond defendants who are facing a determinate term of imprisonment to include defendants who are facing a life sentence. Additionally, it expanded military-trauma

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[99] Penal Code section 1170.03 has since been re-numbered to section 1172.1.

[100] Pen. Code, §§ 1170 and 1171.1.

[101] Pen. Code, § 1473.

resentencing to eliminate the requirement that the defendant be sentenced prior to January 1, 2015, to obtain relief, and included inmates serving life sentences. It allows defendants to apply for resentencing regardless of when they were convicted and authorizes a court to either reduce the term of imprisonment or to sentence on lesser included or lesser related offenses with the consent of the defense and the prosecutor.[102]

RELEASE DOES NOT MEAN REFORM: REAL-LIFE EXAMPLES

Several real-life cases offer compelling examples of the extent to which the California criminal justice system has been reshaped, as well as highlight how releasing someone from prison does not necessarily mean they are reformed.

Timothy Bethell is an example of California's revolving prison doors. Bethell committed numerous thefts in Visalia businesses. In September 2021, he was released to a recovery program, but never reported. Eight days later, he pleaded guilty to stealing $2,800 from a Walgreens in Visalia. In the summer of 2022, Bethell pleaded guilty to six felonies of vandalism and theft at five separate businesses. He was sentenced to three years to be served in local county jail pursuant to Assembly Bill No. 109 but was released three days later due to jail overcrowding. Then, in March 2023, Bethell was sentenced to 64 months in Tulare County for committing 17 felonies. "The defendant epitomizes the dysfunction caused by the passage of soft-on-crime policies such as Assembly Bill No. 109 and Propositions 47 and 57," said Tulare County District Attorney Tim Ward.[103]

The Riverside County "Snake Burglar," Christopher Michael Jackson, pleaded guilty to 54 burglary counts on July 27, 2023, and was sentenced to seven months in jail but, with credit for time served, was freed before the day's end. He was ordered to wear an ankle monitoring bracelet for 12 years and to stay away from the 54 businesses, leading one of the victim store owners to say, "I don't feel like there's a justice system anymore."[104]

Simeon Tasfamarean represents an example of another failure. With felony convictions in 2018, 2019, and 2020, Tasfamarean, who was homeless, attacked Olympic Silver Medalist and *Sports Illustrated* swimsuit model Kim Glass with a metal pole, striking her in the head. Glass summed up the situation in her Instagram:

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[102] Pen. Code, § 1170.91.

[103] McEwen, *This man has 39 Felony Convictions Since 2014. DAs Point Finger at CA's 'Soft-on-Crime' Policies*, GV Wire (Mar. 31, 2023).

[104] Rokos, *'Ridiculous:' Riverside's Snake Burglar admits to 54 felonies, walks out of jail*, Riverside Press Enterprise (Jul. 27, 2023).

> Clearly, he's not mentally well and I do feel for him a lot. At the same time, feeling for somebody and holding them accountable doesn't have to be mutually exclusive … The more we keep letting this issue go on and on, and they keep getting out and they are on the streets, and we know that they are not healthy or mentally well and we're putting our citizens, our healthcare workers, our cops, everyone in harm's way. We're letting our society down … He has assaulted many people before me, and he's violated probation and he's violated paroles [sic] doing the same thing.[105]

Darnell Erby, a repeat felon with a lengthy history of violence was charged in Placer County with the murder and dismemberment of a 77-year-old woman. Erby had been serving a 24-year sentence for various offenses, and had had been denied parole in 2017, 2018, and 2020. He was granted release in 2021, but the district attorney's office was not given sufficient notice and the opportunity to provide input or object to his release.[106] This decision is particularly troubling because the parole board had previously found that he posed a "current unreasonable risk of violence."[107]

Smiley Martin, one of the defendants charged in a 2022 mass shooting in downtown Sacramento, had also previously been denied parole. Yet, Martin was released after serving less than half of his sentence. Both Martin and Erby also committed violations while in prison.

Troy Davis was a parolee charged with the 2021 murder of Mary Kate Tibbitts in her Sacramento home. Davis had been released prior to completing his sentence for a violent offense in 2018. Proposition 47 later decriminalized that offense after his release. Arrested for auto theft in 2021, Davis was allowed to remain out of custody due to the zero-bail policy enacted during the pandemic. Unsurprisingly, given the signals that the criminal justice system was sending the lawless, he failed to appear for arraignment on the auto-theft charge and had a warrant for his arrest at the time of the murder.[108]

Robert Eason was convicted in 2008 in Yolo County for burning thousands of acres as well as causing injury to a firefighter and killing numerous

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[105] Farrell, *'He needs to be off the streets'; US Olympic volleyball silver medalist calls for homeless man who hurled 10 inch metal pole at her head to get 11 years (but will woke LA DA George Gascon oblige?)*, Daily Mail (Jul. 13, 2022.)

[106] *Placer County District Attorney's office requests answers regarding the decision to release alleged murderer, https://www.placer.ca.gov/8182/Placer-County-District-Attorneys-Office-* [as of Oct. 18, 2023].

[107] Watts, *Why a repeat felon, now accused of dismembering a woman, was *really*released early,* CBS News Sacramento (Feb. 6, 2023).

[108] *Parolee arrested in connection with woman killed in home*, Associated Press (Sept. 6, 2021).

livestock. He was sentenced to a 40-year prison sentence, yet he was released after less than 14 years. Indeed, Eason had filed for release every year since 2017 and had been denied every year until 2022. During his criminal career, Eason, a volunteer firefighter, lit over 150 fires by manipulating some common store-bought items to create time-delay devices that caused the fires to ignite long after he was gone.[109]

Nathaniel Dixon stands accused of killing Selma Police Officer Gonzalo Carrasco, Jr. using a ghost gun in an ambush-style attack. Dixon had been convicted of second-degree robbery and was in custody until July 2020 and then released on probation. A month after release, Dixon was re-arrested for carrying a loaded firearm and possessing drugs. However, the drug charge qualified for zero bail and the gun charge only $10,000 bail. In August 2020, he was arrested again, this time for five felonies, including drug charges, possessing a firearm, and resisting law enforcement. He served time in jail until April 2022, when he was transferred to state prison. Because of credits earned and Assembly Bill No. 109, he was released on probation. In November 2022, he spent a mere two weeks in jail for a probation violation. He was arrested for killing Officer Carrasco on January 31, 2023.[110]

David Rivas was released from prison after serving one-third (18 months) of his five-year prison sentence for multiple arsons. Arson is considered a serious crime under California law but sentencing reforms and Proposition 57 gave CDCR the authority to grant early release of criminals, even those with priors for rape and murder. Rivas now faces trial on seven new counts of arson.[111]

Andrew Luster, heir to the Max Factor make-up fortune, committed multiple rapes by drugging his victims. *In 2003, he was convicted of 86 offenses* and sentenced to 124 years in prison. Luster's sentence was vacated on the ground that the original judge did not state the reasons for giving him the maximum on each count, and the new judge resentenced him to 50 years. Since several of the crimes of which Luster was convicted are defined as "non-violent" felonies under California law, he is set to receive the benefit of early release under Proposition 57, and even though he was denied parole in 2022, it is anticipated he will be released in the next four years.[112]

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[109] Grimes, *How Does a Convicted Serial Arsonist Get Early Parole with 1/3 Sentence Served?*, California Globe (Nov. 15, 2022).

[110] Gomez, *The criminal history of suspected Selma cop killer Nathaniel Dixon*, YourCentralValley.com (Feb. 1, 2023).

[111] *Convicted arsonist now accused of starting string of fires in North Hollywood*, ABC7 (Oct. 28, 2022).

[112] Schlepp, *Convicted rapist who was nabbed by Dog the Bounty Hunter denied parole*, ABC7 (Dec. 21, 2022).

Derrick John Thompson was sentenced to eight years after pleading guilty to multiple charges stemming from a 2018 police pursuit that ended in a crash that critically injured a pedestrian in Montecito. Thompson also admitted the allegation of personally inflicting great bodily injury (GBI), causing a comatose condition due to brain injury. The GBI allegation not only resulted in a sentence enhancement, but it also classified the crime as a "violent felony" under Penal Code section 667.5, subdivision (c)(8). Yet, Proposition 57 handed prison officials wide latitude to award additional custody credits toward early release as well as early parole opportunities. Accordingly, Thompson was released after serving only three years of his sentence. After his release, Thompson was jailed in Minnesota on suspicion of murder in connection with a crash that occurred after he sped off an interstate exit ramp in his full-size Cadillac Escalade SUV and struck a car going through an intersection. In short, early release in California resulted in five dead in Minnesota.[113]

SUCCESS OR FAILURE?

Violent Crime

The California Attorney General maintains crime data for California. A review of the crime data from before the passage of Proposition 36 and the flood of reforms showed a decrease in violent crime during the 10-year period after the Three Strikes Law was enacted.[114] The early commentary on Proposition 47, seemed to suggest that none of the horrors predicted by prosecutors had materialized.[115] But those early reports often failed to account for the reclassification of offenses, especially the impact on thefts from merchants. Instead, a deeper dive into the crime data shows a much different picture. When you reduce the number of offenses that make an offender eligible for actual state prison, reduce the application of both conduct and status enhancements for more serious offenders, and push the burden of housing many offenders to the already-overcrowded local jurisdictions, you most certainly will change the dynamics of the justice system and the data relied upon for purposes of analyzing crime.

We can start by looking at the most recent crime statistics issued by the Attorney General.[116] These statistics clearly demonstrate a rise in violent

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[113] Miller, *Son of former Rep. John Thompson arrested in crash that killed 5 women in Minneapolis*, Twin Cities Pioneer Press (Jun. 19, 2023).

[114] *Prosecutors' Perspective on California's Three Strikes Law*, California District Attorneys Association (Summer 2004).

[115] See, e.g., Bird, et al., *The Impact of Proposition 47 on Crime and Recidivism*, Public Policy Institute of California (June 2018).

[116] *Crime in California*, California Department of Justice (2022).

crime and a rise in property crime. The homicide rate was marginally reduced over the previous year.[117] Taking a broader view, we can look at homicides, violent crime, and property crime over the 16-year period since the passage of Proposition 36, and then again at the increase since the passage of Proposition 47, Assembly Bill No. 109, and Proposition 57. According to the Attorney General, between 2012 and 2022, homicides in California have increased 17.5 percent, from 1,878 to 2,206.[118] Since 2012, rape has almost doubled (7,828 to 14,346), robbery has reduced (56,491 to 47,669), and aggravated assault increased (94,432 to 128,798).[119] This resulted in an overall increase of violent crime from 160,629 to 193,019.[120] When viewed as a rate per 100,000, those numbers translate as follows:[121]

	2012	2022
Homicide	5.0	5.7
Rape	20.7	36.8
Robbery	149.3	122.1
Assault	249.6	330.0
Violent Crime	424.7	494.6

With this data in mind, it would be highly misleading to say that Californians are somehow safer than they were before the beginning of the reforms. Federal crime data reveals similar results as to violent crime:[122]

Year	Violent Crime Rate	Property Crime Rate
2012	423.5	2,761.8
2013	402.6	2,651.2
2014	396.4	2,441.7
2015	428.0	2,628.4
2016	444.8	2,550.0
2017	453.3	2,505.3
2018	447.5	2,386.2
2019	441.2	2,331.2

[117] *Id.* at p. 11.
[118] *Id.*
[119] *Id.*
[120] *Id.* Note: These numbers, of course, do not tell the full story: We should never forget these numbers mean 32,390 more human beings were victimized in 2022 than in 2012. This number includes 328 additional lives lost to homicide, 6,518 additional women suffered the violence and degradation of rape, and 34,364 more Californians were violently assaulted.
[121] *Id.* at p. 12.
[122] California Crime Rates 1960-2019, *https://www.disastercenter.com/crime/cacrime.htm* [as of Oct. 18, 2023]; FBI Uniform Crime Reports, Crime in the United States 2019.

Moreover, California's major cities have been hit hardest. In March 2023, *USA Today* reported that Los Angeles experienced an 11 percent increase in overall crime between 2019 and 2022, including both violent crimes (rape, robbery, armed assault, homicide) as well as property crimes (burglary, arson, vehicle theft).[123] Los Angeles is also believed to have the nation's largest homeless population.[124] The downtown area of Los Angeles experienced a 25 percent increase in violent crime and a 57 percent increase in property crime.[125] The most significant rise was auto-part thefts at an increase of 219 percent over 2018.[126] The FBI's statistics showed Los Angeles as having 732 violent crimes per 100,000 people.[127]

Los Angeles is not the only city with rampant crime. According to FBI crime statistics, Oakland is California's third most violent city with a violent crime rate of 1,271 violent crimes per 100,000 residents, including 78 homicides, 372 rapes, 2,859 robberies, and 2,211 aggravated assaults annually.[128] San Francisco has a violent crime rate of 670 per 100,000 residents with 40 murders, 324 rapes, 3,055 robberies and 2,514 aggravated assaults.[129] The state capital Sacramento has a violent crime rate of 627 with 34 murders, 127 rapes, 1,039 robberies, and 2,023 aggravated assaults.[130]

Property Crimes

San Francisco has become a haven for retail thefts. Videos of thefts from high-end retail stores, including Neiman Marcus, and drug stores, including CVS and Walgreens, have gone viral.[131] After 35 years in the city, Nordstrom closed its San Francisco store due to an increase in theft.[132] Widespread retail thefts have also taken place in neighborhoods previously believed to be safe like Irvine and Arcadia.[133] One family-owned hardware store in Fremont lost $700,000 in 2022.[134] The National Retail Security Survey found retailers lost

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[123] Palladio and Abdullah, *Which Los Angeles neighborhoods are safest? See the latest trends in the LA Crime rates,* USA Today (Mar. 20, 2023).

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] FBI Uniform Crime Report, Crime in the United States 2019, Table 8.

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] Ortiz and Ward, *After San Francisco shoplifting video goes viral, officials argue thefts aren't rampant*, NBC News (Jul. 14, 2021).

[132] Valinsky, *Nordstrom Closes San Francisco Store after 35 Years*, CNN (Aug. 28, 2023).

[133] Lloyd, *Irvine jewelry store thieves smash cases and steal $900,000 in merchandise*, NBC News (Aug. 1, 2023); Campa, *Flash mobs rob Riverside and Arcadia stores-the latest in a string of such crimes*, Los Angeles Times (Aug. 1, 2023).

[134] Keene, *Family-owned hardware store lost $700K in just one year due to retail theft*, New York Post (Aug. 1, 2023).

an estimated $94.5 billion nationwide in 2021.[135] While retail theft may be a national issue, according to the Retail Industry Leaders Association President Brian Dodge, "California is truly in a league all its own."[136] The National Retail Federation's 2022 Retail Security Survey ranked Los Angeles as the most hard-hit metropolitan area for the fourth year in a row, with the Bay Area finishing second, and Sacramento seventh.[137]

Interestingly, both state and federal reports suggest a decrease in theft offenses. For a period from 2017–2022, the Attorney General reported over a 50 percent decrease in petty theft, a 6.6 percent decrease in thefts, a 25.4 percent decrease in burglary, and a 27.6 percent drop in vehicle theft.[138] However, these numbers do not tell the whole story, because this theft data only includes commercial burglary and robbery, *and not traditional retail theft.*

According to the Public Policy Institute of California, the commercial burglary rate in California has reached its highest level since 2008, and the commercial robbery rate rose to roughly where it was in 2017. Commercial burglaries went up in 14 of California's largest counties between 2019 and 2022, with Orange County seeing a 54 percent jump in these crimes.[139] Data reveals that in 2022 commercial shoplifting increased 28.7 percent, commercial burglaries increased 5.8 percent, and commercial robberies increased 9.1 percent.[140]

Safe Schools and Communities

California schools are not safer since Proposition 47. California has seen the most school shootings with at least one victim injury or death since 2012.[141] Neighborhoods are not safer since Proposition 47. When examining the impact of crime on neighborhoods, burglars tend to stay within a relatively small distance from their home and commit crimes in either their own communities or in communities with less social cohesion.[142] Violent crime has increased. While the statistics claim a decrease in theft, those numbers do not reflect the realities of communities.

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[135] Johnston, *The rising toll of organized crime*, National Retail Federation (Aug. 28, 2023).

[136] Genoese, *Organized retail crime 'particularly acute' in California, industry expert says*, Fox News (Aug. 16, 2023).

[137] Keene, *Family-owned hardware store lost $700K in just one year due to retail theft*, New York Post (Aug. 1, 2023).

[138] *Crime in California*, California Department of Justice (2022).

[139] Lofstrom and Martin, *Retail Theft and Robbery Rates Have Risen across California*, Public Policy Institute of California (Sept. 7, 2023).

[140] *Id.*

[141] Gillian and Lurye, *States with the Most School Shootings*, U.S. News & World Report (Mar. 31, 2023); *Shooting Incidents at K-12 Schools* (Jan 1970-Jun 2022), Center for Homeland Defense and Security.

[142] Chamberlain and Boggess, *Relative Difference and Burglary Location: Can Ecological Characteristics of a Burglar's Home Neighborhood Predict Offense Location?*, 53 J. Res. Crime Delinq. 6.

Retail theft continues to plague California communities, despite efforts to apply technology.[143] Shoplifting, whether by an organized ring or by individuals has been called "de facto legal" in California.[144] California's major cities have been targets for both large-scale and small-scale retail theft. While there have been recent efforts to curb those thefts, the new legislation targets only organized crime and not the individual offenders.

Homelessness and Crime

From 2014-2022 homelessness rose 51 percent in California while it dropped by 11 percent nationwide.[145] California has six of the top 10 cities with the highest rate of homelessness:[146] San Francisco ranks 9th, San Diego 8th, Sacramento 6th, Oakland 5th, and San Jose 4th. Los Angeles leads the nation with the highest rate of homelessness at 16.9 per 1,000 residents.[147] What became of those who would have received treatment before Propositions 47 and 57 and Assembly Bill No. 109? With no incentive to seek drug treatment, unfortunately, many of these individuals get no help for their addiction issues, become chronically homeless, often resort to crime, and sadly suffer high mortality rates from overdose and other conditions.[148] In many jurisdictions, once robust drug treatment and drug court programs have been dramatically curtailed due to the lack of demand on the part of the offenders.[149]

Those found to be mentally incompetent to stand trial now receive less treatment and get funneled into a program designed to divert them out of the criminal justice system. That does not mean they receive the necessary resources and treatment they need.

Prison Closures

The impetus for California's criminal justice reform revolved around a need to reduce state prison population in response to *Plata*. As California reduced the population of its state prisons within guidelines, it now seeks to close prisons rather than use them to house inmates. The Legislature continues to chip away at conduct and status enhancements resulting in less consequence for the serious offenders. It should not be surprising that even using the

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[143] Leahy, *San Francisco Security Gates Fail as Rampant Theft Continues, Staff Says*, San Francisco Standard (Jul. 31, 2023).

[144] Ohanian, *Why Shoplifting is now de facto legal in California*, Hoover Institution (Aug. 3, 2021).

[145] Streeter, Jialu L., Stanford Institute for Economic Policy Research (SIEPR), from presentation to the California District Attorneys Association (CDAA) on July 13, 2023.

[146] Haines, *The 25 U.S. Cities with the Largest Homeless Populations*, U.S. News & World Report (Mar. 22, 2023)

[147] *Id.*

[148] See, e.g., *https://endhomelessness.org/resource/opioid-abuse-and-homelessness/ [as of Oct. 18, 2023]; https://www.addictioncenter.com/addiction/homelessness/ [as of Oct. 18, 2023]; https://www.sdcda.org/content/MediaRelease/Homeless%20Data%20and%20Plan%20News%20Release%20FINAL%203-21-22.pdf* [as of Oct. 18, 2023].

[149] Dura, *Carrots but no stick: Participation in California drug courts has plummeted, CalMatters* (Jul. 25, 2022, updated Jul. 7, 2022).

Attorney General's report of crime statistics that violent crime continues to rise. California has shifted from housing felons in state prison to housing felons in local jails, where overcrowding leads to early release and early termination of sentences.

A Note About COVID-19

Any article written since 2019 would be incomplete without mentioning the impact that the COVID-19 pandemic has had on the criminal justice system. In California, the State Supreme Court issued special rule changes related to the processing of criminal cases. Law enforcement changed policies about interacting on cases, especially proactive law enforcement. Shelter-in-place mandates kept people at home, and some crimes that peak during the school year—like child abuse—were impacted, while others, such as domestic violence, may also have been underreported as offenders and victims were sheltered in their homes together. Jails struggled to balance keeping dangerous offenders in custody while maintaining healthy environments, often resulting in the release of offenders. Local courts imposed zero-bail structures, which created the immediate release of offenders who would have normally been held in custody. Zero-bail policies were absolute failures.[150] As we came out of the pandemic, counties struggled to handle the tsunami of criminal cases that built up as courts were either shuttered or reduced to minimal staffing. Arrests slowed and the court process slowed. This created a need for either increased plea bargaining or even the outright dismissal of cases due to the lack of courtrooms to provide a trial. Thus, conviction and prison commitment numbers most certainly reflect less crime than truly occurred.

One other aspect of COVID that must be mentioned is how the government reacted to the pandemic. Reminiscent of when President Ronald Regan was shot in 1981, many government officials came forward and stated they were "in control."[151] The executive, legislative, and to some extent, the judicial branches all worked together, in what some believed was the right thing to do. However, much like Alexander Haig, they may have got it wrong.[152] This has not stopped the legislature from continuing to enact COVID-type regulations.

One such bill, signed in 2022, was Assembly Bill No. 2098 (Low), which was designed to regulate doctors' conversations with their patients. The

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[150] Hernandez, *Los Angeles Prosecutors agree with 50 Cent that eliminating bail is a disaster for the city*, New York Post (Jul. 11, 2023).

[151] Quoting Secretary of State Alexander Haig, "As of now, I am in control here, in the White House." (Allen, *When Reagan was shot, who was 'in control' at the White House?* Washington Post (Mar. 25, 2011).)

[152] Raymond, *California counties' pandemic gun store closures unconstitutional, court rules*, Reuters, (Jan. 20, 2022).

bill was immediately challenged in court as being unconstitutional. In four separate courts, judges ruled both for and against the new law. However, the Governor's spokesperson said that the administration would not appeal the two Sacramento cases where the court issued the narrow injunction (blocking the law). The plaintiffs' lawyers had expected the state to appeal the decision, thinking all four lawsuits would then be decided by the appellate courts, providing greater clarity for all parties.[153,154]

The selective choices made by the executive branch to defend (or not) initiatives, statutes, or other legal rulings have a significant impact on the criminal justice system, as well. The process whereby the Attorney General fails to represent the state or chooses not to represent the state in criminal matters has become a significant problem in recent years, so much so that it could be asked if that office is part of the reform movement.

Abandonment of Victims' Rights

The California Constitution declares that criminal activity has a serious impact on the citizens of California. The rights of victims of crime and their families in criminal prosecutions are a subject of grave statewide concern.[155] These rights encompass the expectation shared with all of the people of California: that those who commit felonious acts causing injury to innocent victims will be appropriately and thoroughly investigated, appropriately detained in custody, brought before the courts of California even if arrested outside the state, tried by the courts in a timely manner, and sentenced and sufficiently punished so that public safety is protected and encouraged as a goal of highest importance.[156] Victims of crime are also entitled to finality in their cases. Lengthy appeals and other post-judgment proceedings that challenge criminal convictions, frequent and difficult parole hearings that threaten to release criminal offenders, and the ongoing threat that the sentences of criminal wrongdoers will be reduced, prolong the suffering of crime victims and their families, and must come to an end.[157]

Many of the new and novel criminal justice reforms approved by the legislature that are discussed here have largely ignored the express statutory and constitutional rights that California voters first granted to crime victims

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[153] Wolfson, *California's COVID misinformation law is entangled in lawsuits, conflicting rulings*, Los Angeles Times (Mar. 17, 2023).

[154] Assembly Bill No. 2098 was repealed by a subsequent bill, Senate Bill No. 815 (Roth), which was signed by the Governor on September 30, 2023).

[155] Cal Const., art I, § 28(a)(1).

[156] Cal Const., art I, § 28(a)(4).

[157] Cal Const., art I, § 28(a)(6).

and their families more than more than 40 years ago when they adopted Proposition 8, the Victims' Bill of Rights of 1982, and a quarter century later when they adopted and enhanced Proposition 8's legal rights in Proposition 9, the Victims' Bill of Rights of 2008, Marsy's Law. Time after time, when local prosecutors have argued against the constitutionality of the more recent criminal justice reforms by the legislature, they have faced an Attorney General's office that all too often supports the defendants' claims on appeal. This "Genie out of the bottle" questionable practice of not defending judgments is occurring with greater frequency and at greater risk to the public.

An example of this trend occurred with the case of *Ellis v. Harrison*.[158] The procedural history of this case, can best be explained in United States Court of Appeal, Ninth Circuit, Judge Callahan's dissent:

> At every stage of the post-trial proceedings recounted thus far—from the motion for a new trial and appeal, to the state habeas petitions, to the federal habeas petition and each of the three habeas appeals to our court—the State ably and persuasively defended against Ellis' challenges to his conviction. [¶] But after the panel denied relief and Ellis filed a petition for rehearing en banc, the State did an about-face. In a stark reversal from its previous position, the State declared in its response to Ellis' petition for en banc rehearing, "The Attorney General agrees that where, as here, the record shows that defense counsel harbored extreme animus toward a defendant's racial group, prejudice should be presumed." [¶] The State joined Ellis in asking us to review the case en banc and overrule precedent "to the extent necessary to hold that prejudice will be presumed like the one at issue here." [¶] Acknowledging that its requested new rule would normally be barred on collateral review, the State expressly offered to waive the *Teague* bar and any other procedural bars. [¶] According to the State, its new position was justified because "it is important that there be no ambiguity about the law's appreciation of, and intolerance for, the insidious effects of the deep-seated racism revealed by the present record." ¶ We took the case en banc and appointed the Criminal Justice Legal Foundation ("CJLF") as amicus curiae to defend the State's former position that the writ should not issue. The San Bernardino County District Attorney—the governmental entity that originally prosecuted Ellis at trial—also filed

[158] *Ellis v. Harrison* (9th Cir. 2020) 947 F.3d 555.

> a separate amicus brief, advocating against the requested relief and the proposed new rule, effectively opposing the newfound State position as represented by the California Attorney General. [¶] At en banc oral argument, Ellis and the State shared time advocating for a novel rule, while also conceding that Ellis' Sixth Amendment claim would lose under the *Strickland* or *Sullivan* standards. When asked whether, given the State's newfound agreement with Ellis' position, there was still a case or controversy before us, the State provided little response.[159]

Many might argue that the Attorney General has unfettered discretion in deciding whether to litigate a case or not, but there are limits to what they can or cannot do. For example, Judge Callahan, stated it this way:

> When the State took Ellis' case to trial, it presumably did so as part of its duty to "protect the innocent and convict the guilty," and in pursuit of justice for those who were wronged by Ellis' crimes. Criminal Justice Standards for the Prosecution Function § 3-8.1. When the State chose to defend Ellis' conviction every time it was challenged on direct or collateral review, the State presumably did so because the conviction had been fairly obtained, and because defending the conviction served the interest of "justice within the bounds of the law." *Id.* § 3-8.1. Presumably then, an abandonment of that defense leaves unprotected the just interests that the State once served.[160]

The *Ellis* case involved unknown/late discovered racist language used by the defense attorney. The dispute was not whether Ellis was represented competently, because he conceded he should lose his appeal/writ if he had to show sub-standard representation or that he had been prejudiced by the lawyer's failings; the dispute was about whether any race-related issue was enough by itself to require a reversal. The court was able to dodge the actual question and rely on the Attorney General's stipulation to the reversal. However, the California Legislature went where the Ninth Circuit feared to tread and enacted the Racial Justice Act (RJA)[161] where even harmless errors cannot be ignored in the furtherance of their goal "to eliminate racial bias from California's criminal justice system…."[162]

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[159] *Id.* at 567–568 (footnotes omitted).

[160] *Id.* at 569.

[161] Pen. Code, § 745.

[162] *People v. Simmons*, 2023 Cal.App.Lexis 787, at *14.

In *People v. Simmons*, the Second District Court of Appeal, Division Six, was faced with evaluating the RJA, but once again, the Attorney General conceded the prosecutor violated the RJA and that the defense counsel, therefore, rendered ineffective assistance. This concession amounted to an agreement that the case should be reversed because the RJA eliminated the showing of prejudice that has been required for the past 100 years.

As the dissenting justice stated, "The Legislature's goal is laudable, but to achieve that goal it has resorted to an extreme unconstitutional measure that may wreak havoc on the criminal justice system," namely, that the legislature, rather than the court, can decide whether an error during trial results in a miscarriage of justice.[163] Justice Yegan also noted the problem created when the Attorney General sides with the defendant:

> The Attorney General and appellant agree with the majority opinion. Therefore, it is unlikely that a party will file a petition for review in the California Supreme Court. "If no petition for review is filed, the Supreme Court may, on its own motion, order review of a Court of Appeal decision ...." (Cal. Rules of Court, rule 8.512(c)(1).) If neither party files a petition for review, I urge the Supreme Court to grant review on its own motion. [164]

The majority were also aware of the issues raised by Justice Yegan, stating in the very first paragraph of the opinion:

> The Racial Justice Act (RJA) seeks to eliminate racism from criminal trials in California. Here we decide the RJA does not violate article VI, section 13 of the California Constitution. We acknowledge the dissent's cogent argument that the RJA violates article VI because section 13 states that it is the province of the court to decide whether an error results in a miscarriage of justice. We are hopeful, indeed confident, that our Supreme Court will resolve this issue ... soon.[165]

When legislation is passed, no matter how laudable the goals (be it dealing with a pandemic or racism), it must function within the rest of our constitutional protections. Legislation that erodes the finality of judgments of hard-won criminal convictions should be questioned. It is up to the Attorney General to defend those convictions, and when that office refuses to do so,

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[163] *Id.* at *38.
[164] *Id.* at *29.
[165] *Id.* at *1.

or concedes error, or agrees to free an inmate for reasons that violate the Criminal Justice Standards for the Prosecution Function, the results should be questioned. And when the courts are asked to participate in this erosion with blind fidelity, it must be questioned, as Justice Yegan did in his *Simmons* dissent:

> The courts' core function to interpret the California Constitution is defeated and materially impaired by the Legislature's direction that a violation of the RJA constitutes a miscarriage of justice within the meaning of [article VI,] section 13 [of the Constitution]. We have been applying the "miscarriage of justice" constitutional rule for at least the last one hundred years. The application of this rule involves the exercise of judgment by appellate court justices based upon their legal knowledge and experience. The Legislature has no comparable knowledge or experience. It is ill-equipped to dictate how we should perform our judicial functions. [¶] In addition to violating the separation of powers clause, the Legislature has created a statutory scheme that will waste scarce judicial resources and undermine the public's confidence in the fairness of our criminal justice system. Defense counsel will scour trial transcripts in search of the new and magical reversal ticket: "During the defendant's trial, ... the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, used racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful." (Pen. Code, § 745, subd. (a)(2).) If judgment was entered after January 1, 2021, and counsel discovers such language or such an exhibition of "bias or animus," counsel may be able to obtain a reversal of the defendant's conviction even if the violation of the RJA was innocuous and the evidence of the defendant's guilt was overwhelming.[166]

CONCLUSION

When one examines the full breadth of the changes detailed in this article from realignment, the sweeping initiatives and the legislature's relentless weakening of criminal law, and government officials' refusal to defend judgments, there is little doubt that the new reformers have profoundly reshaped California's criminal justice system.

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[166] *Id.* at *35–37.

Of course, they have succeeded in their goal to reduce the state's prison population following *Brown v. Plata*; and can now boast a 47 percent reduction from the peak of 173,673 inmates[167] to a current population of 91,933.[168] But they accomplished this feat by shifting housing responsibilities for tens of thousands of inmates to local government, through ballot initiatives that redefined numerous drug and theft offenses as misdemeanors, and by granting thousands of felons early release with enhanced credit awards and through broad changes in parole eligibility. They have approved a mountain of reform legislation, dramatically altering sentencing law and rules, expanding time credits, granting diversion eligibility to much more serious offenses, weakening or outright eliminating many sentencing enhancements, and then making many of these changes fully retroactive, thereby permitting countless inmates to request resentencing. For full measure, the new reformers have also shortened authorized parole and probation periods and changed definitions of important success measurements like "recidivism." And it's worth noting that the state first met the capacity requirement under *Plata* on February 17, 2015.[169] Yet, notwithstanding this milestone, criminal justice reform continued unabated.

Along this path, the new generation of reformers advocated that such proposals would restore balance and fairness to the system, prioritize treatment over incarceration, encourage rehabilitation, and reduce racial disparities.[170] Yet, have these reformers really accomplished their stated objectives beyond reducing the prison population?

One's view of the criminal justice system's fairness is likely a matter of perspective. No doubt offenders receiving reduced sentences, early parole, and myriad other benefits afforded, consider the reforms as increased fairness. But what about crime victims? Their rights to finality, restitution, truth in sentencing, and many other express constitutional rights have been disregarded in this movement.

Many previously robust drug courts and treatment programs are either struggling or are no longer in operation due to declines in demand for

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[167] *Offender Data Points for the 24-Month Period Ending in June 2018*, California Department of Corrections and Rehabilitation (January 2019), p. 3.

[168] *Three-Judge Court Quarterly Update*, California Department of Corrections and Rehabilitation (Sept. 15, 2023).

[169] *Id.*

[170] See, e.g., Sen. Holly J. Mitchell on why SB 180 would reduce sentence enhancements, YouTube (Jun 27, 2017); Lagos, *Jerry Brown Signs Criminal Justice Reforms, Eases Prison Terms*, KQED (Oct. 11, 2017); Lyons, *Criminal justice reform panel scores legislative wins* (Oct. 1, 2021); McGreevy, *Newsom signs bills restricting sentencing enhancements for many crimes*, Los Angeles Times (Oct. 8, 2021).

treatment.[171] With the rampant increase in crime and some of the real-life examples discussed in this article, one must seriously question the claim of increased rehabilitation.

The data also casts doubt on any claim that these reforms have removed or substantially lessened racial disparities. Minorities are still disproportionately incarcerated in state prison.[172] Similarly, homicide victimization rates continue to reflect a disproportionate impact on people of color.[173] One researcher, using crime data from Chicago, has made a strong case that decarceration policies disproportionately erode public safety in minority communities.[174]

Moreover, most of the new reforms discussed throughout this article received little public scrutiny as they moved through the legislative process or were concealed in ballot measures given catchy and misleading titles that suggested the measure would increase public safety and reduce costs.

Yet, today, the criminal justice system finds itself at a crossroads, where keeping up with the pace and scope of reforms is daunting for all those who seek justice in the best and most fair system ever created by human beings. While the new criminal justice reformers may truly believe in the merits of the changes they advocate, they should be mindful of the eloquent warning issued five decades ago to a different generation of reformers by California Court of Appeal Associate Justice Macklin Fleming:

> For when we aim at perfect procedure, we impair the capacity of the legal order to achieve the basic values for which it was created, that is, to settle disputes promptly and peaceably, to restrain the strong, to protect the weak, and to conform the conduct of all to settled rules of law. If criminal procedure is unable to promptly convict the guilty and promptly acquit the innocent of the specific accusations against them, and to do it in a manner that retains public confidence in the accuracy of its results, the deterrent effect of swift and certain punishment is lost, the feeling of just retribution disappears, and belief in the efficacy of the system of justice declines.[175]

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[171] Arnold, et al., *Drug Courts in the Age of Sentencing Reform*, Center for Court Innovation (2020), p. 2.

[172] The Prison Policy Initiative reported that in 2010, 27 percent of the prison population was black, yet blacks represented 6 percent of the state's population; 41 percent of the incarcerated population was Latino, and. Latinos represented 38 percent of the state's population. (*https://www.prisonpolicy.org/reports/rates.html* [as of Oct. 18, 2023].) 2020 U.S. Census data shows that 5.7 percent of the state's population is black, and 39.4 percent is Latino. The most recent CDCR data (September 2023) shows 27.7 percent of inmates are black and 45.9 percent are Latino.

[173] Steven Smith, *Paradise Lost: Crime in the Golden State 2011-2021*, Pacific Research Institute (February 2023), p. 36

[174] Rafael A. Mangual, *Criminal [In]justice): What the Push for Decarceration and Depolicing Gets Wrong and Who it Hurts Most (2022)*, p. 18.

[175] Macklin Fleming, *The Price of Perfect Justice 6* (1974).

Time and history will be the best judge of whether these reforms merit praise or condemnation. But as crime continues to increase at a frightening rate and powerful images of daily crime reports are ever present, the sleeping giant is starting to awaken to the new reality, and they are troubled. Nearly two in three Californians believe that street crime and violence in their local community is a problem,[176] and among racial and ethnic groups, black Californians expressed the highest level of concern about crime.[177] A poll conducted in July 2023, showed that 81 percent of California voters favor a revision of Proposition 47 to increase penalties for hard drugs and theft.[178] Increasingly, it appears that California is at a tipping point and the criminal justice pendulum may start swinging back. Perhaps it is time to put the Genie back in the bottle.

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Todd Spitzer

Greg Totten

[176] *PPIC Statewide Survey: Californians and Their Government*, Public Policy Institute of California (September 2022).
[177] Walters, *Annual crime report shows Californians' fear of increasing crime is justified*, CalMatters (Jul. 9, 2023).
[178] Statewide survey of 900 California voters conducted by Probolsky Research from July 8–13, 2023. *https://www.action.goldenstatecommunities.com/pages/prop47* [as of Oct. 18, 2023].

NANCY E. O'MALLEY* AND HAROLD BOSCOVICH**

Victims' Rights in California:

A Historical Perspective to Modern Day

INTRODUCTION

Under English Common Law and initially adopted in early nineteenth century America, crime victims controlled the investigation and prosecution of crimes committed against them. It was not until the early 20th century that the American justice system began to evolve into a public prosecution system, leaving victims with no formal legal status other than as a crime reporter and/or witness for the State.[1]

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* Nancy E. O'Malley served in the Alameda County District Attorney's Office for 39 years, including 15 years as a trial prosecutor, 10 years as chief assistant district attorney, and 14 years as elected district attorney. She retired from the district attorneys' office in January, 2023. She is a nationally recognized Leader in the Victims' Rights Movement. She has written and advocated for more than 65 bills enhancing victims' rights that have become law in California. She has played important leadership and lawmaking roles in California and throughout the nation, particularly in matters of dealing with sexual assault, mandatory testing of forensic sexual assault kits, human trafficking, violence against women, and other significant victims' rights legislation. She received numerous awards for her work, including the Congressional Victim Advocate Award, the Margaret Brent Leadership Award from the American Bar Association, and many statewide awards.

** Harold "Bosco" Boscovich was the co-founder and first director of the Alameda County Victim Witness Assistance Division in 1976. He worked there for more than 30 years. Before that, Bosco served as an Inspector assigned to the trial team in the District Attorney's Office. Though he retired in 2004 from full-time service, Bosco soon returned to the District Attorney's Office where he continued his important victims' rights work until he retired again in 2023. Before joining the Alameda County District Attorney's Office, Bosco was a peace officer in the City of Oakland. Bosco is a national leader in the Victims' Rights Movement. He was instrumental in the creation of the National Victim Assistance Program and traveled across America assisting and guiding other counties as they created their victim assistance program. He served as an officer and leader of National Organization for Victim Assistance (NOVA) and for several years, he coordinated and taught at the Victim Witness Training in California. In September 2022, during its Annual Summer Conference, the California District Attorneys Association named its "Victim Advocate of the Year Award" after Boscovich. It reads, "In grateful recognition of your enduring passion for victim's rights. Your pioneering efforts in California and nationally have created a long and lasting legacy that will continue to inspire the work of generations of advocates.

[1] Fundamentals of Victims' Rights: A Brief History of Crime Victims' Rights in the United States. Office of Victims of Crime (OVC) NCJRS Virtual Library No. 249530 (11/2011).

The new criminal justice system at that time failed to recognize any impact or trauma inflicted on victims and witnesses of crime. As such, during the 20th and much of the 21st Centuries of jurisprudence, victims and witnesses were given no consideration, other than their presence on a witness stand, in open court, with the perpetrator facing them from counsel table. Only the accused, the defendant, had an attorney protecting his or her rights.[2] Until the 1980s, victims had no rights, no support, no resources for healing or moving beyond the crimes.

There was little to no consideration paid to victims of crime by law enforcement investigators or prosecutors, certainly not by the defense attorneys nor even the Judge. To take these injustices further, the Criminal Justice System and those working within it, discounted certain types of crime, such as sexual assault and abuse, child abuse or domestic violence, which were mainly considered "family matters."

The institutionalization and standardization of a system that was driven by a lack of support for victims of crime, or respect for witnesses, was not unique to one jurisdiction, nor one state nor to the federal government. It was just the way things were, sadly. The result was that victims felt blamed, betrayed, abused, and disregarded by the criminal justice system. Growing numbers of victims consciously decided not to engage with the prosecution or law enforcement. If a victim was personally served with a subpoena to appear in Court, and that victim chose to disregard the subpoena, s/he could be arrested and it was the victim who could land in jail, even at times when the perpetrator was not.

In any criminal case, the prosecutor must present evidence and prove the case beyond reasonable doubt. Most criminal cases, and some civil cases, center around harm to a victim(s). Now as was then, the rules of American jurisprudence, with limited exceptions, require victims to testify under oath in court and, if possible, identify their perpetrators, and the nature of the circumstances inflicted on them or their property by those perpetrators. Other individuals may also testify under oath to witnessing the crime(s) committed, identifying the perpetrators, or providing other relevant information. Witnesses, including professional witnesses, can identify a deceased victim(s) and/or declare the official cause of death and whether it was an unlawful homicide.

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[2] Before and after Gideon, few crime victims could or can afford counsel, that is, crime victims and their families have no right to government funded counsel as do those accused of committing the crimes against them; Gideon v. Wainwright (1963) 372 US 335, requires criminal accuseds to be provided defense counsel at government expense if they cannot afford defense counsel.

For both the victim and witnesses to the crime, testifying can be extremely intimidating and resurrects the trauma, fear, and other emotions felt at the time of the crime. This is especially true when confronting the accused face-to-face in a courtroom. Remarkably, because of the Victims' Rights Movement, focus does not shift focus away from the accused; rather, it gives focus on and to the victims and witnesses as well. The rights of victims would never have occurred without the vision and determined leadership of countless pioneers in the Victims' Right Movement. And, through the efforts of these courageous advocates, and a few brave legislators of the time, victims now have rights too.

THE BEGINNING OF CHANGE

As stated above, in the 1960s and 1970s, victims of crime had no rights, and no protective status in the criminal justice system. At the same time, serious and violent crime, as well as social unrest, sometimes violent unrest, steadily began to rise in the United States, including Alameda County. The systems' responses to protests and organizations challenging law enforcement and other government systems also resulted in increased criminal engagement and victimization.

The resulting developing phenomenon was that in the moments following a crime, victims and witnesses became increasingly less likely to call the police. The police would generally respond to a call for help, especially involving violent crimes, victims were forced to navigate the process without victim advocates or resources providing them support. These circumstances were epitomized by Sgt. Joe Friday, a fictional 1940, 50s, and 60s Los Angeles Police Department police officer, who often proclaimed on radio and television hit shows, Dragnet, "Just the facts, ma'am!"

Change began in the early 1970s when brave, bold, outspoken individuals began to rise up and to organize around the rights of victims of crime. They were advocates for improving the treatment of and support for victims of crime. Slowly, a Victims' Rights Movement coalesced and began to parlay into the creation of a system in which victims could find themselves with support and necessary services, such as medical care, fiscal assistance and the like. Actual statutory and constitutional rights for victims of crime and their families were on the way to being achieved. The nascent, but rapidly growing Victims' Rights Movement became virtually ubiquitous and very vocal; victims and those sensitive to the plight of victims became political activists, strategically working through legislatures across America. They advocated for change to the federal government as well.

While change came slowly, the Victims' Rights Movement persevered by gathering more and more supporters and partners. By the mid-1970s, the Victims' Rights Movement included district attorneys, legislators, non-government victim advocates, survivors of crime, the public, and voters. These courageous individuals recognized the impact of crime on victims and the importance of victims' participation in the Criminal Justice System. At the same time, they brought the spotlight on the trauma and other serious impacts of crime on the victims, and those who witnessed the crime as well.

CHANGING A SYSTEM, ONE STEP AT A TIME

Alameda County was at the forefront of the Victims' Rights Movement as it pertained to the criminal justice system. Great strides were made by volunteers from local communities. Many of the volunteers had been victims and survivors of violent crimes, particularly victim/survivors of interpersonal violence, including sexual assault and domestic violence. These were two crimes that were quite literally ignored and/or mishandled by law enforcement. In the early days preceding reform, a responding peace officer would often challenge the veracity of a victim/survivor's statement about being sexually assaulted. It was not uncommon for an officer responding to domestic violence to treat the case as a "family matter" which may have included walking the accused batterer around the block to "cool off." It was also not uncommon for a peace officer to counsel the victim, mostly women, to simply not provoke the man.[3]

These two common areas of systematic, official disrespect for and discounting of victims of sexual assault and domestic violence, led the victims to become, in large measure, central figures in a growing and powerful corps of volunteers whose outrage and advocacy against the insufficiency of response by peace officers and prosecutors led to significant mitigation of negative official behavior and progress by fostering major procedural and legal reforms. In the 1960s, Bay Area Women Against Rape (BAWAR), founded in Berkeley, Alameda County, was one of the first grass-roots efforts to address mistreatment of sexual assault victims. The District Attorney's Office in Alameda County was one of the first prosecutor offices with a Unit to support Victims of Crime.

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[3] DA (Ret) Nancy O'Malley served as a volunteer for one of the first Battered Women's Shelter and the second Rape Crisis Center in California. Not only did she join in the protests of the volunteers, she witnessed first-hand the treatment of victim/survivors of interpersonal violence, including victims of the East Area Rapist/Golden State Killer recently convicted by Sacramento District Attorney's Office under the Leadership of then District Attorney Ann Marie Schubert, a National DNA Expert.

LEADERS OF CHANGE

In 1972, the federal government funded the first three victim assistance programs in the United States. This declaration of victims' rights was followed by follow-on fiscal support which was a monumental step in the recognition that victims' rights are human rights.

The first three agencies selected for the grants were the Bay Area Women Against Rape (BAWAR), located in Alameda County, California.[4] The second program was Rape Crisis Services (DCRCC) located in Washington, D.C.[5] The third program was Aid to Victims of Crime, located in St. Louis, Missouri.[6] All three organizations concentrated on crisis intervention for crime victims. In 1974, the first battered women's shelter was established in Denver, Colorado. Also in 1974, the Contra Costa County District Attorney's Office funded the first Rape Crisis Center in the county.[7]

As previously stated, leaders in the Victims' Rights Movement included Alameda County leaders such as District Attorney D. Lowell Jensen, Deputy District Attorney Lois (Haight) Herrington, who later advocated for the passage of the Victims of Crime Act (VOCA) and served as the first Director of the Office of Victims of Crime under the U.S. Department of Justice. District Attorney Inspector Harold Boscovich and other members of District Attorney Jensen's leadership team began to develop a recognition of and sensitivity to the perceived "apathy" of victims of crime in participating in the criminal justice system.

Jensen's team grew increasingly concerned about the treatment of victims of crime. District Attorney Jensen was a national leader in the law enforcement and prosecutorial efforts and led the national Prosecutorial leadership as the – Prosecutors and Law Enforcement -- joined the National Victims' Rights Movement.

Members of the Alameda County District Attorney's Office, Inspector's Division, had their regular Friday morning meeting with DA Jensen in the District Attorney's Main Office Law Library. DA Jensen spoke of the lack of cooperation from the public to becoming involved in the criminal justice system, and the unwillingness of the public to report crime or cooperate with

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[4] BAWAR is still serving victim/survivors. BAWAR was founded by Oleta "Lee" Kirk Abrams and Julia Rosalind Schwendinger. Abrams created the first 24/hour Hotline for victims and was the first person to ever accompany a victim to court when they testified against their attackers. Two years after founding BAWAR, Abrams was the first employee of the Alameda County District Attorney Victim Witness Advocacy Program in 1975.

[5] DCRCC is still operating.

[6] Still operating, now named "Crime Victims Center."

[7] There are now 1,579 Rape Crisis Centers across America; California leads the country with 101 Rape Crisis Centers.

law enforcement and the prosecution of those involved. It was at that time DA Jensen declared that "*[t]hings would change*…" But he knew that merely declaring it so would not necessarily bring the change. He knew that there needed to be an army of supporters, both inside the District Attorney's Office and beyond. This was especially true at the national level in order to accomplish the very important and critical tasks at hand – to build sustained systems and policies that recognized the impact of crime on victims and witnesses and, to increase the participation of victims in the justice systems in holding offenders accountable.

DA Jensen held a meeting with Inspectors.[8] He informed the Inspectors that the Alameda County District Attorney's Office had applied for a grant from the Law Enforcement Assistance Administration (LEAA)[9] through the National District Attorney's Association (NDAA)[10] to determine whether the perception of victim and witness non-involvement was accurate, not just in Alameda County but across the Nation. If the perception was found to be true, DA Jensen proposed a national effort to determine why and what could be done to change it?

Following the meeting, Inspector Harold Boscovich met with DA Jensen to express his interest in being considered for assignment should the grant application be successful. Inspector Boscovich, former Oakland Police Officer, had worked with Assistant District Attorney Howard Janssen and encouraged ADA Janssen to make the same request, which he did.

In Summer of 1974, the Alameda County District Attorney's Office was selected as one of eight (8) counties to receive a Victim Assistance grant. The grant study proposed by NDAA was to determine whether the public's attitude regarding the treatment of victims of crime were the same in small, medium, and large counties throughout the United States. The eight county prosecutor offices selected were: two from small counties: Davis County – Farmington, Utah and Kenton County, Covington, Kentucky; three from medium-size counties: Alameda County, Oakland, California, Denver County, Denver, Colorado, and Westchester County, White Plains,

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[8] Inspectors are sworn police officers working in the District Attorney's Office.

[9] LEAA was a U.S. Federal agency within the U.S. Department of Justice. It was formed in 1968 by President Lyndon Johnson as part of the "Omnibus Crime Control and Safe Streets Act of 1968." It was abolished in 1982. The program administered federal funding to state and local law enforcement agencies and funded educational programs, research, state planning agencies, and local crime initiatives.

[10] The National District Attorneys Association (NDAA) was founded in 1950. It is a national, non-partisan non-profit membership association that provides training, technical assistance, and services to prosecutors around the country in support of the prosecution profession.

New York; and three large counties: Cook County, Chicago, Illinois, Orleans Parish, New Orleans, Louisiana, and Philadelphia County, Philadelphia, Pennsylvania. NDAA funded these eight programs with funds provided by LEAA. LEAA also supported the first two law enforcement-based victim-witness programs in Fort Lauderdale, Florida, and Indianapolis, Indiana.

As part of the large NDAA grant, DA Jensen created the first District Attorney based Victim-Witness Assistance Bureau. He named Assistant District Attorney Janssen as the Project Director and Inspector Boscovich as the Assistant Project Director.

Elements of these early victim assistance programs have remained guideposts as the Victim Assistance / Victims' Rights Movement has grown. These early programs formed the foundation of basic victim services today: crisis intervention, support during the criminal justice process, assistance in applying for compensation and in receiving restitution, assistance during the post-conviction, pre-sentencing process which includes assisting victims in preparing Victim Impact Statements. Notably, in today's world, virtually every prosecutor's office in the country has a Victim-Witness Assistance program along with Community-Based Victim Advocacy.

VICTIMS' RIGHTS ARE HUMAN RIGHTS

On November 15, 1974, Preston Trimble, the President of NDAA, visited Alameda County as the official start date for the eight counties selected. At the opening of the visit, DA Jensen made the inspiring and catalytic statement, *"Victims of crime are people and not pieces of evidence…we should treat them with respect and dignity."* As a result, the NDAA adopted, "Victims are People," as its grant theme for the eight selected counties.

As part of the effort to learn more about victims' and witnesses' response to the criminal justice system, ADA Janssen and Inspector Boscovich, in a stroke of genius, created the "Victim/Witness Survey of April,1975." The survey sought to learn about the experiences of victims and witnesses throughout their participation in the criminal justice system. The survey invited responders who felt their treatment was unsatisfactory to make recommendations as to procedures that could be developed and adopted which would correct these flaws for future cases? The results of the surveys were used to develop procedures to help make prosecutors' offices more responsive to the needs of both victims and witnesses of crimes.

During the time that the surveys were being conducted, new and corrective procedures were being developed to address issues that victims and witnesses

presented during the survey interviews. Training programs were being developed to instruct professionals in a multitude of fields with whom victims would or could come into contact. At that time, each discipline provided their own training protocols and delivery. It was much later that trainings were consolidated and delivered as a holistic response to victims of crime.

DISTRICT ATTORNEY VICTIM WITNESS CHANGING POLICIES AND PROCEDURES

During January 1975, the first procedures were being developed to improve engagement with victims and witnesses. Two critical procedures were created:

1) A District Attorney Witness Notification Program (DAWN), a case notification procedure by which victims of felony crime would be notified by mail.[11] The letter invited the victim to contact the Victim Witness Assistance Unit with any questions. In assault and homicide cases, the letter notified victims or the next of kin of the victim about the availability of California's Compensation for Victims of Crime Program.

2) A Subpoena by Mail Procedure beginning with the Berkeley-Albany Judicial District.[12]

Following adoption of the new protocols based on the first survey, a second survey was mailed to different victims and witnesses asking the same questions as the first survey. The second survey revealed that victims of crime and their families continued to suffer physically and emotionally from the impact of crime, especially victims of sexual assault, domestic violence, and homicide. One of the important lessons learned from the second survey was that the crime, followed by the criminal justice system response, were just the beginning of problems for the surviving victims of a crime and their families after responding peace officers left the scene. This was critical knowledge for the Victims' Rights' Movement. It was also clear that there was a tremendous amount of continued learning needed. The mission became to develop protocols and implement humanity-based processes. This awakening was shared across the United States with other victims' rights advocates and grantees of the original victim services grants.

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[11] In addition to details about the case involving the individual, the mailing included an informational brochure about the criminal justice process, the court location and parking. The letter provided the name(s) of the defendant(s), a docket number and the charges filed.

[12] The survey showed that 93.7% of the people surveyed responded that they would have come to court if the subpoena was mailed to them. This change resulted in cost savings of $1500/month in police savings for the 300 subpoenas usually served personally.

In August, 1975, Alameda County District Attorney's Office hired Oleta "Lee" Kirk Abrams as the first Victim Consultant/Victim Advocate in the newly created Victim-Witness Assistance Bureau. It was the first time a District Attorney Office had hired the Director of a non-government Victim Advocacy Center to oversee delivery of services and support to victims of crime within a prosecutor's office. Ms. Abrams was hired to engage with sexual assault victims in a way that lessened the emotional impact of the crime committed against them. Ms. Abrams received a copy of the police report in a timely manner and it was she who initiating contact with the victim-survivor of sexual assault.

Empowering community-based victims' advocacy programs, working collaboratively with law enforcement and prosecution offices, and building divisions of victim services within prosecutors' offices, proved to be profoundly successful. These efforts demonstrated clear support for victims and witnesses, from humanitarian perspectives as well as professional, governmental perspectives.

As was the case with the evolving Victims' Rights Movement, in general, change in *one county* was not the overarching goal; *change in all counties across the country* and across all disciplines, including non-government allied partners, was the critical goal of those involved in the work being done. The evolution of change included allowing advocates to be present in court when victims testified, even over the objection of the defense, and the incorporation of many more considerations for victims of crime and those who witnessed crime. This was especially true for those victims and witnesses who came to court to testify.

Advancements also included returning, as promptly as possible property taken from the victim. Prosecutors began to substitute a photograph of the victim's stolen property rather than hold the property as evidence for limitless amounts of time. Also, Victim's Compensation was created and funded in order to pay for mental health, medical treatment, relocation, and other needs of the victims.

FEDERAL GOVERNMENT AND STATE RECOGNITION OF AND SUPPORT FOR VICTIMS OF CRIME

In 1981, California Governor Ronald Reagan became the 40th President of the United States. In 1982, President Reagan formed a presidential task force. Former Alameda County Assistant District Attorney Lois (Haight) Herrington served as Chair of the President's Task Force on Victims of Crime.

The mandate of the Task Force was to "conduct a nationwide study to assess the poor treatment of crime victims in the criminal justice system." The Task Force members crossed America, interviewing crime victims, hearing about their needs, their concerns, and their experiences. The Task Force members were unified in their conclusion that the criminal justice system regularly re-victimized victims and that the system was out of balance in favor of offenders. The Task Force's recommendations centered on what could help make the victim as whole as possible, and then to help prevent secondary victimization by the system.

In the Task Force's final report, Herrington declared, "*You must know what it is to have your life wrenched and broken, to realize that you will never really be the same. Then you must experience what it means to survive, only to be blamed and used and ignored by those you thought were there to help you. Only when you are willing to confront all these things will you understand what victimization means.*"[13]

She added, "*During our hearings we were told by one eloquent witness. 'It is hard not to turn away from victims. Their pain is discomforting: their anger is sometimes embarrassing; their mutilations are upsetting.' Victims are vital reminders of our own vulnerability. But one cannot turn away.*"[14]

Herrington is widely credited for her exemplary work in leading the President's Task Force, subsequently shepherding necessary changes, and catalyzing others. It is worth noting that President Reagan nominated and the United States Senate confirmed Edwin Meese as the nation's 75th Attorney General. Meese was a former Deputy District Attorney in Alameda County.[15] President Reagan also nominated and the United States Senate confirmed former Alameda County District Attorney D. Lowell Jensen as United States Assistant Attorney General, Head of the Criminal Division. Alameda County District Attorney John "Jack" Meehan and Inspector Boscovich testified before the Task Force at the hearing held in San Francisco. Once again, Alameda County District Attorney's Office was in the forefront of the Victims' Rights Movement.

The efforts of the President's Task Force were just the beginning of expansive government support, through passage of laws and through the growth of

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[13] At p. vii.

[14] Id.

[15] Meese was awarded the Presidential Medal of Freedom by President Donald Trump in 2019 during a ceremony in the Oval Office at the White House. Meese received the award for his "distinguished leadership and legal guidance while serving as attorney general under President Ronald Reagan. "Meese is The Heritage Foundation's Ronald Reagan distinguished fellow emeritus and namesake of the Meese Center for Legal and Judicial Studies." "Edwin Meese III Receives Presidential Medal of Freedom," Heritage Foundation News (October 8, 2019).

federal and state fiscal resources that promoted and expanded the rights of crime victims. Many of these programs continue through today building and rebuilding a system of justice by remembering and providing fairness for crime victims and communities.

In 1982, Congress passed the first piece of Federal Crime Victims' Rights legislation, the Victim and Witness Protection Act. In 1983-84, significant federal actions were taken based on lessons learned through the President's Task Force. The Federal Office for Victims of Crime (OVC) was created to implement the President's Task Force recommendations for a variety of related agencies and organizations, public and private. Congress also passed the Victim of Crime Act (VOCA) and Lois Haight Herrington was appointed Assistant Attorney General in charge of the Office of Justice Assistance.

As part of the legislative mandate, OVC provided and managed federal aid to the states for victim compensation programs and for a broad array of programs and services that focus on services to victims of crime and their families. Policies enacted by OVC provided guidance for the State Victim Assistance and Compensation Grant Programs. These policies were in line with the findings of the President's Task Force. There was also an underlying effort to build policies that treated and protected victims on the same scale as upholding the rights of criminally accused, specifically, constitutionally held Victims' Rights.

States, including California, followed the federal advancement of victims' compensation by enacting a statutory structure for compensation for victims. Clearly, one of the important rights communicated to victims was the availability of compensation in the form of payment to providers for treatment of a victims' injuries. Payments were authorized through the California State Board of Control (SBOC). However, quite quickly, the SBOC developed a backlog of claims for reimbursement of victims'' medical costs and lost wages. To address the backlog and expedite claims, the SBOC implemented a Joint Powers Agreement (JPA) Program with a few Victim Witness Centers serving counties within their region of the state.

Alameda County's District Attorney's Office was one of the first Victim Witness Centers to process state compensation claims to assist victims and their families with the application process and to expedite the process. Soon, other established Victim Assistance Centers were also selected to begin a Claims Unit within their offices. Some JPA units were assigned to process claims from neighboring counties as part of the agreement.

The SBOC provided training for Victim Centers' newly hired claim specialists and developed a strong working relationship for the purpose of assisting victims and their families was developed with employees of the SBOC and victim centers.

The claims specialists served as an intermediary between the victim and the SBOC. Claims were processed more efficiently and timely. Applicants for victim compensation had access to the local claims' specialist and a victim advocate who could answer their questions and help with supporting documents for the claim process. The claims specialists worked in cooperation with the victim advocate assigned to the case. In homicide cases, the homicide victim's next of kin/family could file an application to be reimbursed for the funeral and burial expense. Victims could file an application to pay for any medical or hospital bills for life-saving treatment of the victim prior to the victim's death and loss of support of dependent family members due to the death of the victim of crime within statutory reimbursement limits. As the programs expanded, payment for mental health services were included and other critical services for individual victims.

VICTIMS' RIGHTS MOVEMENT CONTINUES TO GROW COMMUNITY RESPONSE TO CRIME VICTIMS

There are now thousands of non-government leaders in the Victims' Rights Movement. Many have been consistently engaged in the development and delivery of victims' services and the growth of victims' rights. It was long ago recognized that the government alone could not provide for all of the needs and empowerment of victims; nor could the government agencies provide all of the resources for all victims of crime. As the Victims' Rights Movement grew, the Federal and state governments wisely built partnerships with and, to this day, continue to provide fiscal and other support for non-government victim service providers.

In 1975, the National Organization for Victim Assistance (NOVA) was founded. It was the first national organization to assist and advocate on behalf of crime victims. NOVA held its first national conference a year later. NOVA is the oldest national victim assistance organization of its type in the United States and is a recognized leader in victim advocacy, education, and credentialing. NOVA is a private, nonprofit organization of victim and witness assistance practitioners, criminal justice professionals, researchers, former victims, and others, committed to recognizing victims' rights in four areas: national and local legislative advocacy, direct victim assistance, member support, and professional development. NOVA coordinates a

National Crisis Response Team and a National Crime Victim Information and Referral Hotline.

NOVA has been the leader in developing and providing crisis response training for victim advocates of government and private non-profit agencies throughout the Nation. NOVA has sent crisis response teams to assist local government agencies in the aftermath of tragic occurrences, (e.g., mass school shootings, World Trade Center massacre on 9/11). NOVA provides training to victim centers throughout the nation and annually convenes a National Training Conference for Victims of Crime and their families, victim advocates, and related public and private agencies. NOVA oversees the annual National Victim Rights Week held in April each year in Washington, D.C. and across the Nation.

In 1978, the National Coalition Against Sexual Assault and the National Coalition Against Domestic Violence were organized by rape crisis and domestic violence program providers. The first national organization to assist homicide survivors, Parents of Murdered Children, was created. Mothers Against Drunk Driving was formed 2 years later in 1980.

In addition, the Vera Institute of Justice began a demonstration project in the 1970s that assisted victims and witnesses in criminal courts in Brooklyn, New York. Today, this comprehensive nonprofit program known as Victim Services, Inc., is located in two sites in Pennsylvania and employs a staff of 650. It operates with an annual budget of $30 million.

Communities around the country began working toward the goal of integrated victim service delivery systems where quality services to crime victims are available and readily accessible to all victims. Recognition and embracing the diversity of America is has been an extremely important advent. Its importance is especially pronounced in the administration of criminal justice and provision support and services to victims of crime. In order to effectively serve victims, advocates and organizations give great focus on the unique experiences and cultures of our diverse society, including race, gender, ethnicity, culture, sexual orientation and other community and individual factors making the United States rich in its populations.

Throughout the growth of the Victims Rights Movement, it has been critically important for victim assistance professionals to be trained to provide effective and sensitive services to all victims, including embracing, recognizing and respecting individual differences. Victim advocates and other professionals in the administration of criminal justice ensure services and information are available in multiple languages other than English, including serving deaf and hard of hearing clients.

While the profession of delivering victim services does not yet fully reflect the extraordinary diversity of our nation's population, achieving that end is one of our highest priorities. Increasingly, victim service providers share ethnic, gender, cultural and other factors with those they serve.

Part of the expansion and growing the breadth of victim support, victim advocates are now trained and are specialized in meeting the needs of victims with disabilities who are particularly vulnerable to becoming victims of crime. This is especially true for those suffering from developmental or severe disabilities, who are often victimized by their own caretakers, making them extremely fearful of retaliation if they report the crime. In 1986, Marilyn Smith founded Abused Deaf Women's Advocacy Services (ADWAS) in Seattle, Washington, providing counseling and legal advocacy for deaf and deaf-blind victims of sexual assault and domestic abuse. This is but one example of the specialization of victim advocacy that ensures trained and experienced professionals are available to address the unique needs of victims. The goal and results foster critical engagement of professionals and volunteers to provide healthy, safe, caring, and experienced support for all victims.

STATE AND COUNTY VICTIM WITNESS ASSISTANCE CENTERS

Victim Witness Centers were established in county prosecutors' offices, probation offices and non-profit organization offices across America. In 1977, the California District Attorneys Association (CDAA) established the first of four annual California Forgotten Victims Weeks.[16] Every Victim Witness Center aligned on the themes. Political and civic leaders throughout California and thousands of victims and advocates endorsed and celebrated that seminal Week. Many national political and civic leaders supported it too. Victim Witness Assistance Centers flourished as the Governor's Office of Criminal Justice Planning (OCJP) began to provide grant money to county-based Victim Witness Centers.

To ensure the access of services to victims of crime, legislation has been passed and funding structures embedded in the States' legislative structures. It is not enough to verbalize support for Victims' Rights; the States must ensure stable and consistent funding for staff to provide those services.

In California, as in many of the States, the Victim Witness Advocates created the California Crime Victim Assistance Association (CVAA), now the California Victim Witness Coordinating Council (CVWCC). Through those

[16] George Nicholson, "The Roots of America's Crime Victims' Legal Rights Movement, 1975-2023, A Personal Retrospective, an unpublished manuscript (2023).

efforts, there is a structure for government funding to support the Victim Witness Centers based on its population, and additional funding based on its crime rate/population comparison. Victim Advocates from the Victim Witness Centers advocated for and were successful in getting laws passed that ensure every county has a Victim Witness Center, with funding. The legislation also established a required training curriculum for personnel in the Victim Witness Assistance Programs. (Cal Penal Code, Section 13835, et seq.) The CVWCC was tasked with developing the training curriculum and for a number of years, the Alameda County District Attorney's Office hosted the mandatory training.

Despite the monumental efforts and advancements in upholding Victims' Rights in California, there occasionally must address and reconcile tension between community-based victim support centers, particularly Rape Crisis Centers and Victim Witness Assistance Centers. In 1987, at the urging of OCJP, leaders of Victim Witness Centers met with leaders of Rape Crisis Centers. The efforts were successful in negotiating a plan to allow Rape Crisis Centers to share in California Penalty Assessment Funds, which are supposed to be paid by convicted individuals and are provided to Victim Witness Assistance Centers and other programs. Through these efforts, Rape Crisis Centers were provided with stable funding. (Cal. Penal Code, Section 1464.)

FEDERAL AND STATE LAWS ENACTED TO PROVIDE FUNDING FOR VICTIM SERVICES AND THE VICTIMS' RIGHTS MOVEMENT

In 1994, federal legislation enacting the Violence Against Women Act (VAWA) was introduced by Representative Jack Brooks (D-TX) in 1994. The bill gained widespread support in Congress and passed through both houses with bipartisan support within the year Congressman Brooks introduced it. VAWA established rights, protections, and funding for women. In addition, VAWA provided $1.6 billion for investigation and prosecution of violent crimes against women. The Act also imposed automatic and mandatory restitution[17] on those convicted, and allowed civil redress when prosecutors chose to not prosecute cases. This Act also established the Office on Violence Against Women within the U.S. Department of Justice.

In 1996, President Bill Clinton created a new Task Force on Victims of Crime. He declared that when someone is a victim of crime, he or she

[17] Courts, state or federal, rarely imposed restitution orders before 1982, no matter how necessary or deserving. That year, restitution in all criminal cases became mandatory in California due to a constitutional amendment contained in Proposition 8, the Victims' Bill of Rights adopted that year by voters. (Cal. Con., article I, section 28(b), since greatly broadened in 2008, Cal. Con., article I, section 28(b)(13). .).

should be at the center of the criminal justice process, not on the outside looking in. The President made the point that accused individuals have constitutional rights, ordinary citizens have a constitutional right to serve on a jury, the press has a constitutional right to attend trials … it is only the victims of crime who have no constitutional rights….

In April, 1996, and again in January, 1997, the Victims' Rights Constitutional Amendment was introduced by Senators Jon Kyl (R-AZ) and Dianne Feinstein (D-CA) in the U.S. Senate and by Representative Henry Hyde (R-IL) in the House of Representatives. The bill has never passed out of Congress. Congress did pass the Crime Victims' Rights and Restitution Act which established several rights of victims of crime, but only in federal criminal cases. (CVRRA, 34 U.S. Code § 20141; and the Crime Victim Rights Act (CVRA, 19 U.S Code. § 3771.) During the past several decades victims' rights legislation has passed in all fifty (50) states, but not every state has amended its Constitution to include protection of Victims' Rights, nor has the federal Constitution adopted Victims' Rights as a Constitutional Right.

Since 1982, thirty-three (33) States have amended their constitutions to include victims' rights, beginning once again with California. California established statutory and constitutional rights for victims of crime and their families when the voters passed Proposition 8, the Victims' Bill of Rights, on June 8, 1982. Slightly more than a quarter century later, almost 54 percent of Final Election voters enacted Proposition 9, the Victims' Bill of Rights Act, "Marsy's Law," on November 4, 2008. Proposition 9 adopted and expanded all the rights contained in Proposition 8, especially restitution as noted, *supra*, footnote 17.

Sadly, many laws are passed because of outrageous tragedies, such as early release of offenders, or lack of services for victims, as we have seen for many years.

Marsalee (Marsy) Ann Nicholas, was a beautiful, vibrant young woman attending the University of California at Santa Barbara. She was stalked and murdered by her ex-boyfriend in 1983. Only one week after her murder, and on her way home from Marsy's funeral service, Marsy's family stopped at a market to buy bread. Marsy's mother was confronted by her daughter's murderer who had been already released on bail. Marsy's family had no notification nor any warning that he was released and walking around carefree and free.

There was no notification to Marsy's family because there was no mandate for the courts or law enforcement to make notification. At the time of passage, Marsy's Law established the strongest and most comprehensive statutory and constitutional rights for victims of crime and their families in the United States and sustained California's decades-long, ground-breaking leadership at the forefront of the national Victims' Rights Movement.

Marsy's Law gives crime victims and their families nineteen (19) meaningful and enforceable statutory and constitutional rights to help balance their rights in the scales of justice, without, in any way, encroaching on the rights of criminally accuseds. This is as it should be.

As Justice Benjamin Cardozo sagely admonished us almost 90 years ago, "But justice, though due the accused, is due the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." (Snyder v. Massachusetts (1934) 291 U.S. 97, 122.)

Justice George Nicholson (Ret), a former senior prosecutor with the Alameda County District Attorney's Office, relying on Justice Cardozo's inspirational words, was instrumental in the enactment of Proposition 8. In 1976, Justice Nicholson left Alameda County District Attorney's Office to become executive director of the California District Attorneys Association (CDAA), and a few years later joined the California Attorney General's Office as a special assistant attorney general. While in the Attorney General's Office, he was principal architect of Proposition 8, the Victim's Bill of Rights.[18]

NEW ISSUES BRING NEW ADVOCACY FOR VICTIMS' RIGHTS

Several issues impacting victims' rights have emerged. Successful advocacy and efforts have brought forth new attention, new resources, and new laws in victims' rights. Then San Diego City Attorney Casey Gwinn brought attention to the fact that victims of interpersonal violence, particularly domestic violence, elder abuse, and sexual assault, were not accessing available services because they were disjointed and separated. Essentially, victims of heinous crimes were forced to navigate the "services promised them" on their own. The outcome, City Attorney Gwinn discovered, was that most victims of interpersonal violence were not being served effectively or comprehensively.

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[18] After several years as a prosecutor in a variety of senior roles, local and state, Justice Nicholson was appointed by Governor George Deukmejian to the Sacramento Municipal Court in 1987 and to the Sacramento Superior Court in 1989. Governor Deukmejian nominated him to serve on the Court of Appeal, Third Appellate District (Sacramento) in 1990 and confirmed by the California Commission on Judicial Appointments the same year. He served for 28 years on the Third Appellate District until his retirement in 2018. U.S. Supreme Court Justice Anthony M. Kennedy (by video) and Chief Justice Tani Cantil Sakauye, among other very distinguished judicial dignitaries, spoke at his retirement dinner.

City Attorney Gwinn brought the issue to the U.S. Capital, resulting in the October, 2003, announcement by President George W. Bush of the creation of the President's Family Justice Center Initiative. The announcement included $20 million in federal dollars to create "specialized, one-stop shops" which co-located service providers in a multi-disciplinary service center for victims of family violence and their children.

The concept of multi-service centers under one roof is fantastic. The 2003 Initiative was followed by a federal grant program which funded the opening 15 Family Justice Centers (FJCs) in the United States. In 1995, the Alameda County Family Justice Center (ACFJC) was one of the first 15 Centers to receive the grant. At its inception, the ACFJC was applauded as the most diverse FJCs at the initial meetings with the grantees.

In 2018, the Office on Violence Against Women honored the ACFJC as one of the twenty most impactful FJCs, providing expansive multi-agency services to a diverse population. Alameda County has been identified as the fourth most diverse county in the United States and that is reflected in both victim witness, community-based advocate service providers, as well as the ACFJC. The ACFJC was created, designed, led, and sustained by then Chief Assistant District Attorney Nancy E. O'Malley, who became the District Attorney of Alameda County in 2009 and retired in January, 2023.

Clearly, this model and the successful expansions and adoptions of FJCs across America and Internationally falls squarely on the shoulders and hard work of Casey Gwinn and Gael Strack, a former prosecutor in the San Diego City Attorney's Office. They continue as the leaders of the ever-expanding FJC movement today.

Due to the successful impacts of FJCs, additional federal resources have been provided. FJCs is now identified as a "purpose area" under VAWA. The new San Diego FJC has been hailed as a national and international model of a comprehensive victim service and support center. There are over 100 FJCs and multi-agency models across the country now. Alameda County FJC has been considered a model and includes a Trauma Recovery Center, providing free trauma and other mental health counseling services.

DNA (deoxyribonucleic acid) evidence has had a remarkable impact on the investigation, prosecution and conviction of offenders who leave body fluid on or around the victims of crime. Former Alameda County prosecutor, Ming Chin, became a member of the Court of Appeal, First Appellate District. He gained recognition for his majority opinion in People v. Barney (1992) 8 Cal. App. 4th 798, that the statistical model used to match DNA evidence to the

defendant was not yet generally accepted in the scientific community. Seven years later, in People v. Soto (1999) 21 Cal. 4th 512, then Supreme Court Justice Chin joined the high court majority to rule that DNA science was ready to be used as evidence in trial courts. In the years between, Barney and Soto, Justice Chin also became a nationally renowned expert on DNA evidence.

Every person's body fluid contains that individual's DNA, which is the carrier of genetic information. DNA is a powerful tool that has made monumental advances in crime solving, in exoneration of wrongly convicted individuals, and in victims' rights, by solving crimes committed by unknown assailants. The use of DNA technology in forensic laboratories and in court started in England (1986) and America (1987). The most important way in which DNA has impacted victims of crime is in solving sexual assault cases.

The victim-survivor of sexual assault consents to an examination where fluids are collected from her or his body and a forensic sexual assault kit "SAK" is created. Survivors always have the choice of whether to participate in the criminal justice system, or to submit to a forensic sexual assault examination. The completed SAK is collected by law enforcement and logged into secure, locked evidence rooms at the police or sheriff's departments. For too many years, it required someone in law enforcement to remove the SAK from a secure evidence room and submit it to a forensic crime laboratory for testing. This was simply not happening across the Country, and serial rapists were undetected, repeatedly sexually assault victims, often times in multiple states.

The unthinkable insult to victims has been that hundreds of thousands of SAK were never submitted for testing. This is in spite of the fact that if there is foreign DNA, and the unknown perpetrator is identified in other forensic settings, his identity will become known. The FBI maintains a national database, Combined DNA Index System (CODIS), and most states maintain their own DNA profile databases for known and unknown samples of offenders of a multiple of crimes, from murders, sexual assaults to burglaries. Some states have passed laws that require the collection of an offender's DNA sample once convicted of certain crimes. That DNA profile becomes part of CODIS. Some States have passed laws that require a person arrested for certain crimes to submit a DNA profile developed from the sample is uploaded into CODIS and into the individual States' own database as well.

Regularly, DNA profiles of unknown assailants are run against DNA profiles of known individuals whose DNA was collected through a criminal justice process. If the DNA of the unknown assailant matches the DNA of a known assailant, it is referred to as a "hit."

Law enforcement has been very expansive in the collection of DNA, with remarkable outcomes. Some states collect DNA is many types of crime, including sexual assault, homicide, burglaries, and other crimes where the perpetrator is likely to leave DNA behind. Identifiable samples may be retrieved if a burglar drinks from a bottle in the refrigerator of the residence he is burglarizing. Or, in a sexual assault crime, the rapist may leave identifiable DNA on the body, clothing, or other items of the victim. DNA evidence is a valuable forensic tool, generally, but DNA evidence has been most useful and most utilized in sexual assault cases.

The National Institute of Justice (NIJ), an arm of the Department of Justice, has worked with a number of cities – Los Angeles, Detroit, Houston and others by providing funding for testing SAKs. Ignorance of or indifference to victims' rights is demonstrated in the huge volume of untested SAKs: Houston had 16,600; Detroit had 11,303; New York City had 20,000; Alameda County had 1,900. It was believed that more than 300,000-800,000 SAKs remained untested.

The outcome of not testing SAKs generally resulted in the failure to capture violent criminals who commit sexual assault. Clearly, not testing the strongest evidence of a perpetrator's identity results in denial of closure and lost justice to the hundreds of thousands of victim/survivors. What testing has shown is the unbelievably high number of serial rapists who continue raping until they are caught and prosecuted.

One of the advocates for change and in holding law enforcement accountable for not testing SAKs has been District Attorney Nancy O'Malley. She has been a strong and successful voice in lifting up the rights, protections, and empowerment of victims of crime. She worked with then Vice-President Joe Biden and his VAWA Advisor on the disgrace of Untested Sexual Assault Kits. At the time, the FBI Crime Lab guestimated that more than 300,000 untested sexual assault kits were sitting in police evidence rooms. DA O'Malley challenged that status quo, by outlining where backlogs occurred; she showed that SAKs were sitting in police property rooms, never submitted for testing.

DNA was not a new science to the Federal Government, as DA O'Malley demonstrated. The Federal government provided funding to government crime labs through the "Debby Smith Act" to test previously untested sexual assault kits. However, as DA O'Malley pointed out, if the police never submitted a sexual assault kit, a crime laboratory could never test it. DA

O'Malley even drew a diagram of the flow of a SAK from crime to entry into an evidence room to testing. Some SAKs had sat in an evidence room for more than 20 years.

From those conversations and advocacy through Congress, came the creation of the federal Sexual Assault Kit Initiative (SAKI), overseen by the Bureau of Justice Assistance and providing millions of dollars of federal money for the testing of backlogged of untested SAKs. Thousands and thousands of SAKs have now been tested as a direct result of the SAKI.

From the early 1980s, there have been initiatives, such as SAKI, where the gap is identified, the need is great, and the law makers and decision makers hear the plea and/or respect the advocacy. SAKI, just like the creation of the Office of Victims of Crime and so many other initiatives uplifting the rights, respect, support, and care for victims are to be applauded.

But, much, if not all, of this would have ever happened without public demands and outcries, especially by victims of crime and their families, and their growing numbers of advocates, and, of course, voters. Voters put politicians' feet to the fire by doing their jobs for them. For the better part of a half century, voters have been responsible for substantial progress in procedural support and growing legal rights for victims of crime and their families. Even so, much more remains to be done, especially now, when crime and violence, including sexual assaults, are once again exploding dramatically nationwide.

DA O'Malley has been at the forefront of legislative change in California. She wrote and sponsored legislation to eliminate the Statute of Limitation in sexual assault cases, so a case can be filed no matter how old the case is. She worked with then Senator Connie Leyva in writing and sponsoring legislation that resulted in mandatory submission of SAKs by law enforcement for testing; she worked with then Assemblymember David Chiu in passing legislation to create SAFE-T. SAFE-T is an online portal maintained by the California Department of Justice, that empowers and allows sexual assault survivors to monitor the status of her, or his, own SAK as it goes through the testing process.

Many states have enacted laws regarding collection, handling, and preservation of SAKs and through these mandates, hundreds of thousands of sexual assault and other serious crimes have been solved. Frighteningly, hundreds of thousands of sex offenders have been deemed serial rapists through DNA, including, Joseph James DeAngelo, the Golden State Killer

(statewide) and the East Area Rapist (Sacramento). DeAngelo committed at least 13 known murders, 51 known rapes, and 120 known burglaries across California between 1974 and 1986. Former Sacramento District Attorney Anne Marie Schubert worked with criminalists, organized multiple District Attorneys from across the State and became a national expert in DNA. Her leadership led the successful identification and prosecution of the East Area Rapist/Golden State Killer. DA Schubert began her career in DNA years before when she was a Deputy District Attorney in Sacramento County handling sexual assault cases. She was the first prosecutor to file a sexual assault case against an unknown individual, using only his DNA code.

Ironically, District Attorney O'Malley served as a volunteer rape crisis counselor in 1975 and was an advocate for one of the women who was sexually assaulted by the then unknown perpetrator (DeAngelo). Forty-three years later, due to the legislative advocacy of DA O'Malley who, in 2018, worked to get a law passed that all SAKs had to be submitted to a crime lab, jurisdictions began submitting SAKs and the East Area Rapist / Golden State Killer was identified. Survivors and family members of those who had been murdered or were deceased finally secured justice.

WHAT IS THE STATUS OF VICTIMS' RIGHTS NOW

Unlike years past, we are now seeing state governors and legislators' chip away at the rights of victims of crime and their families. These conscious, adverse efforts by politicians appear to be creating an imbalance between the rights of victims and the rights of criminal accuseds and convicted criminals. History has shown that upholding the rights of the accused and the rights of the victims are not exclusive and do not have to be pitted against each other.

Rehabilitation is important and is favored in many situations. There are programs for offenders that could allow them to avoid incarceration; there are programs that provide job training, or mental health engagement, but they are subjected to little objective monitoring and little public accountability. There are programs that focus on drug addiction, or mental health courts, or courts specific to veterans who suffer post-traumatic stress, there are diversion programs, and restorative justice programs and many more offering to help individuals find their pathway out of the criminal justice system. These are all options for the individual who can participate, even those individuals who were sent to State Prison after conviction for the most serious crimes.

Through changes in the law, victims are not necessarily notified if a convicted individual is being released significantly sooner than their sentence. There is a constitutional provision mandating, "Truth in Evidence," in California.[19] For victims, there is a law mandating "Truth in Sentencing" but victims are not necessarily informed of changes.

From the perspective of victims' rights, any policy and/or changes to the laws should include consideration on victims of crime and their families. Enhancing opportunities for criminals to make the necessary changes to separate from and remain free of the criminal justice system are important and respectful to criminals and their families. Critically, public policies should not pit executive programs or law enhancements to the rights of criminals as against the rights of their victims.

A subtle but impactful example of the diminishment of a victim's right involves the right to appear at a parole hearing of the person who committed the crime against the victim and/or his or her family member. Constitutional rights of crime victims are set forth in Article 1, Section 28(b). One of those rights is the right of victims to attend and speak at parole hearings. New regulations impose impediments or flat out denials of that right by requiring victims or impacted persons to register with the parole board at least 30 days prior. Failure to do so means they cannot participate in the parole hearing. This is not a change in the law, but an administrative change that impedes victims in the free exercise of their constitutional right to appear and be heard.

Executive branch administrators may adopt rules, but only if they do not impede or otherwise restrict statutory or constitutional rights of victims or family members of victims. Victims should not be required seek emergency writ relief from the courts to appear at a parole hearing for which they had no timely notice and thus were unable to provide 30 days' notice of their intention to appear and testify.

Laws, executive policies and practices that improve conditions for criminally accuseds and/or convicted criminals are important; however, the changes should not be at the expense of upholding the rights we have created for victims of crime and their families. Victims' Rights Movement advocates continue to pay close attention to changes that may impact victims' rights. Advocates are vigorously speaking out publicly to expose and attempt to stop efforts to chip away, sometimes in a subtle, elusive ways, at the rights

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[19] Cal. Con., article 1, section 28(b)(f)(2).

of victims of crime and their families. We must learn from the past, recognize why Victims' Rights Movement was so critical for society and the administration of criminal justice, and resoundingly echo the sentiments and words of our former, venerable leaders … "Victims are people, and not pieces of evidence…"

★ ★ ★

Nancy E. O'Malley

Harold Boscovich

GEORGE NICHOLSON*

The Roots of America's Crime Victims' Legal Rights Movement, 1975-2023,

A Personal Retrospective and Memoir

"But justice, though due the accused, is due the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."
—Benjamin N. Cardozo

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*George Nicholson began his legal career in 1966 in the Alameda County District Attorney's office, rising to senior trial deputy district attorney. He prosecuted all categories of crime, including baby murders and high-profile capital murders. After almost a decade as a county prosecutor, Nicholson was selected in 1976 by unanimous vote of the board of directors to become executive director of the California District Attorneys Association. He transformed the association from a moribund, two-employee staff into a major continuing legal education resource for prosecutors statewide, and an imposing professional and representational presence in the State Capital. From there, Attorney General George Deukmejian invited him to become a special assistant attorney general and serve on the attorney general's seven-member executive committee in the California Department of Justice. Nicholson retired in 2018 after 28 years as an associate justice on the California Court of Appeal, Third Appellate District. He authored almost 3,500 appellate opinions, more than 300 of which were published. He served nine times as a pro tempore associate justice on the California Supreme Court by assignments made by three successive Chief Justices, Malcolm Lucas, Ronald George, and Tani Cantil Sakauye. He was also appointed by Chief Justice Lucas as a member of the Commission on the Future of the California Courts, 1990-1993, http://www.courts.ca.gov/documents/2020.pdf; and later wrote, "A Vision of the Future of Appellate Practice and Process," 2 Journal of Appellate Practice and Process 229 (2000), https://lawrepository.ualr.edu/cgi/viewcontent.cgi?article=1132&context=appellatepracticeprocess, and "A judicial role in calming our divided nation," 21 Journal of Appellate Practice and Process 231 (2021), https://journals.librarypublishing.arizona.edu/appellate/article/id/2937.

INTRODUCTION

The U.S. and all state constitutions grant rights to the accused in criminal prosecutions. But the California Constitution was the first to include a set of rights for the victims of the accused in those criminal prosecutions. What follows is the story of how that came to pass, its aftermath, and my personal journey in making it happen.

As a student at U.C. Hastings College of Law in the mid-1960s, the prose and analysis of Oliver Wendell Holmes, Jr. and Benjamin N. Cardozo affected me deeply, just as they have mesmerized lawyers and judges for generations. Some specific passages from their writings struck me in particular and laid the foundation for directing my attention to crime victims.

"Justice Holmes wrote that '[t]he life of the law has not been logic: it has been experience.' Essentially, Holmes's claim was that the law is not simply about rules and logic, applied neutrally to proven facts; if it were, then a computer program . . . would be much more effective in applying the law than humans. But in reality, the law is a living system continuously adapting to its environment, ultimately changing society and human experience. *Therefore, the law must adapt as those experiences change over time.* That phenomenon is the heart of the common law system that Holmes describes in his classic work The Common Law. . . ."[1] (Italics added.)

But the law was not adapting when it came to crime victims while making great changes in favor of the accused in the 1960s. Presidents, governors, state and federal legislators, city mayors, city councils, county boards of supervisors, and state and federal judges[2] had all failed to recognize the disparity, grief, and fear suffered by victims of crime and their families and did not know or often ignored the glaring truth exposed by Cardozo when he admonished, "But *justice, though due the accused, is due the accuser also.* The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."[3] (Italics added.)

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[1] Kenneth D. Chestek, *The Life of the Law Has Not Been Logic: It Has Been Story*, Faculty Articles, 36 (2013), https://scholarship.law.uwyo.edu/faculty_articles/36; also see, William P. LaPiana, *Logic and Experience: The Origin of Modern American Legal Education* (1994). Doubtless, Holmes was an inspired and eloquent wordsmith, as another, related example, see, "A page of history is worth a volume of logic." *New York Trust Co. v. Eisner* (1921) 256 U.S. 345, 349.

[2] References hereinafter to judges, the judiciary, or judicial organizations concern the institution and their education, training, and court-community outreach, and not individual judges and justices or their in-court decisions. Having been a trial judge and appellate justice for 31 years, I have the deepest respect and admiration for my colleagues, past and present. I merely herein encourage every jurist to be aware of and to do all they can to promote *Cardozian balance* in the administration of criminal justice. I got along with all my colleagues. The two most liberal justices on the Court of Appeal, Third Appellate District, where I served 28 years, Justices Coleman Blease and Richard Sims, asked their families to ask me to speak at their memorial services. Those requests were humbling and high honors, rooted in the collegiality of the Third Appellate District.

[3] *Snyder* v. *Massachusetts* (1934) 291 U.S. 97, 122.

Meanwhile, while I was a law student, lawlessness in our urban areas and its impact on innocent minorities could no longer be ignored in the 1960s. In Martin Luther King, Jr.'s, "Letter from Birmingham Jail," written five years before his tragic assassination in April 1968, he observed the injustice of rampant lawlessness in many of our major cities, and expounded, "We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects all indirectly." Paraphrasing him: "The dark shadow of a deep disappointment [has] settled upon" all our nation's people, in all our cities and towns. It will remain there until the leaders in our major cities restore the rule of law, fully and faithfully; retake their streets, promptly and practically; and remember and aggressively enforce the statutory and constitutional rights of ignored and forgotten victims of crime and their families.[4]

During my 60 years in the law, it soon became apparent that Holmes, Cardozo, and Reverend King were right regarding the unrequited experiences of the forgotten victims of crime and their families who became involuntarily ensnared in the chaotic hustle and bustle of the investigation and prosecution of the accuseds who allegedly harmed them. Pondering such complex circumstances, I understood why victims of crime and their families are cyclically forgotten parties in the administration of criminal justice: They simply had no presence other than as witnesses in America's courtrooms; that is, they had no statutory or constitutional rights.[5]

Unfortunately, social, civic, judicial, and political leaders, law school deans and professors, especially, but also college and university deans and professors, often failed in the past, and too often still fail meaningfully to recognize those same facts. To this day they may be unaware of, or ignore their shared duties to teach *Cardozian balance* which is, morally, not limited to the accused alone. Moreover, until recent decades, there were few advocacy groups for victims of crime and their families. Previously, it was largely left

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[4] And see, Thomas Sowell, the Rose and Milton Friedman Senior Fellow on Public Policy at the Hoover Institution at Stanford University, who also addresses this tragic anomaly eloquently in his, "Mascots of the Anointed," at p. 57, *The Tom Sowell Reader* (2011), ["The 'New York Times' recently ran a front-page story dripping with sympathy for a multiple murderer who is now very old and who, on some days, 'cannot remember' why he is in prison. His victims, however, cannot remember anything on any days. . . . All sorts of heart-tugging stories are told about elderly inmates who are succumbing to various diseases and infirmities of age. There are, however, no stories at all about their victims, or their victims' widows or orphans, or how tough their lives have been."]

[5] Stanley Mosk, *Mask of Reform* (1978) 10 S. W. U. L. R. 885, 889-890; see *Ballard* v. *Superior Court* (1966) 64 C.2d 159; and *Bullen* v. *Superior Court* (1988) 204 C.A.3d 22; but see, *Cal. Const.*, art. I, § 28, subd. (c)(1) and *Cal. Penal Code*, § 679.026(b); *Survey of Select State Laws Governing Crime Victims' Right to Counsel*, National Crime Victim Law Institute (2023), https://ncvli.org/wp-content/uploads/2023/08/Survey-of-Select-State-Laws-Governing-Victims-Right-to-Counsel-2023-1.pdf. Also, few crime victims can afford counsel and they and their families have no right to government-funded counsel as do those accused of committing crimes against them under *Gideon* v. *Wainwright* (1963) 372 U.S. 335.

to America's peace officers and prosecutors to provide support while trying to fill the statutory and constitutional void. Today, once again, matters are getting steadily worse for crime victims in too many places in our nation. Too many people in positions of power seem to ignore crime victims and gravely endanger them by doing so.

The personal commentary, which follows, offers the story behind the establishment of statutory and constitutional rights for victims of crime and their families, born of their shared experiences as virtual cats-paws in the administration of criminal justice. It also traces the role of peace officers and prosecutors in helping victims of crime and their families to rise up peacefully and lawfully, together, to attempt to achieve *Cardozian balance* in the administration of criminal justice. Finally, it reinforces the moral necessity for victims' rights.

Elie Wiesel, who himself had survived Auschwitz and Buchenwald, made a poignant observation regarding victims upon visiting a Cambodian refugee camp years later: "I came here because nobody came when I was there. One thing that is worse for the victim than hunger, fear, torture, even humiliation, is the feeling of abandonment, that nobody cares, the feeling that you don't count." Given this observation and the need for *Cardozian balance*, who can possibly explain why so many of our civic and political leaders had forsaken their oaths of office and abandoned the good people of our inner-cities and elsewhere by leaving them to the terrors of rampant violence at the hands of remorseless criminals and killers?

HOW VICTIMS OF CRIME AND THEIR FAMILIES BEGAN TO TAKE CENTER STAGE

"In the early 20th century, the American criminal justice system did not pay much credence to crime victims. The victims' role did not go beyond participating as witnesses in a hearing. … [T]he American criminal justice system served lawyers, judges, and defendants, but treated victims with an 'institutionalized disinterest.'"[6]

Moreover, three quarters of the 20th century elapsed with very little or nothing in movies, television, or radio about the plight of victims of crime and their families. There was very little political, professional, or popular literature about them either. Some literature existed on limited government compensation for a small number of crime victims and their families, and on

[6] "History Of Victims' Rights," Victim Services and Victims' Rights: Elevating Victims' Voices at a Critical Time, Best Practices Guide," at p. 4 (April 2021), Women Prosecutors Section, National District Attorneys Association, https://ndaa.org/wp-content/uploads/WPS-Victim-Advocacy-Best-Practices-Guide-April-2021-FINAL.pdf.

the short supply of public and private provision of "victim-witness services."

In sum, despite the substantial changes in criminal law and procedure wrought by the Warren Court, very little civic, religious, academic, legal, judicial, or political thought was devoted to victims of crime or their families.[7]

Small practical progress came in 1965 when California became the first state in the nation to provide limited government compensation to specified victims of crime and their families. (Various forms of crime victim compensation now exist in all fifty states, the District of Columbia, Puerto Rico, the Virgin Islands, and Guam.)

However, in the early 1970s, Oakland, California, became one of three cities, each located in a separate state, to receive federal funding for private providers of rape crisis services. Simultaneously, the Alameda County District Attorney's Office became one of eight prosecutors' offices (each of which was located in a separate state) to receive federal funding for victim-witness services projects.[8]

And in the mid-1970s, James Rowland conceived of and cobbled a "Crime Victim Assistance Center" in the county probation department he headed in Fresno, then a small, central valley city 170 miles south of the State Capitol. His department thus became the first in California to establish such a center. Then in 1976, after Rowland invited Professor John P.J. Dussich, of California State University, Fresno, to speak during an educational event in Fresno focused on crime victims' services, Professor Dussich launched the National Organization for Victim Assistance (NOVA).

These efforts picked up steam in the late 1970s and early 1980s. Crime victims—especially parents of murdered children and other family members of murdered victims—began to rebel at their being forgotten and subjected to further anguish by forgiven crimes. They decided to become involved and engage in a committed search for *Cardozian balance* in the administration of criminal justice.[9]

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[7] Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective* (1995) 31 Tulsa Law Journal 1, https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1275&context=articles.

[8] For more on such projects, see O'Malley and Boscovich, *Victims' Rights in California: A Historical Perspective to Modern Day*, elsewhere in this issue of California Legal History.

[9] Edmund Burke is attributed commonly with saying, "All that is necessary for the triumph of evil is for enough good men to do nothing." The statement is often quoted to this day, whomever may have first said it. While Burke's words are important as theory, William Blake said something no less profound, but, more practical. It applies in every circumstance, not just when some men and women may not do the right thing. Blake said, "Execution is the chariot of genius." And, so it is! Nothing is ever done without someone doing it. Victims of crimes and a handful of their advocates applied the thoughts of both Burke and Blake beginning in the late 1970s and early 1980s. Crime victims, and especially parents of murdered children and other members of the families of murder victims, began to rebel at being forgotten and subjected to further anguish by forgiven crimes. They decided to become involved and to engage in a committed search for *Cardozian balance* in the administration of criminal justice.

Perhaps the most visible example of familial outrage stemmed from the murder of prominent actress and model Sharon Tate, along with the murder of five other people during the Charles Manson Family massacre in Los Angeles.[10]

Doris Tate, Sharon's mother, took the loss of her daughter extremely hard. But in time she became omnipresent throughout California as a determined parent of a murdered child, and as an eloquent crime victim advocate. She was an inspiring role model for other parents and families who lost a loved one to murder.

Another grieving mother, Marilyn Ettl, was also devastated by the killing of her son. Despite her grief, she actively campaigned for Senator George Deukmejian in his successful campaign to become attorney general in 1978. Senator Deukmejian asked her to appear in a television advertising spot. Ettl agreed, and the advertisement had a favorable, although tear-inducing impact.

Soon other grieving parents and members of other families became actively engaged, which also had a real impact. These included Harriet and Mike Salarno, and their daughter Nina Salarno, Candy Lightner, Collene and Gary Campbell, Connie and Howard Clery, Robert and Charlotte Hullinger, Mike Reynolds, Dr. Henry T. Nicholas, and countless others.

In 1990, Harriet Salerno founded Crime Victims United, which worked "to support and strengthen public safety, promote balance in the criminal justice system, and protect the rights of victims" by enhancing sentencing laws and creating more effective rehabilitation and re-entry programs.[11]

Similar organizations were also founded, funded, or headed by parents and other family members who lost someone to murder. Perhaps most notable is the National Organization of Parents of Murdered Children (POMC) for the families and friends of those who have died by violence.

POMC was founded by Robert and Charlotte Hullinger in Cincinnati, Ohio, in 1978, after the murder of their 19-year-old daughter, Lisa. Since then, many POMC chapters have been established throughout the nation.[12]

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[10] Angela Serratore, *What You Need to Know About the Manson Family Murders*, Smithsonian Magazine (July 25, 2019), https://www.smithsonianmag.com/history/manson-family-murders-what-need-to-know-180972655.

[11] See https://www.crimevictimsunited.com.

[12] POMC chapters hold monthly meetings to provide support, advocacy, and court accompaniment. Many POMC chapters publish their own newsletters and have designed and implemented special programs to meet the needs of survivors in their area, at https://pomc.org/chapters. The Hullingers' story is inspiring. See https://pomc.org and http://pomc.org/about-pomc/pomc-history.

Candy Lightner founded Mothers Against Drunk Driving (MADD) in 1980, after one of her three daughters was killed by a drunk driver.[13]

One time while visiting the nation's capital in the mid-1980s, I was in one of the Senate Office Buildings when Candy Lightner entered. Pandemonium ensued as U.S. Senators, including the one I was visiting, crowded the halls, along with members of the public, all eager to shake Lightner's hand and have a photograph taken with her.

John Gillis was a Lieutenant on the Los Angeles Police Department. After the 1979 murder of his daughter, Louarna, Gillis became a founding member of Justice for Homicide Victims (JHV). Later, Gillis was nominated by President George W. Bush and confirmed by the U.S. Senate in September, 2001 as the National Director, Office for Victims of Crime, U. S. Department of Justice. Gillis later served four years as a member of the California State Bar Crime Victims and Corrections Committee, which has now, apparently, been disbanded.

One of the early members of the National Organization for Victim Assistance (NOVA), Marline A. Young, said of John Gillis that his "experiences captured the work of all these [victims of crime] groups." She quotes him as saying, "Quite frankly, Parents of Murdered Children saved my life . . . because it gave me an opportunity to talk about what had happened . . . So I attended their meetings. They started asking me questions about law enforcement and why cases were handled certain ways. And this was really helpful to me because then I found out I was providing help and information to others who were really hurting so much. So, it was a two-way street. From there a group of us decided that we wanted to start our own organization, so we started with Justice for Homicide Victims."[14]

For several years, I worked with many of these grieving Americans and their families,[15] most notably, as co-counsel for amici curiae, representing dozens of them in a case, *Brosnahan v. Brown*, heard by the California Supreme Court in 1982. (This case will be discussed in greater detail below.)

Prior to 1976, there was little, if any, civic, judicial, or political discussion or academic literature addressing the potential provision of statutory and

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[13] See https://madd.org.

[14] Marlene A. Young, *A History of the Victims Movement in the United States,* 131st International Senior Seminar Visiting Experts' Papers, at pp. 69, 73 (August 29-October 7, 2005), https://www.unafei.or.jp/publications/pdf/RS_No70/No70_08VE_Young1.pdf.

[15] Rod Blonien, then the executive director of the California Peace Officers Association, also worked with them. He and I worked closely on many legal projects, especially those related to fostering the legal rights of victims of crime and their families.

constitutional rights for victims of crime and their families. Indeed, California Supreme Court Justice Stanley Mosk correctly observed in 1978 that a search for the rights of victims of crime and their families in our state and federal constitutions would fail. He memorialized the legal and moral vacuum then extant when he declared only criminals have constitutional rights, not their victims.[16] I intended to change that in 1976 when I became executive director of the California District Attorneys Association.

Indeed, I was more than ready to do that after dealing with the suffering and grief of countless victims of crime and their families for most of the previous decade as a prosecutor. So, I began a multi-front effort to initiate interest in aiding the victims of crime and their families through every potentially helpful individual and institution in California and elsewhere in our nation.[17]

Besides public relations, advertising, and marketing, I made regular radio and television appearances, including national shows like the Merv Griffin Show. I wrote "core" articles on related subjects and "wrapped" them in opening and closing paragraphs pertinent to specific audiences, such as peace officers, probation officers, school administrators, teachers, lawyers, law deans and professors, judges, university deans and professors, and many others.

At least one major airline printed my article, "Forgotten Victims, Forgiven Crimes," in its glossy, on-plane passenger magazine. With the advent of automated typewriters, I was able to write and send thousands of personal letters, all of which I signed by hand, to editors and journalists, state attorneys general, county prosecutors, public defenders, state and county school superintendents, teachers, and others, all over California and the nation.

At the time, most major newspapers, radio, and television stations in California had capitol news bureaus in Sacramento, but there were few seasoned and down-the-middle journalists from whom prosecutors and peace officers got a fair shake. In the late-1970s, I began writing, *pro bono publico*, a weekly politico-legal news column, often dealing with stories of the grief and suffering of victims of crime and their families, or analyses of appellate and supreme court decisions impacting their interests.

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[16] Stanley Mosk, *Mask of Reform* (1978) 10 S.W. U. L. Rev. 885, 889-890 ["I must concede there is an element of accuracy to the oft-repeated contention that 'criminals have all the rights.' That is elementary constitutional law. One will look in vain among our Bill of Rights and among its counterpart in the state constitution for guarantees to victims, or to the public, or to any persons other than the accused. It must be remembered that our basic charters were designed to protect those whose liberty is endangered and to make certain that if they are to lose their freedom, it will occur only after they have received their due process."].

[17] Later, while I worked for Attorney General Deukmejian, he asked me to organize and recruit experienced staff for a multi-media department and to plan and conduct a related program including print, audio, and visual resources to carry on similar work, as well as more general work statewide tackling a multiplicity of crime prevention projects and programs. Gale Cook, "Slick sales pitches for state's top crimefighter," *San Francisco Examiner*, at p. 1 (April 12, 1981).

I captioned the column as the *Capitol Connection*, which was distributed by the Capitol News Service and published every week in hundreds of newspapers, large and small. In this endeavor, I had assistance from one of our state's leading legal journalists, Carol Benfell, who worked with me at the time. She provided exemplary editorial assistance and candid criticism. She later left to join the *Los Angeles Daily Journal* where she served for a long while, before finishing up her career at the Santa Rosa Press Democrat.

After writing the column without fail for 94 weeks, I resigned because the editor of the news service printed a retraction of an article that I wrote, without talking to me first. I had written the article following publication of a grand jury report exposing a group that, among other things, put rattlesnakes in their enemies' mail boxes.

When I asked the editor to explain himself, he replied simply, "I was scared, not of libel, but of rattlesnakes in my mailbox." To me, this was an insufficient reason for a news service to suppress the truth, and to make matters worse, to apologize publicly for it. I told him that I was far more exposed to potential danger from the group than he. I also recalled to him several of the threats made on my life while I was a prosecutor. And while I had received protection from time to time, I never altered my devotion to my professional duties. Regardless of the personal risks, prosecutors and public officials of all categories, including judges, must perform their sworn duties fully and faithfully, without fear or favor. So, too, must publishers, editors, and journalists of all stripes, whether in print, radio, television, or, in the modern era, social media.

Before delving further into the evolution of California's crime victims' legal rights movement, it is crucial to reiterate that the crime victims' rights movement was not a singular phenomenon of the last quarter of the 20th century. Nor was it the idea or action of any single individual or organization.

Although California was technically the first state to provide victims with statutory and constitutional rights, thereby setting a precedent for the rest of the country and the world, the crime victims' legal rights movement arose from a cornucopia of ideas, creative and determined outreach, and hard work, by different individuals and many organizations, both public and private, in California and beyond. However, only in California were statutory and constitutional rights the laser-focused goal. I now turn to how that happened.

PROSECUTORS BEGIN TO TAKE ACTION

California prosecutors have often been inspired by ancient history, including that of Greece, Rome, and earlier, but, most notably, by the history of freedom and liberty in England and America, including our Declaration of Independence, our U.S. Constitution, and the Bill of Rights. They have also been enabled by the state constitutional right of initiative, and engaged and energized by their real-world courtroom and field investigatory experiences with crime and violence. After witnessing the isolation, grief, and suffering of victims of crime and their families for so long, California prosecutors decided to identify potential legal solutions and to seek their enactment into law.

On all serious cases on which prosecutors work, they too, must live with the isolation, grief, and suffering of the victims of crime and their families, who are really twice victimized, first, by those actually committing the crimes against them, and second, by enduring the disruptions wrought by the often-intrusive investigations and ensuing prosecutions, replete with the duty to face and testify against the accused in court. Prosecutors, then and now, take to heart all the direct and indirect misery that crime and violence inflict on their constituents, victimized and "non-victimized."

In the mid-1970s, prosecutors resolved to act creatively upon the sage advice of Leon Jaworski, former Watergate Prosecutor and former American Bar Association President. He played a key role in the initiation and conduct of the victims' rights revolution in California and the nation. Jaworski encouraged prosecutors to take their message to the people whenever they find the administration of criminal justice to be in decline or failing, and when legal and political leaders are unresponsive and oblivious of their shared duty to provide adequate protection and assistance.[18]

Prosecutors thus worked tirelessly throughout California to bring the growing crime and violence problem out into the open and to educate and involve politicians of both parties at all levels and the public, especially victims of crime and their families, in coming up with solutions.

From 1977-1980, "California's Forgotten Victims' Week" was formally observed by the state, and additionally by scores of cities and counties throughout the state each April. As executive director of the California District Attorneys Association (CDAA) at the time, I conceived and organized those observances. This was after I personally sought and received formal

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[18] *Bold Leadership*, Prosecutor's Brief, at p. 2, California District Attorneys Association (June 1977); earlier, Jaworski called upon judges to help too, "'Bold Bench' Leadership Needed in War on Crime, Judges Told," *Los Angeles Daily Journal* (June 27, 1968).

support by letters, proclamations, and resolutions from most of the state's major and eager-to-learn political leaders of both parties, at all levels.

It was in 1975 that F. Emmett Kilpatrick, then district attorney of Philadelphia, planned and conducted the nation's first "Victims' Rights Week." I suspect I got the idea to organize these California observances from him, but do not recall for certain. Kilpatrick also published a handbook, "Victims are People," funded by the National District Attorneys Association and the U.S. Law Enforcement Assistance Administration.

In February 1977, the California Legislature adopted a formal resolution, "Relative to California's Forgotten Victims Week," which 96 bipartisan legislators joined to encourage Governor Jerry Brown, a Democrat, to proclaim April 25-29, 1977, as "California's Forgotten Victims Week" and declared their support for two simultaneous, week-long educational programs to be conducted by CDAA during that week in Sacramento and Los Angeles.

Legislators "solicited and expected" assistance from various state and federal law enforcement agencies and urged citizens of the state "to become aware of their responsibilities to restore effectiveness to the administration of justice and the need to improve the plight of victims of violent crime and their survivors." Signing the resolution on behalf of the 94 legislators were four Democrats, Senator James R. Mills, Chairman, Senate Rules Committee; Lieutenant Governor Mervyn Dymally, President of the Senate; Louis J. Papan, Chairman, Assembly Rules Committee; and Leo T. McCarthy, Speaker of the Assembly.

Governor Brown soon issued a formal proclamation in support of California's Forgotten Victims Week in 1977. These various precursors were widely reported in positive and compelling terms on scores of radio and television stations and in major newspapers throughout the state.

Poignantly and perhaps presciently, San Francisco Mayor George Moscone significantly advanced the cause in 1977. First, he issued a California Forgotten Victims Week proclamation on behalf of the City and County of San Francisco. Second, he held a joint press conference with prosecutors that year, but tragically, a year later, he and County Supervisor Harvey Milk were assassinated in City Hall.

Moscone's successor, Mayor Diane Feinstein, issued similar proclamations. (She eventually became a U.S. Senator from California, but was unable to serve out her fifth and final term when sadly, she passed away in September 2023, at the age of 90.)

Because the judiciary is vital to addressing the legal rights of crime victims and their families, I called California Chief Justice Rose Bird early in 1977 and invited her to keynote the main dinner held during the annual meeting of CDAA that summer in Newport Beach, California. The annual meeting is always the largest gathering of the CDAA board of directors, elected district attorneys, and their deputies. Chief Justice Bird agreed, appeared, and spoke.[19] A few years later, I also asked her to write a letter in connection with a special crime victims' issue of the Pepperdine Law Review, volume 11, issue 5, as will be discussed below.

For the Sacramento and Los Angeles educational programs held in April 1977 during the seminal California Forgotten Victims Week, I first sought and acquired a federal grant of roughly $150,000. This enabled me to plan simultaneous, week-long crime victims' legal rights conferences, conducted in these two state hubs.

At both conferences, topics included: forgotten crime victims and their families; crime victims' rights in civil litigation; crime victim/witness assistance programs; deterrence and crime; crimes against the elderly; rape and other crimes against women and children; crime and rest homes; crime and its impact on minorities; repeat offenders and career criminals; crime and its impact on business; and crime and its impact on labor.

Distinguished faculty spoke on these topics in Sacramento one day, and again in Los Angeles the next day. While this may sound unwieldly, it worked smoothly and effectively across five days in each city, all the while garnering widespread and favorable media coverage throughout the state.

I asked Governor Jerry Brown to address opening day in Sacramento. Although he declined, after a very successful first day, he called me and asked to speak the next day. Not having an open slot for him, I planned a luncheon for the next day, enlisting the aid of John Price, the local district attorney; Duane Lowe, the local sheriff; and Glen Craig, the commissioner of the California Highway Patrol. They all attended, and arranged for their respective leadership teams and members of their supporting communities to attend, including victims of crime.

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[19] *Chief Justice Bird Highlights Annual Conference Activities*, Prosecutor's Brief, at p. 38, California District Attorneys Association (July 1977). The cover of this issue was a reproduction of a painting I asked an artist to provide for the occasion. I later gave the original painting to Chief Justice Bird. That artist was an elderly man who had been victimized for almost a year, along with his wife of more than a half century, by a young extortionist and residential burglar. The artist and his wife could not afford to bring their older home up to code, sell it, and move to a safer neighborhood. When the old couple could no longer pay the extortionist, he broke into their home, took everything of value, and trashed the place. The case against the young extortionist and residential burglar was my final jury trial as a prosecutor. He was convicted and sent to prison. The elderly artist was commissioned to do several other art works for prosecutorial education programs and projects.

On that second day, the governor walked across the street from the State Capitol to the Sacramento Convention Center and spoke to the luncheon gathering of several hundred attendees. He garnered banner headlines statewide, and obviously, so did the very first California's Forgotten Victims Week.

For a comprehensive cover story featuring a dramatic photograph of Governor Brown, see "New Consciousness Brings Hope for Victims of Violent Crimes, California Leads National Effort to Restore Justice," *Prosecutors Brief*, California District Attorneys Association (May 1977), pp. 2-6.

Significantly, I have not heard of anything scholarly done for crime victims and their families on this scale by any state since then. If you carefully read CDAA's "New Consciousness" article referenced above or this article, you will be shocked by California's densely *bipartisan* crime victims' advocacy and leadership, 1975-1982, when compared with the dearth of such advocacy today.

BRINGING A FORMER DEMOCRATIC PRESIDENT, ATTORNEY GENERAL, AND TWO GOVERNORS INTO THE MOVEMENT

I also obtained support for the seminal "California Forgotten Victims Week" from President Jimmy Carter and Attorney General Griffin Bell, as well as the governors of many states when I began my crime victims' legal advocacy in the mid-1970s. Three letters of support made a difference: one from U.S. Attorney General Bell, on behalf of President Jimmy Carter and himself, and one each from Governors Hugh Carey of New York and Jerry Brown of California.

By way of background, I had written all state governors asking them to emulate California's crime victims' legal rights leadership. Many governors replied, both Democrat and Republican, with plaudits in addition to those from Governors Carey and Brown. After all, the matter was neither partisan nor controversial. No one accused anyone of weaponizing crime, or utilizing it as a wedge issue, as is the case so often today. Crime and violence, as well as legal rights for victims of crime and their families, were discussed rationally.

U.S. Attorney General Bell personally wrote me on April 27, 1977:

"On behalf of the President, please accept my best wishes for the success of 'California's Forgotten Victims Week' program. Its sponsors are to be commended for seeking responsible ways to improve justice and safety. There can be little justice if people cannot live in safety. It has been a long time since large numbers of our citizens felt safe or, in fact, were. Crime is

often felt most cruelly by the poor and elderly—those least able to protect themselves. The Federal government is now developing a program for the national delivery of justice. It is a difficult task. But I am heartened to see California officials are taking the lead to help their own citizens. I hope other states will also redouble their efforts."

New York Governor Carey also personally wrote to me on March 31, 1977:

"For too long the innocent victim of violent crime has been the forgotten person in the Criminal Justice System. I commend both the California District Attorneys Association and the political leadership of the State of California in spotlighting this important problem by California's Forgotten Victims Week."

California Governor Brown had also personally written me earlier that same year:

"In today's society, the plight of crime victims and their families is too often overlooked. Therefore, I join with you in recognizing the week of April 25 through 29 as California's Forgotten Victims Week. The effects of crime touch the lives of all Californians; accordingly, we must each realize our responsibility to support the administration of justice."

Today, political leaders, whether progressive, liberal, conservative, Democrat or Republican, must hear and heed the haunting echoes of the words of President Carter, Attorney General Bell, Governor Carey, and Governor Brown, and empathize with and help calm the trembling cries of anguish shared every day by millions of parents of murdered children and by other victims of crime and violence and their families, which cries continue to reverberate across the face of America.

THE MOVEMENT SPAWNS BIPARTISAN SUPPORT FOR CALIFORNIA CRIME VICTIMS AND THEIR FAMILIES

U.S. Senator Alan Cranston, a Democrat, declared, in part:

"Mr. President, this week, California, under the leadership of the California District Attorneys Association, will give special attention to the victims of violent crime—our forgotten victims. 'California's Forgotten Victims Week,' April 25-29, has been proclaimed by Governor Jerry Brown pursuant to a joint resolution of the State legislature. The purpose is to educate and motivate the public and the government to respond to the plight of the victims and witnesses of crimes and to seek improvement in the criminal justice system. I applaud this effort and commend Assemblyman Alister

McAlister who took the lead in introducing the resolution in the Assembly. The resolution was co-sponsored by 96 legislators and had the support of many State officials and agencies. The victims of crime are society's forgotten victims. We daily deplore crime, yet for unfathomable reasons, society turns its back on the innocent victims. The treatment of victims of crime is a national shame."

U.S Senator S. I. Hayakawa, a Republican, declared, in part:

"Mr. President, in bringing this week to the attention of our fellow colleagues, I, too, wish to endorse the principles and ideals of California's Forgotten Victims Week. The people of my state do well to remind us that a victim's plight is all too often overlooked and forgotten in the administration of justice. Much has been said in these chambers about the rights of criminals to a fair trial. How often do we hear about the rights of their victims? We must remember the innocent victims and their families who suffer in silence through long and demanding court proceedings knowing, in most cases, their lives will never be the same. I applaud the efforts of my constituents to devote their time and attention this week to forgotten victims."

In a statement heard on more than forty major radio stations all over California, Senator Hayakawa also expanded on his Senate speech and commended the California District Attorneys Association for its leadership in creating and implementing California's Forgotten Victims Week.

Lieutenant Governor Mervyn Dymally, a Democrat, Attorney General Evelle Young, a Republican, and Secretary of State March Fong Eu, a Democrat, provided similar support.

Many grand juries throughout the state also adopted their own resolutions of support. Likewise, the County Supervisors Association of California, plus the County Boards of Supervisors of numerous counties, adopted resolutions of support, including, the counties of Los Angeles, Sonoma, Sacramento, Mendocino, Alameda, Contra Costa, Santa Clara, Fresno, Kern, Santa Barbara, Riverside, San Bernardino, Orange, San Diego, San Francisco, and others.

Similar resolutions of support came from the League of California Cities, and the mayors of Los Angeles, Santa Rosa, Sacramento, Ukiah, Oakland, Berkeley, Fremont, Concord, Hayward, Fresno, Bakersfield, Santa Barbara, Long Beach, San Diego, San Francisco, among others.

The California Federation of Labor, AFL-CIO, by executive secretary treasurer John F. Henning, and the California Chamber of Commerce, by the president Walter Baird, also formally lent their support.

Very moving support came from a petition signed by 88 members of the American Association of Retired Persons. Still more support was received from the California Office of Aging and the California Commission on the Status of Women.

Several bar associations throughout California also lent their support. More and more bar associations across the nation then lent support for aiding and assisting the victims of crime and their families. In fact, at the time, the American Bar Association had a very active Committee on Victims and Witnesses, chaired by Los Angeles Municipal Court Judge Eric Younger, who was also an active participant in the week-long California Forgotten Victims Week program, a truly bipartisan and multi-racial event. Terry Hatter, a Democrat, and aide to Los Angeles Mayor Tom Bradley, a Democrat, was active with the event. Hatter was appointed to the Los Angeles County Superior Court almost contemporaneously with his California Forgotten Victims Week speech, seeking to improve governmental perspectives on victims of crime and their families.

PROTECTING RAPE VICTIMS

Not long after I became the executive director for the CDAA, I sent a draft bill to Assemblyman Alister McAlister, a Democrat. It concerned something that had troubled me from the very first rape case that I prosecuted, namely, the burden of involuntary psychiatric examinations imposed on rape victims by *Ballard v. Superior Court* (1966) 64 Cal.2d 159 and its progeny.

There were other, difficult historical burdens lingering in those days as well. For example, "[s]kepticism about sexual violence seems to be written into Western society, and certainly into Western jurisprudence. Lord Matthew Hale, a 17th-century judge in England, captured this sentiment when he instructed jurors to consider carefully the allegations of the victim before them. A rape charge 'is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused,' he advised, adding that the woman's testimony should be examined 'with caution.'"[20]

By the authority of *Ballard*, a criminal defense attorney in a rape case could move the trial court to order the rape victim, and eventually, the child victim in a sexual abuse case, to submit to an involuntary psychiatric examination, essentially, to arm the defense with a powerful means for cross-examination.

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[20] Barbara Bradley Hagerty, *American Law Does Not Take Rape Seriously*, The Atlantic (January 28, 2020), https://www.theatlantic.com/ideas/archive/2020/01/american-law-rape/605620.

Assemblyman McAlister initially introduced CDAA's bill to curb *Ballard*, along with three co-authors, Assemblyman Dave Stirling, a Republican, and state Senators Robert Presley, a Democrat, and Jim Nielsen, a Republican.[21]

As the battle over *Ballard* continued, the text of the original *Ballard* bill was reintroduced repeatedly.[22] Eventually, after considerable difficulty, CDAA's original draft of the bill became law, California Penal Code section 1112, to preclude *Ballard* Motions. But it became law only after considerable legislative squabbling among the various legislative authors to make his or her bill the lead bill.

Eventually, a duplicate bill introduced by State Senator Diane Watson, a Democrat, became the lead bill, to which everyone else signed on as co-authors or supporters. The bill passed both legislative houses, was signed by the governor, and became law, thus abrogating *Ballard v. Superior Court*.

AN ALMOST MORTALLY WOUNDED PRESIDENT OPENS THE DOOR

Immediately after his election in November 1980, President-elect Ronald Reagan formed a special transition team, the Advisory Committee on Victims. Frank Carrington of the Virginia Bar was Chairman. I was also a member.

Carrington was tireless. He worked closely with Edwin Meese and Herb Ellingwood as coordinator of the President-elect's committees on Law Enforcement and on Administration of Justice. (Meese, Ellingwood, and I were former members of the Alameda County District Attorney's Office.) Meese and Ellingwood requested all three committees to submit their final reports as soon as possible.

We flew into Washington, D.C., and Carrington circulated a preliminary draft report of the Advisory Committee on Victims during a meeting there in November 1980 – within weeks of the new President's election. We promptly offered our suggestions and criticisms. We met once again in Washington, D.C. shortly after the first of the new year to discuss the final report. Carrington submitted it immediately to Meese and Ellingwood, who then forwarded it to the President-elect's policy and transition staff.

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[21] *Bill Would Curb Psychiatric Tests in Sex Trials*, Los Angeles Daily Journal (February 2, 1979), page 1, section I; the bipartisan quartet of legislators initially carried this and several other law enforcement bills as a team of co-authors and became known derisively in the news media as the "Gang of Four."

[22] George Deukmejian, *The Statutory Rape of Justice in California*, Los Angeles Herald Examiner (January 15, 1980) p. A19.

Our work contributed significantly to important presidential crime victims' rights initiatives, which were successfully pursued during President Reagan's two-term administration.[23]

Shortly after the first of the year of his administration in 1981, I asked President Reagan to proclaim the first National Victims' Rights Week. On March 21, the President assigned Ellingwood, by then a Deputy Counsel to the President, the task of preparing an appropriate proclamation.

Nine days later, on March 30, 1981, while leaving the Washington Hilton Hotel after delivering a speech, the President was shot. In that single instant, and just three weeks before the first National Victims' Rights Week could be observed, our nation's leading crime victims' advocate became our nation's leading (and most visible) crime victim.

The President was close to death, but eventually stabilized in the emergency room after he arrived at George Washington University Hospital. The medical team, led by Dr. Joseph Giordano, operated immediately and saved his life. The team was stunned to learn the bullet they found near the President's heart was an unexploded "Devastator" slug.

White House Press Secretary, James Brady, was not so fortunate. The "Devastator" slug that hit him exploded upon impact as designed, wounding him grievously, leading eventually to his premature death some years later.

While the President was still in the hospital, Ellingwood completed his work on the proclamation and the President approved and signed Proclamation 4831 – "Victims Rights Week, 1981"— on April 8, 1981, just eight days after being shot. President Reagan was able to leave the hospital in two weeks, return to work in the Oval Office in a month, and heal completely in six to eight weeks, with no long-term effects.

The proclamation reads in operative part, "Now, Therefore, I, Ronald Reagan, President of the United States of America, do hereby proclaim the week beginning April 19, 1981, as Victims' Rights Week." Since then, National Victims' Rights Week has been observed annually, and now approaches its 50th, or golden anniversary.

Proclamation 4831 contains five paragraphs in total, and begins with this one: "For too long, the victims of crime have been the forgotten persons of our criminal justice system. Rarely do we give victims the help they need

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[23] "The fact is that without President Ronald Reagan, the progress on this issue would be minute compared to what it is today." *President Ronald Reagan's Impact on Victims' Rights*, State Attorney Phil Archer, 18th Judicial Circuit, State of Florida, https://sa18.org/page/victim-rights.html.

or the attention they deserve. Yet the protection of our citizens—to guard them from becoming victims—is the primary purpose of our penal laws. Thus, each new victim personally represents an instance in which our system has failed to prevent crime. Lack of concern for victims compounds that failure."[24]

Just after the President signed the Proclamation, Ellingwood called me and quietly said, "You owe us an arm and a leg on this one," and sent me an original copy, signed by the President himself.

MOVING THE BALL FORWARD WITH THE CRIME VICTIMS HANDBOOK AND CALIFORNIA CRIME WATCH

At about the same time that I received an original copy of the President's proclamation, the President sent a letter to the California Attorney General's Office. I was, by then, a special assistant attorney general, and among my multiple duties was the creation of a sophisticated multi-media production unit referenced in footnote 17, ante. I reproduced the President's letter on the first page of *And Justice for All, The Crime Victims Handbook*, which I was already compiling and editing at the direction of Attorney General Deukmejian. The *Handbook* contained information about the criminal justice system and how it might be utilized to help victims of crime and their families.

In his letter to the California Attorney General's Office, President Reagan wrote: "For most of the past thirty years, the administration of criminal justice has been unreasonably tilted in favor of criminals and against their innocent victims. This tragic era can fairly be described as a period when victims were forgotten and crimes ignored.

"We hope that things are now beginning to change for the better."

Unfortunately, things would get worse before they got better. Even so, the *Handbook* came off the presses poignantly, with President Reagan's letter on page 1, all while he was convalescing from the assassination attempt on his life, and long before the shocking news of his near-death experience stopped mesmerizing the nation.

Inspired by President Reagan's touching and timely message, the *Handbook* gained visibility and bolstered our sustained and ubiquitous advocacy for victims of crime and their families, that had begun in 1977. The *Handbook* also

[24] The entire proclamation may be read here, https://www.presidency.ucsb.edu/documents/proclamation-4831-victims-rights-week-1981.

contained an introduction by Attorney General Deukmejian himself in which he observed, "There is a new emphasis on the right of the innocent public to be free from crime, particularly violent crime, and the special obligation a free and just society owes to you, as a past, present, and potential victim."

The *Handbook* also contained a foreword by the prominent chairs of three large, statewide advisory commissions appointed by Deukmejian, including District Attorney William D. Curtis, Monterey County, and chair of the Citizens' Advisory Commission on Victims of Crime; Presiding Justice Carl West Anderson, California Court of Appeal, First Appellate District, chair of the Judicial Advisory Commission on Victims of Crime; and talented artists Paul Conrad of the Los Angeles Times and Jim Kirwan of San Francisco, co-chairs of the Artists' Advisory Commission on Victims of Crime.

In their foreword, these distinguished co-chairs explained, "The Crime Victims Handbook is intended to provide you—California's crime victims and witnesses— with information regarding your roles in the administration of justice and to advise you of your rights and the state and local services available to you."[25]

The Attorney General's Office published and distributed copies of the *Handbook* to 50,000 judges, lawyers, prosecutors, peace officers, defense attorneys, and law professors; to political, civic, academic, and religious leaders; and to journalists throughout California. Many of these leaders reproduced and distributed copies to citizens in their disparate domains.

As suggested in President Reagan's opening paragraph in his Proclamation that "each new victim personally represents an instance in which our system has failed to prevent crime," Deukmejian believed it best to work diligently at reducing the numbers of potential crime victims *before* they and their families had to face the loss of life or property caused by crime and violence and actually needed legal rights and remedies. To do that, he recognized the necessity of instituting a number of public policies providing for effective and aggressive law enforcement, prosecution, corrections, and crime prevention programs.[26]

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[25] No one could have anticipated that a looming voter initiative, Proposition 8, the Victims' Bill of Rights of 1982, was already being drafted and would become law by June of the following year, providing significant legal rights for crime victims.

[26] No victims' legal rights program or crime prevention program, no matter how well conceived, will be successful without adequate funding and staffing. Likewise, no prosecutor's office, public defender's office, alternative defense counsel's office, or law enforcement agency can be successful if starved of adequate funding and staffing. Public safety, crime victims' legal rights, and accused defendants' due process rights suffer when those charged with protecting them are inadequately funded and staffed. That is where mayors, city councils, and boards of supervisors come in. They must provide for adequate funding and staffing for all the criminal justice entities just referenced. Public safety, including criminal prosecutions, are matters of *state* law, and *local* officials should not be telling peace officers and prosecutors how or when to do their jobs or place limits not in state law on them.

Wisely recognizing that crime prevention in the first instance may reduce the burden on law enforcement agencies, prosecution and defense bars, and corrections agencies, Deukmejian directed me to prepare and conduct proactively, within the California Department of Justice, a statewide crime prevention program which reached into every city and county in the state. Labelled, "California Crime Watch," it was organized in cooperation with the U.S. Department of Justice, a new federal crime prevention initiative, the National Advertising Council, and more than 350 city police chiefs, sheriffs, and prosecutors from all 58 California counties, and state and local corrections officials and agencies throughout the state.

As a major part of the "California Crime Watch" program, Deukmejian directed me to address how we might anticipate and prevent a broad range of crimes; to identify best practices for doing so; and to prepare and distribute prototypical educational print materials in camera-ready formats for high-speed, high-volume reproduction by police chiefs, sheriffs, prosecutors, and corrections officials, which they could distribute locally, under their own imprimaturs.

We produced short, high quality, prototypical radio and television public service announcements (PSAs) addressing "California Crime Watch," each PSA dealing with preventing a different crime, and featuring the attorney general. The PSAs were used by prosecutors, sheriffs, and police chiefs, who added their own messages and tag lines, and distributed the finished products to local radio and television stations. Those local distributions led to countless news media interviews that focused on crime prevention by the attorney general, prosecutors, and law enforcement officials throughout the California.

All the foregoing comprised major elements in Deukmejian's "Plan to Restore Public Safety" in the 1980s. However, he did not want this program to be, or appear to be, a political or publicity stunt, but to be an institutionalized, systematic, and sustained professional and public collaboration conceived substantively to prevent crime and violence across the board in every law enforcement and prosecution jurisdiction in California for the benefit of all its citizens.

In February 1980, the California Legislature issued a formal resolution, "Relative to California Crime Watch." Following several "whereas" clauses stating their reasoning, 90 bipartisan legislators joining the resolution, declared, "the Members hereby take this opportunity to endorse and support California Crime Watch and the Attorney General's Plan to Restore Public Safety in the 1980s." Signing the resolution for all 90 legislators were three Democrats and one Republican. These were Senator James R. Mills,

Chairman, Senate Rules Committee; Lieutenant Governor Mike Curb, President of the Senate (the lone Republican); Louis J. Papan, Chairman, Assembly Rules Committee; and Leo T. McCarthy, Speaker of the Assembly.[27]

Deukmejian viewed California Crime Watch as a vast, integrated, and proactive collaboration, energized by the goal of anticipating and preventing crime everywhere in California, especially in our state's inner-cities and in schools, parks, and playgrounds. Its intent was to spare vast numbers of innocent citizens everywhere in California, especially children, from the fear and the reality of crime and violence.

As noted above, Deukmejian required us to work closely with California's prosecutors, sheriffs, and police chiefs. His goals included improved public safety and legally enforceable statutory and constitutional rights for victims of crime and their families. He always sought *Cardozian balance* in the administration of criminal justice, as well as effective crime prevention, and not gotcha" politics. He was a justice-seeking leader, not a political games player.[28]

A few words about George Deukmejian are in order at this point. He was a state senator, an attorney general, and governor. He was a visionary, and ground-breaking leader. He was a humble man, loving husband, and devoted father, who loved California and all its people. He believed, "There but for the grace of God, my family might be harmed by crime." Consequently, he labored diligently to protect everyone's families in our huge state.

Deukmejian was also a kind, civil, and decent man who wished only to serve all our state's people honorably, ethically, and effectively. To him, good government was truly the best politics. And to him, preserving and protecting the Constitution and the rule of law were indispensable. He was a role model to everyone who knew or worked for him, whatever their personal politics, philosophies, or jurisprudences. And he was my dear friend.

FROM PRESIDENTIAL LEADERSHIP EMERGES A NATIONAL TASK FORCE SUPPORTING VICTIMS OF CRIME

Well-recovered from his near assassination in 1981, President Reagan established by executive order his Task Force on Victims of Crime during the second annual National Victims' Rights Week in April 1982. At the President's direction and under future Attorney General Edwin Meese's

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[27] Assemblywoman Maxine Waters and Senator John Garamendi, both Democrats and current members of the U.S. Congress, were also among the legislators joining in this resolution.

[28] As did we all, Deukmejian believed deeply in the eternal verity, "But justice, though due the accused, is due the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." (*Snyder v. Massachusetts* (1934) 291 U.S. 97, 122.)

attentive eye, Lois Haight Herrington, an assistant attorney general, chaired the Task Force. Frank Carrington was also a member. And future justices, Carol Corrigan and William R. McGuiness, were members of the staff.

The Task Force published its *Final Report* in December 1982.[29] It contained important and still relevant recommendations for state and federal governmental action, as well as recommendations for federal and state executive and legislative action, and for police, prosecutors, judges, parole boards, hospitals, the ministry, the Bar, schools, mental health agencies, and the private sector.[30]

As a matter of historical interest, Herrington, Corrigan, and McGuiness, like Meese and I, were all former members of the Alameda County District Attorney's Office. Edwin Meese was, at the time, Presidential Counsellor, with Cabinet level status. He later became our nation's 75th Attorney General, and later still, he received the Presidential Medal of Freedom.

Lois Haight Herrington, using her maiden name of Haight, later served as a trial judge in California. The California Judicial Council named her *Jurist of the Year* in 2002. Although she could have sat on the state Supreme Court had she wished, she preferred to work in the juvenile court of the Contra Costa County Superior Court. She did so until her retirement from the bench in 2019.

Carol Corrigan moved through the court system and presently serves as an associate justice on the California Supreme Court.

Before his retirement in 2017, William R. McGuiness served as presiding judge of the Alameda County Superior Court, and subsequently, as administrative presiding justice of the California Court of Appeal, First Appellate District.

As directed by the President and overseen by Meese, Herrington soon helped form and lead the Office of Victim Assistance (OVA) in the U.S. Department of Justice. It is a large, continuing, and important entity. But it is no substitute for the proactive, vocal, and personal support delivered at least once annually by our nation's Presidents and Attorneys General.

As did Presidents Carter, Reagan, and Bush and Attorneys General Bell, William French Smith, Meese, and their early successors, our nation's presidents and attorneys general must continue to speak out regularly and persuasively to encourage and inspire state governors, state attorneys

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[29] https://www.ojp.gov/pdffiles1/ovc/87299.pdf.

[30] Also see, Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, (1999) 25 New England Journal on Criminal and Civil Confinement 21.

general, mayors, city councils, and county boards of supervisors in all 50 states to become substantive and activist crime victims' legal rights advocates. Leadership on this crucial matter is not delegable. And it does not diminish their duties or that of the administration of criminal justice to insure there is a *Cardozian balance*, so that both victims of crime and their families, and the criminal accuseds and their families, receive their full and fair due process in court.

Inspired by the President's Task Force on Victims of Crime, Governor George Deukmejian established the California State Task Force on Victims' Rights in 1988. Its resulting *Final Report* contains recommendations similar to those contained in the Final Report, President's Task Force on Victims of Crime, from six years earlier.

CALIFORNIA CRIME VICTIMS' BILL OF RIGHTS OF 1982 BECOMES A REALITY

After five years of sustained efforts dealing with crime prevention and holding annual forgotten victims' weeks, as well as related political and public education initiatives, California prosecutors finally achieved an indelible leadership role in the crime victims' legal rights movement when they took their message directly to the voters. And California voters responded positively by adopting the statutory and constitutional initiative, Proposition 8, the Victims' Bill of Rights of 1982.

However, qualifying a voter initiative to achieve them was not easy. Paul Gann and I were statewide co-chairs of the committee seeking to qualify it. California is a big place, and we had to gather roughly a half million validly registered voters' signatures to make the cut. We received considerable help from state Senator Bill Richardson, a Republican, and Wayne Johnson, director of the senator's computer mailing house, Computer Caging, one of the first, if not the first, in the nation.

At a particularly low point, we got an immense boost from San Diego Mayor Pete Wilson, a Republican, and Supervisor Quentin Kopp, a Democrat, Board of Supervisors of the City and County of San Francisco. They made a joint contribution of $50,000, and toured the state in shirt sleeves, collecting voter signatures in Sacramento, San Francisco, Los Angeles, and San Diego, during the initiative qualification process. By the deadline to qualify, we had collected 665,000 signatures. We made the cut.

For use during the final push for votes, I prepared thick binders containing carefully prepared, tabulated materials explaining and supporting in detail the elements of Proposition 8, the Victims' Bill of Rights. I duplicated and delivered a binder to scores of candidates who were on the primary election ballot that year, whether incumbent or not, and whether in a contested primary election or not. In other words, every receptive candidate whom I could reach received a copy of the binder with a cover letter encouraging public support and advocacy for voter adoption of Proposition 8 in their respective jurisdictions.

Whether or not they were on the ballot in June 1982, California's 58 elected district attorneys and 58 elected sheriffs (of whatever party because these offices are non-partisan) also received binders. And most of those who received the binders helped in both large and small ways.

With all that, as with qualification for the ballot, final voter adoption was not easy or certain.

Indeed, before the election, Proposition 8, was challenged in court in order to deny Californians a vote. Fortunately, the California Supreme Court declined to strike it from the ballot in *Brosnahan v. Eu* (1982) 31 Cal.3d 1.

And after Proposition 8 was approved by voters during the primary election, it was challenged once again in court, but the California Supreme Court upheld it in *Brosnahan v. Brown* (1982) 32 Cal.3d 236.

In that connection, I co-authored two amici curiae briefs in *Brosnahan v. Brown*. In one of those briefs, we represented more than 150 prosecutors, sheriffs, police chiefs, mayors, city council members, county board of supervisor members, and others. In the other brief, we represented two dozen sets of parents of murdered children. Several called me at home after the case was won to say in varying ways, "Thank you for giving my family a public voice for the very first time." Most of those who called did so in tears.

The campaigning for Proposition 8 was also arduous. One event while campaigning for Proposition 8 deserves particular mention. Just as Paul Gann and I were leaving the eighth floor of the Bonaventure Hotel in downtown Los Angeles to catch a flight to Sacramento, the power went out, the elevators stopped working, *and* Gann began having chest pains. Alarmed, I asked Gann to allow me to carry his suitcase as we traveled down the stairs. But Gann emphatically declined. So, we each carried our own suitcases down eight flights of stairs, caught a cab, and just made it to the Los Angeles International Airport (LAX). Our plane was full, including several legislators.

By then, Gann was already feeling significantly worse. Even so, he walked up and down the plane's aisle, showing a color photo of a handsome little boy of about 10 to everyone as he told the story behind how he received it.

It seems that the night before, he had spoken before a large crowd in Orange County. As everyone was filing out after he spoke, he spotted a single, sad woman in the back sitting quietly. He walked up to her. She showed him the photo of the young boy, her son, and asked Gann to help her. He asked how. She replied that she hoped that he would try to prevent what had happened to her son from happening to other little boys. She explained that he had been molested and murdered by a convicted sex molester of children, who had been paroled by an administrative error shortly before her son was killed. As Gann traversed the plane's aisle, he had everyone in tears, even the legislators. He was a spellbinding story teller. But as we approached Sacramento, Gann's chest pains worsened. Not long after landing, he was rushed to Kaiser Hospital where he had major heart surgery involving multiple bypasses. While in the hospital, he received a blood transfusion which infected him with AIDS.[31]

THE ACTUAL ENACTMENT OF PROPOSITION 8

The voters' approval of Proposition 8 – and the California Supreme Court's rejection of the after-election challenge to its validity – finally gave the public enforceable statutory and constitutional rights to balance those of the accused. Among them were rights to public safety bail, truth-in-evidence, restitution, and to appear and speak at sentencing, probation revocation, and parole proceedings, adult and juvenile.[32] They also included the nation's first constitutional right to safe schools for students, faculty, and staff.

Proposition 8 also encompassed public safety law restorations and sentence enhancements, particularly for residential burglary. In fact, residential burglary was a special focus because it is such a brazen, heartless, and

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[31] Gann and I remained close friends until his demise. In 1984, he and I stood together in the State Capitol near the center of a 1984 photograph of California's Presidential Electors. We then cast our electoral votes for President Reagan. Three years later, with my family, Gann, and his wife, Nell, in the courtroom's jury box, I was first sworn in as a trial judge in 1987. When Gann died at age 77 in 1989, Nell selected three eulogists for his State Funeral: Governor George Deukmejian, U.S. Senator Pete Wilson, and me. His memorial service was held in the Capital Christian Center in Sacramento. Gann was buried at Mount Vernon Memorial Park, Fair Oaks, Sacramento County. Among other things, Gann helped many thousands of elderly people retain their homes when he teamed up with Howard Jarvis in 1978 to seek and achieve voter adoption of Proposition 13, the Jarvis-Gann property tax limitation initiative, which, among other things, prevented property taxes from being increased astronomically each year. Sixty-five percent of voters supported Proposition 13. Four years later, Gann came back to help prosecutors achieve voter adoption of Proposition 8, the Victims' Bill of Rights. He was a tireless humanitarian, a truly remarkable man.

[32] To learn of all the rights included in this measure, see the *Voter Information Guide for the 1982 Primary Election*, at pp. 32-35, 54-56, https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1917&context=ca_ballot_props.

deliberate invasion of the privacy and inner sanctum of an individual or family, which can leave them scarred psychologically and sometimes physically, for life.[33]

And thus, statutory and constitutional rights for crime victims were born in California. This major transformation of the law happened when it did because until the mid-1970s, most politicians in California state government had forgotten their innocent constituents and were failing to protect them from the fear and reality of crime and violence that was sorely disrupting their lives and liberties, particularly in urban areas. Those governmental officials had also forgotten the basic fundamentals on which our country was founded, fundamentals such as those found in the Declaration of Independence:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, —That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."[34]

Of course, we never suggested the abolition of our state government. Instead, we suggested altering it to make it more perfect by our exercise of

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[33] "Feelings Often Experienced by Burglary Victims," Crime Victim Assistance Division, Attorney General's Office, State of Iowa, https://www.iowaattorneygeneral.gov/media/documents/Burglary_Brochure_32015_010B5DE4AEC_CA92AE5F156F0.pdf; PT Staff, *Beating the Burglary Blues, Focuses on the psychological aftermath of a burglary. Victims' lack of a feeling of security and inviolability; Psychiatrist Billie Corder's interviews with burglary victims; Rape metaphor; Impact on children*, Psychology Today, published May 1, 1996, last reviewed on June 9, 2016, https://www.psychologytoday.com/us/articles/199605/beating-the-burglary-blues; "The Trauma of Victimization," National Center for Victims of Crime, https://www.fredericksburgva.gov/DocumentCenter/View/9552/Responding-to-Traumatic-Situations?bidId=, ["The trauma of victimization is a direct reaction to the aftermath of crime. Crime victims suffer a tremendous amount of physical and psychological trauma. The primary injuries victims suffer can be grouped into three distinct categories: physical, financial and emotional. When victims do not receive the appropriate support and intervention in the aftermath of the crime, they suffer 'secondary' injuries."]; Kevin M. O'Brien, *Introduction to Special Section: Advancing mental health services and research for victims of crime* (April 2010) 23 Traumatic Stress, at p. 179, Issue 2 , https://onlinelibrary.wiley.com/toc/15736598/2010/23/2, and bibliography; Rochelle F. Hanson, Genelle K. Sawyer, Angela M. Begle, and Grace S. Hubel, *The Impact of Crime Victimization on Quality of Life* (April 2010) 23 Traumatic Stress, at p. 189, Issue 2, https://onlinelibrary.wiley.com/doi/10.1002/jts.20508; and, *Initiatives for Improving the Mental Health of Traumatized Crime Victims*, Office of Victims of Crime, U.S. Department of Justice, https://www.ncjrs.gov/ovc_archives/factsheets/mentalhe.htm; the 1982 President's Task Force on Victims of Crime also challenged the mental health community to lead the way in developing and providing treatment programs for victims and their families and to develop training for mental health practitioners that gives them the understanding and skills to treat crime victims, sensitively and effectively.]

[34] Timothy Sandefur fosters an understanding of the Declaration in his book, *The Conscience of the Constitution: The Declaration of Independence and the Right to Liberty* (2015).

venerable constitutional means.[35]

Accordingly, since California government had failed to act on an important matter – in this case, failing actively and effectively to protect the public from crime and violence and failing empathetically to looking after those who were victimized by crime and violence – the people had the right of initiative to add remedial constitutional provisions and to adopt new, remedial statutes or revise old ones.[36]

PROPOSITION 8 INCLUDED A CONSTITUTIONAL RIGHT TO SAFE SCHOOLS

A constitutional right to safe schools for all our children was a priority for us, and we achieved it in Proposition 8. Indeed, I included the pertinent provision, "Right to Safe Schools," Cal. Const., Art. I, § 28, subd. (c), in Proposition 8. The provision has since been expanded (and renumbered) to include all schools, colleges, and universities, whether public or private, as a result of Proposition 9, the Victims' Bill of Rights of 2008 ("Marsy's Law"), as Cal. Const., article I, § 28, subds. (a)(7) and (f)(1).[37]

Kimberly Sawyer, a law student at the time, provided a sound discussion of the original (and narrower) constitutional right to safe schools contained in Proposition 8 in her student comment, "The Right to Safe Schools: A Newly Recognized Inalienable Right," 14 *Pacific Law Journal* 1309 (1983). Although we never met or discussed the matter, Sawyer nicely captured the spirit and intent of the provision. She later became a research attorney with the California Court of Appeal, Fifth Appellate District, where she served with distinction for many years.[38]

Professor Jackson Toby, a former director of a criminology research center at Rutgers University, collaborated with me on several campus safety programs

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[35] For the statements of the proponents and opponents of Proposition 8, and the full text of the initiative, see the *Voter Information Guide for 1982 Primary Election*, at pp. 32-35, 54-56, https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1917&context=ca_ballot_props.

[36] California Constitution, article II, section 8.

[37] George Nicholson, *Campus Crime and Violence, and the Right to Safe Schools*, Defense Comment, Association of Defense Counsel of Northern California (Summer 2018), pp. 5-8 [tracing the 40-year history of safe schools' leadership in California and elsewhere in the nation, including fostering the spread nationally of the inalienable constitutional right to safe schools].

[38] For more, see generally George Nicholson, Frank Carrington, and James A. Rapp, *Campus Safety: A Legal Imperative* (1986) 30 Education Law Reporter 11 ; James A. Rapp, Frank Carrington, and George Nicholson, *School Crime and Violence: Victims' Rights*, Pepperdine University Press (1986), second edition (1992), with a preface by state Supreme Court Justices, Stanley Mosk (California) and Melvyn Tanenbaum (New York); and see George Nicholson and Jeff Hogge, *Retooling Criminal Justice: Forging Workable Governance from Dispersed Powers*, The National Conference on Legal Information Issues: Selected Essays, at p. 223, American Association of Law Libraries (1996), especially, *Educational Institutions*, pp. 241-243.]

in Washington, D.C. and elsewhere and wrote several important and still relevant commentaries.[39]

Indisputably, the campus safety problem continues. Columbine may have been the nation's saddest and most infamous example until more recently. While I was the chair of the Juvenile Justice Subcommittee of the Federalist Society's Working Group on Criminal Law and Procedure, I helped plan and conduct a panel discussion, "Did the Law Cause Columbine?" It was held in Washington, D.C., at the National Press Club and was telecast live, nationwide, in August 1999, on C-SPAN.[40]

In December that same year, McGeorge Law Professor J. Clark Kelso and I testified during legislative hearings in Sacramento on the topic, "Helping to Make Schools Safer, Improve Legal Literacy, and Promote Civic Participation Through Public Education."

California's right to safe schools also spawned more scrutiny on the problem. The Federal Clery Act, which became law because of the humanity, vision, and leadership of Frank Carrington, requires colleges and universities participating in federal financial aid programs to compile and disclose annually information about crime and violence on and near their campuses. Duties to warn are also part of this statutory and regulatory scheme. Most colleges and universities participate to some extent. Compliance is monitored and enforced by the United States Department of Education.[41]

While founding director and chief counsel of the National School Safety Center, a partnership of the U.S. Departments of Justice and Education and

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[39] *The Politics of School Violence*, pp. 34-56, no. 116 (Summer, 1994); *Getting Serious about School Discipline*, pp. 68-83, no. 133 (Fall, 1998); and *Medicalizing Temptation*, pp. 64-78, no. 130 (Winter, 1998); all three articles were in The Public Interest. Professor Toby begins the latter article this way, "When one of the characters in Oscar Wilde's play, Lady Windemere's Fan, says, 'I couldn't help it. I can resist everything except temptation,' the playwright was kidding. He was implying, slyly, that those who fail to resist temptation prefer what they perceive as pleasant to what is moral."

[40] Several distinguished scholars were panelists, including James A. Rapp of the Illinois Bar and editor-chief of *Education Law*, a seven-volume treatise; Troy Eid, chief counsel to Colorado Governor Bill Owens; Professor William Kilpatrick, Department of Education, Boston College, and author of the best-selling book, Why Johnny Can't Tell Right from Wrong: And What We Can Do About It; and Chief Judge J. Harvie Wilkinson, United States Court of Appeals, Fourth Circuit; among others, including Ann Beeson, a top representative of the National American Civil Liberties Union. Watch, https://www.youtube.com/watch?v=87a_t8bxNx8, or read, http://www.fed-soc.org/publications/detail/did-the-law-cause-columbine.

[41] For more on the *Clery Act*, see The Clery Center, https://www.clerycenter.org/the-clery-act; and again, see George Nicholson, *Campus Crime and Violence, and the Right to Safe Schools*, Defense Comment, Association of Defense Counsel (Summer 2018), at p. 7. Congress enacted the Clery Act in 1990, 15 years elapsed before a dreamer, former Texas prosecutor and trial judge, Ted Poe, was elected to Congress. Soon, Congressman Poe and Congresswoman Katherine Harris of Florida, both Republicans, worked with Congressman Ted Costa of California, a Democrat, to co-found the Congressional Victims' Rights Caucus in 2005. The Caucus seems to have changed its name recently to the Congressional Crime Survivors and Justice Caucus. By whatever name, it is hoped that those who serve on the caucus will collaborate and work immediately and diligently to give wings to something Congressman Costa declared at the caucus' founding, "Protecting victims of crime should be a top priority for legislatures at all levels of government."

Pepperdine University, I attended a White House conference held in Cabinet Room in 1985. The gathering dealt with providing safe schools everywhere in America. The meeting was attended by President Reagan, Vice President George H.W. Bush, Attorney General Edwin Meese, III, and Secretary of Education William Bennett, along with law enforcement and education leaders from several states, including California. The President and other national leaders were very attentive to what the gathered school safety experts had to say. The President, the Attorney General, and the Secretary of Education were already helping the National School Safety Center immensely in a variety of ways.

THE PROGENITORS OF THE CRIME VICTIMS' LEGAL RIGHTS MOVEMENT

This narrative regarding the adoption of Proposition 8 (1982) and subsequently, Proposition 9 (2008), would not be complete without a discussion of the 1975 writings of Frank Carrington of the Virginia Bar, Mayor Tom Bradley of Los Angeles, and Fresno State Emeritus Professor John Dussich. Each man supplied a compelling literary vision and moral impetus to spark the idea of crime victims' legal rights and for using a voter initiative to formally institutionalize those rights.

Frank Carrington's seminal contribution was a provocative book, *The Victim* (1975). It was followed the same year by Mayor Bradley in his similar article, *The Forgotten Victim* (1975) 3 Crime Prevention Review, California Department of Justice, at page 1. Carrington's book and Mayor Bradley's article are classics of this creative legal era. Carrington soon wrote another book, Neither Cruel Nor Unusual (1978), with related material in Chapter Four, "Criminals' Rights v. Victims' Rights," at page 73.

Carrington's legacy also includes a vibrant, ongoing institution, the National Crime Victim Bar Association (NCVBA).[42] It is associated with the National Center for Victims of Crime (NCVC).[43] On NCVBA's internet homepage, it declares, "We are the nation's first professional association of attorneys and expert witnesses dedicated to helping victims seek justice through the civil system. The NCVBA continues the pioneering work of Frank Carrington and is a testament to the NCVC's long-standing commitment to civil justice for victims."

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[42] See https://victimbar.org.

[43] See https://victimsofcrime.org.

Before his untimely death in a residential fire, Frank Carrington became a legend. He was honored by President George H.W. Bush as one of the nation's leading crime victims' advocates during a Rose Garden ceremony at the White House.[44]

Frank and I were close friends to the day of his death. He was quiet, poised, humble, and scholarly. He radiated the wit, charm, manners, and grace of a fictional Southern gentleman, but he was real. And he was kind and respectful to everyone he met. He epitomized civility in the law and out. We collaborated in common cause for years. It is painful to ponder the immense, additional vision, inspiration, and practical impact that he might have provided to our nation and to our people, had he not died so young.

Mayor Tom Bradley, a Democrat and former peace officer, was one of the first elected politicians to become interested in the victims of crime and their families. As noted, he, too, was responsible for writings in support of the victims of crime. Others of both major political parties soon followed Mayor Bradley's example, but only after insistent encouragement by California prosecutors.

Notwithstanding the importance of Carrington's and Bradley's seminal writings, they, too, had important antecedents. In the early 1970s, as already noted, James Rowland conceived and cobbled the "Crime Victim Assistance Center" in the county probation department that he headed in Fresno, California. His department became the first in California to establish such a center. Rowland also created the concept of a victim impact statement. Congressman Jim Costa, a Democrat, honored Rowland's creation, declaring, "In 1976 James Rowland created the first victim impact statement to provide the judiciary with an objective inventory of victim injuries and losses at sentencing. The victim impact statement has brought not only nationwide but worldwide recognition that crime victims need additional assistance. This happened through James Rowland's resolve and fierce determination to provide appropriate and comprehensive services to Fresno County crime victims."[45]

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[44] See tributes at 23 Pacific Law Journal, no. 3 (1992), from President Bush, former President Reagan, U.S. Attorney General William Barr, former U.S. Attorney General Edwin Meese III, California Governor Pete Wilson, California Attorney General Dan Lungren, and California Chief Justice Ronald M. George, Washington Attorney General Ken Eikenberry, Dr. Dean Kilpatrick, director, Crime Victims Research and Treatment Center, Medical University of South Carolina, Dan Eddy, executive director, National Association of Crime Victim Compensation Boards, Eric Smith, president, Victims Assistance Legal Organization (Valor), and from me, along with others, https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1855&context=mlr.

[45] *In Honor of James Rowland And The Designation Of The James Rowland Assistance Center In Fresno,* Congressional Record (Bound Edition), Volume 153 (2007), Part 20, October 24, 2007, https://www.govinfo.gov/content/pkg/CRECB-2007-pt20/html/CRECB-2007-pt20-Pg28285-3.htm.

Professor John Dussich was another progenitor of the movement. While working for the governor of Florida, he presented his first paper on the origins of crime victim advocacy during the First International Symposium on Victimology held in Israel in 1973. Three years later, Rowland called him out of the blue and asked him to attend and speak during a special conference on crime victims at the Marina Hotel in Fresno. As earlier noted, while there, Dussich launched the National Organization on Victims Assistance (NOVA). Three years later, he became the founding secretary general of the World Society of Victimology when it was formed in Germany. Indeed, Dussich played key roles in virtually every new and novel crime victim-witness services initiative, nationally and internationally. At 85, he is still at it. He co-authored a huge, new book, *CJ, Realities and Challenges*, to be published in 2024. I have an advance copy and note that the book has major sections on crime victims' rights, remedies, and resources.

California's prosecutors then did the heavy lifting based on the work begun by Carrington, Bradley, Rowland, and Dussich, at times relying on or collaborating with the four men, as well as others doing similar work.[46] For an additional perspective regarding how Proposition 8 came to be enacted, please see Paul Gann, "Justice for the Accuser: Proposition 8, the Victims' Bill of Rights," *Benchmark*, at page 69, Vol. IV, No. 1 (Winter 1988).[47]

THE RESPONSE TO THE ADOPTION OF CONSTITUTIONAL RIGHTS FOR CRIME VICTIMS

California's status as the first state to adopt constitutional rights for victims of crime and their families was in some respects inevitable during an era that tolerated serious crime: "The victim's absence from criminal processes

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[46] See George Nicholson, Tom Condit & Stuart Greenbaum, editors, *Forgotten Victims: An Advocate's Anthology*, California District Attorneys Association (1977); Tom Condit and George Nicholson, *The Ultimate Human Right: Governmental Protection from Crime and Violence* (January, 1977) 52 Los Angeles Bar Journal, at p. 14 number 7; Andrew Willing, *Protection by Law Enforcement: The Emerging Constitutional Right* (1982) 35 Rutgers Law Review 1, 22-54; Frank Carrington and George Nicholson, *The Victims' Rights Movement: An Idea Whose Time Has Come* (1984) 11 Pepperdine Law Review 1; Frank Carrington and George Nicholson, *The Victims' Rights Movement: An Idea Whose Time Has Come - Five Years Later: The Maturing of An Idea* (1989) 17 Pepperdine Law Review 1. A year after Carrington's untimely death in a residential fire, a memorial issue was published in volume 23, issue 3, of the Pacific Law Journal and in it appeared, George Nicholson, *Victims' Rights, Remedies, and Resources: A Maturing Presence in American Jurisprudence* (1992) 23 Pacific Law Journal 815. See also J. Clark Kelso and Briggette Bass, *The Victims' Bill of Rights: Where Did It Come From and How Much Did It Do?* (1992) 23 Pacific Law Journal 843; Williamson L. Evers, *Victim's Rights, Restitution and Retribution*, (January 1, 1996) Policy Briefing, Independent Institute, https://www.independent.org/publications/article.asp?id=9243; and Adam Walinsky, *The Crisis in Public Order* (July 1995) Atlantic Monthly, at page 39, https://www.theatlantic.com/magazine/archive/1995/07/the-crisis-of-public-order/305006; (Adam Walinsky was a trusted aide and confidant of U.S. Attorney General Robert Kennedy.)

[47] For further background regarding Paul Gann, see, Robert Fairbanks, a former Los Angeles Times journalist, former California Assemblyman Alister McAlister, and Frank Carrington, Esq., *Paul Gann, Citizen Politician*, (Winter 1988) Benchmark, at page 67, Vol. IV, No. 1.

conflicted with 'a public sense of justice keen enough that it [] found voice in a nationwide 'victims' rights movement.'"[48]

Although largely out of the general public eye today, Proposition 8, the Victims' Bill of Rights of 1982, remains alive and growing in impact, after being re-adopted and expanded a quarter century later in Proposition 9, the Victims' Bill of Rights of 2008, also known as Marsy's Law, as will be noted in the next section.

Anticipating an effective role for the civil justice system to play in defending the rights of the victims of crime and their families, Frank Carrington and James A. Rapp co-authored a huge, loose-leaf treatise, *Victims' Rights: Law and Litigation*, published in 1989. In its preface, the co-authors declared, "This publication is a practical guide for attorneys interested in this rapidly developing and distinct area of the law. Victims of crime or violence, often dissatisfied or disillusioned with the results of the criminal justice system, have been bypassing their primary actions against perpetrators and asserting their rights of action against third parties. The tort of 'victimization,' whereby a negligent third party enables a perpetrator to victimize or fails to prevent the victimization, is a synthesis of a variety of well-recognized legal principles. Victims' claims under these principles are now more common and more successful than ever before."

But while many sought to further defend the rights of victims, there were also formidable critics of Proposition 8, both pre- and post-election. Among them were powerful and prominent lawyers, including, most notably, Ephraim Margolin, a former president of the National Association of Criminal Defense Lawyers, a member of the State Bar of California's "Trial Lawyers Hall of Fame," and recipient of many other honors. He was described by a respected federal law journal, as "one of this country's pre-eminent criminal defense lawyers." Others included Anthony Murray, then president of the State Bar of California, who had served three years earlier as chair of the State Bar's Criminal Law Section, and was the recipient of many honors; and Jim Brosnahan, a prominent criminal defense lawyer, a member the State Bar of California's "Trial Lawyers Hall of Fame," a "Trial Lawyer of the Year" named by the American Board of Trial Advocates, and the recipient of many other honors. Brosnahan was described by one journalist as, "The man who hates injustice."[49]

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[48] Paul G. Cassell and Margaret Garvin, *Protecting Crime Victims in State Constitutions: The Example of the New Marsy's Law for Florida*, (2020) 110 J. Crim. L. & Criminology 99, 103, 104, fn. 21 [constitutional rights for crime victims "began in California"].

[49] At 89, Brosnahan is akin to Ol' Man River; he just keeps rolling along. See his new book, *Justice at Trial: Courtroom Battles and Groundbreaking Cases* (2023).

There were other critics, too, but, perhaps, none so distinguished or determined as these three venerable gentlemen. Brosnahan was very energetic and creative. With Margolin, he was involved with both of the state high court cases, *Brosnahan v. Eu* and *Brosnahan v. Brown*. Almost four decades later, Brosnahan wrote of his lingering perspectives.[50]

Like Brosnahan, California prosecutors hate injustice, although they come at it with a very different focus based on their specific duty imposed upon them by the law, both statutory and constitutional. Prosecutors believed deeply that the time had come for millions of victims of crime and their families of all races, creeds, and colors, to have statutory and constitutional rights and a place in the administration of criminal justice. Prosecutors felt it was their duty and job to help establish and enforce those legal rights in the spirit of *Cardozian balance*, and they did their best to do that job.

Conversely, Brosnahan and his colleagues felt it was their duty and job to protect the accused. And they did their best to do that job. California's determined prosecutors and Brosnahan, along with his distinguished criminal defense colleagues, deserve immense credit for doing their best in a professional way, both in court and in the electoral arena, in the 1970s, the 1980s, and ever since.

Nevertheless, whatever institutional criticisms may have been made of California's prosecutors and their crime victims' leadership and mission, assertions that it would have been "better to have gone through the legislature" were meritless, as we fully and faithfully tried to do so. But the People reserved to themselves the right to initiative when the legislature was not responsive, as was the case here.

And I submit that we achieved a broadly significant, enduring, and exemplary public good for the benefit of millions of innocent citizens. Further, we did so without undermining the rights of criminal accuseds. Our seminal work has had an enduring shelf life that continues to broaden in scope and to serve the public good, not only in California, but in many other states, as well as nationally. In short, California's traditional prosecutors became role models for restoring *Cardozian balance* in the administration of criminal justice and inspired prosecutors and state attorneys general everywhere in America to follow their lead.

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[50] Jim Brosnahan, *Brosnahan v. Eu: How California Law Turned in 1982 to Face Crime Victims at Defendants' Expense* (Spring/Summer 2018) Newsletter, at page 23, California Supreme Court Historical Society, https://www.cschs.org/wp-content/uploads/2018/06/2018-Newsletter-Spring-Brosnahan.pdf.

My dear old friend, Carol Corrigan, once wrote, "The first, best, and most effective shield against injustice for an individual accused, or society in general [including the victims of crime and their families], must be found not in the persons of defense counsel, trial judge, or appellate jurist, but in the integrity of the prosecutor. Some readers may view this concept with skepticism. Yet this notion lies at the heart of our criminal justice system and is the foundation from which any prosecutor's authority flows."[51]

Still, only when every prosecutor in America, acting with integrity, humility, and devotion, fully and faithfully honors their statutory and constitutional duties will Justice Corrigan's admonition once again be universally true. Hopefully and prayerfully, all our nation's civic and political leaders will emulate them.

To illustrate to the public and the State Bar, especially those on the defense side, including the three distinguished gentlemen just mentioned, the importance and benefit of victims' rights, we tried to enlist the support of everyone we could. As but one example, Carrington and I planned and "sold" the idea of a special issue on crime victims' rights to the editors of the Pepperdine Law Review, volume 11, number 5 (1984). To demonstrate "bridge-building" and the increasing scope and breadth of the then nascent crime victims' movement, I called the following leaders and asked them for letters of support to publish at the outset of this special issue: President Wallace D. Riley, American Bar Association; Director James K. Stewart, National Institute of Justice, U.S. Department of Justice; Assistant Attorney General Lois Haight Herrington, U.S. Department of Justice; Secretary of Education T.H. Bell, U.S. Department of Education; Administrator Alfred S. Regnery, Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice; California Chief Justice Rose Elizabeth Bird; California Governor George Deukmejian; President Dale E. Hanst, California State Bar; California Attorney General John K. Van de Kamp, and California Superintendent of Public Instruction Bill Honig.

Everyone whom I invited agreed to my request.

In addition to these letters, to further demonstrate the need for and benefit of adopting a set of rights for crime victims, the special issue contained our lead article,[52] plus articles by Assistant Professor Deborah P. Kelly,

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[51] Carol Corrigan, *On Prosecutorial Ethics* (1986) 13 Hastings Constitutional Law Quarterly 537.

[52] Frank Carrington and George Nicholson, *The Victims' Rights Movement: An Idea Whose Time Has Come*, (1984) 11 Pepperdine Law Review 1; to access the entire issue, go to https://digitalcommons.pepperdine.edu/plr/vol11/iss5.

Department of Government, American University, on "Victims Perceptions of Criminal Justice;" Paul S. Hudson, New York State Crime Victims Board, on "The Crime Victim and the Criminal Justice System: Time for Change;" Associate Professor Richard L. Aynes, School of Law, University of Akron, on "Constitutional Considerations: Government Responsibility and the Right Not to be a Victim;" and Professor Josephine Gittler, College of Law, University of Iowa, on "Expanding the Role of the Victim in a Criminal Action."

JUDGES EVERYWHERE IN AMERICA TAKE NOTE

Once victims' rights became enshrined in law, the judiciary necessarily had to educate itself in order to comply with its obligation to enforce these new rights. Thus, two years after Proposition 8 was adopted by voters in 1982, the National Judicial College convened a "National Conference of the Judiciary on the Rights of Victims of Crime" at its campus. Conferees included two judges from each of the 50 states. After they did their collaborative work, the gathered judges adopted and published a *Statement of Recommended Judicial Practices*. The National Conference was funded by the National Institute of Justice and the American Bar Association.[53]

The *Statement of Recommended Judicial Practices* "has far-reaching implications for our criminal justice system, springing as it does from a meeting that history may well recognize as a turning point in American jurisprudence. Recognizing the need for change, judges have accepted their necessary leadership role in meeting the crucial needs of the victims of crime. Participants in the National Conference of the Judiciary on the Rights of Victims of Crime not only have established these precepts for ensuring those rights, they are setting an example in their own courtrooms by testing these recommendations and encouraging their colleagues to do the same. The National Institute of Justice is proud to have co-sponsored this historic conference and pledges its continuing effort to promote and help refine the conference recommendations. . . ."[54]

Significantly, the thesis for the Conference and its *Statement of Recommended Judicial Practices* was taken expressly from the earlier final report of the President's Task Force Report on Victims of Crime: "The courtroom is the focal point of the entire criminal justice system. The judge who presides over

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[53] Earlier, Frank Carrington and I visited Dean V. Robert Payant of the National Judicial College, at his invitation, to help ponder and plan the judicial conference.

[54] Preface by James K. Stewart, Director, National Institute of Justice.

a court becomes not only the final arbiter of each evidentiary and procedural issue, but he also establishes the tone, the pace, and the very nature of the proceedings. Particularly for the victim, the judge is the personification of justice."[55]

And a special issue of the *Judges' Journal*, published by the Judicial [Administration] Division of the American Bar Association, told "the conference story - from the perspective of the victims, the organizations which are their advocates, and from the judicial conferees who adopted The Statement of Recommended Judicial Practices for victims."[56]

ESTABLISHING A CRIME VICTIMS LEGAL RESOURCE CENTER TO SUPPORT CRIME VICTIMS

After Proposition 8 was adopted by voters in 1982, I visited with McGeorge Law School Dean Gordon Schaber to encourage him to establish a statewide crime victims' resource center at his law school. He agreed and encouraged me to do what I could to help him.

Accordingly, I spoke with Governor Deukmejian and asked for his help. He issued a supportive proclamation. Then I sought support from the Legislature. And it adopted a supportive resolution joined by 98 bipartisan legislators. Signing the resolution were four Democrats, Senator David Roberti, Chairman of the Senate Rules Committee; Lieutenant Governor Leo T. McCarthy, President of the Senate; Louis J. Papan, Chairman of the Assembly Rules Committee; and Willie Lewis Brown, Jr., Speaker of the Assembly.

Thereafter, Dean Schaber, Associate Dean Glenn Fait, and I worked with the Governor and the Legislature to acquire a stable and enduring statutory source of substantial funding for a Crime Victims' Legal Resource Center at McGeorge School of Law.[57]

The new center would offer a new, statewide crime victims' information and advice telephone hotline, aptly named 1-800-VICTIMS (842-8467). But first I had to acquire the legal, possessory, and operational rights to utilize that number. Accordingly, I placed a call to that number and discovered that Xerox owned and utilized it, but only for interoffice communications

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[55] Inside front cover, Statement of Recommended Judicial Practices.

[56] Special Issue on *Victims of Crime, Giving Them Their Day in Court* (Spring 1984) 23The Judges' Journal , no. 2. Lois Haight Herrington authored one of the articles in that special issue.

[57] California Penal Code, section 13897, has provided for annual funding for the center ever since.

nationally. Somehow, I miraculously reached the President/CEO of Xerox at the time, and asked him for use of the number. He and Xerox not only donated the number, but he paid for its first two years of statewide operation by McGeorge!

According the Center's current website, McGeorge students, under attorney supervision, as well as Center staff, provide information and referrals statewide to victims of crime, their families, victim service providers, and victim advocates. Callers receive information on such matters as victims' compensation, victims' rights in the justice system, restitution, civil suits, the right to speak at sentencing and parole board hearings, as well as information on specific rights of victims of domestic violence, elder abuse, child abuse, and abuse against disabled.

McGeorge's Crime Victims Legal Resource Center and its 1-800-VICTIMS hotline continue to operate to this day, more than 40 years later. They have aided and advised hundreds of thousands, perhaps even millions of victims of crimes, their families, victim service providers, and victim advocates, throughout California.[58]

MARSY'S LAW AND ITS OFFSPRING

The next major step in Proposition 8's life came a quarter century later when California voters approved Proposition 9, The Victims' Bill of Rights of 2008, or Marsy's Law, which incorporated and extended the provisions of the original Proposition 8. The contents of Marsy's Law are digitally accessible and include various statutory and constitutional reforms of criminal law and procedure, all focused directly on victims of crime and their families.[59] Examples of direct victims' rights are those that mandate safe schools, colleges, and universities; restitution; and the opportunity to appear and speak during sentencing and parole hearings. Examples of indirect rights are those that mandate public safety bail and truth in evidence in criminal proceedings.

As with Proposition 8 in 1982, crime victims were among those helping to achieve voter adoption of Proposition 9 in 2008. The latter was initiated and largely underwritten by Dr. Henry T. Nicholas III, the brother of Marsy, who was a victim of an unlawful homicide.

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[58] For more, go to, http://www.1800victims.org; and see, Edwin Villmoare and Jeanne Benvenuti, *California Victims of Crime Handbook, Guide to Legal Rights and Benefits for California Crime Victims* (1988), with a forward by Governor George Deukmejian. I wrote one of the chapters in the book.

[59] For statements of the proponents and opponents of Marsy's Law, and the full text of the initiative, see the *Voter Information Guide for 2008 Final Election*, at pp. 58-63, 65-69, https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2265&context=ca_ballot_props; Uniquely, State Senator Jim Nielsen played important roles with both Proposition 8 and Proposition 9.

"If any good can come of something this horrible—the loss of my sister and the losses of other families of crime victims—it is that these violent acts served as a catalyst for change," Dr. Nicholas said. "Marsy's Law will provide for a more compassionate justice system for crime victims in California and make that a constitutional guarantee. Now the momentum can be put behind a U.S. Constitutional Amendment so that the rights of all crime victims, anywhere in America, can be protected."[60]

The California Department of Justice provides digital access to a *Marsy's Card*, in English and 20 other languages, to provide information on most of the rights now enjoyed in California and web links to additional resources, including the McGeorge Victims of Crime Resource Center.[61]

Marsy's Law or a reasonable facsimile thereof, has been adopted, in whole or in part, in 36 states with perhaps others on the way.[62] From no statutory and constitutional rights in 1982 when California voters first adopted Proposition 9's predecessor, Proposition 8, now more than three dozen states and their citizens are legally protected in varying ways in the administration of criminal justice.

Although voters in Pennsylvania also approved a Marsy's Law amendment to its state Constitution in November 2019, the Pennsylvania Supreme Court enjoined certification of the result in December 2021 on the ground it was unconstitutional because it had too many subjects, an argument that had been rejected by the California Supreme Court in *Brosnahan v. Brown*, almost 40 years earlier.

In addition to Marsy's Law, there were other positive crime victims' rights and criminal justice initiatives too numerous to mention here that were adopted by California voters between 1982 and 2008.[63]

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[60] Dr. Henry T. Nicholas III, Marsy's brother, Founder and Chairman of Marsy's Law for All, https://www.marsyslaw.us/marsys_story.

[61] https://oag.ca.gov/sites/all/files/agweb/pdfs/victimservices/marsy_pocket_en_res.pdf; The National Victims' Constitutional Amendment Passage (NVCAP) provides digital access to a *Crime Victims' Rights Miranda Card*, *Victims' Rights Handbook*, Victims' Rights Brochure Kit, Frequently Asked Questions (FAQ) Kit, and Promising Practices in the Compliance and Enforcement of Victims' Rights Kit, and digital access to a *Creating a Victims' Rights Public Education Strategy Guidebook and Talking Points Kit*, primarily for victim service providers, and organizations and agencies that assist victims of crime, https://www.nvcap.org/vrep/vrep.html.

[62] NVCAP, https://www.nvcap.org/states/stvras.html; Jason Moon, *How One Group Is Pushing Victims' Rights Laws Across The Country*, NPR (March 29, 2018), https://www.npr.org/2018/03/29/597684647/how-one-group-is-seeding-victims-rights-laws-across-the-country.

[63] See, e.g., Proposition 115, "The Crime Victims Justice Reform Act of 1990," and for a complete listing of all the statutory and constitutional rights contained it it, see the statements of proponents and opponents, and its full text in the Voter Information Guide for 1990 Primary Election, at pp. 32-35, 65-69, https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2058&context=ca_ballot_props, and *Raven* v. *Deukmejian* (1990) 52 Cal.3d 336, upholding it for the most part. For an analysis of the relevant legal terrain a little more than a decade later, see Paul Pfingst, Gregory Thompson, and Kathleen M. Lewis, "*The Genie's Out of the Jar*": *The Development of Criminal Justice Policy in California* (2002) 33 *McGeorge Law Review* 717. And for more, two decades later yet, see Todd Spitzer and Greg Totten, *Did Brown v. Plata Unleash a More Dangerous Genie?* elsewhere in this issue of *California Legal History*.

PROPOSITIONS 8 AND 9 AND PUBLIC SAFETY BAIL: AN ENDLESS JURIDICAL CONUNDRUM WITH PUBLIC SAFETY IMPLICATIONS

Another controversial, but an unavoidable, subject matter in the context of victims' rights is bail pending trial. It, too, was part of Proposition 8 in 1982 and Proposition 9 in 2008.

Bail hearings, or more aptly, pretrial release hearings, as such proceedings must increasingly be labelled, present this crucial and timely question, "Wither pre-trial detention in an age of metastasizing crime and violence?" While the virtually ubiquitous life and death nature of this question is of increasing concern to the public, owing partially to the widespread weakening of the traditional bail system in California and elsewhere, it is hardly novel.

The general subject matter has been debated and litigated *ad nauseum* for decades. Responding to the debate, I personally inserted a public safety bail constitutional provision into Proposition 8, the Victims' Bill of Rights. Accordingly, when voters adopted the initiative in June 1982, California Constitution, article I, section 28, subdivision (e), they provided for public safety to be *the primary consideration* when judges decide whether to release an accused on bail. In the same election, Proposition 4 also addressed the issue of bail, but as its sole issue and in a weaker form. Since it was also adopted, its passage presented the question of what to do when two initiative provisions conflict.

Judge Julius A. Leetham of the Los Angeles Superior Court provided the answer in his commentary, "… And the Defendant Will be Admitted to Bail," Beverly Hills Bar Journal, at p. 176, Vol. 18, No. 3 (Summer 1984). But that legal analysis is largely immaterial because many initiatives now address that very possibility in their text, and because almost a quarter century later, Proposition 9 was adopted by voters in 2008. It also contained constitutional mandates related to public safety bail.

Unfortunately, when the California Supreme Court unanimously decided *In re Humphrey* (2021) 11 Cal. 5th 135, it did not have the occasion to fully consider the new provisions in article I, section 28, subdivisions (b)(3), and (f)(3) of the California Constitution,[64] although to some extent it referenced and cited them in various places in the opinion.

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[64] *In re Humphrey*, 11 Cal.5th 135, at p. 155, fn. 7.

In any event, it is important to note that the public safety bail provisions that Proposition 9 inserted into the state Constitution include this unambiguous language: "Public safety *and* the *safety of the victim* shall be the *primary* considerations."[65] (Italics added.) As judges consider how this constitutional mandate should be interpreted and applied, they will surely recognize in the real world of today, in too many places in America, especially our inner-cities, the fear and reality of crime and violence (even "minor" crimes and "victimless" crimes, which often lead to violence) deprive ordinary law-abiding citizens of their right to life and liberty. Parents and grandparents should not be compelled to submit to the urgent necessity of placing their children and grandchildren in bathtubs for protection from stray bullets during neighborhood drive-by gang shootings or of hiding from brazen swarms of "gang-banging shoplifters," while they are shopping for Christmas gifts.

Unfortunately, constitutional bail mandates seem to be taking a complicated aura of late. For instance, "release pending trial proceedings" appear to be on their way to becoming mini-trials, rather than hearings, increasingly requiring witnesses, testimony under oath, and evidence. As these mini-trials on bail grow more complex, they may disrupt yet incomplete law enforcement investigations immediately after the arrests.

Empirical evidence, particularly from our nation's major cities, including San Francisco and Los Angeles, suggests that it is risky when releasing repeatedly violent criminals to rely on the hazy proposition that releasing arrestees "under appropriate nonfinancial conditions" — "such as electronic monitoring, regular check-ins with a pretrial case manager, community housing or shelter, and drug and alcohol treatment" — are sufficient.

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[65] Proposition 9's constitutional bail provisions read as follows in article I, section 28, subdivision (b): "In order to preserve and protect a victim's rights to justice and due process, a victim shall be entitled to the following rights: (1). . . , (2). . . , (3) To have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the defendant." Further, section 28, subdivision (f) provides: "In addition to the enumerated rights provided in subdivision (b) that are personally enforceable by victims as provided in subdivision (c), victims of crime have additional rights that are shared with all of the People of the State of California. These collectively held rights include, but are not limited to, the following: (1). . , (2). . . , (3) Public Safety Bail. A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, *the safety of the victim*, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. *Public safety and the safety of the victim shall be the primary considerations*. (Italics added.) [¶] A person may be released on his or her own recognizance in the court's discretion, *subject to the same factors considered in setting bail*. [¶] Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the prosecuting attorney and the victim shall be given notice and reasonable opportunity to be heard on the matter." (Italics added.)

Indeed, documented evidence of that risk is provided by the Yolo County District Attorney's Office and in a study conducted in the aftermath of Covid shutdown-induced "zero bail" policies.[66]

Despite the existing constitutional mandate that public safety *and* the *safety of the victim* shall be the *primary* considerations in bail proceedings, and the other statutory and constitutional mandates designed to protect the victims of crime, their families, and the public, we are well advised to consider anew and carefully U.S. Supreme Court Justice Robert H. Jackson's dissent in *Terminiello* in the face of the current trends toward drastically weakening bail procedures and the increasing use of *decarceration*: "Has our administration of criminal justice gone too far toward accepting the doctrine that civil liberty means the removal of all reasonable and practical restraints from arrested criminals, misdemeanants and felons, and that all local, related attempts to maintain order are impairments of the liberty of the arrestees, many of whom are repeatedly violent? Our choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if our system of justice does not temper its increasingly doctrinaire logic in this matter with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[67]

THE UNITED STATES CONSTITUTION AND THE RIGHTS OF VICTIMS OF CRIME AND THEIR FAMILIES.

Do victims of crime and their families have any federal rights?

Yes, they do, but they are purely statutory rights, which are subject to change by Congress and the president. More importantly, some of those rights require federal funding, which is will-o'-the-wisp at best.

The Victims of Crime Act (VOCA), which was passed by Congress in 1984 and amended in 1988, established the Office for Victims of Crime (OVC) and created the Crime Victims Fund. The latter provides funds to states for victim assistance and compensation programs that offer support and services to those affected by violent crimes.[68]

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[66] See *Zero Bail Case Study – Zero Bail Policies Increased Crime in Every Category*, Yolo County District Attorney's Office (February 14, 2023), https://yoloda.org/zero-bail-case-study-zero-bail-policies-increased-crime-in-every-category; and the study itself, *Yolo County Emergency Bail Analysis* (August 5, 2022), https://yoloda.org/wp-content/uploads/2023/02/Emergency-Bail-Analysis.pdf; Kristine Parks, "LA reinstates controversial zero bail policy as judge rules holding those who can't pay is unconstitutional, A recent study found violent crime tripled in one California county as a result of a no bail policy," Fox News (May 26, 2023), https://www.foxnews.com/media/l-a-reinstates-controversial-zero-bail-policy-judge-rules-holding-those-cant-pay-unconstitutional.

[67] *Terminiello v. Chicago* (1949) 337 U.S. 1, 37; and see, Justice Arthur Goldberg in his majority opinion in *Kennedy v. Mendoza-Martinez* (1963) 372 U.S. 144, 160 ["[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact."]

[68] https://ovc.ojp.gov/program/victims-crime-act-voca-administrators/laws-policies.

"VOCA uses non-taxpayer money from the Crime Victims Fund for programs that serve victims of crime. These funds are generated by fines paid by federal criminals to support services for over six million victims of all types of crimes annually through 6,462 direct service organizations, such as domestic violence shelters, rape crisis centers, and child abuse treatment programs. Sustained VOCA funds are needed to respond to the dangerous lack of available services for victims."[69]

In response to the question, "What Federal Rights Do Crime Victims Have?," "[t]wo federal statutes describe the federal Government's responsibilities to crime victims. The Victims' Rights and Restitution Act [of 1990] (VRRA) (34 U.S.C. § 20141) describes the services the federal Government is required to provide to victims of federal crime. The Crime Victims' Rights Act (CVRA) [of 2004] (18 U.S.C. § 3771) sets forth the rights that a person has as a crime victim. For purposes of these rights and services, victims are defined in specific ways in the law."[70]

Should there be an amendment to the U.S. Constitution guaranteeing legal rights for victims of crime and their families? For many years, proposals have been introduced, primarily in the U.S. Senate. But they have always failed.

Washington State Attorney General Ken Eichenberry sat on the President's Task Force on Victims of Crime in 1982. He suggested the idea of amending the U.S. Constitution by adding rights for victims of crime and their families. It was a stunning suggestion at the time. But, no more. Some prominent Democrats and Republicans, including President William Jefferson Clinton, have agreed through the years that there should be such an amendment. On June 25, 1996, President Clinton spoke on the subject during a special ceremony held at the White House. He was joined by U.S. Senators John Kyle of Arizona, a Republican, Diane Feinstein of California, a Democrat, and James Exon of Nebraska, a Democrat, along with several members of Congress, all Democrats,

The President declared in part:

"When someone is a victim, he or she should be at the center of the criminal justice process, not on the outside looking in. Participation in all forms of government is the essence of democracy. Victims should be guaranteed the right to participate in proceedings related to crimes committed against them. People accused of crimes have explicit constitutional rights. Ordinary citizens

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[69] https://nnedv.org/content/victims-of-crime-act.

[70] https://www.justice.gov/enrd/rights-victims: also visit the Nation Crime Victim Law Institute (NCVI), https://ncvli.org.

have a constitutional right to participate in criminal trials by serving on a jury. The press has a constitutional right to attend trials. All of this is as it should be. It is only the victims of crime who have no constitutional right to participate, and that is not the way it should be. Having carefully studied all the alternatives, I am now convinced that the only way to fully safeguard the rights of victims in America is to amend our Constitution and guarantee these basic rights: to be told about public court proceedings and to attend them; to make a statement to the court about bail, about sentencing, about accepting a plea if the victim is present; to be told about parole hearings to attend and to speak; notice when the defendant or convict escapes or is released; restitution from the defendant; reasonable protection from the defendant; and notice of these rights. If you have ever been a victim of a violent crime—it probably wouldn't even occur to you that these rights could be denied if you've never been a victim. But actually, it happens time and time again. It happens in spite of the fact that the victims' rights movement in America has been an active force for about 20 years now.

"…

"Two hundred twenty years ago, our Founding Fathers were concerned, justifiably, that Government never, never trample on the rights of people just because they are accused of a crime. Today, it's time for us to make sure that while we continue to protect the rights of the accused, Government does not trample on the rights of the victims."[71]

A OPTIMISTIC POSTSCRIPT

Almost 50 years have elapsed since the mid-1970's when the crime victims' legal rights movement was first seeded in California, inspired by four heroic men, lawyer Frank Carrington, Mayor Tom Bradley, Chief Probation Officer Jim Rowland, and Professor John Dussich.

Those early years of legal creativity fostered both introspection and pursuit of *Cardozian balance* in the law at all levels of the administration of criminal justice. This was the case across California, and eventually, the nation, with immense credit due to the bipartisan leadership of President Reagan

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[71] President William Jefferson Clinton, Remarks at Announcement of Victims' Rights Constitutional Amendment (June 25, 1996). For both the audio/video and transcript, see https://millercenter.org/the-presidency/presidential-speeches/june-25-1996-victims-rights-announcement; On April 16, 2002, President George W. Bush echoed President Clinton at the U.S. Department of Justice, Washington, D.C., https://georgewbush-whitehouse.archives.gov/news/releases/2002/04/20020416-1.html; see generally, "History of Law: The Evolution of Victims' Rights," including, "Federal Constitutional Amendment" and "State Constitutional Amendments," https://www.ncjrs.gov/ovc_archives/nvaa/supp/c-ch4.htm; and Paul G. Cassell, *Barbarians at the Gates, A Reply to Critics of the Victims' Rights Movement*, 1999 *Utah L. Rev.* 479, https://heinonline.org/HOL/LandingPage?handle=hein.journals/utahlr1999&div=20&id=&page=.

and Governors Deukmejian, Wilson, and Brown. Governor Gray Davis, a Democrat, also helped on several occasions in the early days, particularly while he was a state assemblyman. Indispensable were the "Gang of Four," Assemblymen McAlister and Stirling, and Senators Presley and Nielsen; Rod Blonien (my dear friend and colleague for decades); California's elected district attorneys, their assistants and deputies; the California District Attorneys Association; the bipartisan leadership of police chiefs and sheriffs; and virtually all of California's law enforcement associations.

Notwithstanding the efforts of so many former bipartisan civic leaders and politicians, especially prosecutors and peace officers, inspired and aided by the victims of crime and their families, much has since evolved in political and social thought and in the administration of criminal justice. Unfortunately, some of those changes have purported to transform criminals into victims, while the actual victims of crime and their families are once again abandoned and forgotten as human beings. The leaders of our nation and our 50 states must be reminded of Elie Wiesel's sobering observation, "One thing that is worse for the victim than hunger, fear, torture, even humiliation, is the feeling of abandonment, that nobody cares, the feeling that you don't count."

Accordingly, in 2023, and especially in 2024, a presidential election year, more than ever, civic and political leaders, whether progressive, liberal, conservative, Democrat, or Republican, must act imaginatively,[72] creatively

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[72] John W. Cooley opens with a lengthy chapter on "The Thinking Function" in his *Appellate Advocacy Manual, A Design and Decision-making Approach.* He suggests imagination is indispensable for lawyers and for judges, and I would add political leaders. Cooley seems to use Justice Frankfurter's letter to an inquisitive 12-year-old boy suggesting what to study to prepare to enter law school as a guide in his section headings which suggests we, in our profession, are artists, poets, essayists, even dreamers, and the like, at different times and in different circumstances. And so it is. Lincoln was all those things. This is not to suggest technical and legal skills and knowledge of statutory and constitutional law are not indispensable to the practice of law, to judging, or to politics. I only suggest that while we work diligently toward perfection in technical and legal skills and knowledge, we may be falling behind if we do not utilize our imagination to tantalize ourselves with, "did I consider," "perhaps," "maybe," "what if," and, "why not," throughout our professional lives. Einstein suggested, "Imagination is more important than knowledge; knowledge is limited, but imagination encircles the world. To see with one's own eyes, to feel and judge without succumbing to the suggestive power of the fashion of the day, to be able to express what one has seen and felt in a trim sentence or even a cunningly wrought word, is that not glorious? When I examine myself and my methods of thought, I come close to the conclusion that the gift of imagination has meant more to me than my talent for absorbing absolute knowledge. There is no doubt that a single creative thought has the power to change the world." Walt Disney also knew that, although he was, some might say, a mere cartoonist and movie maker. Even so, he called himself and those with whom he worked, "imagineers." They engaged in "imagineering." The term imagineering, a portmanteau, was popularized in the 1940s by Alcoa Aluminum to describe its blending of imagination and engineering and adopted by Walt Disney a decade later. Why shouldn't lawyers, judges, and politicians be imagineers in ethically appropriate circumstances? Lincoln and Frederick Douglass were imagineers. (John Stauffer, Giants: The Parallel Lives of Frederick Douglass and Abraham Lincoln (2009), preface, pp. xi-xii.) One final, related thought: An old, old friend and former colleague in the Alameda County District Attorney's Office, who is gone now, Howard Gilbert, at different times, was a consummate prosecutor and devoted defender. He was an imagineer of concluding arguments in jury trials. He spent countless hours meticulously preparing and trying his cases, but he also spent countless hours in each individual case that he tried, deeply pondering how to fit the facts and inferences he believed he had proven, beyond a reasonable doubt or by establishing the contrary, into the most compelling and persuasive story he could cobble to aid the jury to do justice. Riverside County Public Defender, for whom Howard then worked, suggested to me, "Every prosecutor's or defender's office should have a Howard Gilbert . . . , but only one." He was needling me because I originally suggested that he hire Howard. Even so, Howard was a master of the jury and oral argument. For more of John W. Cooley, see his *A Classical Approach to Mediation — Part I: Classical Rhetoric and the Art of Persuasion in Mediation* (1993) 19 University of Dayton Law Review 83, and *Part II: The Socratic Method and Conflict Reframing in Mediation* (1994) 19 U. University of Dayton Law Review 589.

and decisively, as they did so effectively in the 1970s and 1980s, and listen attentively and patiently to the plaintive cries of anguish by millions of victims of crime and violence and their families, all of them praying and pleading, largely alone and unheeded, for governmental protection from crime and violence and for prompt relief from their shared fears and miseries. The fact is that victims of crime and their families have been overwhelmed by malicious criminals and killers, whatever their age, mental condition, or motive, who currently roam free-range in too many places, largely in urban America, especially in our inner-cities. And, we must all remember, to the parent of a murdered child, none of those things matter. To that parent, they administration of criminal justice is failing.

In addition to enforcing crime victims' existing statutory and constitutional rights, here are some things that defenders of the public's right to life, liberty, and property could do:

First, given that past presidents, senators, and members of Congress *of both parties* declared their support for crime victims' rights, including a yet unrealized amendment to the U.S. Constitution, perhaps major political figures today from both parties could collegially collaborate and make such an amendment happen. After all, the idea has percolated since Washington State Attorney General Ken Eichenberry suggested it more than 40 years ago while serving on President Reagan's Task Force on Victims of Crime. President Clinton, too, endorsed it. Such an amendment is needed more today than ever.

Second, a major area of remaining concern is the lack of representation for victims. After all, criminal accuseds have a right to counsel under *Gideon*,[73] but their victims do not. Frank Carrington, once again, stepped into the breach with the book that he co-authored with James Rapp of the Illinois Bar about victims of crime and civil litigation. His seminal research and advocacy are memorialized in the ongoing work of the National Crime Victim Bar Association (NCVBA).[74]

Third, as observed in a seminal article by John Gillis and Douglas Beloof: "The failure of legal education to produce lawyers with any knowledge of crime victim law is a substantial barrier to enforcement of victims' rights. The course 'Victims in Criminal Procedure' is presently taught in only a few

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[73] See citation in footnote 5, *ante.*

[74] See https://victimbar.org and "Our History and the Legacy of Frank Carrington," https://victimbar.org/about-us/#history.

law schools, and victim law is not significantly addressed in any other existing criminal procedure casebook. As a result, year after year law students who wish to practice criminal or civil rights law graduate from law schools around the nation with no awareness that the victim field within criminal procedure exists. As a result, few young lawyers with training in victim law are available to crime victims."

Gillis and Beloof also explain the reason for this failure: "While unfortunate, the failure of legal academia to educate students about one of the most successful and dynamic civil rights movements of the last several decades is understandable. An indirect effect of the Warren Court, which aggressively extended federal constitutional law to the states, was that law school criminal procedure courses became almost exclusively about the federal constitution. Because federal constitutional law proscribes the boundaries of procedures within which states can formulate procedure, it does have relevance in the states. Because the only criminal law rights in the United States Constitution are defendants' rights, these are the only rights typically taught in law school. In trial procedure casebooks the focus is on the Federal Rules of Criminal Procedure. The difference in legal academia's distinction between a Supreme Court ruling which instantly dictates the nature of federal constitutional rights for the entire country and the incremental, albeit prolific, state-by-state development of victim statutes and state constitutional amendments is profound. Victims' rights are off the academic radar screen."[75]

Yet, if law schools can offer a variety of classes dealing with criminal accuseds' rights (as virtually all do), they can certainly offer at least one class on crime victims' rights.[76] If that seems daunting, they need only draw some inspiration from Cooley's chapter on "The Thinking Function."[77] With a little

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[75] John W. Gillis & Douglas E. Beloof, *Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts* (2002) 33 McGeorge Law Review 689, 696-698, https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=2235&context=mlr; more generally, see Victims in Criminal Procedure (4th ed. Carolina Academic Press 2018) (co-author with Douglas Beloof, Steven J. Twist, and Margaret Garvin); and Paul Cassell, *Defining 'Victim' Through Harm: Crime Victim Status in the Crime Victims' Rights Act and Other Victims' Rights Enactments*, ___ American Criminal Law Review __ (forthcoming) (with Michael Morris).

[76] I believe one reason they don't is inertia, or in plain language, "That is the way we do things around here." Early in my life and later in my professional career, I recognized many such declarations as challenges to be remedied. In baseball, if a player gets a hit three times every 10 at bats long enough, he winds up in the Hall of Fame. Why is that? Because few are able to fail 70 percent of the time and endure long enough to establish a sufficient record. I have answered enough challenges such as that presented by the dearth of law school classes dealing with the legal rights of victims of crime and their families to have learned that you can never prevail with any good idea, any worthy idea, unless you try, and if necessary, again and again. I have failed in trying roughly 70 percent of the time. Michael Jordan perfectly describes what failure meant in his basketball career in a television advertisement, https://www.youtube.com/watch?v=nvrbQBI4ElI.

[77] See footnote 72, *ante*.

thought, a new course comes to mind easily. My suggested title is, *Organizing for the Legal Rights of Crime Victims and their Families*. Such a class would survey the statutory and constitutional rights for victims that are on the books in most states and the legal and political strategies that succeeded historically to foster the broader agenda of *Cardozian balance*.[78] This proposed course would also focus on how coalitions are constructed and include instruction on laws governing funding, disparities in healthcare and mental health counseling for victims of crime and their families, and the sentencing, probation, and parole opportunities for crime victims or their survivors to be heard meaningfully. My proposed class, sprinkled ubiquitously into every law school in the nation, would surely catalyze a leap ahead toward informing future generations of lawyers and judges that nice people who become victims of crime, and their families, have rights, too, as observed by Chief Judge Wilbur K. Miller.[79] A related continuing legal education class conducted in all the law schools for lawyers and judges could also help to inform the present generation of crime victims as well.

I conclude with a few words about prosecutors and peace officers.

Prosecutors serve a distinct and indispensable function in our adversary system which is basic to the continued integrity of our state and federal administrations of criminal justice and to the continued vitality of our constitutional republic. They must be unwaveringly honest and ethical, of course, but they are not social workers or social reformers. Instead, prosecutors have a particular legal duty to be bold, courageous, diligent, and fair, but always aggressive whenever and wherever necessary to protect the victim and the public. They must seek convictions when the evidence is sufficient, decline to charge when the evidence is insufficient, and ask judges for prompt and consequential punishment of criminals who are convicted, especially violent criminals and killers. It seems forgotten in today's political and legal worlds that consequential sentencing plays a potent deterrent role, not only to the convicted criminals who receive empirically impactful sentences, but to those who may be tempted to commit similar crimes. At the

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[78] *Snyder v. Massachusetts* (1934) 291 U.S. 97, 122.

[79] *Killough v. United States* (D.C. Cir. 1962) 315 F.2d 241, 265 (dis. opn. of Chief Judge Wilbur K. Miller). ["Under our system of criminal law, the legal rights of a defendant must be protected even if the result is prejudice to the public. But justice does not require that those rights be exaggerated so as to protect the defendant against the consequences of his criminal act in a factual situation where he is not entitled to protection. That would be more than justice to the defendant, and unjustifiable prejudice to the public. In our concern for criminals, *we should not forget that nice people have some rights too*."]

same time, there are cases in which mercy is called far, but not in some purely emotive, irrational way.[80]

Prosecutors, whether progressive or traditional, take oaths of office fully and faithfully to enforce the law and defend the Constitution. They have no discretion or power to ignore massive categories of crime and violence under the rubric of prosecutorial discretion, which deals largely with individual cases.

And whether progressive or traditional, they must enforce the law evenly throughout their respective jurisdictions. They must fully, faithfully, and firmly seek – as well as deliver – *Cardozian balance*. In that connection it would be useful for all prosecutors to locate in their law libraries, old copies of the *Uniform Crime Charging Standards*, and the *Uniform Crime Charging Manual*, both published years ago by funding from the Law Enforcement Assistance Administration, or LEAA, and to read them carefully and apply them rigorously.[81] Copies of these two venerable and authoritative publications might be retrieved by the National Association of Attorneys General, the

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[80] The third annual Court-Clergy Conference was conducted in Sacramento in 2016. It focused on mercy and justice. The site for these conferences has varied from year to year. In 2016**,** the conference was held at the SALAM Center, a Muslim community center and mosque. Presiding Justice Vance W. Raye, California Court of Appeal, Third Appellate District, and Presiding Judge Kevin Culhane, California Superior Court, County of Sacramento, provided opening remarks and welcoming statements. The morning plenary session was presented by four clergy, Imam Mohamed Abdul-Azeez, Tarbiya Institute; Rabbi Mona Alfi, Congregation B'Nai Israel; Reverend Alan Jones, St. Mark's United Methodist Church; and Pastor Lesley Simmons, South Sacramento Christian Center. The afternoon session was presented by three judges, Justice Carol Corrigan, California Supreme Court; Justice Patricia Bamattre-Manoukian and Justice Nathan Mihara, both of the California Court of Appeal, Sixth Appellate District. At the time, these three justices have been judges and lawyers for more than 40 years each and were still serving with great distinction. Uniquely, Justice Corrigan and Justice Bamattre-Manoukian are Judicial Council *Jurists of the Year* and *St. Thomas More Award* recipients, the highest legal honors bestowed by their profession and by their faith. Something new and novel, a *judicial benediction* was presented by three judges, Justice William J. Murray, Jr., California Court of Appeal, Third Appellate District; Judge Barbara Kronlund, California Superior Court, County of San Joaquin; and Judge Garen Horst, California Superior Court, County of Placer. Judge Jim Mize, California Superior Court, County of Sacramento, describes the new *judicial benediction* generally this way: "Each of the three judges we invite, federal, state, and tribal, speak in ways that reflect our shared reverence for our profession and for the rule of law. Some judges who participate may choose to quote famous inspired legal quotes such as the Preamble to the Constitution or a passage from Abraham Lincoln's Second Inaugural Address. Other judges may reminisce a bit on why he or she became a judge, or reference comments someone may have made to them encouraging them to become a judge. Finally, others speak of how Atticus Finch, a fictional character, was his or her actual inspiration to become a lawyer." For the entire story, see Doug Potts, *Religious Conviction and Judicial Decision-Making: Weighing Justice and Mercy*, Sacramento Lawyer (March/April, 2017), at p. 10, https://issuu.com/milenkovlais/docs/v2_mb_saclaw_mar-apr__2017_web/10.

[81] My long ago, former prosecutorial colleague in the Alameda County District Attorney's Office, Justice Corrigan, authored an article which will help explain why I make this suggestion. See Carol Corrigan, *On Prosecutorial Ethics*, 13 Hastings Constitutional Law Quarterly 537 (1986) and related discussion in the text, *infra*, at p. 540 (footnotes omitted). "The prosecutor also carries the burden of upholding the public faith. He is empowered to make charging decisions, but it is his duty to make them fairly. If he fails to be fair, his failure affects not only himself and the accused, but that level of public trust on which the system depends. 'Where the prosecutor is recreant to the public trust implicit in his office, he undermines confidence, not only in his profession, but in government and the very ideal of justice itself.' ¶ In a democracy, the law must reflect the values of those who live under it. Americans take great pride in our commitment to justice. Accordingly, we use the law as a tool to assure a level of predictability, fairness and safety in our lives. Yet any tool is only as good as the workmen who use it."

50 state attorneys general, the National District Attorneys Association, and the 50 state prosecutors associations, to enable them to conceive and form a collective and collegial revision and republication council that would select a team of the best scholars from their state and national ranks to undertake the painstaking job of updating them. In but a short time, no more than a year, contemporary and well-grounded versions of the second editions of the *Uniform Crime Charging Standards* and the *Uniform Crime Charging Manual* could be published and made available to every prosecutor's office and law enforcement agency in the nation.[82]

Ultimately, even-handed, professional, and aggressive prosecutors and peace officers deal with everything from minor crimes, thereby utilizing practical and effective "broken windows" policing, to the most serious crimes, including murders of infants, gang drive-by ambushes and shootouts, and mass murders. Police officers are at risk every day. While less at risk, prosecutors to a significantly lesser extent personally and professionally also work in harm's way. Prosecutors have all faced death threats, and some have even been murdered for doing their jobs. But that is nothing compared to the routine dangers faced by peace officers or the numbers of them disabled by violent criminals or murdered.

Moreover, we must never forget that peace officers, all peace officers, in every community in America are prepared to die, and may well die at any given moment on any day or night while performing their duty for the citizens in their communities. This selfless willingness to engage danger is inculcated from day one into every cadet in every law enforcement academy. It becomes part of the head and heart of our nation's peace officers. The lyrics of a

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[82] Shared knowledge by prosecutors and peace officers is beneficial to all levels of law enforcement professionals and to victims of crime and their families, and to criminal accuseds and their families. Such ubiquitous knowledge can substantially benefit the administration of criminal justice by minimizing errors, particularly repeat errors. With the advent of digital technology, and in particular, the internet, another question lingers: Why don't law enforcement agencies and the California Commission on Peace Officer Standards and Training (POST) collaborate with the judiciary to devise a quick and easy to use digital mechanisms to provide every peace officer whose conduct is discussed in a supreme court or court of appeal slip opinion with a digital copy of that opinion. A digital copy should also be provided to the peace officer's commanding officer. What could be a better and more timely teaching tool for superior and subordinate peace officers than immediate receipt of specific judicial opinions that address how the courts assessed their conduct? In the past, I taught on occasion for POST. I have been friends with some of the heads of that agency. I asked the foregoing questions more than once and to no avail: Why aren't criminal jury instructions taught to peace officers. While peace officers may be taught *the law* as thought necessary for their work, including from the California Peace Officers Legal Sourcebook, among other sources, they have never been taught from *the book* of California jury instructions. It seems odd they would never have any interest in learning what juries are actually told by judges about the law related to the cases with which each officer is involved. (California has or had a Peace Officers Legal Sourcebook because I learned of Arizona's, obtained a copy, reviewed it, and suggested to Attorney General Deukmejian that our state might replicate it. He assigned top level legal staff to convert Arizona's sourcebook to one utilizing California law. It was once available in both hardcopy and digitally. I do not know whether that remains true.

country song, "American Soldier," apply to soldiers, to be sure, but those solemn lyrics also apply to peace officers. The song was written and first sung by Toby Keith in 2003. It captures an eternal verity in simple, plain language:

> "And I will always do my duty, No matter what the price,
> I've counted up the cost, I know the sacrifice.
> Oh, and I don't want to die for you, But if dyin's asked of me,
> I'll bear that cross with honor, 'Cause freedom don't come free.'"[83]

Consider the recent heroism of North Dakota police officer, Zach Robinson, who on July 14, 2023, was able to take down a Fargo suspect who had plans and materials to carry out a mass murder. The suspect killed Officer Jake Wallin and wounded two others, until from 75 feet away, Officer Robinson fired shots that first disabled the suspect's rifle, then ultimately brought the suspect down. Officer Robinson effectively halted any more casualties, and his body cam footage captured the whole thing.

In tribute to his heroism, North Dakota Attorney General Drew Wrigley urged citizens to "'be worthy' — worthy of what [Officer Zach Robinson] did, worthy of the service of law enforcement officers, 'worthy of what they're willing to do…' When the bodycam video is released, he asked, 'watch it and understand that there are people who will do these things [that] we won't and that we rely on them to do. Don't just go to their funerals.'" (Scott Johnson, "Be Worthy" — The Bodycam Video (August 20, 2023), https://www.powerlineblog.com/archives/2023/08/be-worthy-the-bodycam-video.php.)

And, don't forget, peace officers have families, too.[84]

Hopefully, the statutory and constitutional rights of victims of crime and their families will again become major elements in the daily work of the administration of criminal justice everywhere. And hopefully, *Cardozian balance* will once again become a shared universal value in the daily work of the administration of criminal justice in every local, state, and federal jurisdiction. Indeed, in this vision, a National Crime Victims' Bill of Rights would be amended into the U.S. Constitution, thereby becoming a new and important

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[83] See, *Robert K. Puglia, Freedom Is Not Free* (2005) 36 McGeorge L. Rev. 751, https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=2389&context=mlr.

[84] See John Kass, *Police Families, How Do They Bear It?* (July 31, 2020), Jewish World Review, http://www.jewishworldreview.com/0720/kass073120.php3.

element in the flow of the history of inalienable rights for everyone that began so long ago with the Magna Carta Libertatum and the Petition of Right.[85]

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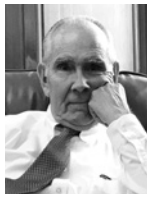

George Nicholson

[85] John P. J. Dussich, "International Victimology; Yesterday, Today and Tomorrow," esp., "I. Victimology in Historical Perspective, A. Legal and Linguistic Roots," https://www.unafei.or.jp/publications/pdf/RS_No70/No70_12VE_Dussich.pdf; and for a brief history of victims' rights provided by the National Organization of Victim Assistance (NOVA), https://www.trynova.org/wp-content/uploads/2018/06/NOVAwebinarWhereWeAreWithEnforceableVictimsRights.pdf.

HON. BARRY GOODE AND JOHN S. CARAGOZIAN*

California Without Law:

1846 Through 1850**

Forty years ago, Professor Jerold Auerbach observed that "the notion of justice without law seems preposterous, if not terrifying. A legal void is especially alarming to Americans, who belong to the most legalistic and litigious society in the world."[1]

But for those living in California between 1846 and 1850 – before it became a state – that was somewhat the situation. How they responded, and how the government at the time (such as it was) dealt with their concerns is a lesson in the role of law in society and of the desire for institutions that can secure orderly justice.

That period also sheds light on how different legal systems function in different cultures. As Professor Auerbach said, "How people dispute is, after all, a function of how (and whether) they relate…[A society may decide] to define a disputant as an adversary, and to struggle until there is a clear winner and loser; or alternatively, to resolve conflict in a way that will preserve, rather than destroy a relationship."[2] That difference was thrown into stark relief as one legal culture transitioned to another.

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** This article was originally a June 21, 2023, public program sponsored by the California Supreme Court Historical Society and co-sponsored by the California Lawyers Association, California Judges Association, Los Angeles County Bar Association, Loyola Law School, Ninth Judicial Circuit Historical Society, and Northern District Historical Society. The program was introduced by California Supreme Court Chief Justice Patricia Guerrero.

[1] Jerold S. Auerbach, *Justice Without Law*? (Oxford, New York, Toronto, and Melbourne: Oxford University Press, 1983), 3.

[2] Ibid., 8-9.

ALTA CALIFORNIA

Mexico broke away from Spain in 1821. It sought to establish a government that would be effective over an enormous territory, including Alta California – comprising the lands of present-day California, Arizona, and New Mexico, and parts of Colorado, Nevada, Utah and Wyoming.[3]

Communication between Mexico City and Alta California was difficult and time-consuming. Transportation was tedious at best.

Over time, especially beginning in the 1830s, those persons of Spanish ancestry who were born in Alta California began identifying themselves as "Californios" – as distinguished from "Mexicans."[4]

Some government existed in Alta California, but it was unstable. Between 1829 and 1845, there were at least twelve disputes among Californio factions. Often the battles were fought over whether the government should be seated in Northern California or Southern California: Monterey or Los Angeles.[5]

As early as 1831, Alta California's representative in the Mexican Chamber of Deputies (Carlos Antonio Carrillo) told that body that a justice system run from Mexico City would not work in Alta California.[6]

Not surprisingly, conflicts emerged among the Mexican government, territorial governors, Californios, and the Catholic Church. For example, in 1833 the California missions were secularized.[7] The Church lost tens of thousands of acres to government insiders and other grantees. There followed years of conflicting orders and counter-orders and even armed threats.[8]

In 1837, in an effort to tame some of the disorder, the Mexican Congress passed laws to establish a system of courts throughout the country – including Alta California.[9] But, as Governor Carrillo feared, those tribunals were not

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[3] *See* https://guides.loc.gov/treaty-guadalupe-hidalgo

[4] Leonard Pitt, *The Decline of the Californios* (Berkeley, Los Angeles, and London: University of California Press, 1998), 5-7.

[5] Michael Gonzalez, "War and the Making of History: The Case of Mexican California, 1821-1846," *California History* 86, no. 2 (2009): 10.

[6] Carlos Antonio Carrillo, "Speech…Requesting the Establishment of Adequate Courts for the Administration of Justice." In *The Coming of Justice to California*, edited by John Galvin, 49-60. San Francisco: John Howell – Books, 1963.

[7] Hubert H. Bancroft, "History of California, vol. 4, 1840-1845," *The Works of Hubert Howe Bancroft*, vol. 21 (Boston: Elibron Classics, 2004) 42 et seq.

[8] *See, e.g*, Leonard Pitt, supra note 4, at 7 ("Unquestionably, the chief reform of the Mexican era was secularization of the missions. . . . [S]ecularization cut the last cord still linking California to its Spanish 'mother.' It upset class relations, altered ideology, and shifted . . . enormous wealth.").

[9] Judicial Act of May 23, 1837. See David J. Langum, Sr., *Law and Community on the Mexican California Frontier*, 2nd ed. (Los Californianos *Antepasados*, Vol. XIII) (San Diego: Vanard Liithographers, 2006) 35 and Leon R. Yankwich, "Social Attitudes as Reflected in Early California Law," *Hastings Law Journal* 10, no. 3 (1959), 251-52 citing 1 Cal. 559 (1851). (Not all versions of 1 *California Reports* contain that text.)

easily adaptable to Alta California, and to a considerable extent, those courts were not even established. Instead, each town was governed by an alcalde: a role combining judicial, legislative, and executive responsibilities.

At the time, Alta California was largely populated by Indians, plus Spanish, Mexicans, and Californios. Even before the Gold Rush, settlers from the United States, England, Ireland, Scotland, France, Germany, Peru and elsewhere also lived there.

There was considerable discussion among these residents about the inevitability of Alta California's conquest by a foreign power.[10] The American consul, Thomas Larkin, speculated that even the Californios might wish to separate from Mexico.[11]

There is a report that some of the leading figures of Monterey, including prominent Californios, Americans, an Englishman, and a Scotsman, met in late March or early April 1846 to discuss *which* country should occupy Alta California; some favoring England; some the United States.[12]

Those discussions became moot with the outbreak of the Mexican War on April 25, 1846. More accurately, given the lack of communication in those days, the war started in Alta California on July 2, 1846, when three ships from the United States Navy's Pacific Squadron sailed into Monterey harbor and occupied the town.

MEXICO-U.S. WAR

The Mexico-U.S. War in 1846 and '47 was the capstone of Manifest Destiny. The U.S. acquired half a million square miles—330 million acres— including Pacific ports and land that eventually produced billions of dollars in crops, livestock, gold, and silver. The U.S. also acquired a territory ruled by Mexican law, and a growing American population that was dissatisfied with what it considered to be the absence of the rule of law.

The seeds of war – and the clash of legal systems -- were sown in the 1820s, as thousands of Americans migrated into the then-Mexican territory of Texas. Initially, Mexico welcomed them, hoping that Americans would fight alongside Mexican Texans against Native tribes. The Americans, however, had

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[10] Hubert H. Bancroft, "History of California, vol. 4, 1840-1845," *The Works of Hubert Howe Bancroft*, vol. 22 (Boston: Elibron Classics, 2004) 416-417; quoting Manuel Castenares, Deputy for Alta California to the Chamber of Deputies, 1844.

[11] Thomas O. Larkin, Letter dated May 21, 1846, in *The Larkin Papers*, ed. George P. Hammond (Berkeley: University of California Press, 1955), 4:385-386.

[12] William Swasey, *The Early Days and Men of California* (Oakland: Pacific Press Publishing Company, 1891), 57-58.

different priorities; they brought slaves, grew cotton, and had little loyalty to Mexico. Mexico began to view American immigration as a threat. In 1829, Mexico partially outlawed slavery.[13] The following year, it capped American immigration into Texas and re-imposed taxes and tariffs on the immigrants.

In 1835, Texans—mostly Americans—revolted and in 1836, established an independent republic.[14]

Many Texans wished to have the U.S. annex Texas as a state, but two obstacles appeared. First, Mexico refused to recognize Texas' independence and opposed U.S. annexation. Second, many Americans opposed admitting Texas as a slave state.

Texas was an issue in the presidential election of 1844. The Democrats nominated James Polk, a slave-owning Tennessean and an outspoken proponent of annexation. He won the November election.

Even before Polk took office, Congress agreed to admit Texas as a state, effective December 1845.[15] Mexico refused to recognize the U.S.'s annexation of Texas, especially with the U.S. proposing that the boundary be as far south as the Rio Grande – adding thousands of square miles to Texas. Mexico severed diplomatic relations with the U.S. and began to talk of war.

Polk tried to negotiate with Mexico to acquire some of its northern territory. Many Americans viewed that as an effort to extend slavery westward and opposed the effort.

In 1845, Polk sent a State Department official to Mexico City to offer $25 million (or even $30 million) in exchange for Mexico's (1) recognition of the Texas annexation -- with the Rio Grande as the boundary, and (2) sale of then-Mexican California and the New Mexico territory. Mexico's government denied the U.S. official an audience.[16]

President Polk saw that denial as an insult. In 1846, U.S. Army troops marched south into the disputed section of Texas. U.S. troops were on the northern bank of the Rio Grande — south of the border claimed by Mexico. There, in April 1846, Mexico fired on and killed American soldiers.[17]

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[13] Alwyn Barr, *Black Texans: A History of African Americans in Texas*, 1528–1995 (Norman, Oklahoma: University of Oklahoma Press, 2nd ed.,1996), at 14.

[14] *E.g.,* William Davis, *Lone Star Rising* (College Station, Texas: Texas A&M University Press, 2006), at 282.

[15] *See, e.g.*, Frederick Merk, *History of the Westward Movement* (New York, New York: Knopf, 1978), at 286; Michael Holt, *The Fate of Their Country: Politicians, Slavery Extension, and the Coming of the Civil War* (New York, New York: Hill & Wang, 2005), at 215.

[16] *See, e.g.*, https://www.archives.gov/education/lessons/lincoln-resolutions

[17] *E.g.,* K. Jack Bauer, *Zachary Taylor: Soldier, Planter, Statesman of the Old Southwest* (Baton Rouge, Louisiana: Louisiana State University Press, 1993), at 149.

Polk requested a declaration of war against Mexico, and Congress obliged him in May 1846.

The ensuing war did not last long and in January 1847, the Treaty of Cahuenga ended the part of the military conflict in Alta California. The Mexicans disarmed and recognized U.S. authority pending a comprehensive treaty.[18]

Polk appointed the number two official in the State Department - Nicholas Trist - to negotiate that comprehensive treaty. Trist was a politically connected lawyer who had married one of Thomas Jefferson's granddaughters and had been Andrew Jackson's White House secretary.[19]

Polk's written instructions to Trist included non-negotiable terms: Mexico must recognize the Rio Grande as Texas's boundary and must cede all of the New Mexico territory and "Upper California." In exchange, Polk authorized Trist to pay Mexico up to $20 million. Armed with these instructions -- plus two pistols — Trist arrived in U.S.-occupied Mexico City in September 1847.

There, Trist faced myriad problems. U.S. commanding general Winfield Scott, known as Old Fuss and Feathers, initially resisted Trist, claiming that he (Scott) had the authority to negotiate a treaty on behalf of the U.S. Worse, the U.S. invasion had strengthened Mexico's intransigence, and simultaneously, so weakened Mexico's government that it was unclear who had authority to negotiate on its behalf.

Even after General Scott relented, other U.S. generals continued to squabble over control of Mexico's future. For example, some were part of an "All Mexico" movement, urging the annexation of the entirety of Mexico. Even some Mexicans agreed, hoping that the U.S. could impose order on war-borne chaos. Other U.S. leaders urged that no annexation beyond Texas occur, lest it (1) be morally condemned as European-style conquest and (2) intensify the ongoing slavery debate.

Trist was finally able to begin negotiations with the Mexicans (sometimes using a British diplomat as a go-between). Perhaps as a tactic, Trist apparently raised the possibility of setting the Texas boundary north of the Rio Grande. In any event, negotiations slowed, at least partly owing to the Mexican government's disorder.

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[18] *E.g.,* Dale Walker, *Bear Flag Rising: The Conquest of California 1846* (New York, New York: Forge Books, 1999), at 239-46.

[19] *See, e.g.*, Amy Greenberg, A Wicked War: *Polk, Clay, Lincoln, and the 1846 U.S. Invasion of Mexico* (New York, New York: Knopf Doubleday Publishing Group, 2012), at 92-93.

President Polk grew frustrated with the delays and with Trist's apparent disregard of his instructions that the Rio Grande boundary was non-negotiable. So, in October 1847, Secretary of State (and future President) James Buchanan recalled Trist to Washington, D.C. and ordered him to discontinue negotiations. He no longer had any lawful authority to negotiate.

Trist notified the Mexicans of his recall, but delayed his actual departure until a replacement arrived and a military escort could accompany Trist back to Veracruz.

While waiting, he changed his mind and decided to resume negotiations. He thought he could negotiate a treaty comporting with Polk's instructions and that the U.S. Senate, faced with a *fait accompli*, would have little choice but to ratify the treaty.

Trist's strategy depended on speed. The arrival of the new U.S. negotiator would undo his progress and might even reignite war. Trist informed his Mexican counterparts of his recall, and they shared his concerns. Accordingly, secret negotiations began in January 1848, in the Mexico City suburb of Guadalupe Hidalgo.

Upon learning of Trist's defiance, Polk ordered Trist to leave Mexico immediately and cut off all Trist's compensation, including expenses. Once again, Trist refused to heed his superiors' instructions.

On February 2, 1848, Trist and the Mexicans agreed to the Treaty of Guadalupe Hidalgo.[20] It included all of Polk's non-negotiable terms: setting the Texas boundary at the Rio Grande and Mexico's ceding Upper California and the New Mexico territory. Mexico even agreed to a $15 million payment, less than the $20 million originally authorized by Polk.

Trist's strategy proved correct: The U.S. Senate — sensing Americans' growing discontent with the war that had lasted longer and cost more lives than anticipated (keep in mind that both Henry Clay and a young congressman whose name was Abraham Lincoln had opposed the war)— ratified the treaty with minor changes. The Treaty's provisions included:

- Under Treaty Article V, Mexico lost over half of its territory, and the U.S. gained California, Arizona, and New Mexico, and parts of Colorado, Nevada, Utah, and Wyoming. Texas's southern boundary was fixed at the Rio Grande.

[20] *See generally* https://www.archives.gov/education/lessons/guadalupe-hidalgo.

- Under Article VIII, Mexicans living in now-U.S. territory—such as California—had the option of becoming U.S. citizens. Property owners had guarantees to their property "equally ample as if the same belonged to citizens of the United States."
- Under Article IX, Mexicans in now-U.S. territory were to enjoy "all the rights of citizens of the United States, according to the principles of the Constitution . . . ."[21]

All from a Treaty that Trist lacked authority to negotiate or sign.

THE INTERREGNUM

As noted, the Treaty of Guadalupe Hidalgo offered U.S. citizenship to all Mexicans who remained in Alta California after the war. They could look forward to all the rights of Americans once Congress ratified the Treaty. But, in the "meantime," the rights of the Americans – and, indeed, everyone in California — were murky at best.

In one sense, the law was crystal clear. This was a time when kings and countries were warring and conquering territories on a regular basis. So, it was important to know what law governed a conquered province.

International law left no doubt. All law regarding the commerce and general conduct of the population of the conquered territory remained in force until the conqueror changed it. Only the people's sovereign and their relation to that sovereign changed.

The U.S. Supreme Court held as much in 1828 in an opinion by Chief Justice John Marshall.[22] The military governor of California, Bennett Riley, knew this rule well. In 1849, he ordered the printing of Mexican laws (translated into English); with the title "The Mexican Laws…as are supposed to be still in force and adapted to the present condition of California." The introduction to that volume cites Marshall's opinion as the reason for publishing Mexican laws.[23]

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[21] https://www.archives.gov/milestone-documents/treaty-of-guadalupe-hidalgo.

[22] *American Insurance Company v. 356 Bales of Cotton*, 26 U.S. 511, 544 (1828).

[23] J. Halleck and W.E.P. Hartnell, *Translation and Digest of Such Portion of the Mexican Laws of March 20th and May 23rd, 1837, as are Supposed to be Still in Force and Adapted to the Present Condition of California; with an Introduction and Notes*, 1849, 3. https://books.google.com/books?id=WLsLAQAAIAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false

But there were two hitches. One, California was under military rule from the time of conquest until December 20, 1849. Congress had difficulty admitting California into the Union as a free state without admitting a slave state to match, and none was available. So, for those three years, Alta California remained under military rule. During that period, the military governor's orders could (and sometime did) supersede other law.

Two, as noted earlier, the Mexicans never really had implemented a complete court system in Alta California. Instead, it gave *alcaldes* power to run a community. So even though Mexican law continued, it was often difficult for the alcaldes (especially Americans in those posts) to determine what the law was. That was even the case for an American as learned as Stephen J. Field, whose judicial career began as alcalde of Marysville.[24]

And the *alcaldes* had great power indeed. Walter Colton, the alcalde of Monterey, explained the scope of his responsibility this way:

> [I have] duties similar to those of a mayor of one of our cities, without any of those judicial aids which he enjoys. It involves every breach of the peace, every case of crime, every business obligation, and every disputed land-title within a space of three hundred miles… Such an absolute disposal of questions affecting property and personal liberty, never ought to be confided to one man. There is not a judge on any bench in England or the United States, whose power is so absolute as that of the alcalde of Monterey.[25]

And the alcalde had more than just judicial powers. Colton explained that the alcalde,

> …is also the guardian of the public peace and is charged with the maintenance of law and order whenever and wherever threatened or violated; he must arrest, fine, imprison, or sentence to the public works…and he must enforce, through his executive powers, the decisions and sentences which he has pronounced in his judicial capacity.[26]

He knew he was supposed to apply Mexican law, but, he noted, "in minor matters, the alcalde is himself the law." "Minor matters" included cases in which he (who did not speak Spanish) was unfamiliar with Mexican law.

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[24] Stephen J. Field, *Personal Reminiscences of Early Days in California with Other Sketches*, 1893. (https://archive.org/details/personalreminis00fielgoog/page/n4/mode/2up)

[25] Walter Colton, *Three Years in California* (Stanford: Stanford University Press, 1949) 55.

[26] Ibid., 230-231.

This did not sit well with the populace, particularly with Americans who were beginning to occupy Alta California. Indeed, the very first edition of *The California Star* newspaper, published in Yerba Buena (soon to be called San Francisco) on January 9, 1847, contained an article entitled, "The Laws of California." In it, the author wrote,

> We hear the enquiry almost every hour during the day "WHAT LAWS ARE WE TO BE GOVERNED BY:" we have invariably told those who put the question to us, 'if anybody asks you tell them you don't know' because…the same persons would be told at the Alcalde's office or elsewhere that 'no particular law is in force in Yerba Buena…and that all suits are now decided according to the Alcalde's NOTIONS of justice, without regard to law or the established rules governing courts of equity.' [W]e hoped that …the citizens [would be] secured and protected in all their rights by a scrupulous adherence on the part of the judges to the WRITTEN LAW of the Territory."[27]

California pioneer Robert Semple, who would later preside over the 1849 Constitutional convention wrote, "we have alcaldes all over the country assuming the power of legislatures, issuing and promulgating their bandos, laws, orders, and oppressing the people."[28]

A writer who called himself "Pacific" wrote in the January 22, 1848 *California Star*,

> "since the United States flag was hoisted over it, [California] has been in a sad state of disorganization; and particularly as regards the judiciary….[W]e have had no government at all during this period, unless the inefficient mongrel military rule exercised over us be termed such."[29]

It would be easy to multiply examples of this sentiment. Nathaniel Bennett, one of the three men appointed to California's newly created Supreme Court in 1850, put it in this nutshell:

> Before the organization of the State Government, society was in a disorganized state. It can scarcely be said that any laws were in existence further than such as were upheld by custom and tradition.[30]

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[27] "The Laws of California," *The California Star,* January 9, 1847, 2. https://cdnc.ucr.edu/?a=d&d=CS18470109.2.14&srpos=1&e=------184-en--20--1--txt-txIN-California+Star-------

[28] "Council-Late Emigrants-Judiciary-Convention," *The California Star* February 13, 1847, 2; attributed to Semple in Cardinal Goodwin, *The Establishment of State Government in California*, 63. https://babel.hathitrust.org/cgi/pt?id=uc1.$b99822&view=1up&seq=85;

[29] Letter to the editor, *The California Star*, January 22, 1848, 2. https://cdnc.ucr.edu/?a=d&d=CS18480122.2.3&e=------184-en--20-CS-1-byDA-txt-txIN-California+Star----1848---

[30] 1 California Reports, preface, vi (1850).

These criticisms may have been a bit hyperbolic. There were trials before alcaldes, some with juries.[31] Both civil and criminal cases were heard. But the Mexican legal system in Alta California had been designed for pastoral communities which needed conciliation and harmony. That did not sit well with the Americans whose legal culture was different, which was adversarial. In addition, Americans' concept of limited government included a separation of legislative, executive, and judicial power and the guarantee of trial by jury.

And it was not just the literati who complained; the criticism was widespread. Mass meetings were held in many towns including San Francisco, San Jose, Santa Cruz, Monterey, Sacramento, and Sonoma.[32] The people's instinct for American-style government and what they regarded as a proper system of justice animated them. They chafed under Mexican-based alcalde rule and under U. S. military rule and clamored for the creation of a familiar civilian government.

1849 CONSTITUTIONAL CONVENTION

Against this background, in June 1849, U.S. military governor General Riley called for a convention to draft a constitution. Riley lacked express authority for such a call. Once again, a U.S. official was acting without legal authority to address a problem created by the absence of a clear system of laws.

There were important issues to be addressed: Riley's call left the convention free to decide for itself such fundamental questions as whether to seek admission to the U.S. as a state or a territory, what should be the state's or territory's boundaries, and whether to ban or permit slavery.

Pursuant to General Riley's call, 48 delegates were elected by district to convene on September 1, 1849, to write a California constitution.[34] The location was Monterey's Colton Hall, which still stands.

The delegates represented a cross-section of California's population, with the major exception of Native Americans, who were unrepresented. Most of the delegates were under 40 years old. Twenty-two were Americans from

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[31] Barry Goode, "The American Conquest of Alta California and the Instinct for Justice: The 'First' Jury Trial in California," *California History* 90, no. 2 (2013): 22-23.

[32] Cardinal Goodwin, *The Establishment of State Government in California, 1846-1850* (New York: Macmillan, 1914), 71-73. As to Sonoma, see Theodore Grivas, *Military Governments in California 1846-1850* (Glendale: The Arthur H. Clark Company, 1963), 201. See also Bancroft, "History of California, vol. VI 1848-1859," *The Works of Hubert Howe Bancroft, Vol. 23* p. 269-270 found at https://archive.org/details/histofcalif02bancroft/page/n9/mode/2up.

[33] *See, e.g.*, William Ellison, A Self-Governing Dominion: California 1949-1860 (Berkeley and Los Angeles, California: University of California Press, 1950), at 19-22.

[34] Id., at 25.

free states, 15 were from slave states, 7 were Californios, and 4 were born elsewhere.[35] The convention hired an interpreter for the Californios who spoke little or no English.

As for the delegates' backgrounds, a slim plurality—14—were lawyers, a dozen were farmers or ranchers, 8 were merchants or traders, 4 were military men, and the rest were of various other backgrounds, including one whose profession was described as "elegant leisure."[36] Interestingly, no delegates were described as miners, perhaps because miners were loath to leave their claims.

The delegates had little guidance, whether from General Riley or from their own materials. One delegate, William Gwin—a former New Orleans customhouse official who would become one of California's first two U.S. Senators—had copies of the Iowa and New York state constitutions, but no other materials were available.[37]

The convention delegates grappled with four open-ended, fundamental questions: (1) would California outlaw or permit slavery, (2) what would be California's eastern boundary, (3) would California seek admission as a single entity or as two or more entities, and (4) would California seek admission as a territory or a state?

Regarding the first question, the delegates voted for a declaration of rights, one of which was to outlaw slavery in California. Some delegates may have been morally opposed to slavery; others, however, may merely have wanted to protect miners from low-wage competition from slaves. In addition, while opposing slavery, the delegates harbored the racial and gender prejudices and mores of the era, as the draft constitution limited voting to "white male citizens."[38]

The second question—namely, California's eastern boundary—ignited lengthy debate. Some delegates wanted California to be as big as possible, that is, extending eastward through present-day Nevada, Utah, Arizona, and New Mexico. Eventually, a majority of delegates voted for a smaller state, with the eastern boundary just beyond the Sierra Nevada so as to include the then-known mineral wealth.

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[35] Id.

[36] J. Ross Browne, *Report of the Debates in the Convention of California on the Formation of the State Constitution in September and October, 1849* (Washington, D. C.: John T. Towers, 1850), at 478-79.

[37] *See* Ellison, supra note 33, at 27.

[38] *See, e.g.*, id. at 27-29.

A rationale for the smaller state was governability, especially the difficulty of transportation and communication across the Sierra during winter.[39] Another rationale for a smaller state was the national debate over slavery: Congress could more easily admit California as a free state if Congress retained free-versus-slave flexibility for the rest of the newly conquered territory.

The third and fourth questions were how many entities would California be and would it be a state or territory. Those questions overlapped. The southern California delegates were approximately one-quarter of the convention's total, and initially, all voted against California seeking admission as a single state. Southern Californians' concerns included taxes and representation. In a single California, property taxes would fall disproportionately on southern California. Northern Californians typically did not have title to their mining claims, but the southern Californians owned ranchos that would be taxed. Southern Californians were concerned, too, that the newly populous north would dominate California's government. In other words, southern Californians feared that they would be paying the bills but without proportionate political power.

Southern California delegates therefore proposed dividing California at San Luis Obispo. The portion of California located north of San Luis Obispo's latitude would apply to be admitted as a state and would be responsible for financing its own government. The southern section would be admitted as a territory, with the federal government responsible for financing the territorial government.

However, the northern delegates were concerned that applying as two entities, one as a state and one as a territory, would signal conflict within California and would complicate and prolong the admission process in Washington, D. C. Eventually, delegates in Monterey compromised. California would seek admission as a single state, but each county would elect its own tax assessors, thereby giving southern counties some local control over property taxes.[40]

The convention completed its work in six weeks, on October 12, 1849. All 48 delegates signed the draft constitution.

The next step was to ask voters for their approval. Originally, 1,000 copies of the draft constitution were printed in English and 250 copies in Spanish so as to inform voters of the constitution's provisions. Later, more copies were printed.[41]

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[39] *See* id. at 33-34.

[40] *See* id. at 36-37.

[41] Id. at 41, 47-48.

In December 1849, voters overwhelmingly approved the constitution, 12,061 in favor and only 811 opposed.[42] That same month, the legislature was elected and met, despite the fact that California had yet to be admitted into the United States.[43]

At last, Alta California had some law recognizable to an American.

Still, it took until September of 1850 for the U. S. Congress to admit California as a state, and then only as part of the Compromise of 1850 – Henry Clay's final effort to stave off civil war while admitting a free state without admitting a slave state. Along with California's admission, that compromise included a strengthened Fugitive Slave Act and the organization of Utah and New Mexico as territories without deciding the slavery question there.[44]

In the meantime, California was still seeking to create a body of law amenable to its gold rush population.

THE CLASH OF CULTURES MADE MANIFEST: *VON SCHMIDT V. HUNTINGTON*

The uncertainties that plagued the legal system in California during the years from the American conquest to the adoption of California first constitution did not magically disappear upon ratification. Rather, as illustrated by an early case, California courts grappled with the clash of legal cultures – Mexican and American – and sometimes chose to disregard controlling authority to support the transition to the new system of law.

The case was *Von Schmidt v. Huntington*.[45] It is on page 55 of Volume 1 of California Reports; just the thirteenth case decided by the new Supreme Court. Indeed, the trial and Supreme Court decision all occurred before Congress admitted California as a state.

The case arose out of a gold rush dispute.[46] In 1849, a group of twenty-nine men in New York founded the New York Union Mining Company. They raised money for the company, agreed to travel to the gold fields via Panama,

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[42] Id. at 53.

[43] Id. at 56-57.

[44] *See generally* https://guides.loc.gov/compromise-1850.

[45] *Von Schmidt v. Huntington* (1850) 1 Cal. 55.

[46] A more complete description of the case and the events surrounding it can be found in: Barry Goode, "The California Supreme Court's First Mistake: *Von Schmidt v. Huntington* – and the Rise, Fall and Ultimate Rise of Alternative Dispute Resolution," *California Legal History* 17 (2022): 267. The history of the New York Union Mining Company and its eventual demise is taken from *Von Schmidt v. Huntington* (1850) 1 Cal. 55 and the Transcript from Records of Court of First Instance, California Supreme Court Case No. 26, filed April 15, 1850, California State Archive, Sacramento, California.

and then work together as a group in the gold country for four and a half years. But that's not how things played out.

The company crossed the isthmus to Panama City to catch a ship to San Francisco. But when they got there, thousands of forty-niners were already waiting for a ship. The problem was that many ships sailed to San Francisco, but few returned, because the crews deserted for the mining camps. Ships piled up in San Francisco harbor.

One historian explained how they managed the Panama mayhem—that is, the imbalance between many passengers and few ships:

> "By a combination of priority, lottery, bribery, trickery and ticket scalping, prefaced by mass meetings and committees of protest, the Americans on shore were screened and … [the] lucky persons selected."[47]

At least three members of the New York Union Mining Company succeeded in elbowing to the front of the line and got passage on an early ship to California. One of them was Julius von Schmidt. The three landed in San Francisco in June 1849. The rest of the company was stuck in Panama and did not arrive for another three months.

The three who got there early did not just sit around. They appear to have headed for the goldfields to seek their fortune.

When the rest of the company arrived, the three early arrivals refused to join their fellow New Yorkers. Not only would they not attend meetings of the company, but "they exerted their efforts to break up and disorganize [the company]…and openly declared that they no longer considered themselves members of the association."

A few days later, Peter Von Schmidt, the father of Julius, arrived. Although Peter was also a member of the New York Union Mining Company, he apparently sided with his son, and the majority accused him, too, of desertion.

Still, the company had brought a fair amount of equipment with them, including some "gold washing machines" invented by Peter Von Schmidt. The question arose as to who was entitled to that equipment or the proceeds of their sale.

That led, of course, to a lawsuit between the bulk of the New York Union Mining Company, who were plaintiffs, and the three early arrivals plus Peter Von Schmidt, who were defendants.

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[47] John Walton Caughy, *The California Gold Rush* (Berkeley and Los Angeles: University of California Press, 1975), 65-66.

The case first came before one of the more colorful characters of early California, Judge William B. Almond. He was born in Virginia, headed west with a fur trapping company, and then settled back in Missouri to practice law and enter politics. When he heard of the gold strike, he rushed to California arriving in late July 1849.[48] Just two and a half months later he was on the bench.[49]

> "He would often sit in his court on an old chair tilted back, with his feet perched, higher than his head, on a small mantel over the fireplace; and in that position, with a red shirt on and sometimes scraping the dirt from under his nails or paring his corns he would dispense justice."[50]

He could not be expected to know Mexican law. But that was a problem, for as noted, the law of a conquered province remains in full force and effect (as between private parties) unless and until the conquering government affirmatively replaces those laws.

Lest there be any doubt, the new California Constitution expressly provided for the continuation of Mexican law:

> …all laws in force at the time of the adoption of this constitution, and not inconsistent therewith, until altered or repealed by the legislature shall continue…[51]

So Mexican law was still in effect. But one of the most important features of Mexican law – of alcalde government – was *"conciliacion"*, conciliation. In old Alta California, towns were small, community was important, and harmony was valued. So, whenever a civil dispute arose, Mexican law provided that no one could file suit without first engaging in mediation.

> Conciliation was "a fixed principle under the Mexican law, and in fact of the civil law from which it sprang… [A]lcaldes…were the ministers of conciliation."[52]

Pre-filing mediation was key to keeping the peace in a small, tight knit frontier community. And it worked. Between 85% and 90% of the civil cases

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[48] William McClung Paxton, *Annals of Platte County, Missouri: From Its Exploration Down to June 1, 1897; With Genealogies of its Notes Families, and Sketches of its Pioneers and Distinguished People* (Kansas City, Mo.: Hudson-Kimberly Publishing Company, 1897), 110, 289-290, https://archive.org/details/annalsofplatteco00paxt

[49] Goode, "The California Supreme Court's First Mistake" *supra*, 276, TAN 34.

[50] Theodore Henry Hittell, *History of California*, vol. II, book VII (San Francisco: Pacific Press Publishing House and Occidental Publishing Co.: 1885) 778, https://archive.org/details/historyofcalifor0002theo/page/778/mode/2up?q=Almond

[51] Constitution of the State of California, 1849, Schedule (following Art. XII), Sec. 1.

[52] Hittell, *supra note 50*, 777.

brought to the alcalde were resolved by conciliation.[53] (That's not surprising. Approximately 87.5% of all civil cases filed in California today settle before trial.)[54]

So, when Von Schmidt was sued by the New York Union Mining Company, he moved to dismiss the case on the ground that plaintiffs had not first sought conciliation – they did not engage in pre-filing mediation as required by Mexican law.

Judge Almond had a rule: no lawyer was allowed to argue for more than five minutes.[55] That was hardly time to explain to the man from Missouri the niceties of Mexican practice and procedure.

The Americans in Northern California had been inveighing against alcalde rule for three years. They wanted nothing to do with a Mexican system that tried to mediate disagreements and keep the peace. Judge Almond – an American through and through – had no doubts. He denied the motion and decided the case on its merits.

Von Schmidt *et al* appealed. Their attorney was John Dwinelle. He was quite prominent, fluent in Spanish, and learned in Mexican law. He had a lively political career and ultimately served on the founding Board of Regents of the University of California – which is why there is a Dwinelle Hall on the Berkeley campus.[56]

Dwinelle correctly explained Mexican law to the high court. And, the Supreme Court agreed with him – generally. It accepted the fact that Mexican law was generally applicable and acknowledged that Mexican law required pre-trial mediation. Justice Nathaniel Bennett 's opinion quoted extensively from Mexican law and acknowledged the value of that system of law,

> …Judges…shall discourage litigation, as far as in them lies, by using their endeavors to induce parties to compose their differences voluntarily and in a friendly manner… and by making use of persuasion, and all other means which their discretion shall dictate, to convince the parties

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[53] David J. Langum, Sr., *Law and Community*, 98 ("approached 90%"), 101 ("about 85%").

[54] Judicial Council of California, *2023 Court Statistics Report, Statewide Caseload Trends, 2012-13 Through 2021-22*, 61, https://www.courts.ca.gov/documents/2023-Court-Statistics-Report.pdf. (Data for Fiscal Year 2021-22.)

[55] Peter H. Burnett, *Recollections and Opinions of an Old Pioneer* (New York: D. Appleton & Company, 1880) 343-44. https://www.loc.gov/item/01006673.

[56] "The Late Mr. Dwinelle," *New York Times*, February 12, 1881, 8. https://timesmachine.nytimes.com/timesmachine/1881/02/12/issue.html. "Class of 1843: John Whipple Dwinelle," *Hamilton Literary Monthly*, May 1882, 365-66.

> of the benefit which will result to them from a composition of their differences, and the damage and expense inseparable from litigation, even when accompanied by success.[57]

So, Justice Bennett concluded, "This being the general rule, *conciliacion* was necessary under the Mexican statute in the case before us."[58]

But recall Justice Bennett's criticism of the "disorganized state" of the law prior to the adoption of the California Constitution.[59] He was no more satisfied with Mexican law than any other American.

So, he wrote in *Von Schmidt*,

> …since the acquisition of California by the Americans, the proceeding of *conciliacion* has, in all cases, been deemed a useless formality by the greater portion of the members of the bar, by the Courts, and by the people….[60]

Applying retroactively a statute passed by the new Legislature,[61] he deemed conciliation – which was at the heart of the Mexican system of justice – to be a "useless and dilatory formality" not affecting the very right and justice of the case.[62]

In short, it did not matter to the court that both Mexican and California law still required pre-filing mediation. What was important was that two legal systems clashed. Two value systems clashed. The conqueror's values and system were adopted.

Not content to decide just this case, Justice Bennett underscored the importance of the conqueror's value system,

> We have entered thus fully into an explanation of the doctrine of *conciliacion*, and given our view of it at length, in order that the profession may understand, that the objection for want of conciliatory measures is, so far as the Court is concerned, disposed of now, and as we sincerely hope, forever.[63]

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[57] *Von Schmidt v. Huntington*, 1 Cal. at 61.

[58] *Ibid.*

[59] 1 Cal. Reports, Preface, vi.

[60] *Von Schmidt v. Huntington*, 1 Cal. at 64.

[61] "The Supreme Court may reverse, affirm, or modify any judgment, order, or determination appealed from… and render such judgement as substantial justice shall require, without regard to formal or technical defects, errors or imperfections, not affecting the very right and justice of the case…". Stats. 1850, Ch. 23, § 26.

[62] *Von Schmidt v. Huntington,* 1 Cal. at 65.

[63] *Von Schmidt v. Huntington,* 1 Cal. at 66.

The court hoped to dispose of pre-*filing* mediation "forever." And, in fact, their view – and that of the bar was so fixed, that it disposed of court sponsored pre-*trial* mediation as well.

Forever is a long time. And, decades later, Justice Bennett's view was finally disregarded.

Beginning in the late 1930s, California took some tentative steps towards allowing mediation in family law courts. In 1939, it created a "children's court of conciliation."[64] In the 1970's, some of our larger urban courts began requiring mediation of child custody and visitation disputes[65], and in 1980, the legislature mandated that.[66]

The movement towards mediation gathered steam through the rest of the 20th century. In 1993, the Legislature declared: "It is in the public interest for mediation to be encouraged and used where appropriate by the courts."[67] And it said, rejecting *Von Schmidt*, "Mediation…can have the greatest benefit for the parties in a civil action when used early…"[68]

Effective 2006, the Standards of Judicial Administration were amended to read, "Superior courts should implement mediation programs for civil cases a part of their core operations."[69] Today, civil lawyers know that sooner or later their case will be mediated, often to a successful conclusion.

The value of the Mexican system – so decisively rejected by the Forty-Niners, finally found a place in our modern system of justice.

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[64] Stats. 1939, Ch. 737. See Family Code § 1800 et seq. which recodified what was originally Code of Civil Procedure § 1730 et seq.

[65] Michelle Deis, "California's Answer: Mandatory Mediation of Child Custody and Visitation Disputes," *Ohio State Journal on Dispute Resolution 1* (1985): 155-56, https://kb.osu.edu/bitstream/handle/1811/75845/OSJDR_V1N1_149.pdf.

[66] Stats. 1980, Ch. 48, § 5, adding Civil Code § 4607.

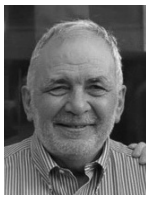
[67] Cal. Code of Civ. Pro. § 1775(c).

[68] Cal. Code of Civ. Pro. § 1775(d).

[69] Standards of Judicial Administration, Standard 10.70, effective January 1, 2006.

About the Authors

Judge Barry P. Goode (Ret.) was a judge on the Superior Court of Contra Costa County, California, where he served in several roles, eventually becoming presiding judge. He began his legal career as a special assistant to U.S. Senator Adlai E. Stevenson III of Illinois in 1972. In 1975, he joined the law firm of McCutchen, Doyle, Brown, and Enersen, and served there for 26 years, becoming a partner in 1980. In 2001, Governor Davis named him legal affairs secretary. He held that position until he was appointed to the bench in 2003. Judge Goode retired in 2018. He serves on the board of the California Supreme Court Historical Society.



John Caragozian is Vice President and General Counsel Emeritus of Sunkist Growers, Inc. Prior to joining Sunkist Growers, he was a trial attorney at the United States Department of Justice and in private practice in Washington D.C. and Los Angeles, California. Caragozian graduated from the University of California, Los Angeles, and the Harvard Law School. He has been an adjunct professor at Loyola Law School where he taught California Legal History and serves on the Board of Directors of the California Supreme Court Historical Society. He is the Chair of the Executive Committee of the Bollens-Ries-Hoffenberg Memorial Lectures at the University of California, Los Angeles, and has served as the Chair of the Executive Committee of the National Council of Farmer Cooperatives, Law/Accounting/Tax Committee.