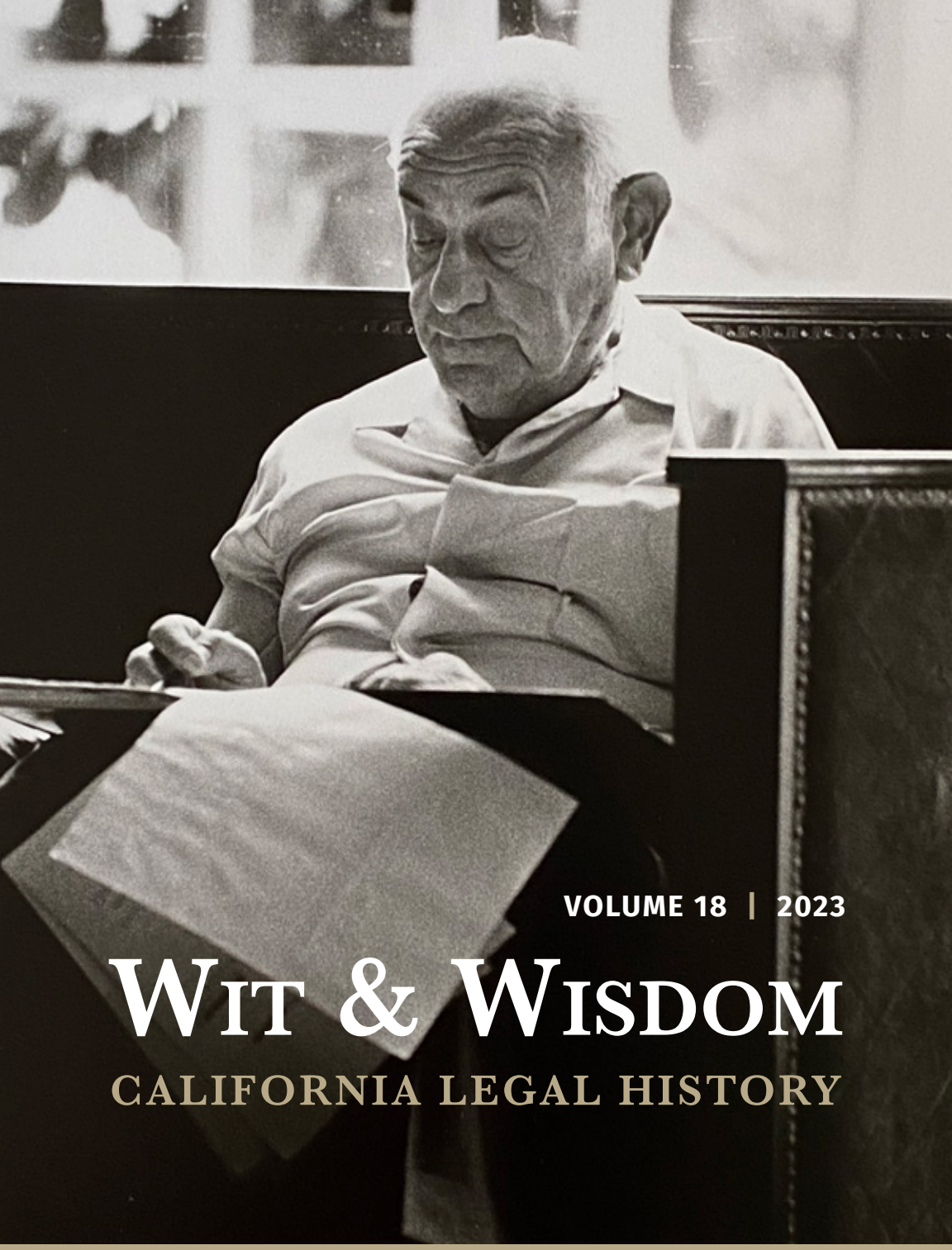

VOLUME 18 | 2023

Wit & Wisdom

California Legal History

JOURNAL OF THE CALIFORNIA SUPREME COURT HISTORICAL SOCIETY

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CALIFORNIA LEGAL HISTORY

JOURNAL OF THE CALIFORNIA SUPREME COURT HISTORICAL SOCIETY

CALIFORNIA LEGAL HISTORY is published annually by the California Supreme Court Historical Society, a non-profit public benefit corporation dedicated to recovering, preserving, and promoting California's legal and judicial history, with particular emphasis on the California Supreme Court.

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DANIEL M. KOLKEY

Foreword

Law and society are constantly changing, often as the result of both experience and experimentation. That is why the California Supreme Court Historical Society's journal of *California Legal History* is so valuable. Its articles can help guide the future based on perspectives of the past.

But this particular issue of *California Legal History* marks a transition for the journal in two different respects.

First, with the retirement of the our longtime and indefatigable editor-in-chief, Selma Moidel Smith, the reins of the journal have been handed to retired Associate Justice George Nicholson, who served 28 years on the California Court of Appeal, Third Appellate District.

Second, while this issue of the journal contains the usual array of articles on legal topics, including the oral history of a retired California Supreme Court justice and articles written by the winners of our student writing competition, this issue offers some surprises:

With crime on the minds of many who live in California's urban centers, this issue also contains several articles that provide detailed, historical perspectives on the evolution of criminal justice policy in California over the past 50 years. Contrasting perspectives will be offered in next year's journal.

This issue also includes a remembrance of the 45-year tenure on the bench of Justice Norman Epstein, whom the State lost on March 24, 2023.

Another article describes the disorganized state of the law in California after the Treaty of Guadalupe Hidalgo while California remained a U.S. territory.

And readers will also discover the delights and highlights of the results of the Society's oral history project regarding Bernard Witkin – whom Justice Epstein called the "Justinian" of California law.

But our journal aspires to do one more thing: Demonstrate *an appreciation* for the legal contributions of the judges who have served California. As centenarian Henry Kissinger recently observed, "No society can remain great if it loses faith in itself or if it systematically impugns its self-perception."[1]

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[1] Henry Kissinger, Leadership: Six Studies in World Strategy (Penguin Press 2022), p. 415.

GEORGE NICHOLSON

Introduction

From the Editor-in-Chief

This is my first issue as editor-in-chief of *California Legal History* and it is dedicated to the late Presiding Justice **Norman L. Epstein** of the California Court of Appeal, Second Appellate District, Division Four.

Justice Norm Epstein: The Man and his Legacy

Justice Epstein was an extraordinary man. Although a Democrat, Governors from both political parties appointed him to important judicial roles. "He was a judge for all seasons and all parties," recalled Presiding Justice **Arthur Gilbert** of Division 6 of the Second Appellate District in the lead article in this issue of *California Legal History*, entitled "March is the Cruelest (Cruellest) Month." (As Justice Gilbert uses "Norm" throughout his article, I will do the same as to all the friends whom I reference in what follows.)

Norm was Art's dear friend, and he was mine. We three, and many other jurists, served together, argued together, and learned together for decades. But Norm was different. More than most of us, he was a teacher. Although it took an immense amount of extra work, he often taught at the Appellate Court Institute conducted regularly by the California Center for Judicial Education and Research. These Institutes are attended by many, and sometimes most, of our state's 105 appellate justices and seven Supreme Court justices.

Norm was also a close friend and colleague of Bernard E. Witkin, or "Bernie" to all who knew him. Most (if not all) trial judges and appellate justices are very familiar with, and use Bernie's three dozen volumes of treatises on key legal subjects. Although Bernie died in 1995, he lives on in

the minds and hearts of his many friends and in his treatises, from which others continue to rely for their research. After Bernie's death, Norm went from co-author to assuming Bernie's role with Witkin's three-volume criminal law treatise.

Of relevance here, Norm almost became the co-editor-in-chief of this very journal: After **Daniel M. Kolkey,** my friend and former colleague on the bench, became president of the California Supreme Court Historical Society, he asked me to become editor-in-chief of *California Legal History*, beginning with this issue. I worried, however, whether I was up to such a huge, complex task, which Selma Moidel Smith had handled so well for so long until she retired with the 2022 issue at the age of 102. So, I sought Dan's permission to bring in a friend to be co-editor-in-chief. When he asked whom, I responded: "Justice Norman Epstein." Dan, of course, knew him, as did everyone who has served on the California appellate bench, and he quickly agreed.

And since I had heard that Norm's obligations on the Witkin treatises had ended, I could not pass up the opportunity to again work with such a remarkable legal scholar and put his talents to use for the Society. So, I called and asked him to join me as co-editor. He asked what it would entail. I told him something that he well knew – that there are considerable, thankless tasks related to editing and publishing such a journal. But I assured him he would be burdened with none of them. Instead, his role would relate entirely to substantive editorial and literary work. He remarked, "You can't beat that!" and accepted.

We spoke many times by phone and by Zoom during the next several weeks. Finally, we planned an important, extended Zoom call to finalize our plans. But that call never happened. Instead, I received word that Norm had passed away peacefully in his sleep the night before, March 24 of this year. It was a very sad day for Norm's family, friends, all who knew him, and for me. Even so, I am certain he was excited about, and enjoyed, his far too short period of work on *California Legal History*.

Finally, I recall here a special memory I have of Norm. It began during an Appellate Court Institute more than 20 years earlier. Norm and I sat together for lunch. And I had the feeling that he had sought me out. After some small talk, he asked me for a favor. He began by reminding me of his experience as general counsel and vice chancellor of the California State University and Colleges – now California State University (CSU) – from 1962 to 1975.

He then outlined a project derived from his CSU experiences: "Working with several other trial judges and appellate justices, and with CSU, I have developed a program by which various CSU campuses regularly send an undergraduate to serve as an intern with each jurist working with us. The idea behind my program is not to groom potential lawyers, but to groom potential leaders. We do this by allowing students to help with and witness close up our judicial endeavors and collegial relationships with bench colleagues, chambers' staffs, court staff, counsel, and parties."

He went on, "One student, in particular, a young black man, impressed me greatly. I knew he had the fiscal wherewithal to finish his undergraduate work, but nothing more. Contrary to what is usually the case with our project, this young man expressed an interest in law school, but lamented his lack of the funds. So, I called Scott Bice, dean of the USC School of Law. I told Scott all about the young man. Scott told me not to worry, he would be admitted. I told Scott that he had misunderstood me and that the young man needed fiscal aid. Scott was silent for a moment before saying, 'Don't worry, he will have it.'"

That did not end Norm's story. He concluded this way: "The young man graduated, moved to another city, began practice, and is a great success. He became the type of lawyer toward whom everyone looks when he enters the room." Norm then turned to his favor. The details are not relevant here, but it involved the same supplication for aiding the human condition that Norm regularly sought time and again. Of course, I agreed to the favor. How could I have done otherwise?

Accordingly, I am humbled and honored to dedicate this issue of *California Legal History* to a great judicial, legal, educational, and humanitarian leader (and my friend), the late Norman L. Epstein.

For more insights about Norm in this issue of *California Legal History*, I commend to you an article by lawyer and legal scholar **John Wierzbicki,** entitled: "Epstein on Witkin: A Conversation with Norm Epstein about his 15-Year Association with Bernie Witkin."

John also discusses Norm and his participation in the Society's Witkin Oral History Project, in another article featured in this issue in the oral history section: "Knowing Bernie: The Witkin Oral History Project."

New Histories Regarding Revolutions in the Administration of Criminal Justice

This issue of the journal also goes well beyond our homage to Norm and Bernie: It contains fresh historical perspectives regarding two revolutions in the administration of criminal justice in California.

In fact, there have been three major revolutions in criminal justice during the past 75 years.

The first revolution began in 1953 when President Dwight Eisenhower nominated, and the U.S. Senate confirmed, California Governor Earl Warren to be Chief Justice of the United States. During the next 15 years, Chief Justice Warren and his high court colleagues rendered many dramatic decisions that substantially changed criminal investigations and prosecutions everywhere in the nation. Those changes have long since been absorbed and applied by judges, prosecutors, criminal defenders, and peace officers, even as the high court continues to modify them and address others periodically.

The second revolution began slowly, twenty years after the first, by gradually providing victims of crime and their families with a narrow variety of governmental services but, eventually, by establishing actual legal rights for them, initially in California. As explained in one of the articles in this issue, the crime victims' legal rights movement was inspired philosophically by Oliver Wendell Holmes, Benjamin Cardozo, Leon Jaworski, Martin Luther King, Jr., and Elie Wiesel, and catalyzed empirically by Frank Carrington, Tom Bradley, Jim Rowland, and John Dussich. The crime victims' legal rights movement literally burst onto the political scene and out in the open in California in 1982, when voters began to imbed in the law, largely by initiative measures, a variety of statutory and constitutional rights for the victims of crimes and their families. During the ensuing decades, this second revolution spread to the other 49 states, each of which has adopted some or all of the legal rights first adopted in California. The federal government in key ways followed California's lead as well.

The very success of the second revolution led to a third revolution or, perhaps more accurately, counter-revolution. In many ways, it is a more dramatic and far more novel departure, procedurally and substantively, than those wrought by Chief Justice Warren and his colleagues or by those who initiated the crime victims' legal rights movement. This counter-revolution is on-going actively. It has been dynamically achieved by the criminal defense bar and its supporters, in and out of government. In its more recent stages, it has acquired new allies, progressive prosecutors driven by non-traditional agendas.

It had been my intent to include articles on both the second and third revolutions in this issue of *California Legal History*, written by distinguished and highly experienced prosecutors and criminal defenders. But while I had little trouble finding members of the prosecutorial bar to write on either revolution, I had considerable difficulty finding members of the criminal defense bar with the time to write. When I finally began to succeed in locating criminal defenders who were willing and had the time to write, it was too late in the 2023 publication cycle. Thus, their story must be presented in the 2024 issue of *California Legal History*.

As a result, the prosecutorial bar's analysis and perspective will be presented this year (2023), while the criminal defense bar's analysis and perspective will be presented next year (2024). Both sides will be represented by highly respected, able, and veteran lawyers and judges. Our 2024 issue will also feature *two* additional articles about the history and evolution of two prisoner and prison family service projects. I will then reveal the distinguished authors.

In this issue, **Todd Spitzer** and **Greg Totten** – among California's most able and experienced prosecutors – provide their analysis and perspective in their article entitled, "Did *Brown v. Plata* unleash a much larger and more dangerous Genie out of the Bottle?"

The views of these two individuals warrant our attention because there is nothing in print comparable to their work and they are exemplary lawyers. Todd Spitzer served as a trial prosecutor in Orange County from 1990 to 1996, and was elected district attorney for Orange County in 2018 and re-elected in 2022. He has been a member of the California State Bar for nearly 35 years.

Before retiring, Greg Totten served 18 years as district attorney of Ventura County, having been elected five times. He is now chief executive officer of the California District Attorneys Association. He has been a member of the California State Bar for more than 40 years.

Their article arose from discussions catalyzed by the California District Attorneys Association's Institute for Education and Research, which has, as part of its charge, the education of prosecutors, others who practice criminal law, and the general public regarding the administration of criminal justice.

In a separate article offering a historical perspective on the second revolution, **Nancy O'Malley,** who served four decades as a prosecutor in Alameda County including three terms as the elected district attorney, and **Harold "Bosco" Boscovich,** an inspector in the Alameda County District Attorney's Office, and co-founder and first director of the office's Victim

Witness Assistance Division where he served for almost a half century, draw upon their vast experience regarding the advent and evolution of a variety of victims' services offered by district attorney offices, to author their article, "Victims' Rights in California."

This issue **includes a related article, this one on the evolution of victims' legal rights from a first-hand perspective.** When Dan Kolkey invited me to become editor-in-chief of *California Legal History*, he soon learned that I had been working on a potential law journal article for two years, "The Roots of America's Crime Victims' Legal Rights Movement, 1975-2023, A Personal Retrospective." He encouraged me to publish it in this issue of the journal. I was reluctant, but he insisted. And so, it also appears herein.

To provide balance, as noted above, our **2024 issue anticipates** showcasing an article by distinguished and venerable members of California's criminal defense bar who will provide their analysis and perspective on the history of the administration of criminal justice in California, with an emphasis on the third revolution or counter-revolution, referenced above. The authors may have something to say about the articles on the administration of criminal justice published in this, the 2023 issue of *California Legal History*. Next year's issue will also feature two articles about the history and evolution of prisoner and prison family service projects. The authors of the three articles will be introduced next year.

California Without Law: 1846 Though 1850

On an entirely different historical subject, this issue includes an article by retired Contra County Superior Court Judge **Barry Goode** and attorney **John Caragozian** based on the California Supreme Court Historical Society's successful webinar entitled, "California Without Law 1846-1850: How the American instinct for the rule of law confronted an uncertain mix of Mexican and military law — and a treaty negotiated without authority." This piece offers an incredible story of the law governing California after the *Treaty of Guadalupe Hidalgo* before California became a state – a period in which few have any background.

Three Prize-Winning Articles from Our Student Writing Competition

Each year, the California Supreme Court Historical Society conducts its annual Selma Moidel Smith Student Writing Competition, awarding cash prizes for the top three student essays.

This issue also includes the three award-winning student essays in 2023 on a diverse set of subjects:

Kyle DeLand, a UC Berkeley Law student, won first place for his essay, "The End of Free Land: The Commodification of Suscol Rancho and the Liberalization of American Colonial Policy."

Michael Banerjee, another UC Berkeley Law student, placed second for his essay, "California's Constitutional University: Private Property, Public Power, and the Constitutional Corporation, 1868–1900."

And **Miranda Tafoya,** a UC Irvine Law student, won third place for her essay, "A Shameful Legacy: Tracing the Japanese American Experience of Police Violence and Racism from the Late 19th Century Through the Aftermath of World War II."

The Oral History of Supreme Court Justice John Arguelles

Finally, this issue concludes with the Society's traditional inclusion of an oral history of a past California Supreme Court justice. In this issue, we include: "From the 'People's Court' to The Supreme Court, Remembering the Legacy of Justice John Arguelles," an oral history of former Associate Justice John Arguelles by **Laura McCreery.** The Introduction and Conclusion were done by journalist **Ryan Carter.**

McCreery is a former researcher in residence and former visiting scholar at the Institute for the Study of Societal Issues, Berkeley. She has conducted oral histories of nine justices, including two chief justices, of the California Supreme Court, Armand Arabian, John A. Arguelles, Marvin Baxter, Ming W. Chin, Ronald M. George, Malcolm M. Lucas, Carlos R. Moreno, Edward A. Panelli, and Kathryn Mickle Werdegar. Her oral history of Chief Justice Ronald M. George, "Chief: the Quest for Justice in California," was named a California Book Award winner by the Commonwealth Club for 2013.

Some final Thoughts

I am very grateful for the kind and generous assistance provided by many friends and colleagues without which the 2023 issue of *California Legal History* would never have been compiled or completed: Daniel M. Kolkey, Art Gilbert, Ryan Carter, Jake Dear, Molly Selvin, Levin, Elaine "Em" Holland, Stuart Greenbaum, Kate Cook, Ben Thompson, Ellen Arabian-Lee, Janet Mueller, John Wierzbicki, and Chris Stockton.

★ ★ ★

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.)

★ ★ ★

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?
>
> 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.
>
> 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

John R. Wierzbicki is a legal writer, historian, and intellectual property lawyer. He is lead publication editor for the Witkin treatises, which are published by Thomson Reuters. He is also a member of the Board of Directors of the California Supreme Court Historical Society (CSCHS). He recently published a series of articles in the *CSCHS Review* on the early life and career of Bernie Witkin. He is working on a Witkin biography.

[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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* Todd Spitzer is the district attorney of Orange County. He is nationally known for actively championing public safety and victims' rights. He was a co-author and served as campaign manager for Marsy's Law, adopted by voters in 2008, our country's most comprehensive Victims' Bill of Rights. He has dedicated his career to public service, as a deputy district attorney, an Orange County supervisor, a former California State Assembly member, and now as the district attorney of Orange County.

** 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…"

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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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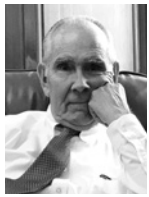

George Nicholson

[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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[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.

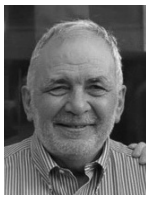
[67] Cal. Code of Civ. Pro. § 1775(c).

[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.



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STUDENT ESSAY COMPETITION

KYLE DELAND*

The End of Free Land:

The Commodification of Suscol Rancho and the Liberalization of American Colonial Policy

"It is just as legitimate to buy and sell a tract of land for a profit as it is a horse or a milch cow…just as long as there is fee a simple title to land, just so long will it be subject to speculation."

– William S. Green, *The Land Monopoly Question*, GREEN'S LAND PAPER, February 3, 1872.

"California is very important for me because nowhere else has the upheaval most shamelessly caused by capitalist centralization taken place with such speed."

— Karl Marx to Friedrich Adolph Sorge, Nov. 5, 1880.[1]

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[1] KARL MARX ET AL., LETTER TO AMERICANS 1848-1895: A SELECTION, at 126 (1953).

Abstract: This article analyzes the processes of land commodification and the collapse of Free Land as the dominant policy framework for American settler colonial policy. Through an excavation of case records relating to an ownership dispute between Pre-Emptors and capitalists on the Suscol Rancho in Northern California, ending in US Supreme Court case Frisbie v. Whitney (1869), I show how key elements of liberal legality –the anti-redistributive state and formalism – emerged on this colonial periphery in response to a dangerous and violent contest of legalities among settlers. While Lockean "use and improvement" provided a justification for expropriating Native lands, it also justified the expropriation of the unproductive land of white landlords. To the California bar this was a disturbing result. In this way, the Suscol cases cut to the heart of the basis of property: would it be delimited by wastage or by the state? Guided by substantive concerns or form alone? Each side was willing to kill for their land and their vision of law. In the end, Suscol demanded a choice, a choice which reflected a larger transformation in American Empire.

…

By the beginning of the Civil War, the colonial policy of "Free Land" had organized a generation of conquest and settlement from Iowa to California. Passed into law in 1841, the first Pre-Emption Act epitomized Jacksonian colonization policy in the United States. In brief, the Act provided for citizen householders to purchase, at the government minimum price of $1.25 per acre, up to 160 acres of Federal land after a year of use, improvement, and residence, with proof and payment taken by the Register and Receiver of the relevant land district.[2] Though only applicable to surveyed land in the original act, later statutes opened unsurveyed land to squatters. Various conditions and exceptions applied. The Act, for example, provided that "Indian title" needed to be "extinguished" at the time of settlement. Land offices enforced these conditions unevenly.

This new "Free Land" policy, a departure from the revenue-generating land offices of the Early Republic, represented a compromise between colonial squatters and imperial bureaucrats.[3] It was, in essence, a statutory legalization of adverse possession. However, squatterdom and officialdom had fundamentally different conceptions of the law. To the former, the Act was the realization of a radical, working-class push for land reform decades,

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[2] The Preemption Act of 1841, 27th Congress, Ch. 16, 5 Stat. 453 (1841); See also, Dexter, Ripley, Nickolls, & Co., The Pre-Emption Laws of the United States. Acts of 1841 and 1843. Together with Directions to the Actual Settlers (1856).

[3] Malcolm Rohrbough, The Land Office Business: The Settlement and Administration of American Public Lands, 1789-1837 (1968); Paul Frymer, Building an American Empire: The Era of Territorial and Political Expansion (2017); Julius Wilm, Settlers as Conquerors: Free Land Policy in Antebellum America (2018).

if not centuries, in the making.[4] To the latter, it was but the latest of hundreds of land statutes, the newest layer of accretion that characterized an era of detailed Congressional administration.[5] Pre-Emption was simply a way for citizens to buy public land with more steps. As described by historian Paul W. Gates, the "incongruity" between these legalities produced technical problems.[6] The rift, however, extended to the level of meaning, the normative world of law.[7] It cut to the purpose of colonization and the foundation of property itself. In this way, the Pre-Emption Law stood as the legal basis and means of a new era for American colonization in general, granting it outsized importance in the settler imagination.

For the two decades that followed the birth of "Free Land" policy, the balance of power favored the colonials, especially on the Pacific Coast, a three-week journey by sea from Washington. Oregon colonization, from which California settlement ideologically developed, was anarchic and organized by Pre-Emption and its statutory kin, the Armed Occupation Act (1842) and the Donation Land Claim Act (1850), which operated through a quasi-Lockean framework of usage, occupation, and security in the "State of Nature."[8] In California, however, Pre-Emption produced adverse titles to lands which already had multiple title claims by Mexican Californios and Americans. Indeed, "extinguishment" of Native title was not a pre-requisite of Pre-Emption, rather Pre-Emption provided a means of extinguishing Native title.[9] So too did Pre-Emption challenge the land titles of Californios, the Mexican elite of Alta California. In both cases, Pre-Emption provided a *justification* for taking land and re-allocating it to its "true" and morally worthy

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[4] M. Beer, The Pioneers of Land Reform: Thomas Spence, William Ogilvie, Thomas Paine (1920); Tamara V. Shelton, A Squatter's Republic: Land and the Politics of Monopoly in California, 1850-1900 (2013).

[5] See, William Wharton Lester, Decisions of the Interior Department in Public Land Cases and Land Laws Passed by the Congress of the United States Together with the Regulations of the General Land Office, Vol. 1 (1860). On the character of nineteenth-century administration in general see, Jerry L. Mashaw, Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law (2012) and Nicholas R. Parrillo, Against the Profit Motive: The Salary Revolution in American Government, 1780-1940 (2013).

[6] See, Paul Wallace Gates, *The Homestead Law in an Incongruous Land System*, 41 Am. Hist. Rev. 652-681 (1936); Sean M. Kammer, *Railroad Land Grants in an Incongruous Legal System: Corporate Subsidies, Bureaucratic Governance, and Legal Conflict in the United States, 1850-1903*, 35 L. & His. Rev. 391-432 (2017).

[7] Robert Cover, *Nomos and Narrative*, 97 Harv. L. Rev. (1983-4).

[8] See, An Act to Provide for the Armed Occupation and Settlement of the Unsettled Parts of the Peninsula of East Florida, 5 Stat. 502 (1842); An Act to create the Office of Surveyor-General of the Public Lands in Oregon, and to provide for the Survey, and to make Donations to Settlers of the said Public Lands 76-9 Stat. 496 (1850). Gray H. Whaley, Oregon and the Collapse of Illahee: U. S. Empire and the Transformation of an Indigenous World, 1792-1859 (2010). On the anarchic nature of Oregon settlement, contemporary jurist J. Q. Thornton Wrote, "being without arms and ammunition, in the midst of savages clamorously demanding pay for their lands, and not unfrequently committing the most serious injuries, by seizing property and by taking life, in consequence of the people having neither the ability nor the right to buy." Jessy Quinn Thornton, Oregon and California in 1848, Vol. 2 at 37 (1849).

[9] See, e.g., George Harwood Phillips, Bringing Them Under Subjection: California's Tejon Indian Reservation and Beyond, 1852-1864 (2004).

owners – the American Yeoman colonist.[10] In supporting, per Genesis 3:19, those who ate bread by the sweat of their own brow, Pre-Emption had the imprimatur of moral legitimacy that outright purchase or grant did not.[11]

Heading into the Civil War, the Pre-Emption concept remained popular with the settler public and was further bolstered by the Free Soilers' beloved Homestead Act (1862) and the Justice Department's systematic escheatment of 2.8 million acres in Californio titles in the US Supreme Court between 1859 and 1862 – a campaign waged on behalf of Pre-Emptors on the public domain.[12] Far from a repudiation of Jacksonian colonization policy, the Union-Republican governments retrenched it. But not all was as it seemed, for the balance of power began to shift, at first by degrees and then in a sudden lurch. Just seven years after Free Land reached its high-water mark in 1862, the Supreme Courts of California and the United States declared Pre-Emption a dead letter, enabling the forcible ejectment of hundreds of Yeomen squatters from the lands of Suscol Rancho in Napa and Solano Counties[13] – squatters who had been encouraged to settle the land by those very courts in 1861.[14] In a contemptuous repudiation of Lockean property, and the entire moral justification for settler colonization in the Pacific, Justice Miller ruled, "There is nothing in the essential nature of [going upon the land and building and residing on it] to confer a vested right, or indeed any kind of claim to land, and it is necessary to resort to the pre-emption law to make out any shadow of such right."[15] This was a startling, if inadvertent, rebuke to the foundations of settler thought, which justified the expropriation of Native lands precisely on these grounds.

How had the legal system turned so quickly on its favored colonists? More importantly, *why* did the Pre-Emption regime crumble? And *what* legality replaced it? I endeavor to answer these questions through an analysis of case records related to the Suscol Rancho conflict – executive correspondence, administrative decisions, and judicial opinions, as well as corporate papers and contemporary newspapers. Suscol Rancho has been studied before, by

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[10] As Whaley described an 1843 case between a Pre-Emptor and an employee of the Hudson's Bay Company, "Reverend Waller positioned the case as a clash between good and evil empires, Jefferson yeomen versus monarchical hirelings… he petitioned Chief Justice Roger Taney that a hireling 'of a foreign monopoly' had no constitutional right to American land." Whaley, *supra* note 8, at 125-6.

[11] For a contemporary usage in land reform discourse see, Isaac S. Tingley, *Letter from a Young Reformer*, Young Am., Sept. 27, 1845.

[12] See, Paul Gates, *The California Land Act of 1851*, 50 Cal. Hist. Q., 395-430 (1971). For contemporary account see J. S. Black, Expenditures on Account of Private Land Claims in California, H. Ex. Doc. 84, 36th Cong. (1st Sess. 1860).

[13] Frisbie v. Whitney 76 U.S. 187 (1869); Hutton v. Frisbie 37 Cal. 475 (1869).

[14] United States v. Vallejo, 66 U.S. 541 (1861).

[15] See Frisbie v. Whitney 76 U.S. 187 (1869) at 194.

Gates, as representative of the large centralization of estates in California created by a combination of official cupidity and the manipulations of landowners.[16] In providing a re-assessment of Suscol, this article argues that Suscol should be understood within a framework of commodification – what historian Patricia Limerick termed "the evolution of land from matter to property."[17] A more fundamental transformation of land and meaning occurred at Suscol than Gates imagined, driven less by individual landowners and officials and more by the ideological force of liberalism and the global commodities market.

In some ways the answers I have found were clear and functional. It was near impossible to sell mortgages on lands with credible adverse possessors and contested titles.[18] Over the 1860s, the Suscol lands underwent a process of triple commodification – as alienable real estate, as secured debt, and as industrial wheat farms. With land, mortgages, and wheat circulating in international markets, Pre-Emption threatened the security of wealth based in land.[19] However, this essentially simple story is not sufficient in itself, for law imposes its own visions on the world. Legal historians have long shown the incongruities and contingencies of legal change and capitalist development in the nineteenth century.[20] In particular, this article converses with Horwitz's famous account of property and formalism in the Atlantic States.[21] While similar in important respects, the change of property law in California was fundamentally conditioned by the settler colonial context. This manifested in a radically different temporality than Horowitz's history – at the edge of American Empire it was not evolution but revolution that characterized legal change. Here, rights had been vested for years not centuries – if they had vested at all. The problem of violence, both between colonist and Native peoples and among colonists, was central to the Suscol

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[16] Paul W. Gates, *The Suscol Principle, Preemption, and California Latifundia*, 39 Pac. Hist. Rev., 453-471(1970).

[17] Patricia Nelson Limerick, The Legacy of Conquest: The Unbroken Past of the American West at 27 (1987).

[18] We might call this the Primitive Accumulation argument. Karl Marx & Frederick Engels, Capital: A Critical Analysis of Capitalist Production, 3rd Ed. At 740-757 (1889). On the mortgage market see also, Jonathan Levy, Freaks of Fortune: The Emerging World of Capitalism and Risk in America (2012). For a contemporary account see James de Fremery, Mortgages in California. A Practical Essay (1860).

[19] For example, see, Ernest Seyd, California and its Resources. A Work for the Merchant, the Capitalist, and the Emigrant (1858). On the California wheat trade see, Rodman W. Paul, *The Wheat Trade Between California and the United Kingdom*, 45 Miss. Valley Hist. Rev., 391-412, at 394 (1958).

[20] See, e.g. Richard Bensel, The Political Economy of American Industrialization, 1877-1900 (2000); Richard White, Railroaded: The Transcontinentals and the Making of Modern America (2011); Gregory S. Alexander, Commodity & Propriety: Competing Visions of Property in American Legal Thought, 1776-1970 (Chicago: University of Chicago Press, 1997)..

[21] Morton Horwitz, The Transformation of American Law, 1780-1860 (1979).

crisis. As jurist Samuel B. Clarke characterized the problem at the closing of the nineteenth century, "no one can base a title of right upon [force] alone without admitting that mere force, whether of ballots or of bullets, can to-day rightfully wipe out existing titles and confer others in their stead."[22] Like force, usage ceased to be a stable basis for property over the 1860s. The Suscol crisis revealed that "improvement" had too much potential for redistribution from large landholders to the landless. Enter a relatively new, and dreadfully unpopular, conception of property, one that disavowed the colonial past upon which it stood, and would transform the face of American Empire: Liberalism. Yet, as this article reveals, the road from waste to commodity, from Free Land to Cheap Land, was not slow, clear, or predictable, rather it was a radical disavowal of the past and the sudden birth of a new regime.

THE VALLEJO DEMESNE

The case that would mark the end the Pre-Emption regime began in 1843, in the far northern "wilderness" of the Mexican department of Alta California or, to put it more accurately, the lands of the Pomo, Wappo, Wintun, and Miwok Peoples. The recent political history of Alta California had been characterized by civil conflict between Californios, Missions, and the Mexican Government. In 1842, Manuel Micheltorena deposed Governor Juan Bautista Alvarado, architect of an abortive independence movement in 1836, the same year as the Texas Revolution. As colonial policy, and perhaps canny political maneuver, Micheltorena began the process of granting massive tracts of land (up to 11 Square Spanish Leagues) to powerful Californio families, who would hopefully prove more loyal to the regime.[23] Micheltorena granted the greater portion of Alta California's northern frontier to the Vallejo Family as their private property. Mariano Guadalupe Vallejo, who was incidentally late Governor Alvarado's uncle, received a grant to a (roughly) 100,000-acre tract bounded "on the north by lands named Tulucay [rancho] and Suisun [tribe], on the east and south by the Straits of Carquines, Ysla del a Yegua, and the Estero de Napa."[24] This tract, combined with another purchase by Vallejo, became known as the Suscol Rancho. To the west, laid Mariano's extensive Petaluma Rancho acquired

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[22] Samuel B. Clarke, *Criticisms Upon Henry George, Reviewed from the Stand-Point of Justice*, 1 Harv. L. Rev., 265-293, at 274 (1888).

[23] Maria Raquél Casas, Married to a Daughter of the Land: Spanish-Mexican Women And Interethnic Marriage In California, 1820-80 (2009).

[24] United States v. Vallejo, 66 U.S. 541, at 550 (1861).

in 1834. Mariano's brother Salvador likewise received a land grant to "Lop Yomi," the local "Indian name" meaning "town of stones," that covered the Clear Lake region, well north of Suscol, and several estates in Napa that lay between (granted from his nephew in 1838).[25] As some of the first European settlers in this waste and wilderness, Vallejo ownership was, to a great degree, nominal. Estimates differ, but the Native population stood around 150,000 in 1846, and though smallpox epidemics had exacted a large toll in Northern California, Native Peoples throughout the state outnumbered Europeans 15:1.[26] This northern borderland was no exception. What's more, contrary to European thought, the Peoples whose lands the Vallejos now "owned" had general conceptions of property quite like those of the Mexican settlers.

Before the coming of the Vallejos, Pomo tribes warred with one another over well-defined territories. As historian William J. Bauer, Jr. writes, incorporating an oral history from a Pomo man named Francisco, "One day the People from K'e bāy Cho k'lal went to K'ŏ,ŭlK'ŏy … to harvest 'grain,' likely indigenous oats or ryes, in order to make pinole. The People from the town of P'hŏ,ŏl, K'ŏy … observed the K'e bāy People harvesting grain at K'ŏ,ŭl-K'ŏy and attacked because the K'e bāy People had not asked for permission. Pomos possessed a finely tuned sense of their territory's limits. In the right circumstances borders could be fluid. It was not unheard of for People to ask for approval to use resources within another group's territory. If one did not ask for clearance or offer a payment, as appears to have occurred in Francisco's story, violence and conflict followed."[27] Through a combination of language barrier, simple prejudice, and self-interest, however, both Spanish-Mexican and American colonists conceived of this land as "unowned."[28] This was obviously a fiction. Elsewhere in the 1840s, Oregonian settlers found Native People demanding payment for their lands – a confusing situation indeed.[29] While Native definitions of place, like the town of Lop Yomi, were declared legitimate in determining the bounds of Mexican grants, Native title was a nullity in law. The Vallejos had few qualms about exercising sole dominion over this place.

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[25] H. F. Teschemacher, et al., claiming the Rancho of Lup Yomi v. the United States in Ogden Hoffman, Reports of Land Cases Determined in the United States District Court for the Northern District of California: June Term, 1853 to June Term, 1858, Inclusive at 36 (1975).

[26] Benjamin Madley, An American Genocide: The United States and the California Indian Catastrophe, 1846-1873 at 3, 50 (2016).

[27] William J. Bauer, Jr., California Through Native Eyes: Reclaiming History at 75, citations omitted (2016).

[28] See Stuart Banner, Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska at 163-194 (2007).

[29] See *supra* note 8 at 37.

The Vallejos began to change the land and the people who lived on it. Over the 1840s, Mariano, commonly known as Don Guadalupe, enslaved hundreds of Miwok People, a relationship Mariano understood as benevolent and based in kinship.[30] Likewise, Salvador "improved" his Rancho and "put upon [Lop Yomi] large numbers of horses and cattle and hogs…built several houses" and cultivated "corn, beans and watermelons."[31] Salvador leased part of his land to American settlers Charles Stone and Andrew Kelsey. As historian Benjamin Madley writes, the American tenants treated the Eastern Pomo and Clear Lake Wappo as serfs that ran with the land.[32] For the next several years, Stone and Kelsey operated a brutal and lethal system of unfree labor. Scores died of starvation, exposure, disease, and, in some especially cruel cases, torture. In December 1849, with California now under American military rule and in the throes of gold mania, five Native men – Shuk, Xasis, Ba-Tus, Kra-nas, and Ma-Laxa-Qe-Tu – killed Stone and Kelsey. News of these killings triggered a punitive expedition by the US Army in San Francisco. (This was not the last time the Army would be called upon to put down a restive population on Suscol.) As Madley writes, the expedition had a "pseudo-judicial rationale for both the indiscriminate killing of California Indians…and the theft or destruction of their property" – the concept of collective guilt.[33] The flimsy legal logic for the expedition was not for lack of lawyers: Major General Persifor Smith, the engineer of the expedition, was a college-educated lawyer from Philadelphia.

The subsequent killing campaign brought with it a major figure in the commodification of the land: Captain John B. Frisbie, Esq, originally of Buffalo, New York. On May 5, 1850, Frisbie and 75 armed men set off on their expedition to from the town of Benicia to Clear Lake. It took the party ten days to cross the Vallejo demesne, and they arrived at Clear Lake on May 15. Though accounts differ as to what followed, Madley and other historians estimate the US Army detachments killed between 500 and 800 people from several Pomo and Wappo communities in a single day, one of the deadliest massacres in the bloody history of US colonization. In Captain Frisbie's own account of the slaughter, published in the *Daily Alta California*, the Army killed Native men, women, and children indiscriminately. Felled, Frisbie wrote,

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[30] Andrés Reséndez, The Other Slavery: The Uncovered Story of Indian Enslavement in America at 248 (2016). The population is simply referred to as "Suscol Indians" in *The Indians of Napa Valley*, Daily Alta California, February 1, 1860, which remarked they had been largely "swept away."

[31] See, *supra* note 25 at 34.

[32] See, *supra* note 26 at 103-144.

[33] *Id.* at 127

"as grass before the sweep of the scythe."[34] The Army promptly disputed Frisbie's account, and under pressure from fellow officers, Frisbie recanted.[35] Whether Frisbie regretted his participation in the massacre, or his retraction, is not extant, but we do know he had something else entirely on his mind as he travelled the Suscol Rancho. Frisbie looked out on the changing, bloodied landscape and saw capital.

The following Autumn, Frisbie left the military and settled in Benicia, having realized that the Suscol grant land represented a tremendous speculative opportunity. So began a new career as a booster and land speculator. He wasted little time. Quickly elevated to the office of President of Board of Directors of Benicia, Frisbie purchased ads in the *Sacramento Transcript* that ran regularly for the next year. In this advertisement, Frisbie advocated for adjacent Vallejo to be made the state capital, citing its potential for a commercial harbor, "inexhaustible" quantity of fine stone for building, "unsurpassed" topography, and "several bold mineral springs."[36] The skeptical reader did not have to take Frisbie's word for it: "The Surveyor-General of the State…having made careful reconnoisance [sic] of this place, fully confirms the facts herein set forth, and the proprietors publish them with a view of inviting public attention to the same. The subscriber is authorized to dispose of a limited number of lots upon liberal terms, and he invites the attention of capitalists and the public generally to the new city."[37] To this small, colonial town amidst princely, personal estates worked by unfree laborers – a thoroughly feudal landscape – Frisbie invited modern capital. His grand ambition of securing the capital briefly succeeded before it failed in favor of Sacramento – the Eastern portion of Alta California's Northern frontier, which had been granted to John Augustus Sutter. Despite this failure, Frisbie hit upon another speculation at the same time. He successfully courted one of the most eligible women in the state: Epiphanra "Fanny" de Guadalupe Vallejo, eldest daughter of Mariano. The two married on April 2, 1851, at the Vallejo estate.[38] It became the Frisbie estate shortly thereafter when Don Guadalupe gifted the Suscol lands to his daughter and new son-in-law. In one short year, Frisbie had gone from Captain in a killing campaign to scion of one of California's most prominent and wealthy families.

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[34] *Horrible Slaughter of Indians*, Daily Alta California, May 28, 1850.

[35] *Supra* note 26 at 129-30.

[36] *Vallejo*, Sacramento Transcript, September 16, 1850.

[37] Advertisement that ran (nearly) daily from September 16 to May 1851. "Vallejo," *Sacramento Transcript*, September 1850 to May 1851. *Id.*

[38] *Married*, Sacramento Daily Union, April 15, 1851.

Though mired in the general legal wrangling over Mexican grants throughout the 1850s, Frisbie's estates escaped the scrutiny of the Board of Land Commissioners and the Northern District Court unscathed.[39] Few seriously doubted the validity of the claim, yet it remained shadowed by litigation. Squatters circled the rich Rancho lands like vultures, hoping for a chance, however slim, of a Court voiding the claim.[40] Despite the clouded title, Frisbie alienated and leased parcels to over 150 individuals, many prominent men like former chief Justice of the California Supreme Court S. C. Hastings.[41] Frisbie's farmlands then became immensely profitable in the California wheat boom of the late 1850s. As English political economist Ernest Seyd wrote in 1858, "It is nothing unusual in California to see a wheat-field bear 60 bushels to the acre, and there are instances of 100 and 120; and the average run of good and bad yields is estimated at from 25 to 35 bushels, which is double and treble the yield in Europe and elsewhere…. These extraordinary results are obtained with comparatively little labor… and one man can easily cultivate from twenty to twenty-five acres."[42] In 1860, the *Daily Alta* estimated Frisbie's land was worth $50 an acre because of its "wonderful" grain output, the best in the state.[43] As the Frisbie-Vallejo family benefited from the economic boom, they retained social and political prominence. Don Guadalupe had been a member of the 1849 Constitutional Convention and a state senator from 1849-50; Frisbie was an active, if minor, Democratic Party functionary.[44]

Not all was well for the Frisbie estate, however. The sheer size of the property, in large part unimproved and left for cattle raising and wheat monoculture, worked by dubiously "free" Indigenous labor, and sold for speculation to other colonial grandees, drew the ire of radical settlers who viewed the family's ownership of Suscol as illegitimate, unrepublican, and fraudulent. Their strongest argument drew on Lockean usage and fit the Pre-Emption regime perfectly. Why should unfenced, unimproved land be withheld from *bona fide* settlers? And so, despite the family's social and political connections

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[39] Confirmed by the Board May 22, 1855 and Confirmed on appeal by the District Court March 22, 1860. *Supra* note 25 at Appendix 40.

[40] "While strolling over the hills last Sabbath, the writer discovered persons running to and fro – here and there – driving small stakes into the earth, which it appears were to be the boundaries of ranches, lots, &c., taken up under the impression that the land title embraced in the Suscol claim will not be confirmed." *Vallejo*, Daily Alta California, April 8, 1857.

[41] See *supra* note 16 at 460.

[42] See *supra* note 19 at 129.

[43] *Notes of a Trip to Solano County – No. 2*, Daily Alta California, July 15, 1860.

[44] Winfield J. Davis, History of Political Conventions in California, 1849-1892 (1893) at 659. Frisbie was Assemblyman from Solano from 1867-8 and vied for multiple other offices, at 624.

and the successful efforts of their lawyers in shoring up the title, the confirmation of the claim was appealed by US Attorney General Black in 1860-1. This was part of a politically motivated push to return 2.8 million acres of land from 25 disputed grants to the General Government, and therefore Pre-Emptors, who had much more voting clout than their absentee landlords.[45]

VOIDED

In December 1861, months into the Civil War, Black brought the Suscol grant before the US Supreme Court in *United States v. Vallejo*.[46] Even at this late moment the claim seemed likely to survive. The Vallejo case was distinguishable from the other 24 cases before the court. Unlike, say, the infamous Limantour case, an elaborate forgery, the Government produced no evidence for fraud in Vallejo's case – no antedating of the original grant or forged signatures. Indeed, the *genuineness* of the grant was generally accepted in California, but no original copy of the grant and patent could be found in the Mexican archives. In Washington a majority on the US Supreme Court sought to make an example of this missing form. Justice Samuel Nelson, writing for the majority, ruled against Vallejo and his 150 assigns. Given the extent of the Suscol land, Nelson ruled, the improvements were "slight" – establishing little equity by way of use and improvement. It did not accord with the prevailing moral economy of Free Land. The grant had violated conditions subsequent in the Mexican colonization laws: Suscol was too close to the coast and exceeded the maximum number of leagues in a single grant. While these may seem valid reasons for voiding a property, the Court's decision was a major reversal of law. Following the infamous *Fremont* case (1854) covering Mariposas Rancho, to which Nelson had added his signature, Mexican grants with these same deficiencies had breezed through the courts in deference to the equitable property rights of grantees.[47] How would the Court explain their obvious reversal of law?

Most damning, the Court declared, was the archival absence. The Court ruled that it would not accept a claim so deficient in form regardless of whether that lack of form was fraudulent or accidental. Nelson explained the logic of the Government's newfound formalism: "Without this guard,

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[45] See *supra* 16 at 454 and *supra* note 4 (2013) at 37-50.

[46] United States v. Vallejo, 66 US 541 (1861). Black had been replaced as Attorney General by his deputy from the land grant cases Edwin Stanton.

[47] Fremont v. U.S., 58 U.S. 542, at 560 (1854).

the officers making the grants…would be enabled to carry with them in their travels blank forms, and dispose of the public domain at will, leaving the Government without the means of information on the subject till the grant is produced from the pocket of the grantee."[48] Therefore, the entire Suscol grant – all one hundred thousand acres of it – was *voided*. No property right had existed, and therefore none could have been passed on to the assignees. Whether the majority recognized it (there was a war going on), *Vallejo* was a radical decision; on the surface, a decisive victory for the value of usage and the Pre-Emption order. The equitable stance of federal law toward grantees' property was reversed sotto voce.

This legal formalism, without shadow of fraud, earned the majority an aggrieved dissent on the dangers of property "confiscation." Justice Robert Grier, a Jacksonian Democrat, understood how radical the *Vallejo* decision really was. This was Don Guadalupe Vallejo, Grier wrote, not "some obscure person, such as…[the priest] Santillan [in the *Bolton* case]" another of Black's 25 cases where fraud was obvious and well documented.[49] Grier continued, "I cannot agree to confiscate the property of some thousand of our fellow-citizens, who have purchased under this title and made improvements to the value of many millions, on suspicions first raised *here* as to the integrity of a grant universally acknowledged to be genuine in the country where it originated."[50] As historian Paul W. Gates notes, Grier had been misled – as stated above the number of "fellow-citizens" stripped of property was nearer 150 – and the extent of improvements was debatable. As a matter of jurisprudence, however, this hardly mattered. The rights of Suscol's owners had vested – it had been, after all, *17 years*. Grier was not finished eviscerating his fellows. He accused the majority of reasoning backward from their opposition to large property holdings as such: "Now that the land under our Government has become of value these grants may appear enormous; but the court has a duty to perform under the treaty [of Guadalupe-Hidalgo], which gives us no authority to forfeit a *bona fide* grant because it may not suit our notions of prudence or propriety."[51] Furthermore, far from providing predictability and rationality the Court's formalism would throw Suscol into chaos. By default, the former Rancho entered the public domain, and was thus opened to the vultures. When news arrived from Washington, nearly 200 squatter families, clearly vindicated by

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[48] United States v. Vallejo at 556.

[49] United States v. James R. Bolton, 64 U.S. 341 (1859).

[50] Vallejo at 556-7. This was not the "correct figure," and the Justices were likely knowingly mislead as discussed in *supra* note 16 at 455.

[51] *Vallejo* at 556-7.

the nation's highest court, wasted no time in seizing the opportunity to erect dwellings on unimproved portions of the Rancho. Equity, the "right and good," had triumphed over the feudal remnant.

Vallejo's assigns and the Pre-Emptors acted simultaneously and in a manner that revealed the confused character of the Court's formalism and of the land system in general. During the Civil War, the General Government, understandably, did not have a good sense of what Federal officials in California or state officials were actually doing. At the start of 1862, state and local officials had control over how *Vallejo* would be implemented. Initially, Frisbie, Vallejo, and their prominent assigns acted in a manner the Court would have disapproved, carrying "with them blank forms" to keep the property in its current hands. While the grantees had the same Pre-Emption right to claim 160 acres as the squatters, this was not sufficient to cover their voided holdings of thousands of acres (at $50/acre a tidy sum). The Vallejo assigns therefore resolved to use state School Land Warrants to "cover" the vast remainder – a proposition of dubious legality. "Any other course would have been a serious detriment to the business interests of Solano County," the *Marysville Daily Appeal* wrote approvingly.[52] Per the formalities of the School Land Laws, the General Government granted every sixteenth and thirty-sixth section to the states for funding common schools. When those sections had adverse claims, the state could "select" suitable, alternative Federal lands. These selected lands were limited to those which had been "offered at public sale and [remained] unsold."[53] As a matter of form, these selections needed to be (1) properly surveyed lands and (2) approved by the General Land Office. The Act was drawn to limit any one individual from attaining more than 320 acres (a ½ section), but as the Surveyor General of California later wrote, "the law was drawn so that the restriction amounted to nothing."[54] At the time of drafting, a legislator later recalled, the problem was "not so much how to keep one man from getting too much, but how to get money into the school fund from that source."[55] California land officials happily sold unapproved, unoffered, and unsurveyed selections for School Lands. The state and its officials had little interest in enforcing the acreage cap. In a fee-for-service model of administration, Vallejo and his assigns were confident they could re-purchase their estates through manipulation of existing land laws.

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[52] *Suscol Rancho*, Marysville Daily Appeal, April 26, 1862.

[53] See *supra* note 5 (1860) at 493 – Circular to the Land Officers in the Territories June 25, 1844.

[54] Surveyor-General of California, Statistical Report of the Surveyor-General of California, for the Years 1869, 1870, 1871 at 5 (1871).

[55] *Surveyor-General's Report*, Green's Land Paper, Jan 6, 1872.

Regardless of Frisbie's plotting, the squatters remained on the front foot. It must have seemed a grand chance to establish a truly republican distribution of land. Yet, the nation's highest court was three weeks away; the county sheriff was not. A fraught, violence atmosphere quickly developed. On Frisbie's Point Farm, Sherriff Neville attempted to enforce writs of ejectment issued against the squatters by a certain Justice Dwyer. The settlers did not go quietly. As reported for the newspapers by Mrs. John R. Price, one of the Pre-Emptors, on December 8, 1862, Neville's deputy went to eject the Martin family from Point Farm.[56] The deputy came face to face with Mrs. Martin who, genuinely or as a ruse, was "too ill to be moved." When the deputy's man refused to grant Mrs. Martin privacy, he was thrown down the stairs and a "volley of Cayenne pepper" followed. The well-spiced deputy retreated to form a *posse comitatus*. The posse, "approaching in armed array to eject a sick woman," Price wrote dryly, demanded Mrs. Martin leave so they could destroy the home. Against the advice of a panel of doctors, the posse carried the ill woman in her bed to a waiting wagon and razed the house. Price reported with horror that similar scenes attended the ejectment of the Curley family and the Hanson family, including one death. Price concluded: "so far, the instigators of all this crime have gone unpunished, for they have money to cover their tracks." Here the Pre-Emptors made a claim on *their* law, the True Constitution.

In the face of these ejectments the Pre-Emptors organized into a "Settlers' League" for their common defense and legal interest.[57] Matters only escalated. In January 1863, a month after the Martin ejectment, an ejectment on the lands of another grantee ended when the ejector, one S. Finelle, killed settler Lewis R. Cox – "blowing his brains out" – and wounded another settler in the leg.[58] In May, one Manuel Vera was accused of shooting a squatter in the leg and was duly arrested by the busy Sherriff Neville and confined in an ad hoc jail in Vallejo.[59] On the night of May 6, members of the Settlers' League "disguised by turning their coats and blacking their faces," skulked the streets of Vallejo in search of Vera.[60] The League members, the *Daily Alta California* recounted, "entered the building where Vera was confined, seized the Deputy Sherriff, and then murdered Vera, by

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[56] *Statement of Facts Relative to the Ejectments on the Suscol Rancho*, Daily Alta California, Jan 14, 1863.

[57] Reminiscent of the Pike Creak Claimants Union in J. Willard Hurst, Law and the Conditions of Freedom in the Nineteenth-Century United States (1956).

[58] *Shooting Affair at Napa from Squatting on the Suscol Ranch*, Daily Alta California, January 25, 1863.

[59] *Interior Items*, Daily Alta California, December 17, 1863.

[60] A scene straight out of E. P. Thompson, Whigs and Hunters: The Origin of the Black Act (2013).

firing their weapons coward-like, through the door of his room." Still alive after this barrage they "dispatched him," leaving no trace of their identities. Ostensibly fearing separatism, the Army responded – a faint echo of the punitive expedition of 1850. Neville, aided by 39 Light Dragoons, and by the San Francisco Detective Service, labored for the next seven months to identify the men responsible, finally arresting 16 men in an early morning ambush of December 16. In the subsequent trial, the principal, F. A. Preston, was acquitted because the prosecution could not prove his presence at the Vera lynching. A frustrated District Attorney entered "a *nolle prosequi*" for the remainder.[61] One of the leaders of the Squatter's League, and the other man to lend his name to our case, Levi H. Whitney, was briefly arrested for the murder while lobbying for the Settlers in Washington D. C. Whitney was released after the Supreme Court of the District of Columbia found no evidence to hold him.[62]

Violence continued. In June 1863, Neville and US Army detachments arrested four settlers for "trespass, cutting hay, etc."[63] The four men were tried and acquitted "there not being sufficient proof that any resistance had been made," the *California Farmer* explained. Two of the settlers then sued the Sherriff for $5,000 in damages for unlawful arrest. Weary of being branded secessionists, the Settlers' signed an oath of allegiance to the United States which they published in the paper. The writer for the *Farmer* continued: "As we have always said, if a man has a *good, clean title to his land*, one thousand, ten thousand, or a hundred thousand acres, give it to him, let him enjoy it, and protect him in it. But if that title is not good, if it is fraudulent, it then belongs to the United States, and the settlers have a right to it by law and justice, and we say give it to them."

Amidst the growing unrest, the state's large land bar got to work to resolve the impasse through administrative adjudication. The ranks of this group had grown as the California land lobbyist was becoming a feature of some prominence in the nation's capital. These lobbyists acted quickly. The first fruit of their efforts came amidst the "settler trouble" in March 1863, when they secured a special act from Congress giving the Vallejo assigns privileged Pre-Emption claims.[64] The Act called for the tract to be surveyed and "to

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[61] *Interior Items*, Daily Alta California, January 27, 1864.

[62] *A Californian Charged With Murder*, Daily Alta California, March 8, 1864.

[63] *Trouble among the Settlers on the Suscol Grant*, California Farmer, June 12, 1863.

[64] An Act to Grant the Right of Pre-emption to Certain Purchasers on the "Soscol Ranch," in the State of California, March 3, 1863 as published in William Wharton Lester, Land Laws: Regulations and Decisions, Vol. 2 (1870) at 78.

have approved plats thereof duly returned to the proper district land office," but its principle purpose was to grant Vallejo's assigns, for twelve months, the right to pre-empt their former lands for $1.25 an acre *provided* that the land "had been reduced to possession at the time of said adjudication of said Supreme Court [in *Vallejo*.]"[65] Still, the frustrated capitalists ran up against Lockean improvement. It would be up to the local Register and Receiver to determine what that possessory proviso entailed. Crucially however, this Act left unresolved the question of rights of Pre-Emptors established during the period between 1862 and 1863, after the *Vallejo* case but before Congress intervened.

THE LIBERAL TURN

Surely, the General Government's officials resolved, more formalism would help. Commissioner of the GLO James M. Edmunds dispatched a letter of instruction to the Register and Receiver of San Francisco demanding an orderly and bureaucratic administration of the Suscol claims.[66] Subsequent instructions revealed he was less than pleased with the actions of his officials. In March 1864, Edmunds admonished the Register and Receiver, insisting they "require the production of the highest evidence" as to being a *bona fide* purchaser from Vallejo, which they evidently had not done.[67] The Commissioner complained that the officers had not correctly signed affidavits and that the certificates of the Register were undated. For parties claiming to be attorneys, administrators, or executors, the Register and Receiver were to require "written evidence of [their] authority" — an affidavit was insufficient. In a fit of due process, Edmunds demanded the officers give *every* party a right to "cross-question the witnesses of others." "The testimony…must be reduced to writing, and subscribed by the witnesses in your presence, and authenticated by the certificate of the officer administering the oath." The General Land Office included blank notices to be distributed and posted to give "due and full notice" to the parties. It was an effort at bureaucratic control that resisted the government's patronage, profit-motivated form.

In this manner, the hundreds of claims to Suscol ground their way through the land bureaucracy, but beneath these surface squabbles colonial policy began to drift away from the Jacksonian regime. Indicative of these changing

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[65] "Reduced to Possession" was a legal concept much adjudicated. Placing a tenant on land, for example, counted as possession.

[66] J. M. Edmunds to Register and Receiver, April 10, 1863 in Records relating to Suscol Rancho cases, MICROFILM BANC MSS 70/67 c, Reel 2.

[67] J. M. Edmunds to Register and Receiver, March 10, 1864, in *Id.*

tides, the entire California Supreme Court was remade by the Union Party in 1863. Oscar Shafter, Lorenzo Sawyer, John Currey, Augustus L. Rhodes, and Silas Sanderson were all swept into office over a "discouraged and disorganized" Copperhead opposition.[68] The five men were remarkably similar: all were born in Vermont or New York between 1812 and 1824 and all were prominent, respectable members of the land bar. In letters to his father at the time, Shafter explained their electoral fortunes: "The people have…hitherto suffered greatly from incompetent, or dishonest, or partisan Judges, and there is a general disposition just now to select men for judicial positions with some reference to their qualifications."[69] Shafter embodied the landholding lawyer, for he himself owned an enormous Rancho in Marin County, and found liberalism an ever more attractive conception of political economy. As he wrote in the same letter, "This State is prospering beyond all parallel, and in the next ten years will take high rank in the matter of wealth and population." His fellow justices were on their way to embracing similar ideas about property. Sanderson was on his way to becoming a powerful railroad lawyer. As Shafter gossiped to a fellow lawyer in 1867, "Sanderson is getting rich as an attorney of the Central Pacific Railroad Co. With a salary of $1,000 per month, and a good practice besides."[70] After his term, former Justice Sawyer lamented the "sand-lot politics" of the "communistic mob."[71] As historian Michael Ross wrote of the elite bar during the Reconstruction period: "[Stephen] Field's great fear of debt repudiation reflected the widespread sense of uneasiness felt by men of property during the late 1860s and 1870s. Industrialists and financiers amassing great fortunes were terrified that the laboring majority might attack their property both through violence and the ballot box."[72] After all, how "improved" were their properties? After 1871, the Paris Commune loomed especially large in their legal imaginations in much the same way the Haitian revolution haunted the slavocracy. To elite jurists, the squatters of Suscol no longer had the guise of the dear People of a democratic age, but appeared menacing, a kernel of European socialism and a threat to private property in general.

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[68] Oscar Shafter & Flora Haines Loughead, Life, Diary, and Letters of Oscar Lovell Shafter Associate Justice Supreme Court of California January 1, 1864 to December 31, 1868 (1915), Letter to his Father Oct 21, 1863, at 223.

[69] *Id.*, 222.

[70] *Id.*, Letter from J. B. Crockett, at 231.

[71] John McLaren et al., Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West (1992), at 249. See also, L Przybyszewski, *Judge Lorenzo Sawyer and the Chinese: Civil Rights Decisions in the Ninth Circuit*, 1 W. L. Hist. (1988).

[72] Michael A. Ross, Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era (2003), at 186.

Three Suscol cases were appealed up to this reconstituted Court. In *Hastings v. McCoogin* (1864), an ejectment case against a squatter, Sanderson wrote for the Court in favor of Vallejo's purchasers, noting they had "inclosed" their property "by a fence" and thereby withdrawn it from Pre-Emption.[73] Similarly in *Page v. Hobbs* (1865), Sawyer wrote that the lands were not subject to pre-emption because they had been "reduced to possession" by Vallejo's assigns. Both decisions relied on narrow constructions of the Pre-Emption laws, and a favorable reading of "the facts of possession," but did fit the current regime. In *Page v. Fowler* (1865), which involved the value of hay grown by the squatters (124 tons of it), Rhodes wrote that neither party could make a claim to land title: "The personal action cannot be made the means of litigating and determining the title to the real property, as between conflicting claimants."[75] In other words the squatters could keep the hay, and no ruling was made as to the true owner of the underlying real estate. Crucially, in all three cases the Court was loath to "redistribute" property from one party to the other, whether real (land) or personal (hay), an important articulation of the liberal principle of state neutrality.

A more confused dynamic played out in federal appeals as holdovers of the Jacksonian regime supported the squatters. Here we turn to the decisive contest. From its inception, *Whitney v. Frisbie* evinced a struggle of legalities *within* the land bar. On the initial hearing of the dispute, the Register and Receiver unsurprisingly found in favor of Frisbie; Edmunds reversed the decision and decided for Whitney and the Pre-Emptors. In May of 1866, Attorney General James Speed, reversed the Commissioner and dismissed the equitable claims of the Pre-Emptors on the grounds that no rights vested *until* the land bureaucracy performed the proper procedures: "It is not to be doubted that settlement on public lands of the United States, no matter how long continued, confers no right against the Government…It is compliance with those conditions that alone vests an interest in the land."[76] By contrast, Vallejo's claimants had a right which "no supposed equity, based upon simple settlement" could defeat.[77] The Attorney General favorably cited Justice Grier's *Vallejo* dissent to support the "superior equity possessed by all *bona fide* purchasers from Vallejo."[78] In only four years, Grier's conservative dissent

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[73] Hastings v. McCoogin 27 Cal. 84 (1864), at 86.

[74] Page v. Hobbs 27 Cal. 483 (1865), at 489.

[75] Page v. Fowler 28 Cal. 605 (1865), at 610.

[76] "Opinion of the Attorney-General in the Case of the Suscol Rancho" in *supra* note 64 at 381.

[77] *Id.*, at 284.

[78] *Id.*, at 285.

on "confiscation" had become the policy of the Justice Department. This decision was dutifully appealed to the Supreme Court District of Columbia.

Here, Justice Wylie reversed Attorney General Speed in August 1866, making the case that the law was entirely on the side of the Settler's League and that the Attorney General was simply making a political decision. Various legislative Acts had opened even unsurveyed California land to Pre-Emption, the most recent in June 1862, Wylie wrote, and this statute clearly governed when Whitney entered the quarter section in October 1862. Whitney, Wylie ruled, "made the necessary improvements and cultivation…[and] from this date, had acquired as good and valid a right to pre-empt this tract of land, as can ever be obtained by any settler prior to the completion of his title by patent. But after he had thus acquired an inchoate equitable title to the land, Congress…interposed in behalf of the *bona fide* purchasers under Vallejo, to take it away from him and sell the land to them."[79] Unlike the Attorney General, Wylie had decades of case law to support his ruling. Wylie cited *US v. Fitzgerald*, 15 Peters 407 (1841) that no reservation or appropriation could be made after a citizen had "acquired the right of pre-emption," and *Delassus v. US*, 9 Peters 133 (1835) which ruled that "no principle is better settled in this country than an inchoate title to lands is property."[80] Not only did the Attorney General rule against law, but also against colonial land policy which, Wylie wrote, was to "invite immigration, to encourage the growth of the new States."[81] In the end, Wylie ruled, Whitney "acquired a vested interest therein, which the Constitution has placed beyond the reach of even an act of Congress to take from him and grant to another."[82] Wylie's decision was a thorough defense of equitable land law. The remedy asked by Whitney was "to obtain a decree on the ground of fraud and trust, which will prohibit the defendant from obtaining from the Government a patent for the land, which in equity ought to be made to himself."[83] It was well established in equity that requesting a patent for land known to be held according to law, but without patent, by another, as Frisbie was doing by asking for a patent to Whitney's land, was a "constructive fraud."[84] The Vallejo claimants were responsible for their fraudulent "deception" of Congress.[85] Wylie duly enjoined the patent from issuing to Frisbie.

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[79] "Opinion of Mr. Justice Wylie as to the Rights of Pre-Emptors on the 'Suscol Ranch,' in *Id.* at 287.

[80] *Id*. at 288.

[81] *Id.*, at 289.

[82] *Id.*, at 290.

[83] *Id.*

[84] *Id*., at 292. Quoting Justice Story.

[85] *Id.*, at 293.

Ten years earlier Wylie's decision likely would have persuaded the land bar. However, the squatters suddenly faced a hostile and reactionary Supreme Court that was unmoved by Wylie's careful antebellum jurisprudence. Faced with the Gordian Knot of Suscol, the Court cut to the basis of landed property itself.

THE TAMING OF PRE-EMPTION

The Court had created the mess at Suscol in 1861 with formalism, both a quite literal insistence on paper forms and a general legal impulse, and so it was perhaps fitting they used the same logic to get out of their mess in 1869. Writing for the Court, an agitated Justice Samuel Miller had clearly had enough of the "equities" of Pre-Emption no matter how well-supported by antebellum legal thought. Miller's restatement of the facts made plain his distaste for Whitney and the Settlers League in general: "Frisbie having become possessor of the legal title to the land in controversy, the complainant, Whitney, claims that he shall be compelled to convey it to him, because he has the superior equity; for this is a suit in a court of equity, founded on its special jurisdiction in matters of trust. It is, therefore, essential to inquire into the foundation of this supposed equity."[86] Despite being rejected by the land office, Miller wrote, Whitney claimed "that his intrusion on Frisbie's inclosed grounds by violence, and his offer to prove his intention to become a *bona fide* occupant of the land, create[d] an equity superior to Frisbie's, which demand[ed] of a court of chancery to divest Frisbie of his legal title and vest it in him. If there be any principle of law which requires this, the court must be governed by it."[87] Predictably, Miller found no such principle. He concluded by dismantling Lockean use and improvement as a form of property – even as enclosure was a vital fact in the case – echoing the Attorney General. In a lurch toward legal positivism, state recognition became the only legitimate source of property rights.

The redistributive potential of Pre-Emption was central to its rejection. In an 1870 case penned by Justice Chase, on the validity of a Texas contract under Confederate law, the Court ruled that "all just legislation…shall not take from A. and give it to B" a principal prefigured in *Frisbie*.[89] This neutrality was an important pillar of the liberal legality *Frisbie* represented. The *Sacramento Daily Union* described the legal development well: "[The Pre-Emption

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[86] Frisbie v. Whitney, 76 U.S. 187 (1869), at 192.

[87] *Id.*, at 193.

[88] *Id.*, at 194.

[89] Legal Tender Cases 79 U.S. 457 (1870), at 580.

law's] obvious purpose is to settle the country, not to disturb settlements."[90] California, in other words, was no longer a colony and the Lockean principles of original acquisition no longer applied. No justice dissented.

The companion to the federal case at state law, *Hutton v. Frisbie* 37 Cal. 475 (1869), was decided the same year, and found the same conclusion: no rights vested in the Pre-Emptor until they had paid for, *and* received, a patent – a process entirely controlled by land officials rather than equitable principles. Writing for the majority, Justice Sawyer ruled that Congress never intended for the Pre-Emption laws to operate to redistribute lands from colonist to other colonists. Rather the laws were "intended to give those who were pioneers in the unsettled wilds of the public domain the right to purchase the unoccupied lands which they have had the courage and hardihood to settle."[91] In other words Pre-Emption was a vehicle for colonization, for the expropriation of Native lands, but inappropriate for republican government. Sawyer believed the Settlers' League was trying to benefit from the honest labor of others. Sawyer, however, *did* need to address the argument that a contract existed between a Pre-Emptor and the State. To do this he resorted to sheer sophistry. No contract existed for the simple reason that a contract provided too much right. If it was a contract, they would have to find a different result, so it was not a contract.

The two new Democratic appointments on the court, J. B. Crockett and Royal Sprague, preferred the antebellum legal formula of inchoate rights and challenged the flimsy contractual reasoning of the majority.[92] Though Crockett shared the sympathies and prejudices of the men of his class he maintained a legal commitment to the Jacksonian order in form if not substance.[93] The two Democrats defended the free land policy of Pre-Emption and the antebellum order of colonization: "[selling] to actual settlers at a very low price…has been for many years a favorite policy with the government. It was deemed advisable to sell the lands to actual settlers at a low price, and thus promote the rapid expansion of our national wealth and the speedy development of our agricultural resources, rather than to sell, for a higher price, to speculators, who would or might keep it out of the

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[90] *The Soscol Ranch Pre-Emption Rights*, Sacramento Daily Union, July 29, 1869.

[91] Hutton v. Frisbie 37 Cal. 475, at 486 (1869).

[92] They replaced Shafter and Rhodes respectively.

[93] "Instead of loafing about the cities earning a precarious living, often by questionable methods, and daily complaining of a lack of employment, let [the ungrateful wretch] go into the country and rent, if he cannot buy, a small piece of land." California Immigrant Union, All About California, and the Inducements to Settle There (1870), at 49.

market, and thus greatly retard the growth of the country."[94] Note, crucially, Crockett's changing justification of Pre-Emption: not to create an egalitarian property order, but to maximize the amount of land in the market, a liberal aim if ever there was one. The Democratic dissent marked how far the Republican transformation of property had progressed during the 1860s and how far the liberal construction of colonization had taken hold even amongst unreconstructed Democrats.

The ejectments resumed in earnest, and this time the Settlers League was broken, no doubt wondering what new world they had been thrown into.

Having successfully driven not one but two populations of people from his father-in-law's lands, Frisbie finally realized his dream of converting the land to pure capital. In 1871, he sold his lands to a corporation called the Vallejo Land and Improvement Company.[95] It was through this vehicle that Frisbie hoped to make Vallejo a rival to San Francisco in the international commodity trade. Former US Senator Milton Latham and former Governor Leland Stanford joined Frisbie as trustees, along with E. H. Green, a London capitalist and Vice President of the London and San Francisco Bank, and Faxon D. Atherton, "one of the Directors of the California Pacific Railroad," a speculative line that would link Vallejo to Sacramento.[96] At its incorporation, the company had a paper stock of $4 million and, as the *Vallejo Chronicle* breathlessly added, "an unlimited amount of capital" to draw upon.[97] This was a speculative venture of an immense scale. Like many such ventures, however, the Company failed to live up to the booster's imagination. The company's accounts from 1872-3 with the London and San Francisco Bank evince a smaller, though still significant, operation.[98] Commercial revolution it was not, but the records of the company do indicate Suscol's continued production for the booming international wheat and flour markets. To make the land pay, the Company contracted with the "Grain King," Isaac Friedlander, to ship wheat.[99] The land was now thoroughly capitalized, as were its products. In a letter of July 30, 1872, Frisbie corresponded with

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[94] Hutton v. Frisbie 37 Cal. 475, at 508-9 (1869).

[95] *Another Immense Corporation*, Vallejo Chronicle republished in the Stockton Independent, October 20, 1871. "The *Chronicle* asserts that they have already secured possession of nearly all the unimproved and much of the improved property of Vallejo. The object of the incorporation is to improve the facilities of that place as a railroad terminus and shipping point."

[96] *A Reported Great Enterprise*, Sacramento Daily Union, October 20, 1871.

[97] *Another Immense Corporation*, Stockton Independent, October 20, 1871.

[98] "Vallejo Land & Development Co.: Accounts with the London and San Francisco Bank, 1872-3," Vallejo Land and Improvement Company records, BANC MSS 78/134 c, The Bancroft Library, University of California, Berkeley.

[99] Rodman Wilson Paul, *The Great California Grain War: The Grangers Challenge the Wheat King,* 27 Pac. Hist. Rev. (1958), at 331-349.

a local bank to loan "money on wheat" for grain of "no 1 quality and in a good warehouse."[100] On this "wheat loan," as Latham recorded one month later on August 30, 1872, the Vallejo Company secured $80,000.[101] No such loan would have been possible with the cloud of squatter title or Native title hanging over the wheat harvest. It had taken two decades, but Frisbie had finally converted the Suscol Rancho into capital.

CONCLUSION

In that same year of 1872, former Commissioner of the General Land Office Joseph S. Wilson (1860-1, 1866-71) sat down to describe and analyze the changes in property and colonization he had overseen. Writing in a new weekly called *Green's Land Paper*, named after its editor William S. Green, who was a major dealer in swamp lands, Wilson's legal history appeared as "The National Domain – Historical Outline," published in four parts from April 3 to May 1, 1872.[102] Wilson's history was not striking for its analytical ability, though its conclusion was clear and could be summarized in a single sentence: The story of the public domain was the journey from Feudalism to Liberalism. To write this history, Wilson followed the chain of title, beginning with a slog through the English crown grants of the seventeenth century. After a tedious accounting, Wilson concluded "It will be observed that these grants from the Crown were frequently in conflict with and overlapped each other. Not only a want of geographical knowledge, but a disregard of prior grants, often led the capricious mind of the Stuart dynasty to annul their own solemn public acts, and to ignore rights acquired under those acts."[103] Stuart arbitrariness was hardly an original theme, but it established the character of the *ancien régime* – irregular, confused, and productive of injustice. Under American law, by contrast, "Vested rights acquired under former jurisdictions have ever been held sacred."[104] Anticipating the reader's objection, Wilson acknowledged the rather large exception to this sacred policy in the following section titled, "Indian Usufructuary Interests," which were of course founded upon "different principles" that demanded "far different treatment."

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[100] Outgoing from John B. Frisbie, July 30, 1872, and Letter to John B. Frisbie, August 2, 1872, "Letters to Vallejo Land & Development Co., 1872," Vallejo Land and Improvement Company records, BANC MSS 78/134 c, The Bancroft Library, University of California, Berkeley.

[101] Milton S. Latham to J. K. Duncan, Esq. Aug 30, 1872, "Letters to Vallejo Land & Development Co., 1872," Vallejo Land and Improvement Company records, BANC MSS 78/134 c, The Bancroft Library, University of California, Berkeley.

[102] Joseph S. Wilson, *The National Domain*, Green's Land Paper, April 3, April 10, April 24, May 1, 1872.

[103] Joseph S. Wilson, *The National Domain*, Green's Land Paper, April 10, 1872.

[104] Joseph S. Wilson, *The National Domain*, Green's Land Paper, May 1, 1872.

To discuss these, "different principles" Wilson employed an extended quotation from *Johnson v. McIntosh* (1823) to deal with the unique rights of conquest. As Chief Justice Marshall wrote, "Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be respecting the original justice of the claim…." However, Wilson wanted to deal with the problem of violence: Did *Johnson* "involve the right of *forcibly* dispossessing [Indians] of that occupancy? This issue has never yet been presented." Wilson provided his answer in a suggestive combination of Locke and the contemporary critique of land monopoly:

> The American people deeply deplore and reprobate the destruction of the Indian tribes, in spite of the utmost efforts of the General Government; but still, the popular insight detects an underlying infraction of the great law of humanity, of common justice, in the Indian monopoly of the continent. As action and re-action are equal and reciprocal no less in the moral than in the physical world, it is not at all surprising that this great fundamental wrong in the social arrangements of our race has been productive of unhappy consequences, or that these have fallen with especial weight upon the heads of their unconscious agents and instruments.[105]

In other words, there *was* a right of violent redistribution, a substantive justification for conquest. Of course, like the courts dealing with Suscol, this idea *needed* immediate repudiation and disavowal for a liberal like Wilson who, as he had insisted mere inches of newspaper column to the left, held property rights sacred. How did Wilson resolve this obvious problem for himself? Well, here he returned to the opening theme of his narrative, to something called "Feudalism," but which was increasingly taking on several incompatible and unorthodox meanings. To the Stuarts, Wilson added "Indian monopoly," escheat, wastage, real actions, tenure, conditional estates, and use rights of all kinds. In an attempt at conclusion, he wrote, "The failure of the first aristocratic efforts at colonization upon the basis of feudalistic social organization now appears as an event giving decisive advantage to the development of freedom."[106] The ultimate legal manifestation of freedom was "allodial tenure," estates with no conditions, which transferred immediately upon grant from the State. Fee simple had emerged as the ultimate achievement of property law. Wilson ended, "It will be seen, from

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[105] *Id.*

[106] Joseph S. Wilson, *The National Domain*, Green's Land Paper, May 1, 1872.

the facts recited, that the liberal principles embodied in our great public-land policy have reconstructed, to a great extent, the legal basis of our social order, by liberalizing the ideas of land ownership. The General Government set this glorious example, and the justice and expedience of its policy in this respect are now universally admitted."

The reader might rightly suspect I have skipped the part of the history where Wilson discussed his own actions or the conflict over California land titles. I have omitted this for the simple reason that Wilson did not discuss it. He was, of course, quite aware of how property law had developed on the Pacific Coast – at that moment he was also writing an advertisement to European investors to purchase railroad lands in western Oregon – but it made no sense in the Liberal regime which had *arrived*, outside of historical time.[107] To tie this regime to history – to blood and morality and crisis – would be to discredit it, and so, like in *Frisbie* and in Locke, Wilson conjured a discontinuity in historical time. This was not a legal change marked by careful technicalities accreted over time, as in Horowitz, but a convulsion in legal thought. Capitalist development fundamentally transformed property in California, and by natural extension the American settler form. Free Land had been replaced by a new term, quite popular in *Green's Land Paper:* Cheap Land. Suscol revealed this slippage, and only in examining a "New Country," a colony, could such a rupture be directly observed and then disavowed.

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Kyle DeLand

[107] Joseph S. Wilson, Railroad Lands in Western Oregon: For Sale at Low Rates and on Liberal Terms: Extraordinary Inducements to Emigrants (1872).

MICHAEL BANERJEE*

California's Constitutional University:

Private Property, Public Power, and the Constitutional Corporation, 1868–1900

September 2023

INTRODUCTION

It is well known that the University of California is the world's foremost public university.[1] Indeed, in a 2020 interview with the University's president, the chairman of the University of California Board of Regents, the University's governing body, could remark in passing, "obviously, we're

* Ph.D. student in Jurisprudence and Social Policy (on clerkship leave), UC Berkeley School of Law. I would like to express my gratitude to a number of (natural) persons. My doctoral advisors, Christopher Tomlins and Dylan Penningroth, have been a constant source of support and intellectual energy since I began my studies in Berkeley Law's Jurisprudence and Social Policy Program in 2019. The archivists at the University of California at Berkeley's Bancroft Library and the University of Vermont's Billings Library were exceedingly helpful, patient, and accommodating. Benjamin Leong, an undergraduate at UC Berkeley, provided excellent research assistance in the summer of 2022, made possible by Sabrina Soracco, Linda von Hoene, and UC Berkeley's SURF-SMART research program. Daniel Farber, Stanley Katz, Stephen Galoob, John Aubrey Douglass, Jonathon Booth, and Ming-hsi Chu provided incisive comments on an early draft. Illuminating comments from the participants of the 2022 Max Planck Summer Academy for Legal History in Frankfurt, Germany, the 2022 History of Education Doctoral Summer School in Madrid, Spain, and the 2023 Boston-Area Legal History Colloquium greatly improved the paper. Without Haris Durrani's encouragement, this paper would not have been submitted. Justice George Nicholson, editor of *California Legal History*, exhibited great patience during the editing process. Finally, my mother has discussed this project with me nearly every day for the last four years and those conversations continually invigorated my interest in the University of California's legal history. In that time, she has been subjected to much more in the way of university legal history than anyone rightly deserves, and this article is therefore dedicated to her. All errors are my own.

[1] *See* "UC Berkeley remains the No. 1 public university in the world," Berkeley News (Nov. 3, 2022), https://news.berkeley.edu/2022/11/03/uc-berkeley-remains-the-no-1-public-university-in-the-world/.

a *public* university."[2] Two years later, in his end-of-the-year message, the University's president would thank the members of the University for making it "the best public research university system in the world."[3] What is less well known is that the University is the private property of the California Regents, who are non-public constitutional officers making law and leading an independent branch of California government. Proprietary government persists in twenty-first-century California, although legal historians have long thought this governmental scheme to have been eradicated in the United States.[4] What is more, this proprietary governmental scheme springs, surprisingly, from the ultimate public authority: the People of California themselves. Upon further investigation, the world's foremost public university turns out not to be so obviously public after all.

The University of California Board of Regents was established by the California Legislature through the Organic Act of 1868, which provided that "[t]he general government and superintendence of the University shall vest in a Board of Regents, to be denominated the 'Regents of the University of California,' who shall become incorporated under the general laws of the State of California."[5] In addition to the general government and superintendence of the University, the Regents were also to take "custody of the books, records, buildings, and all other property of the University."[6] Further, "[t]he Regents and their successors in office, when so incorporated, shall have power, and it shall be their duty, to enact laws for the government of the University, to elect a President of the University and the requisite number of professors."[7] However, "[n]o member of the Board of Regents, or of the University, shall be deemed a public officer by virtue of such membership, or required to take any oath of office, but his employment as such shall be held and deemed to be exclusively a private trust."[8]

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[2] *Meet UC's Next President, Michael V. Drake, M.D.*, YouTube (July 10, 2020), https://www.youtube.com/watch?v=LqHdoQUJTbQ, at 00:22:00 (spoken emphasis maintained).

[3] *An end of Year Message from UC President Michael V. Drake*, YouTube (Dec. 22, 2022), https://www.youtube.com/watch?v=09znyzVjBUY, at 00:00:23.

[4] On the present-day jurisprudential puzzle posed by the proprietary rights of public bodies, *see* Seth Davis, *The Private Rights of Public Governments*, 94 Notre Dame L. Rev. 2091 (2019).

[5] *An Act to create and organize the University of California*, 1867–68 Cal. Stats. ch. 244 § 11 [hereinafter, "Organic Act"].

[6] Id. § 12.

[7] Id. § 13.

[8] Organic Act, § 11. On the deceptively difficult question of who are members of the university, *see* Terry F. Lunsford, *Who are Members of the University Community?*, 45 Denv. L.J. 545 (1968). In the Middle Ages, "the term 'members of the university', or 'privileged persons', included not only graduates and scholars, but also all college servants, and members of certain trades which served the university, such as stationers and bookbinders, cooks, caterers and innkeepers, and carriers." W. A. Pantin, Oxford Life in Oxford Archives 59 (1972). Today, it is unclear who constitutes the membership of the university. While "the connection between [t]rust and [c]orporation is very ancient," it is outside of the scope of this paper. Maitland, "Trust and Corporation," *in* State, Trust and Corporation 94 (David Runciman & Magnus Ryan, eds., 2003). Nonetheless, the trust is treated in the discussions of the 1868 Organic Act and the 1879 California Constitution, *infra*.

The People of California then incorporated this private, proprietary governmental scheme into the 1879 California Constitution, which proclaimed that "[t]he University of California shall constitute a public trust, and its organization and government shall be perpetually continued in the form and character prescribed by the organic Act creating the same."[9] Thus, the Regents, whose members were non-public officers, became a constitutional corporation, perpetually endowed with lawmaking powers and the University's government and property. Through the occupation of their office—"the formal position[] from which governance is conducted"[10]—the Regents owned the government and property of the University, including an undulating and overlapping kaleidoscope of constitutional powers. As legal historian Frederic William Maitland wrote, "ownership and rulership are but phases of one idea,"[11] and the Regents' portfolio—or, rather, its "estate"[12]—expressed both phases in equal measure. By transforming the University from a legislative corporation to a constitutional corporation, which could be changed only by the People themselves, Californians created a constitutional university.

Constitutional corporations are corporations chartered directly by the sovereign People via constitutional provision. These corporations take written constitutions as their charters. "The people, in their political capacity, are the corporators"[13] of these corporations, which, having "received the sanction of the constitution . . . [have] become a part of the fundamental law."[14] Such corporations might include the legislative, executive, and judicial

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[9] Cal. Const. art. IX, § 9 (1879) (emphasis in original). The 1918 amendment to this provision removed explicit reference to the Organic Act and stated that the University was "to be administered by the *existing corporation* known as 'The regents of the University of California,' with full powers of organization and government," which would appear to indirectly reference–and thereby incorporate—the Organic Act. *Id.* (as amended, Nov. 5, 1918) (emphasis supplied). The 1918 provision also mandated that "[s]aid corporation shall be vested with the legal title and the management and disposition of the property of the university and of property held for its benefit." *Id.* Thus, the 1918 amendment sustained and reaffirmed the Regents in their "existing" form—that is, as a corporation whose members were non-public officers—and "vested" this corporation "with the legal title and management and disposition of the property of the university."

[10] Karen Orren, *Officers' Rights: Toward a Unified Field Theory of American Constitutional Development*, 34 L. & Soc'y Rev. 873, 874 (2000).

[11] Frederic William Maitland, Township and Borough 31 (1898).

[12] Maitland notes that "[f]ew words have had histories more adventurous than that of the word which is the *State* of public and the *estate* of our private law, and which admirably illustrates the interdependence that exists between all parts of a healthily growing body of jurisprudence." Frederic William Maitland, "Editor's Introduction," *in* Otto Gierke, Political Theories of the Middle Ages xxv (Frederic William Maitland, trans., 1900 (1958)). *See also* Natasha Wheatley, The Life and Death of States: Central Europe and the Transformation of Modern Sovereignty 11–12 (2023) ("Put succinctly, the 'historical rights' of the estates became the historical rights of states.").

[13] Regents of the University of Michigan v. Detroit Young Men's Society, 12 Mich. 138, 163 (1863 MI) (Manning, J., dissenting).

[14] Auditor General v. Regents of the University of Michigan, 83 Mich. 467, 468 (1890 MI) (Champlin, C.J.).

departments of the state and federal governments. These corporations are unmediated "expression[s] of the will of a whole people"[15]; special repositories of sovereign volition. They are corporations brought into legal existence directly by the People themselves. As David Ciepley notes, "[j]ust as a sovereign king could issue a corporate charter to found a government with a legally limited (charter-limited) jurisdiction, so could a sovereign people."[16] In short, "a constitutional corporation," as the Michigan Supreme Court put it in 1911, is "the highest form of juristic person known to the law."[17] Because the People created the University, it was the creature of the People rather than a creature of the legislature.[18] "[W]hat the state may create it may destroy—or regulate."[19] However, the People's creations may only be destroyed by the People themselves. Between 1879 and 1900, Californians worked out the purpose and delineated the power of their constitutional university, established by the People as a constitutional corporation, through constitutional corporate law.

In arguing that the California Regents are non-public constitutional officers leading an independent branch of California government and that the Board of Regents holds the world's foremost public university as its private property,[20] the article revives the concepts of the constitutional corporation—a corporation chartered directly by the sovereign People—and the constitutional university—a university that is itself a constitutional corporation. The Regents are, to quote the aforementioned Michigan

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[15] Alexis de Tocqueville, 1 Democracy in America 247 (1862 (1990)).

[16] David Ciepley, *Democracy and the Corporation: The Long View*, 26 Ann. Rev. Pol. Sci. 1, 10 (2023).

[17] Auditor General v. Regents, *supra* note 14, at 450. Other courts adopted the term *constitutional corporation*, as well. *See*, *e.g.*, State ex rel. Black v. State Board of Education, 196 P. 201, 205 (1921 ID) (Budge, J.).

[18] Some nineteenth-century observers believed that even those universities that would be considered private today were public by dint of their legislative creation. New York politician Samuel B. Ruggles considered Columbia College, "[f]ounded by a temporal sovereign," to be "solely the creature of the State." "Samuel B. Ruggles States the Case for the Appointment of Wolcott Gibbs," 1854, *in* 1 American Higher Education: A Documentary History 454 (Richard Hofstadter & Wilson Smith, eds., 1961 (1970)). John Whitehead writes that, to Ruggles, Columbia's "trustees were merely agents entrusted with the interests of the community." John S. Whitehead, The Separation of College and State: Columbia, Dartmouth, Harvard, and Yale, 1776–1876 160–61 (1973).

[19] Grant McConnell, Private Power and American Democracy 129 (1966).

[20] Grant McConnell argued in his 1966 book that state constitutions tend to collect power in private hands. *See id.* at 194 (state constitutional arrangements "surrender the peculiar functions of government to private hands over which many who must feel government power can have no influence"). In arguing that the Regents are non-public officials, who, in their corporate capacity own the University as its private property, this paper might provide support for McConnell's argument, if only in one state. More recently and topically, Christopher Newfield has lamented what he calls "privatization" whereby university "control shifts from public officials to private interests." Christopher Newfield, The Great Mistake: How We Wrecked Public Universities and How We Can Fix Them 20 (2016). As we shall see, Newfield's own university, the University of California, might not have been as "public" as he suggests it once was. *See id.* at 21 (comparing Clark Kerr's complaints about extramural governmental influence in University of California affairs in the early 1960s to present-day extramural private influence in public university affairs more generally).

Supreme Court case more fully, "the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the Legislature."[21] The Regents are imbued with every bit as much sovereignty as are the California legislature, executive, and judiciary. This article is the very first to explore these concepts in any depth[22] and the very first to unearth lawmaking by non-public constitutional officers.[23] It is also the first to argue

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[21] Auditor General v. Regents, *supra* note 14, at 450. Justice James Wilson wrote in 1785 that "States are corporations or bodies politick of the most important and dignified kind," James Wilson, "Considerations on the Bank of North America" (1785), *in* 3 The Works of The Honourable James Wilson 408 (Bird Wilson, ed., 1804), striking a chord similar to that which the Minnesota Supreme Court struck in its 1928 rebuttal that the *Auditor General* "dictum . . . ignores the fact that the state itself is a political corporate body." State v. Chase, 175 Minn. 259, 265 (1928) (Stone, J.) (quotation omitted). David Runciman would restate this proposition as a question at the turn of the century. *See* David Runciman, *Is the State. Corporation?* 35 Government & Opposition 90 (2000).

[22] The term *constitutional university* was coined by University of Michigan law professor William P. Wooden in a 1957 case-review article published over 100 years after the University of Michigan became the world's first constitutional university in 1850. *See* William P. Wooden, *Recent Cases*, 55 Mich. L. Rev. 728, 729 (1957) (reviewing the Utah Supreme Court case of *University of Utah v. Board of Examiners*, 4 Utah 408 (1956)). Another case-review article only briefly discusses the constitutional corporation. See P. W. Viesselman, *Legal Status of State Universities*, 2 Dakota L. Rev. 309 (1928). The term *constitutional corporation*, meaning a corporation established by constitution, was coined in the 1890s in Michigan. *See* Weinberg v. Regents of the University of Michigan, 97 Mich. 246, 249 (1893) (Montgomery, J.) ("It is contended on behalf of the defendants that the statute does not apply to the Regents of the University of Michigan; that the university buildings are not built at the expense of the state, nor are they contracted for on behalf of the state, within the meaning of the statute; that they are constructed by a constitutional corporation which may sue and be sued, and has power to take and hold real estate for the purpose which is calculated to promote the interests of the university."). Prior to 1893, American courts used the term *constitutional corporation*, albeit infrequently, to refer to corporations that comported with the applicable law and constitution. Gifford v. Livingston, 2 Denio 380, 387 (Ct. Corr. Err. N.Y. 1845) ("But the actual judgments given by the Supreme Court and by this Court in that case can only be sustained upon the supposition that such associations were legal and constitutional corporations, so as to be taxable as corporate stock at the place where the office of the association was located, and by the corporate name."); First Div. of St. Paul & P.R. Co. v. Parcher, 14 Minn. 297, 323 (1869) (Berry, J.) ("No greater nor other franchises have been bestowed by the state than the St. Paul & Pacific Railroad Company, a legal and constitutional corporation, possessed.").

Several works discuss the constitutional university but do not argue that it is a world-historic development. See Edwin Duryea, The Academic Corporation: A History of College and University Governing Boards 159–60 (Don Williams, ed., 2000); John S. Brubacher, The Courts and Higher Education 76–78, 134 (1971) (discussing Sterling v. Regents of the University of Michigan, 110 Mich. 369 (1896)); Malcolm Moos & Francis E. Rourke, The Campus and the State 22–34 (1959) (discussing constitutional corporation); Edward C. Elliott & M. M. Chambers, The Colleges and the Courts: Judicial Decisions regarding Institutions of Higher Education in the United States 134–45 (1936) (discussing constitutionally independent corporations); David Spence Hill, Control of Tax-Supported Higher Education in the United States 71–77 (1934) (discussing higher-educational developments in California).

A few articles discuss constitutional-university autonomy. Joseph Beckham's 1978 article on constitutionally autonomous governing boards provides a helpful survey of relevant cases. *See* Joseph Beckham, *Constitutionally Autonomous Higher Education Governance: A Proposed Amendment to the Florida Constitution*, 30 U. Fla. L. Rev. 543, 546–55 (1978). Another pair of articles discuss the University of California's "autonomy" but do not shed light on the constitutional university or constitutional corporation. *See* Caitlin M. Scully, *Autonomy and Accountability: The University of California and the State Constitution*, 38 Hastings L.J. 927 (1987); Harold W. Horowitz, *The Autonomy of the University of California under the State Constitution*, UCLA L. Rev. 23, 25 (1977).

[23] Some scholars have addressed the related phenomenon of legislative delegation of lawmaking authority to private groups. *See* James Willard Hurst, Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin 1836–1916 92 (1984) (discussing "the characteristic nineteenth-century reliance upon delegation of public functions to private hands"); Jonathan Lurie, *Private Associations, Internal Regulation, and Progressivism: The Chicago Board of Trade, 1880–1923, as a Case Study*, 16 Am. J. Leg. Hist. 215, 218 (1972) (arguing that Chicago Board of Trade was private association exercising extensive self-government); McConnell, *supra* note 19, at 147 ("Often, for example, the exercise of licensing powers is delegated to 'private' associations, even though the coercive power involved is that of a state."); Louis L. Jaffe, *Law Making by Private Groups*, 51 Harv. L. Rev. 201, 220 (1937) (discussing "law-making by private groups under explicit statutory delegation").

that the constitutional university represents a world-historic innovation, a novel and peculiarly American university. Six centuries after the first universities were established,[24] western Americans invented a new kind of university, chartered directly by the sovereign People. Legislative universities may be destroyed by the legislature; constitutional universities may be destroyed only by the sovereign People.[25] Californians remade the university, which was characterized by an "unbroken continuity,"[26] by reformulating the ancient, direct connection between university and sovereign.

The constitutional university is a supremely powerful legal creature that has been hiding in plain sight for 173 years, as discussed below. These universities enact laws for their government,[27] exercise the police power,[28]

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[24] *See* Duryea, *supra* note 22, at 5.

[25] *See* Brubacher, *supra* note 22, at 77 (describing transfer of government of University of Michigan from Michigan legislature to Michigan Regents through 1850 Michigan Constitution); Thomas McIntyre Cooley, Michigan: A History of Governments 324 (1906) (noting, under 1850 Michigan Constitution, "the board [of Regents] was given complete control of the university and its funds, to the exclusion of legislative dictation"). The constitutional university has endured, although "[s]tate constitutions have little of the sacredness of the federal document," McConnell, *supra* note 19, at 193, and even through the nineteenth century's " 'era of permanent constitutional revision' in the states." See G. Alan Tarr, Understanding State Constitutions 94 (1998 (2000)) (quoting Daniel T. Rodgers, Contested Truths: Keywords in American Politics since Independence 93 (1987)).

[26] Charles Homer Haskins, The Rise of the Universities 24 (1923 (1972)); *see also* Helene Wieruszowski, The Medieval University 5 (1966) ("As the direct descendant of the medieval *studium* the modern university looks back to more than seven hundred years of a continuous history."); Walter Rüegg, "Foreword," *in* 1 A History of the University in Europe: Universities in the Middle Ages xx (Hilde De Ridder-Symoens & Walter Rüegg, eds., 1992) (noting that the university "is . . . the only European institution which has preserved its fundamental patterns and its basic social role and functions over the course of history."); James Axtell, Wisdom's Workshop: The Rise of the Modern Research University 2 (2016), (noting that the university is "one of the very few European institutions that have preserved their fundamental patterns and basic social roles and functions over the course of history.").

[27] "The regents shall have power, and it shall be their duty to enact laws for the government of the university." Minn. Territorial Stats. c. 28, § 9 (1851). The California legislature used nearly the same language in the California Organic Act of 1868, which established the University of California and was incorporated by reference into the California Constitution of 1879: "The Regents and their successors in office, when so incorporated, shall have power, and it shall be their duty, to enact laws for the government of the University." Organic Act, § 13. The U.S. Supreme Court determined in 1934 that the California Regents' enactments were state statutes. That Court wrote that, "by the California Constitution the regents are, with exceptions not material here, fully empowered in respect of the organization and government of the University, which, as it has been held, is a constitutional department or function of the state government." Hamilton v. Regents of the University of California, 293 U.S. 245, 257 (1934) (Butler, J.). Therefore, "[i] t follows that the [Regents'] order making military instruction compulsory is a statute of the state within the meaning of section 237(a), [Judicial Code] 28 USCA s 344(a)." *Id.* at 258.

Constitutional universities are not the only universities that legislate. For example, the Texas Commission of Appeals, an appellate tribunal created in 1879 "intended to relieve the [Texas] Supreme Court of a portion of its caseload," James L. Haley, The Texas Supreme Court: A Narrative History, 1836–1986 95 (2013), observed that "[s]ince the board of regents" of the University of Texas, created by the Texas legislature, "exercises delegated powers, its rules are of the same force as would be a like enactment of the Legislature, and its official interpretation placed upon the rule so enacted becomes a part of the rule." Foley v. Benedict, 122 Tex. 193, 199–200 (Tex. Com. App. 1932) (Sharp, J.) (citations omitted). Universities are not the only corporations that legislate, although university legislation might be the only corporate legislation that carries "the same force as would . . . a like enactment of the Legislature." Ciepley writes that, as a general matter, a corporate "charter also grants jurisdictional autonomy to this government—the right to legislate, that is, to set rules (by-laws and work rules, for example)." Ciepley, *supra* note 16, at 6.

[28] Williams v. Wheeler, 23 Cal.App. 619, 623 (1st Dist. 1913) (Richards, J.); Wallace v. Regents of the University of Cal., 75 Cal.App. 274 (1925) (Tyler, P.J.). *See also* Sweinbjorn Johnson, *When the Importer Is a State University, May the Government Collect a Duty?*, 27 Mich. L. Rev. 499, 519–20 (1929) (arguing that the state university "has been *endowed with a portion of the police power of the state*." (emphasis preserved)).

unilaterally reject unconstitutional legislation,[29] take property by eminent domain,[30] and incorporate inferior corporations.[31] That is, these modern universities exercise a great deal of "positive authority,"[32] reminiscent of their medieval predecessors. Their legal powers and capacities paint a picture of modern "scholastic authority"[33] quite different from the common, enervated, and nebulous descriptions of "autonomy."[34] The constitutional universities represent a signal American contribution to the world history of universities. They tend to rank among the best universities in the world,[35] and they developed first in the American west. The history of the constitutional university demonstrates a forgotten vision of state-university relations that is ripe for recovery.

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[29] *See* Black v. Board of Education, *supra* note 17, at 205.

[30] *See* Mich. Const. art. XIII §4 (1908) ("The regents of the University of Michigan shall have power to take private property for the use of the University, in the manner prescribed by law."); People v. Brooks, 224 Mich. 45 (1923) (McDonald, J.) (dismissing writ of certiorari for meritless challenge to Regents' exercise of eminent domain power for the purpose of constructing a club and dormitory for law students). Interestingly, non-constitutional universities also exercise this power. *See* Russell v. Trustees of Purdue University, 201 Ind. 367 (1929) (Willoughby, J.) (Trustees of Purdue University, a creature of the legislature, empowered to exercise the right of eminent domain as a state institution). The transfer of private property for scholarly use finds expression in the university's early history. In 1300, pursuant to "a time-honored custom claimed by the university [of Oxford]," King Edward I "requested that the burgesses surrender to the scholars any houses that had once been utilized by clerks." Pearl Kibre, Scholarly Privileges in the Middle Ages 271 (1962). At Paris in 1245, the scholars passed statutes regulating the price of rent. An uncooperative landlord risked having "his dwelling… interdicted for five years, that is, he would be forbidden to rent his house to scholars during that period." Pearl Kibre, *Scholarly Privileges: Their Roman Origins and Medieval Expression*, 59 Am. Hist. Rev. 543, 559–60 (1954). Strikingly, some contemporary jurists held that "the scholar's right to expel a smith or anyone living in his house who should disturb him in his studies was one of the peculiar privileges of a scholar." *Id.* at 560–61. One scholar "related that he had expelled a certain weaver living near the Collège du Vergier at Montpellier because the weaver sang in such a loud voice that he interfered with the students' study." *Id.* at 561. Crucially, this expulsion (what we might today call an eviction or taking) "was justified… because of the public utility which abides in scholars." *Id.* at 561 (citation omitted).

[31] *See* People ex rel. Regents of the University of Michigan v. Pommerening, 250 Mich. 391, 396 (1930) (Wiest, C.J.) ("In 1924, under the provisions of Act No. 84, Pub. Acts 1921, and as a creature of the Board of Regents, a nonprofit corporation was organized for the declared purpose of 'The furtherance in general of the physical betterment of the students at the University of Michigan….'). The power of incorporation was long held by universities. Blackstone noted that the University of Oxford held this power through its Chancellor: "In this manner the chancellor of the univerfity of Oxford has power by charter to erect corporations; and has actually often exerted, it in the erection of feveral matriculated companies, now fubfifting, of tradefmen fubfervient to the ftudents." 1 Blackstone's Commentaries ch. 18. On Ciepley account, universities that may incorporate inferior corporations would be understood as "sovereign or semisovereign." Ciepley, *supra* note 16, at 6.

[32] Richard Hofstadter & Walter P. Metzger, The Development of Academic Freedom in the United States 11 (1955 (1965)).

[33] Kibre, *supra* note 30, at 290.

[34] *See*, *e.g.*, John Aubrey Douglass, The California Idea and American Higher Education: 1850–1960 Master Plan 69 (2000) (discussing the constitutional universities' "unusual level of autonomy").

[35] *See* David Labaree, A Perfect Mess: The Unlikely Ascendency of American Higher Education 133–34 (2017). Three (Michigan, Minnesota, and California) of the five public universities that Roger Geiger includes in "the select group" of research universities on which he focuses in his 1986 monograph are constitutional universities, which were chosen because "they led all others in the quality of their faculties as judged by their academic peers." Roger L. Geiger, To Advance Knowledge: The Growth of American Research Universities, 1900–1940 v, 3, 6 (1986). Tellingly, these are the exact same five state universities that Edwin Slosson visited as he prepared his famous 1910 volume, although he chose them through the proxy of the Carnegie Foundation rankings of annual expenditures. Edwin E. Slosson, Great American Universities ix (1910). Julie Reuben includes only two public universities—Michigan and California—in her study of eight elite universities, selected for "their leadership in the development of the research university during the late nineteenth and early twentieth centuries, and because of the contributions of the intellectuals who were associated with these institutions." Julie A. Reuben, The Making of the Modern University: Intellectual Transformation and the Marginalization of Morality 9 (1996).

Western American universities occupy a special place in the history of the American university. Frederick Rudolph writes that

> [t]he American state university would be defined in the great Midwest and West, where frontier democracy and frontier materialism would help to support a practical-oriented popular institution. The emergence of western leadership in the movement stemmed in part from the remarkable rapidity with which western states were populated and from the accelerated speed with which their population grew.[36]

In this way, Rudolph follows Frederick Jackson Turner, who made the same observation half a century earlier. Turner argued that the midwestern state universities, "shaped under pioneer ideals," gathered vocational, collegiate, applied, and professional studies in a single university.[37] "Other universities do the same thing," Turner wrote, "but the headsprings and the main current of this great stream of tendency come from the land of the pioneers, the democratic states of the Middle West."[38] Roger Geiger argued that the midwestern and western state universities constituted a group of central importance—along with the colonial colleges to the east and the research universities established in the last third of the nineteenth century—to the rise of the American research university.[39] Legal historian Lawrence Friedman cited two constitutional universities—the Universities of California and Idaho—as examples of outstanding state universities in his discussion of the importance of states in America's federal system.[40] The western colleges and universities were also the first in the nation to offer coeducational instruction, although sometimes unevenly, as in the famous case of Clara Foltz, discussed below.[41]

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[36] Frederick Rudolph, The American College and University: A History 277 (1962 (1990)).

[37] Frederick Jackson Turner, "Pioneer Ideals and the State University," *in* The Frontier in American History 258 (1977 (1920)). These pioneer ideals included conquest, discovery, individualism, and democracy. *See id.* at 245–49. Roger Geiger might add dynamism and egalitarianism to Turner's list, *see* Geiger, *supra* note 35, at 243, and some might refer to these "pioneer ideals" as "educational populism," Tom Slayton, "UVM, Carl Borgmann, and the State of Vermont, *in* The University of Vermont: The First Two Hundred Years 283 (Robert V. Daniels, ed., 1991). For a recent and critical appraisal of Turner's ideas, *see* Greg Grandin, The End of the Myth: From the Frontier to the Border Wall in the Mind of America 113–31 (2019).

[38] *Id.*

[39] *See* Geiger, *supra* note 35, at 3.

[40] *See* Lawrence M. Friedman, A History of American Law 505 (1973 (2005)).

[41] *See* Barbara Miller Solomon, In the Company of Educated Women: A History of Women and Higher Education in America 43 (1985); Bruce A. Kimball, The "True Professional Ideal" in America: A History 228 (1992); Duryea, *supra* note 22, at 158. Coeducational universities fit into and fueled the general openness of nineteenth-century western American society. *See* Elizabeth D. Katz, *Sex, Suffrage, and State Constitutional Law: Women's Legal Right to Hold Public Office*, Yale J. L. & Feminism 137, 174 (2022) ("The Western Territories were on the cutting edge of granting women political rights."); *see also id.* at 144 ("One crucial reason for Midwestern advances in women's officeholding was women's early acceptance into higher education."); Jacques Barzun, From Dawn to Decadence: 500 Years of Western Cultural Life 1500 to the Present 611 (2000) (noting women's right to vote in western United States).

While historians of the university have noticed that the nineteenth-century universities in the west were special, they have missed what made a subgroup of these universities unique in world history. They have generally not noticed that a select group of universities in the American west were constitutional universities.[42] Even when historians have recognized that some western universities were constitutional universities, these historians tend to view them as "unique among state universities."[43] The constitutional university was not simply unique among state universities in the United States. When the People of Michigan established the country's first constitutional university in 1850, as discussed below, such a university existed nowhere else.

Although it represents a novel legal foundation, the constitutional university fits comfortably in the lineage of the ancient universities, generally established by either sovereign king or sovereign pope. For this reason, more medieval European material appears below than one might expect to find in an article about a nineteenth-century American university. Rather than compile this material in a background section or the like, it has been introduced where relevant because this is hardly background material. It cannot be avoided in a history of universities and corporations, even that of a university corporation as youthful and American as the University of California. I hope that this article will serve, among other things, as an introduction for generalists interested in the questions, challenges, and rewards of university legal history.

The article shows that the constitutional university represents at once continuity and discontinuity.[44] Along the way, the article also challenges some prevailing ideas about (1) constitutional law, such as the idea that the tripartite

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[42] Duryea's discussion of state universities' corporate foundations comes close to linking the constitutional university's striking geographical contours but he does not make this connection explicitly. *See* Duryea, *supra* note 22, at 158–60.

[43] Howard H. Peckham, The Making of the University of Michigan 1817–1992 35 (Margaret L. Steneck & Nicholas H. Steneck, eds. 1967 (1994)). John Whitehead includes only a laconic discussion of the constitutional university in his study of state-university relations at four early-American colleges. *See* Whitehead, *supra* note 18, at 136–37. In his April 2023 book, Timothy Kaufman-Osborne describes the provisions of the California Constitution that address the University of California, and even points out that the Regents are a corporation, but does not discuss the world-historic character of this provision. *See* Timothy V. Kaufman-Osborn, The Autocratic Academy: Reenvisioning Rule within America's Universities 197 (2023).

[44] In writing a legal history, one must acknowledge the challenge presented by what medievalist Brian Tierney called "[t]he characteristic problem in studying the history of ideas": the fact that "patterns of words (encoding patterns of ideas) often remain the same for centuries; but, as they are applied in different social and political contexts, they take on new meanings." Brian Tierney, Religion, Law, and the Growth of Constitutional Thought 1150–1650 ix (1982). However, this "characteristic problem" is, as we shall see, leavened by the countervailing fact that "the word-patterns do not entirely lose their original connotations." *Id.*

separation-of-powers framework is exemplary for state constitutions,[45] and (2) corporation law, including that "[c]orporations in the United States are all creatures of the states, literally legal persons created and recognized by *state* governments."[46] Indeed, if it is true that American constitutions have corporate content, then the separation-of-powers debate may be restated in corporate terms. This is because the concept of equality might be unknown to the corporation. As the University of Oxford argued during a struggle with the City of Oxford in the 1640's, "where two Corporations live together, there is a necessity that one of them be subordinate to ye other, for it cannot be expected that they should live together peacably, if they be of equall power, and independent; as this very place hath found heretofore by bloody experience."[47] If American constitutions contain corporate content, and if corporations cannot be equal to one another, then the separation of co-equal branches of government might be further complicated.

Californians—rather than the State of California—created their constitutional university in 1879. Proprietary constitutional government persists in the relationship of the Regents to the University, where ownership and rulership continue to converge in twenty-first-century California. The Regents possess "both public power and private right, power over persons, right in things."[48] At the same time, this confluence of ownership and rulership helps to highlight (1) the forgotten, "agential"[49] sovereign People[50]

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[45] *See* Jonathan L. Marshfield, *America's Other Separation of Powers*, 73 Duke L.J. (forthcoming, 2023). On the distinctiveness of state constitutionalism, *see* Tarr, *supra* note 25, at 6–28, 121.

[46] Jessica L. Hennessy & John Joseph Wallis, "Corporations and Organizations in the United States after 1840," *in* Corporations and American Democracy 74 (Naomi R. Lamoreaux & William J. Novak, eds., 2016) (emphasis in original). American jurists have long espoused this view. Nineteenth-century treatise writer John Dillon wrote that "[c]orporations, however, as the term is used in our jurisprudence, do not include States, but only derivative creations, owing their existence and powers to the State acting through its legislative department." John F. Dillon, 1 Commentaries on the Law of Municipal Corporations § 31 (1872 (1890)).

[47] Pantin, *supra* note 8, at 96 (quoting Oxford University Archives, SP. E. 8. 16.)

[48] Maitland, *supra* note 11, at 30.

[49] Daniel Lee, Popular Sovereignty in Early Modern Constitutional Thought 305 (2016).

[50] The sovereign People were once "a practical reality," as Christian Fritz has shown. Christian G. Fritz, American Sovereigns: The People and America's Constitutional Tradition Before the Civil War 12 (2008). The sovereign People directly established corporations in the nineteenth-century American west. While early Americans inherited "the idea that some positive act of the sovereign was necessary to create corporate status," this idea has been lost. James Willard Hurst, The Legitimacy of the Business Corporation 1780–1970 8–9, 15 (1970). Today, some corporation law scholars seem to either conflate or confuse the sovereign with the state. *See*, *e.g.*, Ciepley, *supra* note 16, at 5 ("At American independence, the British king's right of chartering corporations passed to the colonial legislatures and then, under the Union, to the federal and state legislatures, with state legislatures today generally delegating the task of chartering to an office of the secretary of state."); Elizabeth Pollman, *Corporate Personhood and Limited Sovereignty*, 74 Vand. L. Rev. 1727, 1729 (2021) (corporations are "artificial persons created by the state"); Elizabeth Pollman, *Reconceiving Corporate Personhood*, Utah L. Rev. 1629, 1633 (2011) ("After independence, royal charter was no longer required for incorporation; that authority subsequently resided in each state."); Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 William & Mary Quart. 51, 51 (1993) ("With independence, the legislatures acquired the power to incorporate, which in Britain was a prerogative of the crown."). Kaufman-Osborn repeats this view throughout his newly released book. *See* Kaufman-Osborn, *supra* note 43, at, *e.g.*, 40, 41, 46, 50.

and (2) that state and corporation are, according to Maitland, "but phases of one idea"[51] and that "there seems to be a genus of which State and Corporation are species."[52] Chief Justice John Marshall wrote in 1811 that "[t]he United States of America will be admitted to be a corporation."[53] Francis Lieber wrote in 1830 that "[a]ll the American governments are corporations created by charters, viz. their constitutions."[54] Maitland wrote in 1901 that "the American State is, to say the least, very like a corporation: it has private rights."[55] In 2017, political theorist David Ciepley argued that "the [federal] Constitution should be seen as a popularly issued corporate charter."[56] This article intervenes at a moment in which scholars have been inquiring into the university's corporate foundations and the relationship between state and corporation anew.[57] The relationship between state and corporation blurs into identity in the constitutional corporation. The constitutional corporation is Maitland's missing link, without which he could not see that state and corporation form a single species.[58]

The constitutional university shows that the universally accepted idea that corporations are "artificial persons created by the state"[59] does not capture all American corporations. To the extent that the concession theory holds that "[t]he corporation is, and must be, the creature of the State," it is mistaken.[60]

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[51] Maitland, *supra* note 11, at 31.

[52] Maitland, *supra* note 12, at ix; *see also* Nikolas Bowie, *Corporate Personhood v. Corporate Statehood*, 132 Harv. L. Rev. 2009, 2015 (2019) ("When these [colonial American] corporations disembarked, they then served as the colonies' first governments."); David Ciepley, *Is the U.S. Government a Corporation?: The Corporate Origins of Modern Constitutionalism*, 111 Am. Pol. Sci. Rev. 418 (2017); Andrew Fraser, *The Corporation as a Body Politic*, 57 Telos 5, 7 (1983) (explaining that "[t]he corporation, in short, was shorn of its identity as a body politic" in the nineteenth century).

[53] Dixon v. U.S., F.Cas. 761, 763 (Cir. Ct. D. Va. 1811) (Marshall, C.J.).

[54] 3 Encyclopaedia Americana 547 (Francis Lieber, ed., 1830).

[55] F. W. Maitland, "The Crown as Corporation," *in* State, Trust and Corporation 46 (David Runciman & Magnus Ryan, eds., 2003).

[56] Ciepley, *supra* note 52, at 419. *See also* Ciepley, *supra* note 16, at 10 ("The US Constitution is not a written 'social contract,' as widely held, but a popularly issued corporate charter, or 'constitutional charter.' " (quoting The Federalist, No. 49)).

[57] For example, on March 14, 2023, political philosopher Philip Pettit's *The State* was published. Philip Pettit, The State (2023). On April 7, 2023, political theorist Timothy V. Kaufman-Osborne's book, entitled *The Autocratic Academy: Reenvisioning Rule within America's Universities*, was released. Kaufman-Osborn, *supra* note 43. In June 2023, political theorist David Ciepley published his article, entitled "Democracy and the Corporation: The Long View." Ciepley, *supra* note 16, at 2.

[58] Maitland was reluctant to admit that the state was a corporation because "certain uncomfortable things followed" from this admission, such as the fact that, "if the state were a corporation, some account would have to be given of how it came to be." Runciman, *supra* note 21, at 98–99; *see also* Tierney, *supra* note 44, at 26 (noting that "the underlying perception that the structure of a *universitas* could provide a model for the structure of the state is an old one," and that this "point was made long ago by Gierke and Maitland" and is now "part of the conventional wisdom of all who deal with these matters"). More recent scholars maintain Maitland's distinction. In Natasha Wheatley's 2023 book on the Habsburg Empire, she maintains the distinction between state and corporation. *See* Wheatley, *supra* note 12, at 283 ("Enduring collective legal entities like states and corporations are sometimes called 'fictional persons' or 'artificial persons.'").

[59] Pollman, *supra* note 50, at 1729 (citation omitted).

[60] Maitland, *supra* note 12, at xxx.

Mistaken though it may be, this theory is so enamoring that scholars who seem to know it to be underinclusive nevertheless allow it to lead them astray. One such scholar wrote in a book about academic corporations that "[t]he central feature of governance comes into focus when one considers a board's relationship with the general society. First and fundamentally, it holds its office and assumes its responsibilities on the basis of an act of public government: a charter or a statute or constitutional provision."[61] A constitutional provision is no act of government at all; rather, such a provision brings government into existence. An American concession theory would therefore conceptualize incorporation as either a direct or indirect grant of authority from the sovereign People.

In what follows, the term *Regents* is deployed to refer both to the Regents as a unified corporate body and to the non-public constitutional officers that make up that body. This, I believe, is correct "corporation grammar,"[62] and, in exchange for some ambiguity, the reader is rewarded with a greater appreciation of the multidimensional meaning of corporate personhood. The term, at times, denotes "the all of unity" and, at other times, denotes "the all of plurality"[63]; at times it "disguish[es]," and at times, it "reconcile[s] the manyness of the members and the oneness of the body."[64] Indeed, Maitland writes, "[t]he property of a corporation is unquestionably its property, and are we to be angry whenever a noun in the singular governs a verb in the plural? If so, we had better not read medieval records, for even *universitas* [Latin for "corporation"] is sometimes treated as a 'noun of multitude.' "[65] If so, we ought not to read nineteenth-century University of California records either.

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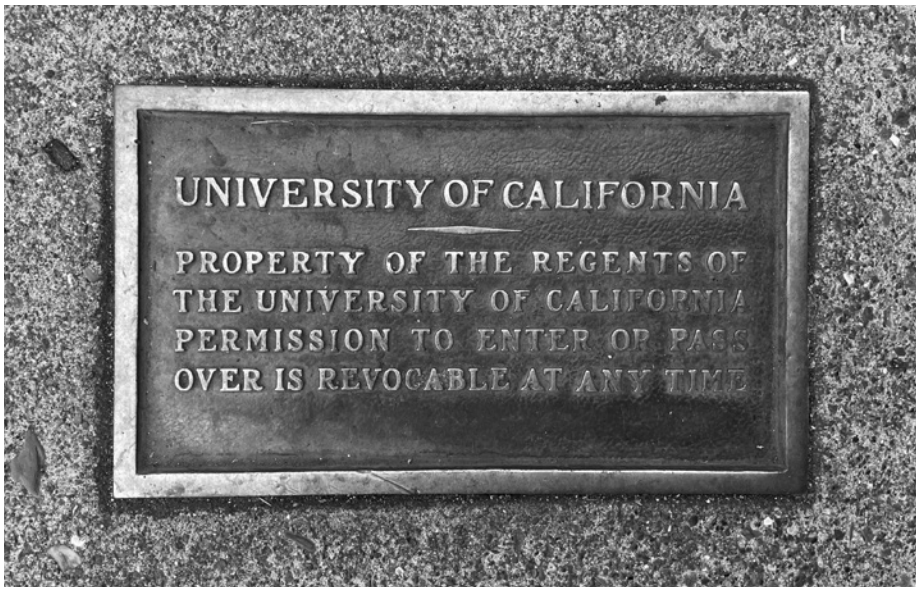
[61] Duryea, *supra* note 22, at 2.

[62] Edward H. Warren, *Safeguarding the Creditors of Corporations*, 36 Harv. L. Rev. 509, 510 n. 1 (1923).

[63] Maitland, *supra* note 11, at 22.

[64] Maitland, *supra* note 12, at xxvii. Clark Kerr's famous appellation for the modern American university—the "multiversity," replacing the combining form *uni* with *multi*, Clark Kerr, The Uses of the University 5 (1963 (2001))—can be seen as a modern attempt to underscore the University's "Manyness," which "has its origin in Oneness," Otto Gierke, Political Theories of the Middle Ages 9 (Frederic William Maitland, trans., 1900 (1958)).

[65] Maitland, *supra* note 11, at 13 (quoting Gierke, Genossenschaftsrecht, ii 49). *See also* Paddy Ireland, *Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality*, 17 J. Leg. Hist. 41, 45–48 (1996) (discussing nineteenth-century English references to corporation as "it" and "they").



Plaque embedded in sidewalk at University of California at Berkeley, at the intersection of Center Street and Oxford Street, Berkeley, CA (June 24, 2022). Photo Credit: Michael Banerjee.

Underneath the above pictured plaque, declaring that the University of California is "property of the Regents," is a surprisingly deep and ironic legal history. "Irony and nostalgia play[ing] fundamental roles in the study of academics,"[66] this article draws out both characteristics of the University's legal history, with nostalgia running into irony and irony running into nostalgia.

First, I discuss the University's first decade under the Organic Act of 1868, which established the University of California. Second, I discuss the Constitutional Convention of 1878, out of which came the California Constitution of 1879 and the creation of California's constitutional university. Third, I discuss the legal development of California's constitutional university up to 1900 before concluding.

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[66] William Clark, Academic Charisma and the Origins of the Research University 20 (2006). For a defense of historical irony as an explanatory tool, *see* Sheldon Rothblatt, The Revolution of the Dons: Cambridge and Society in Victorian England 5 (1968 (1981)).

PART I: THE LEGISLATIVE UNIVERSITY, 1868–1879

Clark Kerr, who was then president of the University of California, wrote in 1963 that

> Heraclitus said that "nothing endures but change." About the university it might be said, instead, that 'everything else changes, but the university mostly endures'—particularly in the United States. About eighty-five institutions in the Western world established by 1520 still exist in recognizable forms, with similar functions and with unbroken histories, including the Catholic church, the Parliaments of the Isle of Man, of Iceland, and of Great Britain, several Swiss cantons, and seventy universities. Kings that rule, feudal lords with vassals, and guilds with monopolies are all gone. These seventy universities, however, are still in the same locations with some of the same buildings, with professors and students doing much the same things, and with governance carried on in much the same ways.[67]

In what follows, I will argue that Kerr's own university actually represents a wholly new kind of university, unique in the world and peculiar to the American west.

Before the creation of the world's first constitutional university in Michigan in 1850, universities were established in five ways: papal bull, royal charter, imperial decree, legislative enactment, and prescription.[68] What would become California's wholly new constitutional university was itself initially created in a typical way: through legislation.[69] The Organic Act of 1868 formed the University of California by unifying the Congregationalist, classically liberal College of California with the technical Agricultural, Mining, and Mechanical Arts College.[70] The California Legislature passed

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[67] Kerr, *supra* note 64, at 115.

[68] *See* Walter Rüegg, *"Themes," in 1 A History of the University in Europe: Universities in the Middle Ages* 7 (Hilde De Ridder-Symoens & Walter Rüegg, eds., 1992). The University of Cambridge, for example, is an ancient corporation by prescription. *See* The King v. The Chancellor, Masters and Scholars of the University of Cambridge, 1 Strange 557, 557 (1722) ("To this [mandamus] they [the University] return, that the University of Cambridge is an ancient university, and a corporation by prescription, consisting of a chancellor, masters and scholars, who time out of mind have had the government and correction of the members, and for the encouragement of learning have conferred degrees, and for reasonable causes have used to deprive."); Frederic William Maitland to Henry Sidgwick, 1893, *in* The Letters of Frederic William Maitland 106–10 (C. H. S. Fifoot, ed., 1965). On prescription generally, *see* Edward Cavanagh, *Prescription and Empire from Justinian to Grotius*, 60 Hist. J. 273 (2017).

[69] Moos & Rourke, *supra* note 22, at 19 (noting that "[m]ost state universities are also creatures of the legislature rather than the constitutions").

[70] *See* Verne A. Stadtman, "Higher Education," *in* The Centennial Record of the University of California 304 (Verne A. Stadtman, ed., 1967); John Aubrey Douglass, *Creating a Fourth Branch of State Government: The University of California and the Constitutional Convention of 1879*, 32 Hist. Educ. Quart. 31, 34 (1992) (describing the "Congregationalist-leaning College of California"); In re Royer's Estate, 123 Cal. 614, 621–22 (1899) (Chipman, J.) ("The property previously belonging to the College of California, now the site of the university, was conveyed to the state for the benefit of the state university…." (internal quotations omitted)). For an illuminating recapitulation of the Organic Act's passage, *see* William Warren Ferrier, Origin and Development of the University of California 603–04 (1930).

the Act to take advantage of the 1862 Morrill Act grants.[71] The Act charged a corporation, "to be denominated the 'Regents of the University of California' " and incorporated under California law, with "enact[ing] *laws* for the government of the University."[72] The Act was based on the 1837 legislation establishing the University of Michigan, which afforded a great deal of power to the governing body of that university,[73] and on the Dartmouth College charter.[74] The Regents consisted of twenty-two members: six *ex-officio* members, including the California Governor and Lieutenant-Governor; eight gubernatorial appointees; and eight honorary members selected by the fourteen other members.[75] Both the appointed and honorary members served sixteen-year terms.[76] The Regents were incorporated under California law on June 18, 1868, when

> a certificate properly executed by the governor, lieutenant governor, and superintendent of public instruction was filed in the office of the secretary of state, certifying that, in pursuance of the provisions of the [Organic Act of 1868], they, 'three of the persons indicated in and by such enactment as trustees and directors of the corporation thereby directed to be created, have associated ourselves together for the purposes mentioned in and by said enactment, and to form a corporation for such purpose by the name and style designated in and by said enactment, which is the "Regents of the University of California."[77]

A classic definition of *corporation* is "a conjunct or collection in one body of a plurality of persons," and "the most significant feature of the personified

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[71] *See* Report of the Board of Regents of the University of California 6 (1872). For a recent, critical account of the Morrill Act, *see* Robert Lee & Tristan Ahtone, *Land-Grab Universities: Expropriated Indigenous Land is the Foundation of the Land-Grant-University System*, High Country News (March 30, 2020), https://www.hcn.org/issues/52.4/indigenous-affairs-education-land-grab-universities.

[72] Organic Act, § 13 (emphasis supplied). This kind of language is quite ordinary for nineteenth-century university charters—royal, legislative, and constitutional—in the United States and elsewhere in the common-law world. *See*, *e.g.*, An Act to Establish a College at Newark, Laws of the State of Delaware, chp. 257 § 1 (University of Delaware Charter) (February 5, 1833) (empowering the college's self-perpetuating Board of Trustees "to make by-laws as well for the government of the college, as their own government"); Royal Charter of McGill University (July 6, 1852) ("And We do by these presents, for Us, Our Heirs, and Successors, will, ordain, and grant, that the Governors of the said College, or the major part of them, shall have power and authority to frame and make statutes, rules, and ordinances touching and concerning the good government of the said College"); An Act to Incorporate the University of the Territory of Washington, Wash. Terr. Laws, https://leg.wa.gov/CodeReviser/documents/sessionlaw/1861pam1.pdf (January 29, 1862) ("The regents, shall have power to enact ordinances, by-laws and regulations, for the government of the University."). But the effect of this language is radically different when incorporated into a constitutional text, which is to lodge ultimate legal authority in the university itself.

[73] *See* Douglass, *supra* note 70, at 37 (describing the creation of California's Organic Act). *See also* William B. Cudlip, The University of Michigan: Its Legal Profile x (1969) (timeline including description of 1837 legislation forming the University of Michigan); Horowitz, *supra* note 22, at 25.

[74] *See* In re Royer's Estate, *supra* note 70, at 621, discussed *infra*.

[75] *See* Organic Act, § 11.

[76] *See id.*

[77] Lundy v. Delmas, 104 Cal. 655, 658–59 (1894) (per curiam) (quoting June 18, 1868, incorporation certificate), discussed *infra*.

collectives and corporate bodies was that they projected into past and future, that they preserved their identity despite changes, and that therefore they were legally immortal."[78] The Regents, as a corporation, "were that 'plurality' in succession, braced by Time and through the medium of Time."[79] The plurality sustained over time was emphasized in both the Organic Act of 1868 and the California Constitution of 1879.[80]

Section 11 of the Act read, in relevant part, as follows:

> The general government and superintendence of the University shall vest in a Board of Regents, to be denominated the "Regents of the University of California," who shall become incorporated under the general laws of the State of California by that corporate name and style. The said Board shall consist of twenty-two members, all of whom shall be citizens and permanent residents of the State of California.

The Regents is not a "what" but a "who." Although university historian Hastings Rashdall asked "what is a university,"[81] he could just as easily have asked "who is the university?"[82] After all, "the word 'university' means merely a number, a plurality, an aggregate of persons. *Universitas vestra*, in a letter addressed to a body of persons, means merely 'the whole of you'; in a more technical sense it denotes a legal corporation or juristic person."[83] In other words, it describes a collective nominated to exist as a single body. In the 1819 *Dartmouth College* case, Chief Justice John Marshall proffered his classic definition of a corporation: "[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."[84] A charter is "a franchise," granting "a property right over and

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[78] Ernst H. Kantorowicz, The King's Two Bodies: A Study in Medieval Political Theology 310–11 (1957 (1981)) (quoting Gierke, *Gen.R.*, III, 193f).

[79] *Id.* at 310.

[80] *See* Organic Act, § 13 ("The Regents and *their successors in office*, when so incorporated, shall have power, and it shall be their duty, to enact laws for the government of the University" (emphasis supplied)); Cal. Const. art. IX, § art. IX, § 9 (1879) ("The University of California shall constitute a public trust, *and its organization and government shall be perpetually continued* in the form and character prescribed by the organic Act creating the same." (emphasis supplied)).

[81] *See* Hastings Rashdall, 1 The Universities of Europe in the Middle Ages 1 (F. M. Powicke & A. B. Edmen, eds., 1895 (1936)).

[82] M. M. Chambers, *Who Is the University?: A Legal Interpretation*, 30 J. Higher Educ. 320, 320 (1959) (emphasis preserved). In a recent article, Adam Sitze has asked a similar question: "[i]s the professor an employee who works *for* and *in* the university or an appointee who in some constitutive sense *is* the university itself?" Adam Sitze, *University in the Mirror of Justices*, 33 Yale J. L. & Human. 175, 179 (2021).

[83] Rashdall, *supra* note 81, at 5. Maitland's influence on Rashdall is apparent here; Rashdall solicited Maitland's commentary on drafts of the books. *See id.* at x–xi (crediting Maitland for assistance with medieval law).

[84] Dartmouth College v. Woodward, 4 Wheat. 518, 636 (1819 US) (Marshall, C.J.).

above the specific properties granted in the document."[85]

As Walter Rüegg wrote,

> Even the name of the universitas, which in the Middle Ages applied to corporate bodies of the most diverse sorts and was accordingly applied to the corporate organization of teachers and students, has in the course of centuries been given a more particular focus: the university, as a *universitas letterarum*, has since the eighteenth century been the intellectual institution which cultivates and transmits the entire corpus of methodically studied intellectual disciplines.[86]

"[T]he *universitas* is a person."[87] *Universitas* included, Maitland and co-author Frederick Pollock state, even "the king himself," who "is the greatest of all communities, 'the university of the realm,' "[88] and whose "twinned" corporate personality was elucidated by Ernst Kantorowicz in his famous study of the King's two bodies.[89] The medievalist Maurice Powicke maintains that the *universitas* referred specifically to "the internal structure of

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[85] Hendrik Hartog, Public Property and Private Power: The Corporation of the City of New York in American Law, 1730–1870 19 (1983). While it is outside the scope of this article, franchises were granted to certain constitutional universities through constitutional provision. Blackstone defined a franchise as "a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject." Caleb Nelson, *Vested Rights, "Franchises," and the Separation of Powers*, 169 U. Pa. L. Rev. 1429, 1439 (2021) (quoting 2 Blackstone's Commentaries 37). Incorporation itself is a franchise. *See id.* at 1429 ("Blackstone observed that 'it is . . . a franchise for a number of persons to be incorporated, and subsist as a body politic, with a power to maintain perpetual succession and do other corporate acts.' " (quoting 2 Blackstone's Commentaries 37) (brackets omitted)).

In the section of the 1858 Minnesota Constitution dealing with the University of Minnesota, the People of Minnesota proclaimed that "[a]ll the rights, immunities, franchises, and endowments heretofore granted or conferred are hereby perpetuated unto the said university." Minn. Const. art. VIII, § 4 (1858)); see also Gleason v. University of Minnesota, 104 Minn. 359, 360–61 (1908) (Lewis, J.) (discussing same). The 1890 Idaho Constitution provided that "[a]ll the rights, immunities, franchises, and endowments heretofore granted thereto by the territory of Idaho are hereby perpetuated unto the said university." Id. Const. Art. IX § 10 (1890). Similarly, the 1896 Utah Constitution stated that "[t]he location and establishment by existing laws of the University of Utah, and the Agricultural College are hereby confirmed, and all the rights, immunities, franchises and endowments heretofore granted or conferred, are hereby perpetuated unto said University and Agricultural College respectively." Utah Const. art. 10, § 4 (1896). In the nineteenth century, it was not the case that "franchises were granted by the government," a mistaken view that American jurists have embraced dating at least to James Kent. Nelson, *supra* note 85, at 1438 (internal quotation marks omitted); *see also id.* at 1440–41 (discussing nineteenth-century American views on franchises). The sovereign People granted franchises as well. Indeed, Western Americans perpetuated franchises unto their constitutional universities.

[86] Rüegg, *supra* note 26, at xx; *see also* Blackstone's Commentaries, *supra* note 31, at ch. 18 ("They were afterwards much confidered by the civil law [a], in which they were called univerfitates, as forming one whole out of many individuals ; or collegia, from being gathered together : they were adopted alfo by the canon law, for the maintenance of eccleſiaſtical diſcipline ; and from them our ſpiritual corporations are derived.").

[87] Maitland, *supra* note 12, at xxii.

[88] Frederick Pollock & Frederic William Maitland, 1 The History of English Law Before the Time of Edward I 725 (1898) (quoting Bracton at 171); *see also* Maitland, *supra* note 12, at xxxvii (discussing Bracton's reference to "*universitas regni*"). Francis Lieber believed that "[a] nation itself is the great corporation, comprehending all the others, the powers of which are exerted in legislative, executive and judicial acts, which, when confined within the scope, and done according to the forms, prescribed by the constitution, are considered to be the acts of the nation, and not merely those of the official organs." Encyclopaedia Americana, *supra* note 54, at 547.

[89] KANTOROWICZ, *supra* note 78, at 3.

a community, whether this be a body politic, a city or borough, a *studium*, or other entity."[90]

Section 12 of the Act read, in relevant part:

> The said Board of Regents, when so incorporated, shall have the custody of the books, records, buildings, and all other property of the University . . . . Regents to have power. All lands, moneys, bonds, securities or other property which shall be donated, conveyed or transferred to the said Board of Regents by gift, devise, or otherwise, including such property as may hereafter be donated and conveyed by the President and Board of Trustees of the College of California, in trust, or otherwise, for the use of said University . . . shall be taken, received, held, managed, invested, reinvested, sold, transferred, and in all respects managed, and the proceeds thereof used, bestowed, invested and reinvested, by the said Board of Regents, in their corporate name and capacity.

Furthermore, the California Legislature included among the Regents' powers "[t]he general government and superintendence of the University."[91] The Act required the University to provide instruction in the various liberal arts as well as training in the mechanical arts.[92] The Act further required that the College of Agriculture be established first, followed by the College of Mechanical Arts, and then the College of Civil Engineering, highlighting the primacy of technical instruction.[93]

When the California Legislature granted the University a corporate personality in the Organic Act it engaged in an ancient practice.[94] The university is fundamentally a legal entity—a corporation[95]—and "the corporate form [is] the legal foundation for the governance of colleges and

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[90] F. M. Powicke, Ways of Medieval Life and Thought: Essays and Addresses 163 (1949 (1971)). By *studium*, Powicke meant to refer to "the academic institution in the abstract—the schools or the town which held them." Rashdall, *supra* note 81, at 5–6; *see also* Thomas J. McSweeney, Katharine Ello, & Elsbeth O'Brien, *A University in 1693: New Light on William & Mary's Claim to the Title "Oldest University in the United States*," 61 William & Mary L. Rev. Online 91, 94–96 (2020) (discussing the meanings of *studium generale*); *but see* William Clark, From the Medieval Universitas Scholarium to the German Research University: A Sociogenesis of the Germanic Academic 252 (unpublished dissertation 1986) (discussing differences between *universitas* and *studium generale*).

[91] Organic Act, § 13.

[92] *See id.* at 1.

[93] *See id.* at 2–3.

[94] *See* Duryea, *supra* note 22, at 7–30 (discussing academic corporation's medieval origins).

[95] Jonathan Levy observed that "[i]n twentieth-century American public discussion, 'the corporation' became synonymous with just one kind of corporation—the for-profit business corporation." Jonathan Levy, "From Fiscal Triangle to Passing Through," *in* Corporations and American Democracy 213 (Naomi R. Lamoreaux & William J. Novak, eds., 2016).

universities."[96] "If one regards the existence of a corporate body as the sole criterion," Rüegg writes, "then Bologna is the oldest" university.[97] This should not surprise the student of corporations history, as the corporation was a Roman invention.[98]

By 1215, the ancient universities at "Bologna, Paris, and Oxford were" already in operation, "exercis[ing] a high degree of legal autonomy, elect[ing] their own officers, control[ling] their own finances."[99] As Clyde Milner wrote of the American West, the university "is an idea that became a place."[100] The idea of the university finds its roots, like the "constitutional kingship, or parliaments, or trial by jury," in medieval Europe.[101]

A university's corporate personality is located in its governing body. "In the eyes of the law," wrote legal scholar Merritt Chambers, "this ghostly legal entity *is* the university."[102] In the United States, "governing authority . . . flows directly through the governing board."[103] As a result, "colleges and universities have performed a public function that remains essentially separate from the state in the private sector and from other agencies of government in the public."[104] In contrast, the English and European universities were "scholastic guild[s] whether of masters or students."[105] In the eighteenth century, American "academic corporations attempted to

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[96] Duryea, *supra* note 22, at 3. The university was so interwoven with law that even the conferral of degrees was a distinctively legal process: "[i]n the Middle Ages, award of degrees presumed and transformed a moral subject or juridical persona beyond the physical person. The degree inhabited a juridico-ecclesiastical charismatic sphere similar to knighthood and holy orders." Clark, *supra* note 66, at 197. The right to award degrees itself was a *legal* right. *See* Axtell, *supra* note 26, at 119 ("upstart Harvard simply *assumed* the customary and perhaps legal right to award degrees to its graduates" (emphasis in original)).

[97] Rüegg, *supra* note 68, at 6. Rüegg is quick to note, however, that "[i]f one regards the association of teachers and students of various disciplines into a single corporate body as the decisive criterion, then the oldest university would be Paris, dating from 1208." *Id.*

[98] *See* Duryea, *supra* note 22, at 3 ("Historians credit Rome during the period of the Empire from the first to fifth centuries with the creation of the corporation.").

[99] Axtell, *supra* note 26, at 4.

[100] Clyde A. Milner II, "Introduction: America Only More So," *in* The Oxford History of the American West 3 (Clyde A. Milner II, Carol A. O'Connor, & Martha A. Sandweiss, eds., 1994).

[101] Rashdall, *supra* note 81, at 3.

[102] Chambers, *supra* note 82, at 320 (emphasis preserved). *But see* Ernst H. Kantorowicz, The Fundamental Issue 16 (1950), https://oac.cdlib.org/view?docId=hb0f59n9wf;NAAN=13030&doc.view=frames&chunk.id=div00012&toc.depth=1&toc.id=div00012&brand=lo) (arguing that "the judges *are* the Court, the ministers together with the faithful *are* the Church, and the professors together with the students *are* the University."). As we will see, the California Supreme Court put Chambers's dictum to the test in an 1899 case where the central question was who the University was.

[103] Duryea, *supra* note 22, at 2.

[104] *Id.* The terms *college* and *university* are used interchangeably in the United States but this article deploys the latter because of its essential link to *universitas*. *See* Labaree, *supra* note 35, at 2 ("One of the peculiarities of the system is that Americans use the terms 'college' and 'university' interchangeably.").

[105] Rashdall, *supra* note 81, at 15. On the universities as guilds, *see* Norman F. Cantor, The Civilization of the Middle Ages 440–41 (1963 (1993)).

reassert their chartered prerogatives as 'masters of their colleges' and were defeated. Colleges in America were not to be governed by their teachers, but by the representatives of the civil society that supported and protected them."[106] Because those who owned the government of the university were the university, the American governing board became synonymous with the university.

The medieval university's jurisdiction was extensive. *Jurisdiction*, as it is used here, "meant the power of ruling in general," and, in our medieval and early-modern context, "actual powers of government were widely diffused,"[107] including among universities. In 1215, the pope granted each master at Paris "jurisdiction over his scholar,"[108] although this jurisdiction would later be "exercised by university officers (rector, chancellor)."[109] Cambridge was "endowed with an explicit jurisdiction in cases involving its members" by the letters patent of 1561.[110] In addition to its "immunities, privileges, and special jurisdiction," Cambridge was granted "seats in the House of Commons in 1604 . . . [,] a further acknowledgement of [its] exceptional status."[111] Cambridge maintained "its jurisdiction over regraters and ingrossers, the sale of victuals, and policing in the town" of Cambridge.[112] Cambridge was recognized "as a liberty, partly insulated from normal jurisdictions."[113] Even in nineteenth-century Cambridge, "[t]he university's far-reaching regulation of local tradesmen, its assumption of police power

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[106] Jurgen Herbst, From Crisis to Crisis: American College Government 1636–1819 48 (1982).

[107] Tierney, *supra* note 44, at 30.

[108] "Rules of the University of Paris, 1215," *in* University Records and Life in the Middle Ages 29 (Lynn Thorndyke, trans., 1944 (1975)). In the Middle Ages, "scholar" meant "someone who was resident at, or who came to be associated with, a school." Kibre, *supra* note 30, at xv; *see also* Elisabeth Leedham-Green, A Concise History of the University of Cambridge 245 (1996) (defining *scholar* as "the general term for all members of the university").

[109] Jacques Verger, "Teachers," *in 1* A History of the University in Europe: Universities in the Middle Ages 157 (Hilde De Ridder-Symoens & Walter Rüegg, eds., 1992).

[110] Victor Morgan, 2 A History of the University of Cambridge 1546–1750 74 (2004); *see also* Paolo Nardi, "Relations with Authority," *in 1* A History of the University in Europe: Universities in the Middle Ages 83 (Hilde De Ridder-Symoens & Walter Rüegg, eds., 1992) (discussing jurisdiction over scholars).

[111] Morgan, *supra* note 110, at 74–75. Blackstone found this development noteworthy enough to include it in his *Commentaries*. *See* Blackstone's Commentaries, *supra* note 31, at ch. 2. Oxford received the same recognition. *See* Herbst, *supra* note 106, at 3. The College of William & Mary had representation in the Virginia legislature in the seventeenth century. *See* Axtell, *supra* note 26, at 146; Duryea, *supra* note 22, at 88. The College held its legislative representation, as did sixteenth-century Scottish royal burghs, as part of its estate. *See* Phil Withington, The Politics of Commonwealth: Citizens and Freemen in Early Modern England 20 (2005) ("In Scotland, royal burghs possessed not only parliamentary representation but also an extra place of corporate identity in the form of the Convention, whereby burgh representatives would formulate a burghal position on various topics prior to sitting in parliament."). The scholars received a similar "right, as members of corporative associations, particularly at Paris, to have a proctor of their own to look after their interests at the papal court." Kibre, *supra* note 30, at 326. In the Middle Ages, "privilege" meant "the specific favor granted or . . . the grant of favors and exemptions made to scholars as individuals and as members of university associations by ecclesiastical and lay potentates and communes." *Id.* at xv.

[112] Morgan, *supra* note 110, at 74. On Cantabrigian privileges more generally, *see* George Dyer, The Privileges of the University of Cambridge (2 Vols. 1824).

[113] Morgan, *supra* note 110, at 74.

within the town, its high-handed treatment of prostitutes and the inquisitorial nature of its examination of prisoners in the university prison—so much at variance with common law—aroused the suspicion and hostility of borough officials."[114]

Meanwhile, in Oxford, "[a]fter quarrels and disputes with the burgesses, the university, victorious since the mid-fourteenth century, practically governed the town of Oxford."[115] According to Brockliss, "Oxford University was essentially an ecclesiastical liberty, a town within a town or a state within a state; its Chancellor in many respects enjoying a jurisdiction and authority analogous to the vast powers of the palatine bishops of Chester and Durham."[116] English kings repeatedly confirmed the university's status as an ecclesiastical liberty by reference to what Brockliss calls its "jurisdictional autonomy."[117] As Brockliss argues, "[s]ince Oxford's organizational structure was largely aped by Cambridge, it becomes possible to speak of the emergence, by 1350, of a specifically English university model, independent and self-contained, with its own institutional identity."[118] The Oxford Chancellor's court, "a quasi-ecclesiastical jurisdiction," was "free to proceed either according to the 'laws and customs of the university' or according to the 'law of the realm'; but in fact the canon law procedure of the ecclesiastical courts was used."[119]

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[114] Rothblatt, *supra* note 66, at 184. These privileges and immunities were a frequent issue between town and gown, especially with regard to "boundaries and jurisdiction." Morgan, *supra* note 110, at 10–11; *see generally* Rowland Parker, Town and Gown: The 700 Years' War in Cambridge (1983). On the chancellor's imprisonment power at Oxford, Cambridge, and Paris, *see* Alan Cobban, English University Life in the Middle Ages 218 (1999). The Oxford Chancellor was even known to imprison town officials for impinging on university privileges. *See* R. L. Storey, "University and Government 1430–1500," *in* 2 The History of the University of Oxford: Late medieval Oxford 723 (J. I. Catto & Ralph Evans, eds., 1992) (noting that "[i]n the previous year [1458] one of the bailiffs of Oxford had imprisoned a scholar, whereupon the chancellor had the bailiff flung into prison for his breach of the university's privilege" of having arrested scholars delivered to the university by secular authorities.).

[115] Aleksander Gieysztor, "Management and Resources," *in 1 A History of the University in Europe: Universities in the Middle Ages* 123 (Hilde De Ridder-Symoens & Walter Rüegg, eds., 1992) (citing Alan B. Cobban, The Medieval Universities: Oxford and Cambridge to c. 1500 259 n. 12 (1988)).

[116] L.W.B. Brockliss, The University of Oxford: A History 24 (2016). The university's privileged realm was always in flux, however, and "[i]n 1559 Parliament restored the crown's 'ancient jurisdiction over the state ecclesiastical and spiritual,' including the universities, where an oath to crown supremacy was required of 'anyone taking holy orders or degrees at the Universities.' " Axtell, *supra* note 26, at 49 (quoting G. R. Elton, The Tudor Constitution: Documents and Commentary 372–77 (1960)). While other medieval entities enjoyed privileges, universities received privileges of a different sort. In his history of the University of Paris, Stephen Ferruolo writes that, by dint of King Philip's 1200 charter, "[s]cholars had become an acknowledged group within the city, with their own rights and privileges, which were similar in kind to but distinct in form from those of other clerics." Stephen C. Ferruolo, The Origins of the University: The Schools of Paris and Their Clerics, 1100 – 1215 287 (1985). At Oxford, the "members of the university were part of a separate estate." Brockliss, *supra* note 116, at 7.

[117] Brockliss, *supra* note 116, at 25; *see also* Gaines Post, The Papacy and the Rise of the Universities 155 (William J. Courtenay, ed., 1931 (2017)) ("In England, then, jurisdiction was fundamentally ecclesiastical, but in the case of Cambridge was set up and enforced by royal authority.").

[118] Brockliss, *supra* note 116, at 24; *see also* Duryea, *supra* note 22, at 43 (Oxford and Cambridge transformed, during the fifteenth and sixteenth centuries, from unified corporations "dominated by regent masters . . . into autonomous, self-contained colleges, each chartered as a corporation.").

[119] Pantin, *supra* note 8, at 60, 64.

The university's place in medieval society reflected or derived from this jurisdiction: it was one "[o]f the three acknowledged powers of medieval European society—*regnum, sacerdotium*, and *studium*."[120] These three powers "form[ed] a single compound entity."[121] At the same time, however, one former Oxford archivist would attribute "the survival (so far) of academic freedom . . . to the fact that the medieval university, the *studium*, was a kind of third force, not wholly to be identified either with the *regnum* or the *sacerdotium*."[122]

Of the ancient universities, Oxford and Cambridge—independent, privileged, self-contained, and possessed of jurisdiction—were "the fullest and most direct transplantation[s]" to what would become the United States.[123] James Axtell argues that "[t]he genesis of America's great modern universities lies not in the continental experience of all European universities, but in the provincial antecedents of England's Oxford and Cambridge."[124] As Pearl Kibre argues, scholarly privileges, originating in Roman law, come down to America through England: "[o]nly in England were the universities to retain some semblance of their earlier autonomy and vested rights. From England these rights, privileges, and immunities which in the Middle Ages distinguished the university associations as well as their professors and scholars were no doubt carried to America."[125] These privileges were not merely "secondary characteristics," as Susan Reynolds argues with regard

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[120] Rüegg, *supra* note 26, *at xix*; *see also* Axtell, *supra* note 26, at 38 (recalling that universities—"the collective *Studia*—quickly became key institutions in the maintenance and direction of society, along with the *Imperium* or *Regnum* (empire or kingdom) and the *Sacerdotium* (church)."); Rashdall, *supra* note 81, at 2 ("*Sacerdotium*, *Imperium*, *Studium* are brought together by a medieval writer as the three mysterious powers or 'virtues', by whose harmonious co-operation the life and health of Christendom are sustained." (footnote omitted)). Jurgen Herbst argued for "*the continuing viability of the European concept of the unity of regnum, sacerdotium, and studium in the colonies as the unity of established state, church, and college.*" Herbst, *supra* note 106, at *x. As Thomas McSweeney notes, "[j]ust as canon law was regarded as the universal law of the sacerdotium, the priestly power exercised by the pope, Roman law was regarded by many as the universal law of the regnum.*" Thomas J. McSweeney, Priests of the Law: Roman Law and the Making of the Common Law's First Professionals 4 (2019). The *studium* had its law as well. It also had its peace. *See* Storey, *supra* note 114, at 709 ("Here again [Oxford Chancellor] Chace was presumably exercising an authority conferred by Edward III's charter of 1355, that of the chancellor to imprison and punish anyone carrying arms in the university; indeed, the university told the king's council on this occasion that its chancellor had long been empowered to imprison breakers of its peace without being accountable to any royal judge.").

[121] Roger L. Geiger, The History of American Higher Education: Learning and Culture from the Founding to World War II xviii (2015).

[122] Pantin, *supra* note 8, at 56.

[123] Axtell, *supra* note 26, at 43. *But see* Herbst, *supra* note 106, at 3 (arguing that early American colleges "continued a form of academic government practiced consistently among Calvinist-Reformed groups in Europe from Switzerland to the Netherlands and Scotland."). One might prefer "implants" to "transplants." *See* John Roberts, Águeda M. Rodríguez Cruz, & Jurgen Herbst, "Exporting Models," *in* 2 A History of the University in Europe: Universities in Early Modern Europe 257 (Hilde de Ridder-Symoens, ed., 1996).

[124] *Id.*

[125] Kibre, *supra* note 30, at 566; *see also* Axtell, *supra* note 26, at 42. ("The genesis of America's great modern universities lies not in the continental experience of all European universities, but in the provincial antecedents of England's Oxford and Cambridge.").

to the privileges of the medieval English towns, but the university's defining possessions.[126] In the United States, the university would continue to exercise its ancient jurisdiction, including over students.[127] One historian of the university could write as late as 1982 about "the relationship between civil and academic jurisdiction."[128] That a university has a jurisdiction might be striking to moderns, but, to the medievalist, "[t]he really astonishing and unique feature about the university's jurisdiction was its mixed character, half secular, half ecclesiastical."[129]

To moderns, a university might seem like a peculiar thing to own, and an especially peculiar thing for a corporation to own. It turns out, however, that a university is exactly the kind of thing that a corporation might own.[130] It is important to emphasize that the university is the product of the Middle Ages,[131] a time when "[t]he struggle of ownership and rulership to free themselves from each other"[132] was very much ongoing, and which "knew

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[126] Susan Reynolds, An Introduction to the History of English Medieval Towns x (1977).

[127] *See* Scott M. Gelber, Courtrooms and Classrooms: A Legal History of College Access, 1860–1960 49 (2015) ("The admission of students in a public educational institution is one thing . . . and the government and control of students after they are admitted, and have become subject to the jurisdiction of the institution is quite another thing." (quoting State ex rel. Stallard v. White 82 Ind. 278, 284 (1882 IN) (Niblack, J.)); Duryea, *supra* note 22, at 190 (discussing same case). On Purdue's legal profile, *see* Edward C. Elliott & M. M. Chambers, Charters and Basic Laws of Selected American Universities and Colleges 435–43 (1934 (1970)).

[128] Herbst, *supra* note 106, at ix. In 1931, Hawai'i's territorial legislature placed "a Teacher's College under the jurisdiction and management of the [Hawai'i] regents." Robert M. Kamins & Robert E. Potter, Malamalama: A History of the University of Hawai'i 38 (1998). For further discussion of "academic jurisdiction," *see* Rainer A. Müller, "Student Education, Student Life," *in* 2 A History of the University in Europe: Universities in Early Modern Europe 331–32 (Hilde de Ridder-Symoens, ed., 1996).

[129] Pantin, *supra* note 8, at 55.

[130] A corporate portfolio might also include "Jurisdictions Court powers Officers Authorities fines Amerciaments perquisites fees," as was the case with the City of the Corporation of New York. Hartog, *supra* note 85, at 18–19; *see also* Runciman, *supra* note 21, at 93 ("A corporation may have an area of interest, an area of conflict, even an area of jurisdiction."). Academic corporations own jurisdictions, as described *supra*. The jurisdiction described here play a "substantive role in law." Shaunnagh Dorsett & Shaun McVeigh, Jurisdiction 37 (2012). This is a general feature of corporations. Political theorist David Ciepley underscores the fact that a corporation "receives a *jurisdiction* within which it can make and enforce rules beyond the law of the land, so long as not inconsistent with the law of the land." David Ciepley, *Member Corporations, Property Corporations, and Constitutional Rights*, 11 L. & Ethics Hum. Rights 31, 32 (2017) (emphasis in original).

[131] See Axtell, *supra* note 26, at 1 ("Universities, like cathedrals and parliaments, were unique creations of Western Europe and the Middle Ages.").

[132] Maitland, *supra* note 11, at 30. Maitland illustrates this point through the term *landlord*. "Landlord: we make one word of it and throw a strong accent on the first syllable. The lordliness has evaporated; but it was there once. Ownership has come out brightly and intensely; the element of superiority, of government, has vanished; or rather it is in other hands." *Id.* Gierke wrote that, in the medieval German lands, Land—and its organization through "the *comradely union of the estates*"—and "Lord became the juxtaposed bearers of political Right." Otto von Gierke, Community in Historical Perspective 84 (Antony Black, ed., & Mary Fischer, trans. 1868 (1990)). Nineteenth-century American jurists, perhaps more so than their medieval Roman and canon law predecessors, separated rulership and ownership. *See* Hartog, *supra* note 85, at 261; David Ciepley, "Governing People or Governing Property?: How Dartmouth College Assimilated the Corporation to Liberalism by Treating it as a Trust," at 1 (working paper 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3796298 (arguing that the *Dartmouth College* case "place[d] a spotlight on the corporation's property powers while putting its governance powers in shadow"); Tierney, *supra* note 44, at 30 ("[A]round 1200 any competent Roman or canon lawyer could discriminate between ruling and owning . . . .").

no fundamental distinction between 'public' and 'private,' between (personal) property and (state) territory."[133] As Maitland reminds us in his book about medieval Cambridge, in which "three learned corporations," otherwise known as colleges, along with several other legal persons laid competing claims to parcels of land, "ownership and rulership are but phases of one idea."[134] In the case of New York, "[t]he opposition between property and sovereignty often said to lie at the heart of nineteenth- and twentieth-century American law had no place in the [City's] Charter of 1730 and can only limit our understanding of the corporation of the city of New York."[135] The California Regents have, since 1868, straddled both sides of the property-sovereignty divide and continue to do so. While "universities may be seen to exist in the borderland between public and private law" generally,[136] and while such "university corporation[s]"—a legal tautology—were

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[133] Wheatley, *supra* note 12, at 8.

[134] *Id.* at 2, 31.

[135] Hartog, *supra* note 85, at 19.

[136] Simon Whittaker, *Public and Private Law-Making: Subordinate Legislation, Contracts, and the Status of 'Student* Rules,' 21 Oxford J. Leg. Studies 103, 105 (2001). One recent study of the academic corporation notes that "[t]he colleges of colonial America could not be and were not neatly categorized as either public or private." Kaufman-Osborn, *supra* note 43, at 200. This was true in the early Republican period as well. One lawyer, for example, argued in 1790 in a Virginia appellate court that the College of William & Mary was "a corporation for public government, and whose proceedings must therefore be subject to the control of this Court." Herbst, *supra* note 106, at 220 (quoting Bracken v. College of William and Mary, 3 Call at 573, 590 (1790)).

There was great disagreement about how to classify nineteenth-century American universities, including universities that are considered public today. For example, nineteenth-century Michiganders disagreed about whether the University of Michigan was public or private. *See* Regents of University of Michigan v. Board of Education of the City of Detroit, 4 Mich. 213, 217, 226 (1856) (Green, J.) (Detroit's Board of Education arguing that the territorial act of 1821 incorporating the university created a private corporation); Regents v. Detroit Young Men's Society, *supra* note 13, at 163 ("The university of Michigan is a public corporation."). The issue was not settled elsewhere in the country, even in the twentieth and twenty-first centuries. "When Carl Borgmann accepted the presidency of the University of Vermont in 1952, he assumed he was taking over a public university, pure and simple." Slayton, *supra* note 37, at 282. However, "in the 1950s, as in the 1980s, there was considerable uncertainty and debate on campus about whether the school was actually public or private." *Id.* Around the same time, Governor Earl Warren could write in the *Oakland Tribune* that the University of California was "a quasi-public institution with practically all the attributes of a private corporation organized for a public purpose." Kantorowicz, *supra* note 102, at 18 (quoting Earl Warren, Oakland Tribune, Sept. 22, 1950).

The University of Delaware, one education scholar wrote in 2003, exists in "an ambiguous state-university relationship," causing "[l]egal opinions [to] differ on the question of whether the University of Delaware is a state agency or not." Gunapala Edirisooriya, *A Historical Analysis of the State-University Relationship: A Case Study of the University of Delaware, USA*, 32 Hist. Educ. 367, 380 (2003).

Modern readers will likely think that the question of whether a university is public or private turns on the source of its funding. Historians of universities urge us to resist this temptation: "The question of public control is to be kept separate from that of public support. Yet the two are intimately connected." Elmer Ellsworth Brown, The Origin of American State Universities 18 (1903). In the nineteenth century, public funding and public control were not necessarily related. For example, the Indiana Supreme Court wrote in 1887 that "[t]he university [of Indiana], although established by public law, and endowed and supported by the state, is not a public corporation, in a technical sense." State ex rel. Robinson v. Carr, 12 N.E. 318, 319 (IN 1887) (Mitchell, J.). Indeed, the Indiana high court wrote, "[t]he legal *status* of the state university being that of a technically private, or at most a *quasi* public, corporation, the university fund, of which it is the sole beneficiary, is therefore not a public fund, within the meaning of the law." *Id.* at 320 (emphasis in original). In concluding that the University of Indiana was a private corporation, the court noted that "[i]ts members are not officers of the government." *Id.* Duryea opined that this case was "typical" of the difficulty that nineteenth-century courts faced in addressing the corporate personality of universities. Duryea, *supra* note 22, at 157.

On the public-private issue regarding corporations generally, *see* Bruce A. Campbell, *Social Federalism: The Constitutional Position of Nonprofit Corporations in Nineteenth-Century America*, 8 L. & Hist. Rev. 149, 160–61, 175 (1990) (tracing a line of nineteenth-century cases in which courts found publicly-established, publicly-supported entities to be private); Fraser, at 11 (describing nineteenth-century distinction between "[p]ublic corporations [which] were those established with a view to the 'general good' " and "[p]rivate corporations [which] were created instead for the 'private emolument' of their owners." (quoting Ellis v. Marshall, 2 Tyng 168 (MA 1807)).

"unclassifiable" even in the Middle Ages,[137] the California Regents' story raises these familiar issues with special vigor.

The Regents had both *dominium* and *proprietas* in the university. Maitland emphasizes that

> [n]ot every *dominium* is *proprietas.* There is a baron with a barony; above stand count, duke, king. Each of the four has a *dominium* over the land, but only the baron's *dominium* is a *proprietas* of the land, for he has an immediate *dominium* and the other *dominia* are mediate. Then, however, we must admit that count, duke and king, each of them has a *proprietas* (that is, an immediate *dominium*), not in the land, but in his *dominium*: a property in his lordship.[138]

Moreover,

> [b]efore we have gone far back in our own history, the 'belongs' . . . of private law begins to blend with the 'belongs' of public law; ownership blends with lordship, rulership, sovereignty in the vague medieval *dominium*, and the vague medieval *communitas* seems to swallow up both the corporation and the group of co-owners.[139]

The Regents had a *proprietas* in the University itself and a *proprietas* in their *dominium*—"ownership"[140]—over the university. Just as "[t]o have a proprietary right of 'owning' feudal territory implied and entailed a corresponding juri[s]dictional right of 'ruling' that territory,"[141] the Regents' ownership of the University implied and entitled it to rulership of the same.

As Shaunnagh Dorsett and Shaun McVeigh argued, "[s]overeignty connoted authority (often political) but without a nexus to the modern concept of the state."[142] "Medieval Europe was a complex amalgam of hierarchies and territories through which authority was organized and exercised."[143] In the

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[137] Jacques Le Goff, Intellectuals in the Middle Ages 72 (Teresa Lavender Fagan, trans., 1957 (1994)).

[138] Maitland, *supra* note 11, at 31.

[139] *Id.* at 11–12.

[140] Maitland, *supra* note 8, at 94.

[141] Lee, *supra* note 49, at 91.

[142] Dorsett & McVeigh, *supra* note 130, at 35.

[143] *Id. See also* Orren, *supra* note 10, at 904 ("European kings surveyed realms fragmented into principalities, duchies, estates, bishoprics, and all manner of corporate associations, to whom they granted or sold off land and privileges in exchange for aid and supplies in the constant struggle against invasion."); Ciepley, *supra* note 52, at 418 ("In the wake of the recovery of Justinian's *Digest* in the 11th century, Europe was gradually reorganized as a civilization of corporations—a dense web of monasteries, bishoprics, confraternities, universities, towns, communes, and guilds that governed the associational life of an energized Europe."). This description of medieval Europe rhymes with Laura Edwards's description of the early Republican United States, in which she observed "multiple, overlapping jurisdictions within the new republic's governing order." Laura F. Edwards, Only the Clothes on Her Back: Clothing and the Hidden History of Power in the Nineteenth-Century United States, Introduction (2022).

early modern era, Philip Stern observed a "world filled with a variety of corporate bodies politic and hyphenated, hybrid, overlapping, and composite forms of sovereignty."[144] The California Regents' *domiunium* and *proprietas* are products of these lost worlds.

Maitland wrote in 1900: "[r]eally and truly the property of a corporation—for example a city or university—belongs to no *real* person or persons."[145] What does it mean to own a university? A university is owned by whomever owns its government. The university's government is so important that one historian of the university observed of early American colleges that "[w]hat was taught was seen as a means to an end." Rather than the content of the curriculum, it was, ironically, "the circumstances under which instruction was offered [that] came as close to being the end itself as anything within the college possibly could."[146] A university belongs to those who control "the circumstances under which instruction was offered." The university has a fundamental legality.[147] Expressing and enforcing this fundamental legality, by vying "with church and public authorities for legal rights to practice their trade,"[148] is as close to the university's purpose as any. "For this intellectual nobility, nothing was more important than autonomy."[149] While the content of this legality may change, enforcing this legality, rather than education, is the university's ultimate purpose. Although this paper highlights the in-court enforcement of one university's legality, this enforcement usually takes place outside of state court and inside of the university, including in

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[144] Philip J. Stern, The Company State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India 3 (2011).

[145] Maitland, *supra* note 12, at xxi (emphasis added).

[146] Herbst, *supra* note 106, at xii. To the extent that Herbst is correct, the early American colleges shared this preoccupation with the conditions under which instruction was given with the ancient universities. The ancient privileges, which the scholars guarded jealously, *see* Clark, *supra* note 66, at 187, 199, and, at times, appropriated to themselves, *see* Parker, *supra* note 114, at 31 ("the chancellor and masters of the university of Cambridge have appropriated to themselves of their own authority more liberties than are granted in the charters which they hold of the king's predecessors") (quoting thirteenth-century Hundreds Rolls)), "were concerned almost entirely with the external conditions surrounding [the scholars] rather than with the less tangible circumstances of intellectual activity," Kibre, *supra* note 30, at xv. Internal conditions were determined within the university. For instance, "[t]he discipline and control to which the professor was subjected were largely intramural." Cantor, *supra* note 105, at 441.

[147] Following David Ciepley and William Clark, my focus in this paper is not on the University as an "institution" or "organization," but on the University as "a legal person"—the "juridical" university. *See* David A. Ciepley, *Juridical Person of State*, at 2 (working paper 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3796297; Clark, *supra* note 66, at 154 (arguing, in study of university history, "that, not the modern concepts 'institution' and 'individual,' but rather the scholastic concepts 'corporation' ('*universitas*') and 'juridical person' ('*persona repraesentata*') provide the proper conceptual nexus"). The institutional approach continues to predominate the study of state and corporation. *See*, *e.g.*, Taisu Zhang & John D. Morley, *The Modern State and the Rise of the Business Corporation*, 132 Yale L.J. 1970, 1973 (2023) ("The two great institutions of modernity are the business corporation and the state.").

[148] Joseph A. Soares, The Decline of Privilege: The Modernization of Oxford University 17 (1999).

[149] *Id.* at 18.

university courts.[150]

In addition to universities, corporations also owned cities, as Maitland noticed.[151] Hendrik Hartog famously observed that part of the portfolio owned by the Corporation of the City of New York in the eighteenth century was the city's government. "The city's charter created an institution in which property and governmental rights were blurred and mixed. The charter was a grant of property, but it was a grant of property for government."[152] Unlike in New York City's charter, in which "[t]here was nothing . . . to divide the 'public' from the 'private' rights of the corporation,"[153] however, attempts *were* made to distinguish the public from the private in the 1868 Organic Act creating the University of California.

The Organic Act endowed the Regents with the power to legislate.[154] The Act empowered them to "consider and determine whether the interests of the University and of the students, as well as those of the State, and of the great body of scientific men in the state whose purpose is to devote themselves to public instruction" might be advanced by employing short-term professors. Such workaday considerations and determinations constitute the substance of the Regents' law. Tellingly, the Regents continue to confer degrees with "all the rights and privileges thereto pertaining."[155]

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[150] In 1968, a California appellate court held that the University's suite of constitutional powers "necessarily includes the delegation of such [judicial] powers." Ishimatsu v. Regents of the University of California, 266 Cal.App.2d 854, 864 (3rd Div. Ct. App. 1968) (Brown, J.). Universities have long exercised judicial powers. In the thirteenth century, "[t]he chancellor [of Oxford], Henry III asserted, was to have authority over all cases involving scholars and pertaining to such matters as the assessing, changing, receiving, and rental of houses occupied by them; as well as the sale of foodstuffs and other commodities or moveable articles within the area of the city and in the suburbs of Oxford. And he was to have cognizance of all personal actions involving scholars who were immune, as at Paris, from summons for any civil cause outside the jurisdiction of the university. The chancellor was authorized to summon to appear before him, burgesses and other laymen, who were parties to a suit pertaining to a scholar. This provision was reaffirmed, in 1272, by Edward I, and again in 1275, when the chancellor was given a blanket authorization to have jurisdiction over all cases where either party was a scholar." Kibre, *supra* note 30, at 273 (footnotes omitted). At Cambridge, university court proceeded, at least for a time, according to civil law. *See* George Dyer, Academic Unity: Being the Substance of a General Dissertation 48–54, 188–90 (1827). At Oxford, the steward presided over a common-law court. *See* Storey, *supra* note 114, at 743–45.

[151] Corporate ownership of cities is of ancient vintage. In 1229, King Henry III of England offered to the masters and scholars of the University of Paris, grappling with an early iteration of the perennial struggle between town and gown, the following relief: "[i]f it pleases you to come to our kingdom of England and make it your permanent center of students, whatever cities, boroughs or towns you choose we shall assign to you." Barzun, *supra* note 41, at 229 (quoting King Henry III (July 16, 1229), Chart. Univ. of Paris, at 119); *see also* Kibre, *supra* note 30, at 92–93 (discussing same); Wieruszowski, *supra* note 26, at 157 (discussing same with a slightly different translation). The *universitas* of scholars and masters were offered "whatever cities, boroughs or towns" they should choose.

[152] Hartog, *supra* note 85, at 21.

[153] *Id.* at 18.

[154] Organic Act, § 13. The Michigan Regents were similarly charged. As Michigan's Superintendent of Public Instruction noted in 1861, "[t]he Regents as a Board legislate for the University . . . . They enact its laws." University of Michigan Regents' Proceedings with Appendixes and Index 1837–1864 975 (Issaac Newton Demmon, ed. 1915) (Quoting "Report on the Removal of the Medical Department to Detroit") (September 28, 1858)); *see also id.* at 1157 (quoting President Henry Philip Tappan) (the Regents "are also the fountain of all legislative and executive power in relation to the university….").

[155] This language is featured in the University of California degree that the author holds. Pearl Kibre wrote that " '[w]ith all the rights, privileges, and immunities thereunto pertaining,' has become a phrase strikingly familiar to countless generations of American holders of Academic degrees. The very triteness of the words have indeed obscured the extent to which they evoke the mediaeval past in which they were enunciated and had practical application." Kibre, *supra* note 30, at xiii.

The Regents' conferral of degrees is a *legal* act and represents a familiar and ubiquitous, albeit unrecognized, legal action regularly undertaken by universities around the world. Indeed, William Clark wrote, "[i]n the Middle Ages, award of degrees presumed and transformed a moral subject or juridical persona beyond the physical person. The degree inhabited a juridico-ecclesiastical charismatic sphere similar to knighthood and holy orders. Statutes delimited the required moral subject or juridical persona."[156] More specifically, "[e]ach degree created duties and privileges. The degree marked one juridically for life."[157]

Degrees were but one expression of the university's legality. The university register, "the official legal record kept by the university's magistrate, the rector," was a legal document.[158] "When the register documented academic condition, it recorded the juridical status of the individual as scholar, bachelor, licentiate, master, or doctor within the corporation of scholars."[159] Even the doctoral examination was legal. "Related to the confession, the inquisition, and the sentencing, examination . . . has a judicial provenance."[160]

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[156] Clark, *supra* note 66, at 197.

[157] *Id.* at 198. Clark argues that "[l]ike other medievalisms, it appeared [academic degrees] would perish with the *ancien régime*," *id.* at 196, and that "degrees survived only because they largely ceased treating the candidate as juridical person, and thus became suitable to the rational authority of the bureaucratic state," *id.* at 199. Pearl Kibre argues, with regard to academic privileges, that they "were not to be swept away on the continent until the end of the old regime," and, "even after that, they were retained in their entirety in England, and, in spirit at least, in most countries of Europe. For the force of the tradition of scholarly privileges so firmly planted and cultivated in the middle ages could not be wholly obliterated by the revolutionary changes that took place in Europe." Kibre, *supra* note 30, at 330. The same might be said of academic degrees, linked intimately as they were to academic privileges.

[158] Clark, *supra* note 66, at 185.

[159] *Id.* at 185–86.

[160] *Id.* at 93. The "judicial-confessional" examination, *id.* at 94, reminds us of the interconnections between the scholar, the judge, and the priest. Ernst Kantorowicz wrote in 1950 that "it is through the fact that [the scholar's] whole being depends on his conscience that he manifests his connection with the legal profession as well as with the clergy from which, in the high Middle Ages, the academic profession descended and the scholar borrowed his gown." Kantorowicz, *supra* note 102, at 21. Indeed, the first academics were in fact priests, and "[a]lmost anything might be referred to the judgment of the masters," including "matters of ecclesiastical, theological, moral and public interest." Powicke, *supra* note 90, at 185; on the early scholar-priest, *see* W. N. Hargreaves-Mawdsley, A History of Academical Dress in Europe Until the End of the Eighteenth Century 5 (1963) (noting that, in the thirteenth century, "[t]here was only one exclusively clerical non-liturgical garment, the *cappa clausa*," and a 1222 order by the Archbishop of Canterbury introduced the *cappa* clausa, a variant of "a loose cape with a hood" that was "already in use on the Continent," to English clergy, and "[t]he result of this was that at Bologna, Paris, and Oxford and at subsequent universities the *cappa clausa* came to be regarded as the academical dress, at least for formal occasions, for Doctors of Theology and Masters of Arts, who as priests—nearly all Masters were in Orders—wore this garment before any particular form of academical dress had come to be established"). At Oxford, the scholar-priest remained in office until the middle of the nineteenth century. *See* Soares, *supra* note 148, at 20 (under 1854 reforms, "Oxford's teachers made the transition from clergymen to don"). Kantorowicz maintained that "[t]here are three professions which are entitled to wear a gown: the judge, the priest, the scholar. This garment stands for its bearer's maturity of mind, his independence of judgment, and his direct responsibility to his conscience and to his God. It signifies the inner sovereignty of those three interrelated professions." Kantorowicz, *supra* note 102, at 6. Hastings Rashdall wrote that "[t]he philosophy of clothes in its application to the medieval universities is a less superficial matter than might at first sight appear" because "[i]t throws much light upon the relation of the universities to the Church." Hastings Rashdall, 3 The Universities of Europe in the Middle Ages 393 (F. M. Powicke & A. B. Emden, eds., 1936 (1895)) (internal quotation marks omitted). Interestingly, the judge did not follow the scholar in borrowing the priest's gown, *see* W. N. Hargreaves-Mawdsley, A History of Legal Dress in Europe Until the End of the Eighteenth Century 3, 54 (1963) ("In legal costume the influence of ecclesiastical dress was . . . only slight."), but the judge nonetheless

Such medieval examinations are regularly "replicated" today.[161] One early-nineteenth-century commentator could write that "[t]he polity of our [English] Universities is, in some respects, of a nature peculiar to itself, and, indeed, possesses more of law than [properly] belongs to places of literature."[162] Universities, in short, were "[l]egal to the core."[163]

That the University's authority was vested in its Board of Regents is worth dwelling upon. The California Regents owned the government of the University, and the Regents considered the University to be "an independent institution, having a complete unity in itself."[164] The Organic Act "places all this property under the control of a little government."[165] The term *regent* has a highly particularized legal meaning, and has historically been used to describe "[a] ruler; a governor.[166] Francis West, a legal historian of medieval

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inhabits "a role that is, in large part, clerical, where he labors largely as a functionary, applying and implementing the law," Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. Davis L. Rev., 127, 189 (1998) (citation omitted).

More recently, William Clark drew a similar comparison between priests and scholars, recalling that "[l]ike priests, degree-holders had been invested by those before them, and these by those before them, and so on, in an unbroken chain." Clark, *supra* note 66, at 197. By university law, degree-holders were, at times, "enabled, at times obliged, to wear a certain costume." *Id.* at 198; *see also* Peter A. Vandermeersch, "Teachers," *in* 2 A History of the University in Europe: Universities in Early Modern Europe 246 (Hilde de Ridder-Symoens, ed., 1996) ("Moreover, the statutes of the universities defined academic garb."); Hargreaves-Mawdsley, *supra* note 160, at 69 (describing 1770 university statutes requiring Oxford's doctors of divinity to "wear, in common with other doctors, their Convocation dress on all Sundays within term"). More recently still, Thomas McSweeney argued that thirteenth-century English jurists sitting on the central royal courts, through treatise writing, "transformed themselves from servants of the king to priests of the law." McSweeney, *supra* note 120, at 32. McSweeney draws on a sentence from Bracton's treatise on English laws and customs, which read "law is called the art of what is fair and just, of which we are deservedly called the priests, for we worship justice and administer sacred rights." *Id.* at 1 (quoting 2 Bracton, On the Laws and Customs of England 24 (1220s–60s)).

Ultimately, the gowns marked the gown-bearer as a privilege-holder. These privileges, in turn, "marked [privilege-holders] off from the rest of the community in which they lived." Brockliss, *supra* note 116, at 7. In the late thirteenth century, Parliament enhanced the University of Oxford's privileges, applying them, in addition to the scholars themselves, to "the servants of the clerks or scholars as well as to bedels, parchment dealers, illuminators, scribes, barbers, and any others who wore the livery or robes of clerks." Kibre, *supra* note 30, at 280. These "bedels, parchment dealers, illuminators, scribes, barbers," according to Clark, would have been "within the *universitas* [but] not necessarily within the studium generale," which was "a very abstract consortium of professional collegia." Clark, *supra* note 90, at 252. This distinction between *universitas* and *studium generale* maps onto the distinction drawn by the California Supreme Court between the University of California and the California Regents in 1899, discussed *infra*.

This excursis on gowns and gown-bearers aims, on the one hand, following Laura Edwards, to illuminate the legal "relationship between a person and the garments in question," Edwards, *supra* note 143, at Introduction, and, following Clark, the legal meaning of the "material practice" of gown-bearing itself, on the other, Clark, *supra* note 66, at 5. The gown stands for the gown-bearer's clerical status, from which privileges flow. The priests stand in a clerical position to God, the judges to Law, and the scholars to Truth.

[161] Cantor, *supra* note 105, at 530.

[162] Dyer, *supra* note 150, at 50.

[163] Orren, *supra* note 10, at 879.

[164] "The State University: Memorial by the Board of Regents" (1876), UC Berkeley Bancroft Library, CU-1, Box 3.

[165] Ciepley, *supra* note 16, at 2. Americans have long emphasized the value of little governments, through which "rational discussion" may be conducted, as demonstrated by "the New England town meeting and the Quaker meeting." McConnell, *supra* note 19, at 95.

[166] "Regent," 2 Bouvier's Law Dictionary 431 (12th ed., 1868). The word *regent* is derived from the Latin *regēns*, meaning "ruler" or "governor." *See* "Regent," *in* The Concise Oxford Dictionary of English Etymology (T.F. Hoad, ed. 2003). Lord Bryce, in the second volume of his classic *American Commonwealth*, suggested that to a given state, the state university was the "highest organ of its intellectual life." James Bryce, 2 The American Commonwealth 718 (1914). "On the whole," Bryce writes, "the Regents of late years have generally *ruled* well." *Id.* (emphasis added). The California Regents even issued "rulings" regarding the charge of laboratories, the use of seals by affiliated colleges, and the award of degrees. *See* Regents' Manual of Endowments, Foundations, Agreements, Laws, and Orders Governing the University 322–23 (1911). Regents' rulings are "mandarin materials" that American legal historians have left untouched. Robert W. Gordon, *Critical Legal Histories*, 36 Stan. L. Rev. 57, 120 (1984).

England, identified "three features of regency" at early common law, the first of which was "that the regent had power to treat the administrative system as the king would."[167] Universities also had regents. At medieval Oxford and Cambridge, "the congregation of regents became the body that carried out the routine functions of university government."[168]

In the university context, the "regent masters" held "powers of government."[169] In 1569, the Earl of Leicester addressed a letter to "Mr Vitz Channcelor as to the rest of the Regentes and rulers in the Universitye."[170] At Paris, Oxford, and Cambridge, newly minted masters were "obligated to teach for one or two years of necessary regency."[171] The regents within the university, as with the regents outside the university, *ruled*. New York seems to have established the first American regents, although the New York Regents are statutory and superintend educational activities across the state, rather than in a single university.[172] Americans adopted the term, and most of the constitutional universities established in the nineteenth century are governed by regents.[173]

During the University's first decade, "it was frequently threatened with proposals for drastic reorganization by the legislature."[174] The Regents

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[167] Francis West, The Justiciarship in England 1066–1232 15 (1966). *See also* E. P. Thompson, Whigs and Hunters: The Origin of the Black Act 77 (1975) ("Throughout th[e] summer [of 1723] the Lords of the Regency Council evidently enjoyed their godlike exercise of the prerogative of mercy, normally reserved to the King.").

[168] Cobban, *supra* note 114, at 228.

[169] Morgan, *supra* note 110, at 76; *see also* Pearl Kibre, The Nations in the Mediaeval Universities 160 (1948) (noting the masters' university "was strictly speaking a masters' association, with the control of affairs largely in the hands of the regent masters in arts").

[170] *Id.* at 77 (quoting Cambridge University Archives, Letter 9.c.2a).

[171] Axtell, *supra* note 26, at 19. The terms *master* and *doctor* were interchangeable in the medieval university. See Rashdall, *supra* note 81, at 19. ("[T]he three titles, master, doctor, professor, were in the Middle Ages absolutely synonymous."); Clark, *supra* note 66, at 187 ("In the Middle Ages, 'master' and 'doctor' had been used rather promiscuously for a time, so that a certain pragmatic synonymy existed.").

[172] *See* E. Blythe Stason & Wilfred B. Shaw, "The Organization, Powers, and Personnel of the Board of Regents," *in* 1 The University of Michigan: An Encyclopedic Survey 140 (Wilfred B. Shaw, ed., 1942) (noting that term originated in University of Paris, where it was used to denote masters of arts, and came to New World via English universities, first arriving in 1787 in the University of the State of New York); *see also An act to revise and consolidate the laws relating to the University of the State of New York*, Laws of New York 1892 ch. 378 §§ 9, 27 (amended 1905) ("The Regents may, as they deem advisable in conformity to law, make, alter, suspend or repeal any bylaws, ordinances, rules and resolutions for the accomplishment of the trusts reposed in them.").

[173] In Michigan, "[t]he term 'Regents' appeared in the Proposed Act of 1818 for the first time." Shelby Schurtz, "The First Twenty Years," *in* A University Between Two Centuries: The Proceedings of the 1937 Celebration of The University of Michigan 39 (Wilfred B. Shaw, ed., 1937). The University of Missouri's Board of Curators is the exception. The Missouri Curators might owe their name to the medieval "apostolic curators," a group of curial officers tasked with "protect[ing] the privileges which the popes had granted to the universities from being abridged or infringed on by local actions." Rüegg, at 16 (citing Miethke, "Kirche," at 314 n. 4)). *See also* Duryea, *supra* note 22, at 3 ("Under such titles as *curators*, *reformatores*, and *trattatores*, the concept of the nonacademic trustees had precedents in the northern Italian medieval *studia* at Bologna, Padua, Florence, and Pisa."); Post, *supra* note 117, at 144 (noting that the University of Paris held "the corporate right of electing a *procurator* to represent them at Rome in causes concerning them."). Oxford also had procurators, known as "proctors." *See* Pantin, *supra* note 8, at 77.

[174] Verne A. Stadtman, "Constitutional Provisions," *in* The Centennial Record of the University of California 149 (Verne A. Stadtman, ed., 1968).

proclaimed themselves to be the University of California's "guardians against external attack" in response to a law to unify California's Common Schools and its University.[175] They might have meant to invoke the Michigan Regents, who commissioned a report in 1858 to investigate the question of moving the university's medical department to Detroit. The Report concluded that the 1850 Michigan Constitution made the Regents "the constitutional guardians of the Institution."[176] Henry Philip Tappan, the University of Michigan's first president,[177] described the Michigan Regents in a speech two months earlier as "the legal guardians of the University."[178]

The California Regents defended the University against internal attack in addition to external attack. For example, "[i]n the autumn of 1873, [Professor Ezra S. Carr] instigated a movement to abolish the appointed board of Regents and to abolish all colleges of the University but that of agriculture and mechanic arts."[179] Carr and one of his colleagues "joined the protests of the Grange," a group of "discontented farmers [who] rose in anger" against California's bankers, railroad tycoons, and University.[180] Instead of subordinating the University, these attacks helped to elevate the University "to the place and dignity of a constitutional department of the body politic."[181]

Although the Regents were granted the government of the University, they did not govern all of the University's constituent components and the University remained within the Legislature's reach. The Hastings College of the Law provides an early example.

The Hastings College of the Law "was founded by S[erranus] C[linton] Hastings, under and by virtue of the act entitled 'An act to create Hastings College of the Law, in the University of the State of California,' approved March 26th, 1878."[182] Classes commenced in San Francisco in August

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[175] "Memorial by the Board of Regents," *supra* note 164.

[176] University of Michigan Regents' Proceedings, *supra* note 154, at 778.

[177] The Rise of the Research University: A Sourcebook 145 (Louis Menand, Paul Reitter, & Chad Wellmon, eds., 2017).

[178] Henry Philip Tappan, The University: Its Constitution and Its Relations, Political and Religious (1858), *reprinted in* 2 American Higher Education: A Documentary History 543, 544 (Richard Hofstadter & Wilson Smith, eds., 1961). Drawing on the imagery of defense and guardianship, one University of California historian went so far as to compare the university to a castle. *See* Thomas Garden Barnes, Hastings College of the Law: The First Century 1–2 (1978).

[179] Richard E. Powell, "College of Chemistry," *in* The Centennial Record of the University of California 71 (Verne A. Stadtman, ed., 1968).

[180] Douglass, *supra* note 34, at 48–49.

[181] Williams v. Wheeler, *supra* note 28, at 623.

[182] Foltz v. Hoge, 54 Cal. 28, 31 (1879) (per curiam).

1878.[183] That same year, Serranus Hastings, California's first Chief Justice and the first Dean of the College of the Law which, until recently, bore his name,[184] urged the California Regents to affiliate the College with the University of California.[185] Under the Organic Act of 1868, the Regents could "affiliate with the University, and make an integral part of the same, and incorporate therewith, any incorporated College of Medicine or of Law . . . and such college or colleges so affiliated shall retain the control of their own property."[186]

The College's founder saw the question as to who had the government of the College, which was an open one because the College had a Board of Directors independent of the Regents, through the medieval prism of *dominium*.[187] Hastings put forth his "Suggestions for affiliation" of the College of the Law with the University in an 1879 document addressed to the Regents.[188] In it, Hastings discussed several concerns regarding this affiliation, including what relationship the Directors of the College would have with the Regents. On this issue, he wrote the following: "It is asked have the Regents anything to do with this College? The answer to which is, they *rule* it as a department and as a College affiliating. They have the *general dominion* while the Directors have a *Special Dominion*."[189] The Directors' *dominium* is, according to Hastings, a *proprietas*; they have a *proprietas*—"an immediate *dominium*"[190]—in the College itself. The Regents, however, have a mediate *dominium* and no *proprietas* in the College; their *proprietas* was in their *dominium*.

Clara Foltz's case for admission to California's first law school[191] in the last quarter of the nineteenth century illustrates this point. Foltz found herself in

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[183] Verne A. Stadtman, "Hastings College of the Law," *in* The Centennial Record of the University of California 303 (Verne A. Stadtman, ed., 1968).

[184] The College of the Law has indicated that it will change the school name because of controversy over its founder's alleged involvement in wars with Indian tribes in the second third of the nineteenth century, *see* Thomas Fuller, *A New Name for California's Oldest Law School? It's Not Easy*, N.Y. Times (March 17, 2022), https://www.nytimes.com/2022/03/17/us/new-name-california-law-school.html, notwithstanding the statutory requirement that the College "be forever known and designated as 'Hastings' College of the Law.' " 1878 Cal. Stats. ch. CCCLI, § 1. *See also* John Briscoe, *Of Colleges and Halls and Judges Bearing Gifts: Reflections on the Great Denaming Debates*, Cal. Sup. Ct. Hist. Soc'y Rev. 2 (2023).

[185] *See* Foltz v. Hoge, *supra* note 182, at 31 (quoting Organic Act of 1868).

[186] Organic Act, § 8 (1868).

[187] *See* Foltz v. Hoge, *supra* note 182, at 32.

[188] Hastings Suggestions, UC Berkeley Bancroft Library, CU-1, Box 5.

[189] *Id.* at 2.

[190] Maitland, *supra* note 11, at 31. Similar jurisdictional debates were taking place at the University of Cambridge around the same time. Rothblatt notes that, in the mid-nineteenth century, "[d]iscipline was undermined . . . by jurisdictional disputes between the university and its constituent colleges; college loyalty frequently conflicted with university authority." Rothblatt, *supra* note 66, at 184.

[191] *See* Barbara Babcock, Woman Lawyer: The Trials of Clara Foltz 10 (2011).

the midst of "the medieval muddle"[192] of *proprietas* and "divided *dominium*."[193] Often reduced to "the happy haze of collective ownership"[194] —"a haze that was more than [the] fog" so emblematic of the San Francisco Bay[195]— *proprietas* and *dominium* continue to haunt the University. The *Foltz* case at once exemplifies California's progressive proclivities and helps us see clearly "the beginnings [that] could easily be lost in the haze of a half-legendary past."[196]

Foltz, an early proponent of public defense in criminal cases, attempted, against considerable opposition, to enroll at Hastings.[197] After Foltz attended the school for three days (more or less), the Directors refused her admission. Her supplications for reconsideration failed to reverse the decision, and she sued the Directors for admission.[198]

In February 1879, as the delegates to the Constitutional Convention in Sacramento were framing the new Constitution, Foltz litigated her case along with another woman seeking admission to the law school.[199] The Directors, through their president Joseph Hoge,[200] claimed that the College "is a private eleemosynary perpetual trust, and although not a corporation, its nature and character may be ascertained by way of analogy, from what has been declared to be the attributes of corporations created for similar purposes."[201] To make their case, they turned to the *Dartmouth College* case as well as English precedent, including a seventeenth-century English case called *Philips v. Bury*,[202] which stood for the principle that determinations by a visitor, according to the constitution and laws of a college properly formed as an eleemosynary corporation, were "final, and examinable in no other court whatsoever."[203] The Directors argued that they "have the entire

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[192] Maitland, *supra* note 11, at 32.

[193] Lee, *supra* note 49, at 95.

[194] *Id.* at 31.

[195] Barnes, *supra* note 178, at 43.

[196] Tierney, *supra* note 44, at 28.

[197] Sara Mayeux, Free Justice: A History of the Public Defender in Twentieth-Century America 25 (2020) (describing how Foltz "toured the nation lobbying for public defender legislation beginning in the 1890s"); *see also* Laurence A. Benner, *The California Public Defender: Its Origins, Evolution and Decline*, 5 Cal. Leg. Hist. 173, 174 (2010).

[198] *See* Babcock, *supra* note 191, at 44–46.

[199] *See id.* at 46, 48.

[200] *See* Barnes, *supra* note 178, at 53, 71.

[201] Foltz v. Hoge, *supra* note 182, at 28–29 (citations omitted). On "unincorporate bodies," *see* Frederic William Maitland, "The Unincorporate Body," *in* The Frederic William Maitland Reader 130 (V. T. H. Delaney, ed., 1957).

[202] Philips v. Bury, King's Bench (1694) (C.J. Holt, dissenting).

[203] Blackstone's Commentaries, *supra* note 31, at 470 (summarizing Chief Justice Holt's opinion). There is an ongoing "debate as to whether university decision-making should be subject to judicial review." Whittaker, *supra* note 136, at 105.

control and management of the trust," full power to "exercise[] a wise and enlightened discretion upon all matters of government and of discipline which are essential to the success and usefulness of the College," and were "not controlled by the general law which regulates the University."[204] While "[t]he act of foundation, it is true, makes the College the Law Department of the University, . . . it does not give the Regents any control of it."[205]

On the other side, the "legal theory for [Foltz's] suit was clear. Hastings was a branch of the public university, which had been made coeducational by law."[206] Shortly after the Constitutional Convention closed in early March 1879, the trial judge, Robert Morrison, ruled in favor of Foltz.[207] "Against the wishes of founder Hastings, who thought the opinion correct, the directors decided to appeal."[208]

The California Supreme Court took the appeal, hearing arguments in late December 1879.[209] Foltz argued the case herself, and she was no doubt aided in this effort by the fact that she had been, since September 1878, admitted as a lawyer to the California bar.[210] The Court's decision was swift and brief: "[f]emales are entitled, by law, to be admitted as attorneys and counsellors in all the courts of this State, upon the same terms as males . . . . It was affiliated with the University, and thus became an integral part of it, and in our opinion became subject to the same general provisions of the law, as are applicable to the University."[211] In the final analysis, "the same general policy which admitted females as students of the University, opened to them the doors of the College of the Law."[212] Foltz, who was a lawyer when she successfully sued the American West's first law school for admission, never matriculated to the law school.[213]

Although the Directors of the College of the Law had the government and property of the College, rather than the Regents, Foltz's suit demonstrated that the College was integrated into the University. The University, in

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[204] Foltz v. Hoge, *supra* note 182, at 29.

[205] *Id.*

[206] Babcock, *supra* note 191, at 47.

[207] *Id.* at 55.

[208] *Id.*

[209] Barbara Allen Babcock, *Clara Shortridge Foltz: "First Woman*," 30 Ariz. L. Rev. 673, 714 (1988).

[210] *See id.* at 31, 57.

[211] Foltz v. Hoge, *supra* note 182, at 35.

[212] *Id.*

[213] *See* Babcock, *supra* note 191, at 57 (noting that California Supreme Court decision in *Foltz* "came too late for Foltz" herself because of competing demands).

turn, was within the Legislature's reach. The new Constitution, which the People would ratify in just a few short months, would drastically change this arrangement. We will return to the College of Law's "medieval muddle" after discussing California's second Constitutional Convention.

PART II: THE CONSTITUTIONAL CONVENTION OF 1878

Californians convened a second Constitutional Convention in Sacramento in September of 1878,[214] ten years after the Organic Act was passed. This second Convention grew out of "deeply rooted discontents" that "reflected disillusionment, and often keen outrage, with how the political system was performing."[215] While the Grangers remained concerned with University affairs, drought, depression, corruption, race issues, and labor disputes drew most of the delegates' focus at the Convention.[216] Delegates introduced two main proposals regarding the University: one "that would both limit the function of the University to instruction 'of a practical character' and place it more directly under legislative control" and another "that would free the University from 'all pernicious political influences"[217] and "remove[] the University from the changeable and sometimes capricious ideas of education and of methods of administration advocated from time to time in legislatures."[218]

The delegates thought that how the University planned to use the proceeds generated from the sale of land provided by the 1862 Morrill Act, furnishing public lands for the advancement of education in the agricultural and mechanical arts, was important.[219] The Grangers also brought complaints about the University's curriculum, by that time familiar, to the Constitutional Convention.[220] But other elements of the Convention had a different plan in mind for the University.

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[214] *See*, *e.g.*, Ferrier, *supra* note 70, at 306–15.

[215] Harry N. Scheiber, *Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution*, 17 Hastings Const. L. Q. 35, 37 (1989).

[216] *See* Douglass, *supra* note 34, at 57; *see also* Gordon Morris Bakken, *California's Constitutional Conventions Create Our Courts*, 1 Ca. Sup. Ct. Hist. Soc'y Yearbook 37 (1994) ("[T]he motive force behind the calling of a convention was domestic politics and depression.").

[217] Stadtman, *supra* note 174, at 149.

[218] Ferrier, *supra* note 70, at 372–73; *see also* Stadtman, "Constitutional Provisions," supra note 174, at 149.

[219] Act of July 2, 1862, Public Law 37–108. Some believed that this initial grant from the national government, coupled with the largesse of the State of California, endowed the University with "a National and State character." Prospectus for the Phebe Hearst Architectural Plan of the University of California 3 (1897).

[220] *See* Douglass, *supra* note 70, at 59–60.

In October 1878, Walter Van Dyke, a Republican lawyer and Delegate from Alameda,[221] introduced a proposal that would shield the University from "legislative enactments" that might change its organization.[222] The delegates would later adopt much of this proposed amendment. Because of its extraordinary nature, the proposed Amendment is reproduced in its entirety below:

> Whereas, the University of California is not, either in its origin or endowments, exclusively a State institution, but derived its origin from the College of California, and has received large endowments from the Congress of the United States upon certain conditions connected therewith affecting its organization, and also valuable endowments from individuals, which were designed to preserve and develop it in its present form, and to attain the full benefit and proper use of said endowments, and give such stability to said University as will tend to acquire further endowments from private sources, it is expedient that it should continue in perpetuity under its present organization and government, and incapable of change—it is declared that said University shall constitute a public trust, and that its organization and government shall be perpetually continued in their existing form, character, and condition, subject only to such legislative enactments as shall not be inconsistent therewith, and shall only pertain to its support and more complete development; and it is further declared that the Board of Regents, in its corporate capacity, and their successors in that capacity, their officers and servants, shall have, hold, use, exercise, and enjoy all the powers, authorities, rights, liberties, privileges, immunities, and franchises which they now have or are entitled to have, hold, use, exercise, and enjoy, and the same are hereby ratified and confirmed unto them and to their successors, and to their officers and servants, respectively, forever.[223]

Van Dyke's proposal is extraordinary for a number of reasons. First, it represents an attempt by a nineteenth-century legal mind to make sense of the academic corporation. Second, it represents a constitutional attempt to satiate the American insistence on external lay government of universities.[224]

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[221] Biographical Sketches of the Delegates to the Convention to frame a New Constitution for the State of California 156 (T.J. Vivian & D.G. Waldron, eds. 1878).

[222] E. B. Willis & P. K. Stockton, Debates and Proceedings of the Constitutional Convention of the State of California, Convened at the City of Sacramento, Saturday, September 28 1878, Vol. 1 at 172 (1880).

[223] *Id.*

[224] *See* Duryea, *supra* note 22, at 3 ("one can note a pervasive trait of American higher education has been the influence of governing boards of lay trustees").

Third, it underscores the Regents' corporate personality. Fourth, it highlights the Regents' perpetual existence. Fifth, it grants the Regents an impressive estate, complete with such "authorities, rights, liberties, privileges, immunities, and franchises" that it already held, and in addition, those that it might be entitled to hold, and mandates that these entitlements be held "forever."

The University's foremost proponent at the Convention, Regent Joseph H. Winans of San Francisco,[225] argued in January 1879 that the University "will never flourish" so long as it remains the "plaything of politics."[226] He drew inspiration from the University of Michigan example.[227] Regent Winans offered a proposal, which included the public-trust language, developed by the University's supporters in the months after Van Dyke offered his October proposal.[228]

In his excellent book on the University's history, political scientist John Aubrey Douglass suggested that the University's detractors implored the other Convention delegates to reject the public-trust language because that status "could not be revoked 'no matter what naughty things it may do hereafter.' "[229] Douglass argued that most delegates were "decidedly against the university becoming a public trust."[230] But this, the delegates said explicitly, was not the main objection to the aforementioned proposed language. One delegate asked whether the University "[i]s . . . not a public trust." Another delegate responded: "I will explain in the course of the argument. That is not the main objection."[231] A third delegate observed that "no one can deny that [the University] is a great public trust, but objection is made to the provision that its organization and government shall be perpetually continued."[232] If this delegate summarized the disagreement accurately, the issue would appear to have been the irrevocable fixing of the University's organization and government. No one, it seems, wished to deny that the University was a public trust. Moreover, it is not clear that the Constitution's public-trust language affected the University's public-trust

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[225] Biographical Sketches, *supra* note 221, at 130. *See also* Douglass, *supra* note 70, at 40–52, esp. 42.

[226] Douglass, *supra* note 34, at 68 (quoting E. B. Willis & P. K. Stockton, 2 Debates and Proceedings of the Constitutional Convention of State of California 1476 (1881)).

[227] *See id.* at 64 (Winans was "[e]nthralled with Michigan's 1849 definition of its university as a 'coordinate branch of state government' "); Mich. Const. art. XIII § 8 (1850). University supporters drew inspiration from the University of Michigan, with one article in the San Francisco *Evening Bulletin* suggesting that "[w]hat the Michigan University is now doing for the West we hope to see the University of California do for the Pacific Coast." Ferrier, *supra* note 70, at 285 (quoting San Francisco *Evening Bulletin*, March 17, 1868).

[228] *See* Douglass, *supra* note 34, at 64.

[229] *Id.* at 66 (quoting 2 Debates and Proceedings, *supra* note 226, at 1110, 1113).

[230] *Id.* at 65.

[231] 2 Debates and Proceedings, *supra* note 226, at 1116.

[232] *Id.* at 1117.

status. In using the present tense to reference the University's public-trust status, the third delegate quoted above indicated that the University was, at the time of the Convention, already a public trust. Lastly, the pages in the Convention record that Douglass cited to support his claim that the delegates objected to the proposal because of the public-trust language contain no mention of the term *public trust*.[233]

A last-minute proposal, drafted in part by Regent Winans, carried the day.[234] Article IX, § 9, read as follows:

> The University of California shall constitute a public trust, and its organization and government shall be perpetually continued in the form and character prescribed by the organic Act creating the same, passed March twenty-third, eighteen hundred and sixty-eight (and the several Acts amendatory thereof), subject only to such legislative control as may be necessary to insure compliance with the terms of its endowments, and the proper investment and security of its funds. It shall be entirely independent of all political or sectarian influence, and kept free therefrom in the appointment of its Regents, and in the administration of its affairs; *provided*, that all the moneys derived from the sale of the public lands donated to this State by Act of Congress, approved July second, eighteen hundred and sixty-two (and the several Acts amendatory thereof), shall be invested as provided by said Acts of Congress, and the interest of said moneys shall be inviolably appropriated to the endowment, support, and maintenance of at least one College of Agriculture, where the leading objects shall be (without excluding other scientific and classical studies, and including military tactics) to teach such branches of learning as are related to scientific and practical agriculture and the mechanic arts, in accordance with the requirements and conditions of said Acts of Congress; and the Legislature shall provide that if, through neglect, misappropriation, or any other contingency, any portion of the funds so set apart shall be diminished or lost, the State shall replace such portion so lost or misappropriated, so that the principal thereof shall remain forever undiminished. No person shall be debarred admission to any of the collegiate departments of the University on account of sex.[235]

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[233] *See* Douglass, *supra* note 34, at 66 (quoting 2 Debates and Proceedings, *supra* note 226, at 1110, 1113).

[234] For a detailed account, *see id.* at 62–67.

[235] Cal. Const. art. IX, § 9 (1879) (emphasis in original).

This section incorporated the 1868 Organic Act into the Constitution and continued the University's government in perpetuity, as the California Supreme Court observed in 1894.[236] A 2011 treatise on California constitutional law noted that, "[b]y virtue of Section 9, the university was invested with 'constitutional' status, acquiring significant autonomy from the legislature in its governance."[237] Douglass wrote that "the regents suddenly possessed exclusive power to operate, control, and administer the University of California."[238] Thus, the University was, as one California appellate judge put it in 1913,

> elevat[ed] . . . to the place and dignity of a constitutional department of the body politic, and from the express terms of the constitution itself, to the effect that its organization and government should be perpetually continued in the form and character prescribed by the act of its foundation, and that in those respects it should not be subject to legislative control.[239]

The University's authority no longer derived from the Legislature, but directly from the People of California.[240] The University's "organization and government," which was to "be perpetually continued" in the manner described in the 1868 Organic Act, included the 1868 incorporation certificate, which was an essential part of the University's corporate history.[241] Incorporating by reference the Organic Act and the incorporation certificate into the 1879 Constitution created a constitutional corporation, which was the foundation of California's constitutional university. While "various groups have sought to give their own favored public bodies special constitutional status," the University's proponents not only secured special constitutional status for the University, they transformed it into "the highest form of juristic person known to the law, a constitutional corporation."[242]

If the University is a fourth branch of government,[243] as Douglass

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[236] *See* Lundy, *supra* note 77, at 659

[237] Joseph R. Grodin, Calvin R. Massey, & Richard B. Cunningham, The California State Constitution 166 (2011). *See also* Douglass, *supra* note 70, at 32 ("the existence and powers of the university were elevated from a statutory to a constitutional provision.").

[238] Douglass, *supra* note 34, at 69.

[239] Williams v. Wheeler, *supra* note 28, at 623.

[240] *See* Douglass, *supra* note 70, at 32, 65 (quoting Joint Committee on Legislative Organization, Constitution Revision Commission, "Article IX, Education: Background Study" at 16–19 (Jan. 1969), UC Santa Barbara Archives).

[241] *See* Lundy, *supra* note 77, at 658–59.

[242] Auditor General v. Regents, *supra* note 14, at 450.

[243] Or, if one prefers, the Regents constitute the fifth branch of government where the electorate is the fourth. See David A. Carrillo, Stephen M. Duvernay, & Brandon V. Stracener, *California Constitutional Law: Popular Sovereignty*, 68 Hastings L.J. 731, 734 (2017) ("[T]he electorate should be viewed as a legislative branch of the state government when using its legislative powers."); Leah Haberman, *More than Moratoriums?: The Obstacles to Abolishing California's Death Penalty*, 17 Cal. Leg. Hist. 333, 335 (2022) ("Because of California's ballot initiative process, there are four branches of government that shape California's laws: the executive, the legislature, the courts, and the people."). Arrangements such as this are common in state constitutions. See Marshfield, *supra* note 45, at 6 (noting the "highly complex, ad hoc, cross-cutting, and imbalanced arrangement of powers in state government").

argued,[244] then at the core of this branch of California government are, ironically, private citizens, who are not public officers.[245] In other words, the Regents are non-public constitutional officers.[246]

The 1879 Constitution was adopted by the Convention on March 3, 1879, ratified by the People of California on May 7, 1879, and took full effect on January 1, 1880.[246]

PART III: CALIFORNIA'S CONSTITUTIONAL UNIVERSITY, 1879–1900

California's constitutional university posed immediate legal problems after its creation and, while "the scope of [the University's] independence has never been precisely delineated" by California courts, the few opinions dealing with the issue are instructive.[247] The 1886 California Supreme Court case of *People v. Kewen* sheds light on the issue by demonstrating the constitutional university's legislation-busting power.

The *Kewen* case dealt with two statutes passed by the California Legislature soon after the new Constitution went into effect. The College of Law's early years were at once successful and tumultuous.[248] The College's founder, Serranus Hastings, delivered a scathing speech at a September 1882 Regents meeting, in which he argued that either a college's founder or the founder's heir retains visitorial power, citing English precedents and statutes.[249] Hastings delivered the speech after draft legislation, enacted the following year, concerning the College was introduced in the California Legislature.

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[244] See Douglass, *supra* note 34, at 69 (noting that the University "became virtually a fourth branch of government"); *see also* Horowitz, *supra* note 22, at 25 (noting that 1879 California Constitution "seems clearly to have created a separate branch of state government in the area of higher education"). This metaphor was invoked by Moos and Rourke in 1959 but its earliest appearance seems to be in Chambers and Elliot's 1941 book on colleges and the courts. *See* Moos & Rourke, *supra* note 22, at 18, 22 ("And those states which have given the university constitutional recognition as virtually a fourth branch of government have honored higher education with a status that has lifted it high above the common run of state activities."); M. M. Chambers, The Colleges and the Courts 1936–40 35 (1941). One historian has suggested that, "[u]ntil the late nineteenth century, Oxford was literally part of the British state. Along with the monarchy, Parliament, and the Church of England, Oxford was a branch of the governing establishment." Soares, *supra* note 148, at 5. That is, until recently, Oxford was, by my count, also a "fourth branch of government." To the extent that this was the case, this branch of government was an exceptionally weak one at times. At late medieval Oxford, for instance, "the university had come to regard the unofficial position of protector as established in practice, and necessary" for the protection of its privileges. Storey, *supra* note 114, at 719.

[245] The Regents held their positions as private trust[s]" only. Organic Act, § 11. One popular nineteenth-century legal dictionary defined a trust as "[a] right of property, real or personal, held by one party for the benefit of another." "Trust," 2 Bouvier's Law Dictionary 615 (1868).

[246] *See* Cal. Const. art. XXII § 12 (1879).

[247] Grodin, Massey, & Cunningham, *supra* note 237, at 167.

[248] *See* Barnes, *supra* note 178, at 77.

[249] *See id.*

That act amended the College's 1878 charter, stating that "[t]he Regents of the University shall have the same control of the College as they possess over the academic department of the University of California."[250] According to legal historian Thomas Garden Barnes, "[t]he effect of the amending act was to make the Board of Directors superfluous, though it does not appear to have effected the Board's abolition."[251] All authority formerly vested in the Directors was vested instead in the Regents, including control of the College's property.

The second bill at issue in *Kewen* was introduced in the Legislature in February 1885, and would amend the 1883 act by vesting in the Chief Justice of California, who was the president of the Directors by both the 1878 act and the 1883 act,[252] the power to appoint future Directors, with the assent of the remaining members of that body.[253] The act reaffirmed the Regents control of the College and aimed to addressing the issue of the control of College property. The Organic Act of 1868 granted the Regents the power to "affiliate with the University, and make an integral part of the same, and incorporate therewith, any incorporated College of Medicine or of Law . . . and such college or colleges so affiliated shall retain the control of their own property."[254] The 1883 Act succeeded in integrating the College with and incorporating the College into the University but had failed to affiliate the College by relieving the Directors of their *proprietas* in and *dominium* over in the College, thereby causing the "affiliating corporate entity" to "disappear[] by virtue of the act."[255] Indeed, "by vesting the property of the College in the [Directors], the 1885 act cured the [1883 act's] defect by recreating the affiliating entity."[256] Property constitutes "the breath of a fictitious life,"[257] guaranteeing independence and defining "the public and political character of boroughs like New York City"[258] and universities like the University of California.

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[250] *Id.* at 79 (quoting Cal. Stats. 1883, ch. 20).

[251] *Id.* at 80.

[252] *See* 1878 Cal. Stats. ch. CCCLI, § 14.

[253] *See id.* at 80–81.

[254] Organic Act, § 8 (1868).

[255] Barnes, *supra* note 178, at 81.

[256] *Id.* at 82.

[257] Maitland, *supra* note 12, at xxx.

[258] Hartog, *supra* note 85, at 23–24. On the relationship between university independence and property, *see* Soares, *supra* note 148, at 15–31, 273 ("The power of self-governance ultimately rests on material resources, especially cash."); *see generally* Miguel Urquiola, Markets, Minds, and Money: Why America Leads the World in University Research (2020). A recent book on the history of university endowments is illuminating: Bruce A. Kimball with Sarah M. Iler, Wealth, Cost, and Price in American Higher Education: A Brief History (2023).

The 1885 act caused as many problems as it resolved. Most importantly, the act disturbed the delicate, unorthodox relationship between founder and Directors, producing "an impasse in the exercise of responsibility and powers that really did not affect function."[259] While not affecting function, the act galvanized the original Directors, appointed under the 1878 act, into action against the founder. In April 1885, the Directors asserted their "claim as the rightful authority over the College," rather than the new "trustees" appointed under the 1885 act, by appointing Regent Winans—"the noted lawyer, man of culture, bibliophile"—to the deanship and Perrie Kewen to the position of registrar, goading the College's founder.[260] The Directors elevated to "the deanship the most stalwart fighter for the University's independence from political influence," who was instrumental in securing the University's constitutional status, which was "the basis of [the Directors'] case against the 1883 and 1885 acts."[261] The Chief Justice of California, who as a trial judge had ruled in favor of Foltz in 1879, allied himself with the Directors, but does not appear to have participated in the case.[262] The Directors succeeded in eliciting legal action from the founder, who caused the California attorney general to bring a lawsuit to remove the Directors' registrar.

The founder prevailed over at trial, and Kewen appealed. Five directors, including former president Joseph Hoge, represented Kewen in the appeal, which was heard by the California Supreme Court in March 1886. The question was the constitutionality of the 1883 and 1885 acts. If the acts were lawful, the Directors' appointment was unlawful; if they were unlawful, the Directors' appointment was lawful. In a short opinion, the Court held that

> [t]he constitution of 1879 (article 9, § 9) declared that the university should be continued in the form and character prescribed in the acts then in force, subject to legislative control for certain specified purposes only. Such being the case, it was not competent for the legislature, by the act of March 3, 1883, or that of March 18, 1885, or by any other act, to change the form of the government of the university, or of any college thereof then existing.[263]

Thus, the court held that the constitutional prohibition on legislative interference with University governance extended even to the Hastings

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[259] Barnes, *supra* note 178, at 82.

[260] *Id.* at 83.

[261] *Id.*

[262] *See Id.* at 83.

[263] People v. Kewen, 69 Cal. 215, 216 (1886) (Myrick, J.).

[264] This may reflect Americans' deep distrust of the legislature, legislators, *and legislation itself* in late-nineteenth-century California. *See* Grodin, Massey, & Cunningham, at 21; *see also* Barnes, *supra* note 178, at 46 (listing "distrust[] of legislators and the judiciary" among the "small-farmer element in California society" whose demands brought about the Second Constitutional Convention).

College of the Law, which was not governed by the Regents.[264] The Court so held without defining the extent of the University's independence. What was clear from the opinion was that the Regents' *dominium* extended to the whole of the University, which was "a complete unity in itself,"[265] including to that part of the University in which the Regents did not have a *proprietas*.

The case evinced the irony characteristic of university history. As Barnes noted, "[t]he constitutional safeguards against political interference in the University had been construed to prevent the legislature from perfecting the affiliation of Hastings with the University, which had been intended by the original act of [the College's] creation of 1878."[266] The Legislature was unable to legislate for the College, even if that meant frustrating the design of the College's original legislative charter. Because the University was a constitutional university, the legislature was no longer able to control that which it created.

In the following decade, the University would again appear before the California Supreme Court, this time concerning the Regents' status as public officers. The case began with a "an early-day gift of inestimable value to the University" that became "the crowning possession of the University": the Lick Observatory at Mount Hamilton, located seventy miles south of the University, just east of San Jose in the Diablo Mountain Range.[267] The still-standing observatory, made possible through James Lick's munificent 1875 gift of $700,000, was the largest telescope on earth when it was completed and transferred to the Regents in 1888.[268] The Regents maintained a telegraph and telephone line running from San Jose to the Observatory, presumably along the very road constructed in 1876.[269] In November 1891, Daniel Lundy was traveling along this road when he was caught in the utility wires and instantly killed. Lundy's son sued the Regents and, in doing so, presented the California courts with an interesting case turning on the Regents' status as public officers.

The *Lundy* plaintiff accused sixteen Regents of negligently maintaining the utility poles, allowing them to rot.[270] These rotting poles, in turn, dropped the utility wires dangerously low to the ground. The Regents, the plaintiff

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[265] "Memorial by the Board of Regents," *supra* note 164.

[266] Barnes, *supra* note 178, at 84.

[267] Ferrier, *supra* note 70, at 417 (quoting Millicent W. Shinn, "The University of California," Overland Monthly (Oct. 1892)).

[268] *See id.* at 418; Annual Report of the Secretary of the Board of Regents of the University of California 13 (1876).

[269] Lundy, *supra* note 77, at 656.

[270] *Id.* at 659.

alleged, allowed these wires to remain in this dangerous position, and were therefore at fault for Lundy's death. The Regents moved the trial court to consider whether the suit could proceed because "[t]he negligence shown, if any, is the negligence of the corporation called the 'Regents of the University of California,' which, as owner of the lines in question, owed to the plaintiffs' father the duty of maintaining said lines in proper condition."[271] The trial court denied this motion. After parties presented their respective cases, the trial court ruled for the plaintiff and awarded $10,000 in damages.[272] The case was then appealed to the California Supreme Court.

The only question before the Supreme Court in *Lundy v. Delmas* was whether the lower court properly denied the Regents' motion. The court recounted the University's chartering documents—the 1868 Organic Act, the 1868 incorporation certificate, the 1879 Constitution—before turning to the pertinent suite of statutory provisions. First, there was the 1873 act, which enumerated the state's "civil executive officers." This list included the twenty-two Regents.[273] However, the Court noted, the 1868 Organic Act required that no Regent "be deemed a public officer by virtue" of their regency,[274] and this arrangement was "perpetually continued" by the 1879 Constitution.[275]

The Court first addressed the preliminary question as to whether the Regents were a corporation, answering it in the affirmative. The next question was whether the Regents were individually liable for Lundy's death. "The rule," the Court wrote, "undoubtedly is that public officers are answerable in damages to any one specially injured by their neglect or omission to perform the duties of their offices."[276] Yet the Regents "were not public officers" by the explicit language of the 1868 Organic Act.[277] The 1879 Constitution overrode the 1873 act including the Regents among the state's "civil executive officers." The verdict below had to be reversed because none of the Regents could be held liable under the rule of public-officer negligence, according to which the case proceeded. Thus, the Court recognized for the first time that the Regents were non-public constitutional officers.

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[271] *Id.* at 657.

[272] *See id.*

[273] *See id.* at 659.

[274] *Regency* was the term used to refer to the collective Regents in both California and Michigan. *See* Annual Report, *supra* note 268, at 3 (describing "changes in the Regency"); A University Between Two Centuries, *supra* note 173, at 8 (quoting University of Michigan president Alexander G. Ruthven recounting that Regent Edmund C. Shields had "steadfastly refused to hold any public office except the Regency of the University").

[275] Lundy, *supra* note 77, at 658–59 (quoting 1868 Organic Act).

[276] *Id.* at 659.

[277] *Id.*

The Regents were before the California Supreme Court again five years later in *In re Royer's Estate*.[278] Herman Royer included a provision in his will that "[a]ll the rest and residue of my property and estate I do hereby give, devise, and bequeath unto the University of the State of California."[279] Should this gift fail, it was to revert to Royer's next of kin. In the case involving a challenge to the resulting bequest to the University, the trial court concluded that

> neither the University of the State of California, nor the University of California, is now, or ever has been, a corporation under the laws of this state, and is not a person, and that each is an entity distinct from the Regents of the University of California, which latter are a corporation duly organized under the laws of this state.[280]

Because neither the University of the State of California nor the University of California was a corporation, neither could receive the bequest and the same was to revert to the next of kin.[281] The case was appealed to the California Supreme Court.

Because "[t]he questions involved are of much importance, as they concern not only the bequest in issue, but previous gifts and grants as well as the legal status of the university,"[282] the high court entered into a thorough discussion of the University's legal history, beginning with the California Constitution of 1849, which reserved certain lands for the prospective use of a contemplated university, and running up to the provisions of the 1879 Constitution.[283] After recounting this history, the Court analyzed the University's corporate status.

The Court determined that, while the University "may be unique, . . . it is nevertheless an instrumentality of the state, created by the legislature acting within its just power."[284] Further, "[t]hat the regents are by law made the governing body of the university, and are required to incorporate under the laws of the state, is by no means inconsistent with the continued existence of the university as a public corporation." Because the University was a public corporation, the Court reasoned, with reference to the U.S. Supreme Court's 1819 *Dartmouth College* decision, "[a]ll its property is property of the state. It was created by the state, and is subject to the laws of the state, as a state institution, within the limits of the new constitution, which has declared it

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[278] In re Royer's Estate, *supra* note 70, at 615.

[279] *Id.* at 615; *see also* Regents' Manual, *supra* note 166, at 211–12.

[280] In re Royer's Estate, *supra* note 70, at 615.

[281] *See id.* at 616.

[282] *Id.* at 616.

[283] *See id.* at 617–20 (citing Cal. Const. art. 9, § 4 (1849)).

[284] *Id.* at 620.

to be a public trust." The Organic Act established the University and, while vesting the government thereof in the Regents, it did not establish them as a corporation. The Organic act "nowhere provides, in terms or by implication, that when incorporated the regents should become, and thereafter be, the university."[285] Because "[t]he regents are in fact a part of the university, with specifically defined powers in their custody and control of the property and the management of university affairs,"[286] they "have no duties or powers beyond the purpose of their creation, which was to take the custody and control of the university property, and to perform certain prescribed duties in the management of the university."[287] The Regents constituted "a corporation within a corporation,"[288] and cannot be regarded "as a legal corporate entity, except as a part of, and ancillary to, the parent and principle institution,—the public corporation created by law as such, and entitled 'The University of California.' "[289] This view of the University's legal status aligned with the view espoused by the Regents in 1876, according to whom the University had "a complete unity in itself."[290] Because the University was a public corporation, it could receive money by bequest and the decision below was accordingly reversed.[291]

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[285] *Id.* at 621.

[286] In re Royer's Estate, *supra* note 70, at 621.

[287] *Id.* at 622.

[288] *Id.* The corporation within a corporation might reflect the issue of corporate government, which some scholars believe is constituted separately from the corporation itself. "[B]ecause an abstract legal entity cannot itself act," David Ciepley writes, the corporation's "charter also constitutes a government for the corporation, such as a board, with authority to manage the corporation's property and contracts as its legal agent." Ciepley, *supra* note 16, at 6. Where governing boards are corporations themselves, Ciepley's view might precipitate an infinite legal regress in which nobody, including no *body*, has the government of a given corporation because a corporation's government must vest separately from the corporation itself.

[289] *Id.* at 622.

[290] "Memorial by the Board of Regents," *supra* note 164.

[291] In re Royer's Estate, *supra* note 70, at 622–23. The concept of "corporations within corporations" was a fixture of the legal organization of the ancient universities. *See* Morgan, *supra* note 110, at 10–11. With regard to the University of Cambridge, Morgan notes, "[i]t should be added that certain readerships and professorships were also 'bodies corporate', and therefore, the university reasoned, capable of accepting the security of income to be derived from permanent endowment." *Id.* 187 n. 22. The situation was similar at Oxford, where "[t]he colleges were often a powerful force in the university because they were independent corporate entities and usually supported older students in the higher faculties." Brockliss, *supra* note 116, at 8. In thirteenth-century Paris, Gaines Post reports, "the development of the organization of the University was slow, starting with a general body which broke up into several small bodies or corporations within a corporation." Gaines Post, *Parisian Masters as a Corporation, 1200–1246*, 9 Speculum 421, 429 (1934); *see also* Le Goff, *supra* note 137, at 73 (describing "corporations or colleges inside the university" of Paris). Medieval universities encompassed corporate nations of students. *See* Kibre, *supra* note 169, at 16 ("In considering the question when the nations at Paris came into existence, a distinction is made between the voluntary associations of masters and students from the same locality, and the legal corporation which possessed a seal, a common treasury, and the right to bind its members by the oath to the rules decreed."). In the twentieth-century American multiversity, Clark Kerr noticed a similar pattern. In comparing the university to the United Nations, he writes that in the modern multiversity "[t]here are several 'nations' of students, of faculty, of alumni, of trustees, of public groups. Each has its territory, its jurisdiction, its form of government." Kerr, *supra* note 64, at 27. On corporations within corporations in English law, *see* Mary Sarah Bilder, "English Settlement and Local Governance," *in* I The Cambridge History of Law in America: Early America (1580–1815) 70 (Michael Grossberg & Christopher Tomlins, eds., 2008) ("This corporation-within-a-corporation was, theoretically, a coherent model for London-based governance, but the only settlement actually governed that way was Bermuda."). American universities also incorporate inferior corporations. *See* Regents of the University of Michigan v. Pommerening, *supra* note 31, at 396 (noting that Michigan Regents incorporated inferior corporation in 1924). However, the California Regents ruled in 1897 that "[t]he Academic Colleges of the University are not corporate bodies, and the use of seals by them has no legal force." Regents' Manual, *supra* note 166, at 322.

In affirming the University's ability to accept bequests, the *Royer* Court to show that the state was able to accept a bequest. Statutes enacted in the 1870s, which the Court appears to cite,[292] address these issues directly. For example, one statute stated that "[t]he state of California, *in its corporate capacity*, may take by grant, gift, devise, or bequest, any property for the use of the university, and hold the same, and apply the funds arising therefrom, through the regents of the university, to support the university."[293] The next section of the statute was similar but addressed the Regents instead of the state and was considerably longer:

> [t]he regents of the university, *in their corporate capacity*, may take, by grant, gift, devise, or bequest, any property for the use of the university, or of any college thereof . . . and such property shall be taken, received, held, managed, and invested, and the proceeds thereof used, bestowed, and applied by the said regents for the purposes, provisions, and conditions prescribed by the respective grant, gift, devise, or bequest.[294]

A related statute, dealing with the Regents' power, reaffirmed that the Regents could "receive, in the name of the state, or of the board of regents, as the case may be, all property donated to the university."[295] These statutes relate directly to and deepen the mystery of the *Royer* case. It remains unclear why the Court went to such lengths to deny the Regents' corporate personality, especially when such personality plainly appeared across the relevant statutes. It is also curious that the Regents' seal was the University's seal, reading only "University of California."[296] Like the rector at medieval Bologna and the chancellor at medieval Oxford,[297] the Regents were the corporate Head of the University; they had a personality separate from and contained within the University.

Curiously, the *Royer* court found it necessary to emphasize that "[t]he university, while a governmental institution, and an instrumentality of the state, is not clothed with the sovereignty of the state, and is not the sovereign."[298] Judges and scholars disclaim university sovereignty with a

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[292] *See* In re Royer's Estate, *supra* note 70, at 619 (citing Cal. Stats. 1873-74, § 1415).

[293] Elliott & Chambers, *supra* note 127, at 74 (quoting Cal. Stats. Title III, Article II, § 1415(6) (1874)) (emphasis added).

[294] *Id.* (quoting Cal. Stats. Title III, Article II, § 1415(7) (1874)) (emphasis added).

[295] *Id.* (quoting Cal. Stats. Title III, Article III, § 1425(5) (1874)) (emphasis added).

[296] Regents' Manual, *supra* note 166, at 294.

[297] *See* Kibre, *supra* note 169, at 54 ("The rector as the supreme head of the *universitas* presided over the examinations and at the ceremonies at which degrees were conferred."); Le Goff, *supra* note 137, at 74 (noting that "[t]he 'chancellor' was the head of the university" at medieval Oxford); Rashdall, *supra* note 160, at 54 ("The chancellor loses his independent position and becomes the presiding head of the university" at thirteenth-century Oxford).

[298] In re Royer's Estate, *supra* note 70, at 624.

surprising frequency and exasperation, which might hint at the enduring force of the idea of university sovereignty. The Minnesota Supreme Court, for instance, found it necessary to proclaim in a 1928 case that the Minnesota Regents were not "the rulers of an independent province or beyond the lawmaking power of the Legislature," notwithstanding the fact that "the people of the state, speaking through their Constitution, have invested the [Minnesota] regents with a power of management of which no Legislature may deprive them."[299] A former Michigan Regent wrote in his 1969 book on the University of Michigan that "[a] university campus cannot be an extraterritorial state within a state."[300] These reflections highlight the legal challenge posed by constitutional corporate personality.

The *Royer* case neatly presents each side of the constitutional-university puzzle. While *Royer* offers a rather strained reading of the relevant documents, it demonstrates the difficulty posed by the novel issue of a constitutional university's corporate personality. The question of whether university property was state property was particularly vexing in the nineteenth century, and the *Royer* court's assertions that the Regents were not a corporation and that the University's property was state property does not resolve the underlying issue. As discussed above, the Michigan Supreme Court saw things differently in their state. In an 1893 case, that court held that "[u]nder the constitution, the state cannot control the regents. It cannot add to or take away from its property without the consent of the regents."[301] The property of the Michigan Regents was its own but only because it was a corporate entity separate from the state. The Idaho Regents, a constitutional corporation, proclaimed in 1920 that "the board of Regents denies that a claim against the University is a claim against the state of Idaho and subject to the regulations prescribed for the latter."[302] The Idaho Regents' view was ultimately upheld by the Idaho Supreme Court.[303] Only by depersonifying the Regents could the *Royer* Court assign any property that body might hold to the state. The Court does not explain how it was that the state could hold property and did not think it necessary to show that the state was a corporation.

The Regents prevailed in *Royer* because the Court was convinced that they were not a corporation, or at least not a corporation in the first instance.

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[299] State v. Chase, *supra* note 21, at 266.

[300] Cudlip, *supra* note 73, at 113.

[301] Weinberg v. Regents, *supra* note 22, at 254.

[302] Black v. Board of Education, *supra* note 17, at 202 (quoting Oct. 1, 1920, Idaho Regents Resolution).

[303] *See Id.* at 205.

The Regents won the case by losing their corporate personality. This corporate personality was, however, reaffirmed by constitutional provision just nineteen years later. The California Constitution was amended in 1918, making clear that the Regents were in fact a corporation: "the University to be administered by the *existing corporation* known as 'The regents of the University of California,' with full powers of organization and government," which would appear to indirectly reference and incorporate the Organic Act.[304] This clarification did not resolve the issue of whether the Regents was the University, a question that is beyond the scope of this article. While the Regents won by losing itself—that is, *its self*—conflict arose at constitutional universities across the West.

Americans across the Western United States established constitutional universities, first in Michigan in 1850, and then in Minnesota in 1858, then in Missouri in 1875, in Colorado in 1876, in California in 1879, in Idaho in 1890, and in Utah in 1896.[305] Each constitutional university charter was initially legislative before its corporate foundation was "elevated from a statutory to a constitutional provision."[306] That each constitutional university followed the Michigan pattern might reflect the fact that, by the 1870s, "the universities then in course of establishment in the West already looked to Michigan for guidance."[307] Historian Jurgen Herbst wrote that the U.S. Supreme Court's decision in the *Dartmouth College* case "safeguard[ed] chartered college government" by holding that, "[f]or a corporation charter to be altered, the corporation had to agree to the changes or else be convicted of wrongdoing by due process in a duly constituted court of law."[308] However, Herbst wrote, "the court did not move the colleges beyond the reach of governmental authority."[309] The U.S. Supreme Court had no power to remove colleges from government authority because that power rested with the People themselves. Thirty-one years after *Dartmouth College*, the People of Michigan severely restricted the Michigan legislature's authority over their university. The real achievement of the constitutional university was to place the university and the legislature on the same plane by creating the one by

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[304] Cal. Const. art. 9, § 9 (as amended, Nov. 5, 1918) (emphasis added); *see* Elliott & Chambers, *supra* note 127, at 64 (quoting amended California Constitution).

[305] *See* Mich. const. art. XIII § 8 (1850); Minn. Const. art. XIII § 3 (1858); Mo. const. art. XI (1875); Colo. Const. art. IX § 14 (1876); Cal. Const. art. IX, § 9 (1879); Id. Const. art. IX § 10 (1890); Utah Const. art. X (1896).

[306] Douglass, *supra* note 70, at 32.

[307] A University Between Two Centuries, *supra* note 173, at viii.

[308] Herbst, *supra* note 106, at 241–42.

[309] *Id.* at 242.

the same means and at the same moment as the other.[310]

The constitutional university emerged only in the second half of the nineteenth century and only in the Western United States, centuries after the first universities were established in Western Europe and thousands of miles west of the ancient seats of the university at Bologna, Paris, Oxford, and Cambridge (UK), and indeed hundreds of miles west of the ancient seats of the American university at Cambridge (US), Williamsburg, New Haven, and Princeton.

It is surprising that the constitutional university emerged in the middle of the nineteenth century, amidst a general distrust of corporations[311] and a movement toward general incorporation fueled by a "desire to prevent the politics of special privileges from influencing the legislative process."[312] Just as other anglophone universities, including the ancient English and Irish universities (to the extent that Irish universities may be considered anglophone), saw their authority reduced, western Americans were busy enhancing the authority of their universities. In 1850, the same year that the first constitutional university was created, a motion in Parliament proposed the establishment of a royal commission to "inquire into the state of the Universities of Oxford, Cambridge and Dublin 'with a view to assist in adaptation of those important institutions to the requirements of modern times.' "[313] This motion led to the passage of legislation pertaining to the ancient universities, the 1856 bill for Cambridge substantially mirroring that which was passed for Oxford.[314] That bill established a commission whose members "were to have the power to frame statutes" for the college,[315] dispossessing the University of one of its foundational ancient privileges. The ancient English universities were adapted to modern times while the modern western American universities were reconfigured in an ancient mold.[316]

The American West seems to have stood out even among modern universities in the English-speaking world, where universities seemed to be losing ground

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[310] While the California Constitution does not itself incorporate the University, it fixes the University's incorporation by reference to and perpetuation of the Organic Act of 1868. *See* Cal. Const. art. IX, § 9 (1879). The 1850 Michigan Constitution offers a more straightforward case of constitutional incorporation: "The regents of the university and their successor in office shall continue to constitute the body corporate, known by the name and title of 'The Regents of the University of Michigan.' " Mich. Const. art. XIII, § 7 (1850).

[311] *See* Friedman, *supra* note 40, at 391 (discussing contemporary distrust of corporations).

[312] Hennessy & Wallis, *supra* note 46, at 83.

[313] Leedham-Green, *supra* note 108, at 152 (quoting Motion, April 23, 1850).

[314] *Id.* at 158.

[315] *Id.*

[316] Soares argues, however, that "Oxford was never more autonomous, wealthy, and influential than in the period between the Victorian Royal Commissions and the Second World War." Soares, *supra* note 148, at 270.

alongside their ancient counterparts. For example, by 1853 legislation, the University of Toronto, established in 1827, was "effectively controlled by the government."[317] The American university's quintessential embodiment is, as Willard Hurst argued regarding American law,[318] found in the west.[319]

Cases contesting the constitutional university's authority appeared regularly in state supreme courts soon after the first constitutional university was established in Michigan in 1850. For fifty years the Regents resisted the legislature's attempts to govern their universities, resulting in decades of litigation. In 1896, the Michigan high court, in denying a writ of mandamus that would have compelled Michigan's Regents to establish a homeopathic medical college under a legislative enactment, explained that "[t]he board of regents and the legislature derive their power from the same supreme authority, namely, the constitution. In so far as the powers of each are defined by that instrument, limitations are imposed, and a direct power conferred upon one necessarily

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[317] Martin L. Friedland, The University of Toronto: A History 8, 39 (2002).

[318] *See generally* J. Willard Hurst, Law and the Conditions of Freedom in the Nineteenth-Century United States (1956).

[319] When one thinks of the quintessential American university, Harvard University likely springs to mind. However, Harvard is an ordinary legislative university, of which there exist many across the nation and world. It cannot lay claim to anything like the special constitutional status of the western constitutional universities. This was denied to Harvard long ago. The Massachusetts Constitution of 1780 includes a chapter on Harvard University and its government. *See* Mass. Const. c. V §§ I & II (1780). The Massachusetts constitution ordained that the Harvard Corporation "shall have, hold, use, exercise and enjoy, all the powers, authorities, rights, liberties, privileges, immunities and franchises, which they now have or are entitled to have, hold, use, exercise and enjoy: and the same are hereby ratified and confirmed unto them, the said president and fellows of Harvard College, and to their successors, and to their officers and servants, respectively, forever." *Id.* at § I art. I. However, that constitution expressly reserved to the Massachusetts legislature the power to govern the university: "nothing herein shall be construed to prevent the legislature of this commonwealth from making such alterations in the government of the said university, as shall be conducive to its advantage and the interest of the republic of letters, in as full a manner as might have been done by the legislature of the late Province of the Massachusetts Bay." *Id.* at § I art. III.

Another early example of a university claiming its origin in a state constitution came from North Carolina. The North Carolina Supreme Court held in 1805 that the University of North Carolina was established by the North Carolina legislature according to a mandate included in the North Carolina Constitution of 1789, and, therefore, the legislature could not deprive the university of the property previously granted thereto by that body. *See* Trustees of the University of North Carolina v. Foy and Bishop, 5 N.C. 58, 86 (NC 1805) (Locke, J.); *see also* Herbst, *supra* note 106, at 220–21 (discussing *Foy*). The court "view[ed] this corporation as standing on higher grounds than any other aggregate corporation; it is not only protected by the common law, but sanctioned by the [North Carolina] constitution . . . . [T]he people evidently intended this University to be as perpetual as the Government itself." *Id.* at 86. Additionally, "although the Trustees [of the University of North Carolina] are a corporation established for public purposes, yet their property is as completely beyond the control of the Legislature, as the property of individuals or that of any other corporation." *Id.* at 88. However, the North Carolina Constitution is not the University of North Carolina's charter. That charter came from the legislature, rather than the Constitution. *See id.* at 58. The crucial difference between the University of North Carolina and the University of California after 1879 is that the California Constitution was the University of California's charter. On the importance of the *Foy* case in American legal history more generally, *see* Jonathan Levy, "Altruism and the Origins of Nonprofit Philanthropy," *in* Philanthropy in Democratic Societies: History, Institutions, Values 25 (Rob Reich, Chiara Cordelli, & Lucy Bernholz, eds., 2016); R. Kent Newmyer, *Justice Joseph Story's Doctrine of Public and Private Corporations and the Rise of the American Business Corporation*, 25 DePaul L. Rev. 825, 833 n.29 (1976). Interestingly, the California Regents claimed a similar constitutional status for their legislative university in the early 1870s. *See* Report of the Board of Regents, *supra* note 71, at 5–6 ("[T]he University, as one of the future institutions of the State, is expressly recognized by Article IX, section four, of the [1849] Constitution of California.").

excludes its existence in the other."[320] In 1911, the Michigan Supreme Court put it more strikingly: "By the Constitution of 1850, and repeated in the new Constitution of 1908, the Board of Regents is made the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the Legislature."[321] One historian of the University of Michigan explained the decision's meaning: "[c]reated by the constitution, the Board of Regents of the University was as firmly founded as the legislature, the governor, or the judiciary, and was equal in its power over its designated field of state endeavor."[322]

Differences in the University of Michigan's constitution might explain the differences in judicial opinion between the Michigan Supreme Court and the California Supreme Court. The first difference is that the Michigan Regents were undoubtedly public officers. In Michigan, according to president Tappan, "[t]he Regents of the University have ever regarded themselves as State officers, and not as the representatives of special religious or political interests."[323] "As the President of the University of Michigan," Tappan proclaimed, "I claim to be an officer of the State."[324]

In addition to Michigan, litigation across states arose in the early twentieth century, as states centralized and streamlined "the sheer multiplicity of agencies in state government" through "reorganization movement[s]."[325] This was especially true during the first quarter of the twentieth century, when constitutional universities faced renewed external challenges to their independence and authority.[326] Meanwhile, in 1922, a committee of the American Association of Land-Grant Colleges and State Universities was charged with investigating "the administrative relationships of the land-grant colleges and their respective State governments with special reference to the increasingly frequent adoption of the system of centralized expenditure control, a system which is seriously encroaching upon the administrative officers of many land-grant institutions."[327]

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[320] Sterling v. Regents, *supra* note 22, at 382.

[321] Auditor General v. Regents, *supra* note 14, at 450.

[322] Peckham, *supra* note 43, at 35.

[323] Tappan, *supra* note 178, at 539.

[324] *Id.* at 541.

[325] McConnell, *supra* note 19, at 183–84. On centralization and the university, *see generally*, Moos & Rourke, *supra* note 22, at 43–69 (discussing administrative centralization); see also Elliott & Chambers, *supra* note 22, at 155–64 (discussing consolidation in states).

[326] *See* Auditor General v. Regents, *supra* note 14, at 450; Black v. Board of Education, *supra* note 17, at 205; State v. Chase, *supra* note 21, at 265.

[327] Moos & Rourke, *supra* note 22, at 44–45 (quoting Association of Land-Grant Colleges, Proceedings of the Thirty-Sixth Annual Convention, November 21–23, 1922).

In the 1928 case *State v. Chase,* the Minnesota Supreme Court affirmed a decision ordering the state auditor to issue funds requested by the University of Minnesota, holding that "the University, in respect to its corporate status and government, was put beyond the power of the Legislature by paramount law, the right to amend or repeal which exists only in the people themselves."[328] It would appear that the University of Minnesota, while "a function of the state . . . may not be subject to state control."[329] This conclusion would have been familiar to nineteenth-century jurists, who were of the opinion that "a grant of property was beyond the reach of the legislature, whereas a grant of political power could never be viewed as a 'vested right' against the state."[330] One might think of the Regents as a "mixed corporation—a corporate body with a combination of public and private powers"[331]—but it might be more helpful to think of the Regents as a classical corporation, "a juridical person steered by a legally constituted government that exercises jurisdictional authority,"[332] who was "peculiarly intangible" due to its existence "apart from the individual human beings who are its members and officers, apart from any property it might own, apart even from the place at which it resides."[333] To the extent that the Regents and the University shared a single identity, their corporateness, and the peculiar intangibility that sprang therefrom, "disembodied"[334] the University. In this disembodied individual, "the belongs of the private law" were interconnected with and inseparable from "the belongs of the public law."[335] As Anne Hyde wrote in her history of the nineteenth-century American West, "*belong* turns out to be a very capacious term."[336]

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[328] State v. Chase, *supra* note 21, at 265.

[329] Moos & Rourke, *supra* note 22, at 19.

[330] Hartog, *supra* note 85, at 17.

[331] *Id.* (internal quotation marks omitted).

[332] Ciepley, *supra* note 16, at 7. More specifically, the Regents were a classical, complex Anglo-American corporation, which features "the board as the head" of the corporation, *id.* at 9, and in which the "head and members ruled co-ordinately." Tierney, *supra* note 44, at 83. If Axtell is correct when he writes that "[t]he faculty is the indispensable mind and soul of a university," then the university's mind might be located outside of its head. James Axtell, The Making of Princeton University: From Woodrow Wilson to the Present 27 (2006).

[333] Runciman, *supra* note 21, at 93.

[334] Axtell, *supra* note 26, at 8 (quoting W. A. Pantin, "The Halls and Schools of Medieval Oxford: An Attempt at Reconstruction," *in* Oxford Studies Presented to Daniel Callus 31–32 (1964)).

[335] Maitland, *supra* note 11, at 11–12. David Ciepley notes that "[c]orporations were originally understood to be (legally limited) governments, exercising rights of government delegated to them by the public authority." Ciepley, *supra* note 16, at 3. This is generally what is meant by "classical corporation," although the exercise of university authority sometimes preceded authorization. *See* Parker, *supra* note 114, at 31 (noting Cambridge claimed more liberties than were granted by king).

[336] Anne F. Hyde, Empires, Nations, and Families: A New History of the North American West, 1800–1860 17 (2011) (emphasis in original).

CONCLUSION

The histories of the constitutional corporation and constitutional university have gone unwritten. By 1900, seven constitutional universities were in existence, and more were established in the early twentieth century, including the Oklahoma Agricultural and Mechanical College in 1907, and Michigan State University and Wayne State University, both in 1908.[337] Legal historians and university historians have generally not recognized that the university is fundamentally legal. Because the university is fundamentally legal and has a fundamental legality, it also has a legal history. General histories of the American university tend to give the university's legality short shrift, and, even when attention is paid thereto, law is presented as something that *happens to* the university somewhere *outside of* the university.[338] In sharp contrast, this article focuses on what the university does with and to law within its own walls, bringing law back into the university, and returning the university to the history of government.[339]

Just as "universities are historical institutions,"[340] universities are also legal institutions. Here, *legal institution* has a triple meaning.[341] Universities are legal institutions because they (1) are corporations and, therefore, are fundamentally legal; (2) have a fundamental legality, the enforcement of which is their raison d'être; and (3) make law in their corporate capacity in service of enforcing this raison d'être. Because universities are legal institutions, it follows that, just as "Western history is legal history,"[342]

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[337] *See* Okla. Const. (1907); Mich. Const. (1908).

[338] *See*, *e.g.*, John R. Thelin, A History of American Higher Education 43–44, 70–73 (2004); Laurence R. Veysey, The Emergence of the American University (1965). Even self-consciously legal histories of the university embrace this view. *See*, *e.g.*, Gelber, *supra* note 127.

[339] Relatedly, Ciepley seeks to return corporations "to the history of government." Ciepley, *supra* note 16, at 4. Indeed, as Philip Stern wrote, corporations "were by nature public authorities and governments in their own right, which were not always quiescently subject to the nation-state." Stern, *supra* note 144, at 214. Universities, too, "were by nature public authorities and governments in their own right."

[340] Thelin, *supra* note 338, at xiii.

[341] As I have tried to show, universities are not, in the first place, "institutions" at all. They are corporations. As William Clark wrote in 1986, the "[a]dministrative history of scholastic forms must be written, not as a history of institutions, but rather as a history of collegia and corporations, a history of a multiplicity of corporate persons, 'personae.' " Clark, *supra* note 90, at 16. Institutional history is valuable scholarship but this paper is not an institutional history. Rather, it is a history of the University of California as such.

[342] Katrina Jagodinsky, "Introduction: Into the Void, or the Musings and Confessions of a Redheaded Stepchild Lost in Western Legal History and Found in the Legal Borderlands of the North American West," *in* Beyond the Borders of the Law: Critical Legal histories of the North American West 3 (Katrina Jagodinsky & Pablo Mitchell, eds., 2018); *see also* Patricia Nelson Limerick, The Legacy of Conquest: The Unbroken Past of the American West 55 (1987) ("Western American history was an effort first to draw lines dividing the West into manageable units of property and then to persuade people to treat those lines with respect."). Earlier collection of essays on Western legal history include Law in the Western United States (Gordon Morris Bakken, ed., 2000) and Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West (John McLaren, Hamar Foster, & Chet Orloff, eds., 1992). Sarah Barringer Gordon's contribution to the *Blackwell Companion to the American West* is a concise and valuable bibliographical essay on western legal history. *See* Sarah Barringer Gordon, "Law and the Contact of Cultures," *in* A Companion to the American West 130 (William Deverell, ed., 2004).

university history is also legal history.[343] Legal historians and university historians alike have neglected university legal history, which is the history of the university as such. As a result, thousands of legal institutions in the United States alone have been left unexplored.[344] Because university legal history, as we have seen, has less to do with courses, curricula, and students than it does with constitutions, corporations, and sovereignty, scholars have not uncovered what universities might tell us about the latter set of subjects. Perhaps more importantly, neglecting university legal history leaves obscure the legal-governmental nature of academic work. This neglect has caused academics to forget that, in undertaking their academic duties as members of university corporations, they *govern*.

The fact that scholars tend to view university history as something separate from legal history might help to explain why the university's prominent place in corporations history—from Miatland in 1898 up to Philip Stern in 2023[345]—has gone unremarked. It is no coincidence that Maitland began his 1897 lectures on the medieval corporate borough of Cambridge, delivered at Oxford, with the following sentence: "[o]n the 20th of January, 1803, Mr Justice Lawrence and a jury of merchants were sitting at the Gildhall in London to try an issue between the Mayor, Bailiffs and Burgesses of the Borough of Cambridge and the Warden, Fellows and Scholars of Merton College in the University of Oxford."[346] That the university features so prominently in the history of the corporation should, by now, come as no surprise. The constitutional university and its constitutional corporate personality bring these features into stark relief and open avenues for further study.

The proprietary government—a *proprietas* in *dominium*—vested in the Regents is something that legal historians might expect to find in seventeenth-century Pennsylvania,[347] eighteenth-century New York,[348] or nineteenth-century

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[343] This was not lost on Hastings Rashdall, whose history of the university in the Middle Ages begins with a chapter entitled "What is a University," which quickly turns into a legal history. *See* Rashdall, *supra* note 81, at 5.

[344] *See* Axtell, *supra* note 26, at xiv–xv (discussing number and variety of colleges and universities in United States).

[345] *See* Philip J. Stern: Empire, Incorporated: The Corporations That Built British Colonialism 85, 89, 118–19, 128, 147, 152–55, 162, 166–67, 257 (2023) (discussing colonial American universities and English universities).

[346] Maitland, *supra* note 11, at 1.

[347] *See* Bilder, *supra* note 291, at 75. This was a feature of the early proprietary colonies more generally. See Christopher Tomlins, Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580–1865 166–77 (discussing early proprietary colonies).

[348] Hartog, *supra* note 85, at 20 (because "the officers of the corporation could not be certain of their ability to assert their possession of the government of the city of New York and its properties," a new charter "was drafted").

Utah[349] but this regime will strike this same group as out of place, if not downright anachronistic, in twenty-first-century California. Corporate government, or, if one prefers, "corporate rulership,"[350] is hardly an anachronism. As much as early Americans "reconceive[d] the fundamentals of government and society's relation to government,"[351] in California, "the change in the idea of political authority itself, 'from a lordship into an association,' " remains incomplete.[352] At the same time, the California Regents, and American Regents in general, appear strikingly modern in a bureaucratic, centralized, post-New Deal United States.[353]

The University of California was "the great University created by the people of the State of California," the California Regents wrote in 1897.[354] However, the California Regents, as noted above, are not unique in their constitutional status and power, although they might be unique in that they are not public officers. Since 1879, California's Regents have comprised a corporation of constitutional officers, which holds the University of California, the world's foremost public university, as its private property. This remains the case today.[355] They might be the only constitutional officers in the country who are not public officials. As such, they might also be emblematic of a genus of constitutional officers, appearing in all manner of American constitutions, who have not been studied carefully.[356]

Indeed, many of the legal arrangements of authority in the nation's States, Tribal Nations, and Territories will surprise legal historians who seem to view American legal history, and especially the history of American constitutional

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[349] *See* Sarah Barringer Gordon, The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America 210 (2002) ("Because [the Mormon Church corporate charter] granted a religious organization the right to make laws that affect society, most conspicuously among them control over marriage and the right to tax citizens through the tithe, [one antipolygamist lawyer] claimed, the territorial legislation that had created the Mormon Church corporation violated the establishment clause.").

[350] Tierney, *supra* note 44, at 82.

[351] Bernard Bailyn, The Ideological Origins of the American Revolution 230 (1967 (2017)).

[352] Tierney, *supra* note 44, at 2 (quoting J. N. Figgis, Political Thought from Gerson to Grotius, 1414–1625 (1916 (1960)); *see also* Stern, *supra* note 345, at 309 (discussing continuity of corporate government).

[353] *See* Daniel R. Ernst, "Law and the State, 1920–2000: Institutional Growth and Structural Change," *in* 3 The Cambridge History of Law in America: The Twentieth Century and After (1920–) 2–3 (Michael Grossberg & Christopher Tomlins, eds., 2008) (noting that "[c]entralized administration finally came to the United States in the twentieth century in three waves of state building," following an initial "wave [that] emerged at the state and local level in the 1890s and reached the federal government by World War I.").

[354] Memorial to Regent Timothy Guy Phelps, June 11, 1899. UC Berkeley Bancroft Library, CU-1 Box 25, Folder: Phelps.

[355] Cal. Const. art. IX, § 9 (1879) (as amended Nov. 5, 1974).

[356] The Regents of the constitutional universities are one example. Vermont's assistant judges constitute another. *See* Vt. const. ch. II, § 50. The Texas Attorney General is yet another. *See* Tx. const. art. 4, § 1 (1876). *See generally*, Orren, *supra* note 10.

law, as primarily, if not exclusively, the history of federal law. The States, Tribal Nations, and Territories, along with their subdivisions, are ripe for legal-historical research.

Historians have traditionally thought of the past as "a foreign country" where things are done differently.[357] The continued scholarly focus on federal law has inhibited our understanding of American law and its history.[358] Indeed, a legal historian could write earlier this year that "states are highly familiar but poorly understood constitutional entities."[359] By refocusing our attention on the constitutions of the States, Tribal Nations, Territories, and the subdivisions thereof, we can begin to address this neglect.[360] The development of this constellation of constitutions is where America's constitutional history may be found. American law's present appears as foreign as its past if one knows where to look.

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Michael Banerjee

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[357] See L. P. Hartley, The Go-Between (1953).

[358] Christian Fritz made this point nearly two decades ago. *See* Christian G. Fritz, *Fallacies of American Constitutionalism*, 35 Rutgers L.J. 1327, 1327 (2004) (arguing that inaccurate assumptions about early American constitutional experience "impoverish our constitutional discourse by denying us the capacity to see that the history of American constitutions is dynamic, not an elaboration of a static idea from 1787").

[359] Craig Green, *Beyond States: A Constitutional History of Territory, Statehood, and Nation-Building*, 90 U. Chi. L. Rev. 813, 817 (2023).

[360] This effort is, happily, already well underway. On the States, *see*, *e.g.*, Maureen E. Brady, *Uses of Convention History in State Constitutional Law*, 2022 Wisc. L. Rev. 1169; Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. Pa. L. Rev. 853 (2022); Maureen E. Brady, *Zombie State Constitutional Provisions*, 2021 Wisc. L. Rev. 1063 (2021); Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 N.W. L. Rev. 65 (2019). Far too little work has been done on western state constitutions generally but one valuable, if somewhat antiquated, contribution is Gordon Morris Bakken, Rocky Mountain Constitution Making, 1850–1912 (1987). On the Tribes, *see* Elizabeth Anne Reese, *The Other American Law*, 73 Stan. L. Rev. 555 (2021); Linda Colley, The Gun, the Ship, and the Pen: Warfare, Constitutions and the Making of the Modern World 153 (2021) ("[r]ival attempts to use these [constitutional] devices," such as the 1827 Cherokee Constitution, "to advance separate legislative and national projects within United States territory were not permitted and often brutally repressed"). On the Territories, *see* Anthony M. Ciolli, *Territorial Constitutional Law*, 58 Idaho L. Rev. 206 (2022). On subdivisions, *see* Nestor M. Davidson, *Local Constitutions*, 99 Tex. L. Rev. 839 (2021).

MIRANDA TAFOYA*

A Shameful Legacy:

Tracing the Japanese American Experience of Police Violence and Racism from the Late 19th Century Through the Aftermath of World War II

Law enforcement agencies are allegedly meant "to protect and serve" and yet there are numerous examples of state violence and brutality against citizens, especially because of racial profiling and racist stereotypes. One often ignored blight on American history is Executive Order 9066. Law enforcement agencies played an integral part in the round up of Japanese American families and the implementation of President Franklin Delano Roosevelt's infamous wartime executive order. This paper argues that the actions of law enforcement in the lead-up to the forced removal of Japanese Americans, in the operation of the prison camps, and in the aftermath of Japanese Internment demonstrate how deeply rooted nativism coupled with wartime hysteria resulted in racialized violence against Japanese immigrants and Japanese American citizens. Law enforcement did not protect and serve Japanese Americans and this paper examines how this state violence is part of a shameful legacy that must be part of discussions about policing and race in America. Moreover, this paper shines a light on the policing of everyday life for Japanese Americans during this historical period.

This project arises out of my family history. My great-great-grandfather, a leader in the San Francisco Japanese community, fought for his civil rights all the way to the U.S. Supreme

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Court in a case against the San Francisco Sheriff in 1902. My grandmother was born after World War II, but her two older siblings, her parents, grandfather, and extended family were imprisoned at Topaz War Relocation Center in rural Utah. In this telling of my family's story, I offer a heretofore underexamined aspect of the criminalization of Japanese Americans' everyday life and the ways that government action and law enforcement controlled this community. I also subvert the dominant narrative of silence and shame about pre-war Japanese exclusion and Executive Order 9066 by turning this shame squarely onto the state to encourage accountability and aid future discussions of policing and race in America.

INTRODUCTION

"December 7, 1941, a date which will live in infamy."[1] The American President who uttered these famous words not only plunged the country into World War II, but also derailed the lives of approximately 120,000 people with a staggering executive order.[2] Wartime hysteria and pre-existing anti-Asian sentiments collided with devastating results. For nearly a century prior, many Californians viewed Asian immigrants and Asian American citizens as an economic threat.[3] White America considered Asian Americans perpetual foreigners whose loyalties were in question, a stereotype of Orientalism that remains pervasive today.[4] The bombing of Pearl Harbor was the impetus for legitimizing this pre-existing xenophobia into official government policy as the U.S. government and many of its citizens perceived anyone of Japanese descent residing in the West Coast as a "menacing fifth column" that could thwart the American war effort.[5] In the name of national security, local police and FBI forces teamed up to conduct warrantless raids of Japanese American homes, confiscating "contraband" and arresting community leaders.[6] Then—upon intense petitioning by lobbyists from

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[1] Speech by Franklin D. Roosevelt, New York (Transcript), Library of Congress. Available at https://www.loc.gov/resource/afc1986022.afc1986022_ms2201/?st=text.

[2] Roger Daniels, *The Japanese American Incarceration Revisited: 1941-2010*, 18 Asian Am. L.J. 133, 134 (2011).

[3] *See generally* Roger Daniels, The Politics of Prejudice: The Anti-Japanese Movement in California and the Struggle for Japanese Exclusion (University of California Press, 1977). *See also* Chinese Immigration and the Chinese Exclusion Acts, U.S. Dept of State, Office of the Historian. Available at https://history.state.gov/milestones/1866-1898/chinese-immigration.

[4] *Combatting the AAPI Perpetual Foreigner Stereotype*, New American Economy Research Fund, https://research.newamericaneconomy.org/report/aapi-perpetual-foreigner-stereotype/.

[5] Quote from the Office of the Attorney General (1941). Investigation of Un-American Propaganda Activities in the United States: Hearings Before a Special Committee on Un-American Activities. H. Res. 282, 72nd Cong. (1942). Available at http://www.mansell.com/eo9066/1942/ROJA/Report_on_Japanese_Activities_1942.html.

[6] National Archives, *Japanese-American Incarceration During World War II*, Jan. 24, 2022. Available at https://www.archives.gov/education/lessons/japanese-relocation.

nativist groups, military officials, politicians, and police—on February 19, 1942, President Franklin D. Roosevelt signed Executive Order 9066.[7]

Shame is a strong value in Japanese culture. For many families—my own included—feelings of shame about Japanese incarceration and pre-war exclusion led to this history being swept under the rug for generations. Shame is about taking personal responsibility for failure. Many Japanese Americans silently carried this burden to save face and *gaman* (我慢): persevere. Through this paper highlighting the shameful legacy of state violence against Japanese Americans, and the telling of my own family's story, I hope to turn this shame squarely onto the U.S. government to encourage accountability and aid future discussions of policing and race in America. Japanese Americans faced a broad range of state violence and policing before, during, and after Executive Order 9066.

This paper demonstrates how police agencies deeply rooted in nativism and exacerbated by wartime hysteria played an integral role in racialized violence against Japanese immigrants and Japanese American citizens. Local and military police participated in the forced removal of Japanese Americans, the operations of the prison camps, and the continued surveillance and control in the aftermath of Japanese incarceration. The analysis for this paper follows in three parts.

Part I describes the historical backdrop to the extreme policing of the Japanese American community post-Pearl Harbor. Nativist responses to Japanese immigration in the late nineteenth century laid the groundwork for President Roosevelt's infamous Executive Order 9066. Included in this history is the story of my great-great-grandfather, Matsunosuke "George" Tsukamoto. In his pursuit of the American Dream, my great-great-grandfather faced intense discrimination from the San Francisco Sheriff and the Anti-Jap Laundry League. He took his case all the way to the U.S. Supreme Court in 1902. His story is an example of how competing entrepreneurs and disgruntled neighbors used law enforcement to hold Asian immigrants back, enforcing the status quo both economically and racially. His story is also an example of how government action and law enforcement officers shaped and controlled the everyday lives of Japanese Americans. Xenophobia and fearmongering about Asian immigrant communities set the stage for Executive Order 9066.

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[7] Executive Order 9066, February 19, 1942; General Records of the Unites States Government; Record Group 11; National Archives. *See* "Executive Order 9066: Resulting in Japanese-American Incarceration (1942), National Archives. Available at https://www.archives.gov/milestone-documents/executive-order-9066.

Part II analyzes the police aggression against the Japanese community in the wake of the Pearl Harbor attack, inside the prison camps, and upon returning from the prison camps. In the aftermath of Pearl Harbor, law enforcement officials raided Japanese American neighborhoods along the West Coast to seize items considered contraband.[8] Local police departments, including the Los Angeles Police Department ("LAPD"), patrolled Japanese American neighborhoods, and accompanied FBI agents to raid Japanese American homes and arrest community leaders.[9] This Part also investigates the violence in the prison camps and the ways that the Military Police, the uniformed law enforcement branch of the U.S. Army, operated with impunity. This Part will conclude with a summary of the hostile actions of law enforcement, specifically the LAPD, upon the return of the imprisoned Japanese Americans. The LAPD made it only more difficult for returning Japanese Americans to pick up the pieces of their shattered lives and try to find normalcy again.

Part III critiques the policing of Japanese Americans during World War II as an outgrowth of decades of xenophobia and nativism, ultimately asserting that the shame Japanese Americans have felt about their wartime incarceration should be foisted on the state instead. This Part inverts the dominant narrative of shame and silence by highlighting how the U.S. government failed to protect Japanese American citizens and the Japanese immigrants who had long been denied citizenship.

I. NATIVISM, ANTI-JAPANESE SENTIMENT PRE-WORLD WAR II, AND THE CASE STUDY OF MATSUNOSUKE TSUKAMOTO

Even before the attack on Pearl Harbor, people of Japanese ancestry living in America faced discrimination. In some states, Japanese immigrants could not own land, become naturalized citizens, or vote.[10] These Japanese immigrants, also known as *Issei* (meaning "first generation" in Japanese), first arrived in the United States in the 1880s.[11] In the spring of 1882, Congress passed the

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[8] *See generally* Roger Daniels, The Japanese American Cases: The Rule of Law in Time of War (University of Kansas Press, 2013).

[9] *Id.*

[10] J. Burton, M. Farrell, F. Lord & R. Lord, Excerpts from "Confinement and Ethnicity: An Overview of World War II Japanese American Relocation Sites," The National Park Service: A Brief History of Japanese American Relocation During World War II, https://www.nps.gov/articles/historyinternment.htm. For an exploration of how settlement was an important tool to maintain racial hierarchy, see generally Genevieve Carpio, Collision at the Crossroads: How Place and Mobility Make Race (University of California Press, 2019).

[11] *See generally* Yuji Ichioka, The Issei: The World of the First Generation Japanese Immigrants, 1885-1924 (Free Press, 1988). The Naturalization Act of 1790 only allowed an immigrant to become a naturalized person if he was a "free white person." Naturalization Act, 1 Stat. 103 (1790). In California, for example, lawmakers passed the 1913 Alien Land Law and voters passed the California Alien Land Law of 1920. The first act prohibited "aliens ineligible for citizenship" from owning or taking on long-term leases of agricultural property; the second prohibited aliens from owning stock in companies holding agricultural land. *Alien Land Laws in California (1913 & 1920)*, Immigration History, https://immigrationhistory.org/item/alien-land-laws-in-california-1913-1920/.

Chinese Exclusion Act, perhaps one of the most prominent and effective nativist responses to Asian immigration at that time.[12] The Chinese Exclusion Act created a demand for new immigrant labor. As a result, Japanese began to come to America, chasing the American Dream.

Japanese immigration threatened the racial and economic status quo in America and from this xenophobia, the anti-Japanese exclusion movement was born. The anti-Japanese exclusion movement was the combined endeavor of politicians, intellectuals, and community leaders to label Japanese an undesirable race.[13] These efforts ranged from introducing discriminatory legislation to discourage Japanese immigration, encouraging and enforcing boycotts of Japanese businesses, and spreading propaganda about reasons to exclude Japanese from America.[14] This movement paved the way for the wartime incarceration of Japanese Americans by laying a groundwork of suspicion about Japanese loyalty.

In Japanese culture, there is a common saying "*shikata ga nai*" (仕方がない). "It can't be helped." "Nothing can be done about it." "It is what it is." My great-great-grandfather, a first-generation Japanese immigrant, threw "*shikata ga nai*" to the wind and persistently fought for his rights. My great-great-grandfather's story illustrates the nativism and xenophobia that Japanese immigrants to California faced in their pursuit of the American Dream. Furthermore, his story is an example of how government action and law enforcement shaped and controlled the everyday lives of a marginalized group.

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Matsunosuke Tsukamoto (1857–1958) was a civil rights pioneer and a leader in the San Francisco Japanese community. In his pursuit of the American Dream, he faced many obstacles because of discriminatory policing and the anti-Japanese exclusion movement.

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[12] Chinese Exclusion Act, Pub. L. No. 47–126, 22 Stat. 58, Chap. 126 (1882).

[13] Raymond Leslie Buell, *The Development of the Anti-Japanese Agitation in the United States*, 37 Pol. Sci. Q. 605, 608 (Dec. 1922).

[14] *Id.* at 618.

[15] The Japantown Task Force, Inc., Images of America: San Francisco's Japantown, 11 (Arcadia Publishing, 2005).

My great-great-grandfather, Matsunosuke "George" Tsukamoto was one of the first Japanese to immigrate to America, arriving in California in the 1880s.[16] Sent by Fukuzawa Yukichi, "the great educator" of the Meiji era, to open new fields for agricultural development in America, Matsunosuke and a colleague purchased twenty acres of wasteland in Valley Springs, Calaveras County, California.[17] Their venture was unsuccessful because the seller did not actually own the land.[18] While his friend returned to Japan, Matsunosuke remained in California and opened a hand laundry in Tiburon in 1892.[19]

Seeing an opportunity to expand his successful business, Matsunosuke moved to San Francisco to open a steam-powered laundry.[20] He established Sunset Laundry, the first Japanese-owned automated laundry, in 1899.[21] At the time, there were many Chinese-owned hand laundries in San Francisco, but all the steam laundries were white-owned.[22]

Matsunosuke attempted to equip his laundromat with modern machinery and sought a permit to operate a steam boiler from the Board of Supervisors.[23] The Board denied his permit at the prompting of a petition circulated by disgruntled residents who claimed his steam laundry would be "an intolerable nuisance from a sanitary standpoint," that it "[would] cause an increase in insurance rates, deteriorate the value of residents' property, and materially interfere with the development of the neighborhood."[24]

He filed a new petition with the Board of Supervisors, this time attaching a certificate signed by two competent boiler inspectors stating that the boiler was in good working order.[25] He also filed a paper from one of the inspectors that certified him as competent to operate the boiler safely.[26] At the hearing on his second application, many property owners near the laundromat protested his license application.[27] The Board once again denied his petition.[28]

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[16] *Id.*

[17] Hiroshi Ushimaru, *Japanese Immigrants in the North Bay Region: Their Movements, Achievements and Settlements 1870-1930*, Sonoma State University, 1987.

[18] *Id.*

[19] Ikuro Torimoto, Okina Kyūin and the Politics of Early Japanese Immigration to the United States 1868-1924, 122 (MacFarland & Company, Inc., Publishers, 2017).

[20] David E. Bernstein, *Two Asian Laundry Cases*, 24 J. Sup. Ct. Hist. 95, 102 (1999).

[21] *Id.*

[22] *Id.*

[23] *Id.* at 103.

[24] *Id. See also* U.S. Supreme Court Transcript of Record *Tsukamoto v. Lackmann*, 187 U.S. 635 (1902), The Making of Modern Law: U.S. Supreme Court Records and Briefs, 1832–1978.

[25] Bernstein, *supra* note 20, at 103.

[26] *Id.*

[27] *Id.*

[28] *Id.*

Matsunosuke realized the Board was discriminating against him, so he practiced civil disobedience and operated his steam boiler without the permit.[29] The San Francisco Sheriff arrested him later that month for violating the fire ordinance.[30] The court convicted Matsunosuke and sentenced him to pay a $20 fine or serve a 20-day jail term.[31] He appealed to the California Superior Court, which affirmed the conviction and held the fire ordinance constitutional.[32]

Then he filed for a writ of habeas corpus in the U.S. District Court for the Northern District of California.[33] The named defendant was John Lackmann, the Sheriff of the City and County of San Francisco.[34] Matsunosuke argued that the Board had granted non-Japanese people permits and the refusal of the Board to grant him a permit was "an unjust, arbitrary, and unreasonable discrimination against him prompted solely by prejudice" because of his Japanese ancestry.[35] He also asserted a Fourteenth Amendment argument and an argument about a violation of a treaty between the United States and Japan.[36] The City of San Francisco intervened and hired a private attorney as special counsel to work with the District Attorney.[37]

Matsunosuke lost and appealed to the U.S. Court of Appeals for the Ninth Circuit.[38] He took his case all the way to the U.S. Supreme Court in 1902.[39] Unfortunately, he lost there too in a one-sentence ruling that a writ of habeas corpus was an improper remedy.[40]

Matsunosuke did not take his case back to the California Supreme Court.[41] Instead, he continued practicing civil disobedience and was arrested over fifty times in a one-and-a-half-year period.[42] He spent three weeks in jail at one

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[29] *Id.*

[30] *Id.* Chinese laundry owners had successfully invalidated a San Francisco laundry ordinance that prohibited laundries in wooden structures. The U.S. Supreme Court ruled in 1886 that the ordinance was intended not for health and safety purposes but rather to discriminate against Chinese-owned laundries and therefore violated the Equal Protection clause of the Fourteenth Amendment. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

[31] Bernstein, *supra* note 20, at 103.

[32] *Id.*

[33] U.S. Supreme Court Transcript of Record *Tsukamoto v. Lackmann, supra* note 24.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] Bernstein, *supra* note 20, at 104.

[38] *Id.*

[39] *Id.*

[40] *Tsukamoto v. Lackmann,* 187 U.S. 635 (1902).

[41] Bernstein, *supra* note 20, at 104.

[42] *Id.*

point.[43] San Francisco law enforcement and the Anti-Jap Laundry League constantly harassed him.[44] Later, he purchased an old masonry building and established a steam laundry there.[45] This evaded the fire ordinance because it was a stone building rather than a wood building.[46] He also incorporated his business under the name of a white ally to avoid further harassment.[47]

Despite hostile legislation, discriminatory enforcement of the rules and harassment by the Anti-Jap Laundry League, Matsunosuke became a great businessman and "a leader in the San Francisco Japanese-American community."[48] He persisted in fighting for his constitutional rights. Unfortunately for Matsunosuke and his family, all the suspicion, hatred, and fear of Japanese Americans suddenly escalated when the Empire of Japan attacked Honolulu, Hawai'i in 1941.

Matsunosuke's experience is especially relevant to this paper given the involvement of the local police. The San Francisco Sherriff discriminatorily enforced the law at the prompting of racist neighbors who wanted to keep Matsunosuke from having a steam boiler. This is one of the many examples from history of the shameful legacy of law enforcement discriminating against racial minorities in America, perpetuating white supremacy and the subjugation of racial minorities. It is also one of the many examples of the criminalization of routine life for members of marginalized groups.[49]

People of Asian descent have long faced bigotry in the United States. From the stereotype of the "perpetual foreigner" to the racist trope of "Asians coming to steal white jobs," many generations of Asian Americans have been subject to discrimination, scapegoating, and violence.[50] While discrimination was rampant in this historical period, retellings of Japanese-Californian acts of resistance are less likely because Japanese culture greatly values conformity and the preservation of social harmony. It is notable that there has been a more documented history of Chinese-Californian resistance to injustice, such as the civil disobedience in the case of Yick Wo.[51] This landmark U.S.

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[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] The Japantown Task Force, Inc., Images of America: San Francisco's Japantown, 11 (Arcadia Publishing, 2005).

[49] For more examples of the criminalization of everyday activities for Asian Americans, see Gabriel J. Chin & John Ormond, *The War Against Chinese Restaurants*, 67 Duke L.J. 681 (Jan. 2018). *See also* Joshua S. Yang, *The Anti-Chinese Cubic Air Ordinance*, 99 Am. J Pub. Health 440 (Mar. 2009).

[50] *See* Gillian Brockell, *The long, ugly history of anti-Asian racism and violence in the U.S.*, Washington Post (Mar. 18, 2021), https://www.washingtonpost.com/history/2021/03/18/history-anti-asian-violence-racism/.

Supreme Court case bears a surprising resemblance to my great-great-grandfather's story, but Matsunosuke's case was nearly two decades later and distinguished from *Yick Wo* because Matsunosuke was unable to prove that the ordinance discriminated against Japanese.[52] The *Yick Wo* ruling by the Supreme Court should have served as clear precedent. It appears, however, that prejudice against a new group of immigrants distracted judges from their duties to apply laws—and precedents—universally. Both cases are historical examples of Asian American civil disobedience that deserve recognition.

II. POLICE ACTION AGAINST THE JAPANESE AMERICAN COMMUNITY IN THE AFTERMATH OF PEARL HARBOR

After the Empire of Japan brought World War II to America in 1941, shock, anger, and fear swept the States—a fear magnified by long-standing anti-Asian bigotry. Many suspected that Japanese Americans remained loyal to their ancestral homeland. As suspicions grew about Japanese Americans, Frank Knox, FDR's Secretary of the Navy blamed the Pearl Harbor sneak attack on Japanese espionage.[53] This led to talk of sabotage and an imminent Japanese invasion.[54]

Fueled by racial prejudice against the unpopular group, more rumors spread about a plot among the Japanese people living in America to sabotage the war effort.[55] Patriotism inflamed the country and racial tensions were high. Lieutenant General John L. DeWitt, head of the Western Defense Command wrote, "The Japanese race is an enemy race."[56] And Los Angeles representative Leland Ford insisted that "all Japanese, whether citizens or not, be placed in concentration camps."[57] *The Los Angeles Examiner* published the following, "A viper is nonetheless a viper no matter where the egg is hatched."[58] This quote supports the then-popular view that an American born of Japanese parents would grow up to be Japanese, not American. Theories about rampant

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[51] *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

[52] U.S. Supreme Court Transcript of Record *Tsukamoto v. Lackmann, supra* note 24.

[53] Burton et al., *supra* note 10.

[54] *Id.*

[55] *Id.*

[56] Stanford M. Lyman, *The "Yellow Peril" Mystique: Origins and Vicissitudes of a Racist Discourse*, 13 Int'l J Pol., Culture & Soc. 683, 707 (Summer 2000).

[57] *Japanese Americans,* The War, PBS.org, https://www.pbs.org/kenburns/the-war/civil-rights-japanese americans#:~:text=Los%20Angeles%20representative%20Leland%20Ford,posted%20on%20April%2030%2C%20 1942.

[58] *See* Samantha Schmidt, *Migrant children: 'Lies just big enough to stick' are all too familiar to George Takei, who was interned in America during WWII*, Washington Post (June 20, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/06/20/lies-just-big-enough-to-stick-are-all-too-familiar-to-george-takei-who-was-interned-during-wwii-in-america/.

espionage by Japanese living in Hawai'i and along the West Coast was "one way to save face . . . to explain the disaster at Pearl Harbor."[59]

At the beginning of World War II, Matsunosuke's eldest son, Keitaro, and his family featured in a set of publicity photographs that attempted to sway public sentiment about Japanese American loyalty. Ultimately and unfortunately, public opinion was not on their side. According to a public opinion poll conducted by the American Institute of Public Opinion in March 1942, 93% of Americans surveyed agreed that the forced removal of "Japanese aliens" was "the right thing," with 6% saying they do not know, and 1% saying no.[60] In addition, 59% of Americans surveyed thought that Japanese who were born in this country should be removed as well, with 25% saying no, and 16% saying they do not know.[61] The only national political figure to publicly denounce the wartime incarceration of Japanese Americans was Norman Thomas, a socialist leader, in 1942.[62] Even former chief justice of the U.S. Supreme Court, Earl Warren—considered by some to be "one of the most vigorous advocates of civil liberties in the history of the Supreme Court"—advocated and defended this racist policy that deprived the civil rights of Japanese Americans.[63]

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[59] Fritz Snyder, *Overreaction Then* (Korematsu) *and Now (The Detainee Cases)*, 2 Crit 80, 84 (2009).

[60] Survey from the American. Institute of Public Opinion, "Public Opinion Poll on Japanese Internment," United States Holocaust Memorial Museum, https://exhibitions.ushmm.org/americans-and-the-holocaust/main/us-public-opinion-on-japanese-internment-1942.

[61] *Id.*

[62] *See generally* Norman Thomas, Democracy and Japanese Americans (1942) (criticizing the incarceration of Japanese Americans as unconstitutional and immoral).

[63] G. Edward White, *The Unacknowledged Lesson: Earl Warren and the Japanese Relocation Controversy*, 55 Va Q. Rev. 4 (Autumn 1979). Available at https://www.vqronline.org/essay/unacknowledged-lesson-earl-warren-and-japanese-relocation-controversy (Dec. 12, 2003). In 1942, Warren referred to the presence of Japanese Americans in California as "the Achilles' heel of the entire civilian defense effort." *Id.* He felt that "when we are dealing with the Caucasian race we have methods that will test [their] loyalty," but "when we deal with the Japanese we are in an entirely different field" because of "their method of living." *Id.* In Warren's posthumously published memoirs, he later repudiated his role in bringing about Executive Order 9066. *Id.*

[64] The Tsukamoto Family featured in a set of publicity photos attempting to convince the American public that Japanese Americans are loyal and not a threat to national security. Image source: USC Digital Library, "Japanese American Incarceration Images, 1941–1946," https://doi.org/10.25549/jarda-m73, https://doi.org/10.25549/jarda-m71. AP Photos. Used with permission from the Associated Press.

A. Searches and Seizures in Japanese American Neighborhoods Post-Pearl Harbor

In the aftermath of the attack on Pearl Harbor, the policing of Japanese Americans went as far as policing homes, the area considered most sacrosanct under the Fourth Amendment.[65] The FBI searched the private homes of thousands of Japanese American residents on the West Coast, seizing items considered to be contraband.[66] As a response to these rampant warrantless searches in the hysteria that followed the events of December 7, 1941, Japanese Americans burned family photos, destroyed precious wall hangings, and buried their cultural heritage in their backyards.[67] Many families destroyed or hid anything that might make them appear loyal to Japan.

No Japanese household was safe from the aggressive policing tactics that law enforcement agencies employed post-Pearl Harbor. Police came to Fred Korematsu's house in Oakland and confiscated all his family's flashlights and cameras without a search warrant.[68] Korematsu recounted the experience saying, "[the police] confiscated everything that they thought we might use for signaling."[69] My great-aunt was a seven-year-old Japanese American in West Oakland at the time. She told me that she remembers *Ojiisan* (her grandfather, Matsunosuke) burying the family's shortwave radios and camera in the backyard, hiding the contraband items so the authorities would not confiscate them.

In addition to warrantless searches, immediately after the bombing of Pearl Harbor, the FBI issued orders "to arrest enemy aliens based on pre-drafted watch lists."[70] The FBI rounded up 1,291 Japanese American community and religious leaders, arresting them without evidence and freezing their assets.[71]

In Los Angeles, for example, on the night of December 7, 1941, the FBI and local law enforcement arrested eighty-six *Issei* leaders and held them at the LA County Jail.[72] For the next two months, FBI agents, LA Sheriffs, and

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[65] U.S. Const. amend. IV. *See also Payton v. New York*, 445 U.S. 573 (1980) (holding that searches and seizures inside a home without a warrant are presumptively unreasonable).

[66] Burton et al., *supra* note 10.

[67] Annelise Finney, *How Japanese Americans in the Bay Area Are Carrying Forward the Legacy of Reparations*, KQED, Feb. 23, 2022, https://www.kqed.org/news/11906015/how-japanese-americans-in-the-bay-area-are-carrying-forward-the-legacy-of-reparations.

[68] *See generally* Lorraine K. Bannai, *Taking the Stand: The Lessons of Three Men Who Took the Japanese American Internment to Court*, 4 SEATTLE J. SOC. JUST. 1 (2005).

[69] *Id.* at 6.

[70] Jonathan Van Harmelen, *Los Angeles County Jail (detention facility)*, Densho Encyclopedia, https://encyclopedia.densho.org/Los%20Angeles%20County%20Jail%20(detention%20facility).

[71] PBS.org, *WWII Internment Timeline*, https://www.pbs.org/childofcamp/history/timeline.html (excerpted from the Japanese American National Museum).

[72] Van Harmelen, *supra* note 70.

LA policemen conducted mass arrests and raids in the Japanese American community.[73] Although FBI records showed there were 300 "Japanese enemy aliens classified for arrest" in Los Angeles, by late December, there were over 400 Japanese held in the LA County Jail.[74] The police departments of other counties in Southern California, such as Ventura, Santa Barbara, and San Luis Obispo brought their arrested *Issei* to the LA County Jail.[75]

Many local jails across the West Coast and in Hawai'i were used as temporary holding centers for Japanese Americans in the aftermath of Pearl Harbor.[76] As described in the previous section, the Los Angeles County Jail served as a temporary holding area for Japanese arrested by the FBI following the Pearl Harbor attack.[77] Holding periods ranged from one day to multiple weeks in the jail.[78] The police limited visits between inmates and their families.[79] In some instances, family members were told to wait hours for a meager minutes-long visit.[80]

Overcrowding and inadequate sanitation in the jails coupled with the stress and uncertainty of being arrested led to depression and, in some cases, suicide.[81] In the LA County Jail there were at least two documented cases of suicide among the incarcerated Japanese Americans in December 1941. On December 12, 1941, an *Issei* woman strangled herself in the LA County Jail after she was arrested for possession of a Japanese war bond.[82] And Dr. Rikita Honda died by suicide on December 14, 1941, in the LA County Jail.[83] His suicide note read: "I dedicated myself to Japanese-American friendship. Now Japan and America are at war. I could not prevent it. I wish to make amends by taking my own life."[84] While the LA County Jail has the most records of specific examples of Japanese incarceration during this time, given the large number of Japanese Americans living on the West Coast and the racist

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[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] See Densho Encyclopedia, https://encyclopedia.densho.org/categories/ for a list of the detention facilities.

[77] Van Harmelen, *supra* note 70.

[78] *Id.*

[79] *Id.*

[80] Duncan Ryūken Williams, American Sutra: A Story of Faith and Freedom in the Second World War, 19 (Belknap Press of Harvard University, 2019).

[81] Van Harmelen, *supra* note 70.

[82] *Japanese Alien Prays, Then Hangs Herself*, San Francisco Chronicle, Dec. 13, 1941.

[83] Eiichiro Azuma, *Rikita Honda*, Densho Encyclopedia, https://encyclopedia.densho.org/Rikita_Honda/#cite_ref-ftnt_ref5_5-0.

[84] Yuji Ichioka, Gordon H. Chang and Eiichiro Azuma, eds., Before Internment: Essays in Prewar Japanese-American History, 264 (Stanford University Press, 2006).

hysteria in response to the attack on Pearl Harbor, it is likely that there were many other jails being used to imprison Japanese Americans without due process of law.

Although local jails were not part of the larger carceral system operated by the War Relocation Authority or the Department of Justice and the Immigration and Naturalization Service, the willingness of these local jails to participate in the incarceration of Japanese Americans shows the true colors of the police departments. Carrying out these federal orders complemented their xenophobic and nativist beliefs, so law enforcement agencies were more than willing participants in carrying out the mass removal of Japanese Americans.

The xenophobia of local law enforcement at the time can be seen in the actions of then-LAPD-Commissioner Alfred Cohn. Commissioner Cohn was a longtime anti-Japanese advocate and "an important force in persuading Los Angeles Mayor Fletcher Bowron to support the forced removal of Japanese Americans."[85] Commissioner Cohn demonstrates how a law enforcement leader can advise and influence politicians to advocate for change. In this case, Cohn presented a thirty-two-page report—among other memoranda[86]—to Mayor Bowron to convince him that Japanese incarceration was a good idea.[87]

Cohn was a public official, reporter, and screenwriter.[88] Mayor Bowron of Los Angeles appointed Cohn to the Board of Police Commissioners on February 9, 1940.[89] As LA Police Commissioner, Cohn initiated several procedural reforms.[90]

Commissioner Cohn's paternalistic ideas about Japanese Americans were on display in his report to Mayor Bowron where he stated, "The Issei are so completely rattled that many of them welcome the thought of the security internment affords them."[91] In that same report to Mayor Bowron, Cohn

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[85] Jonathan Van Harmelen, *The LAPD and Japanese Americans*, The Rafu Shimpo (July 18, 2020), https://rafu.com/2020/07/the-lapd-and-japanese-americans/.

[86] Scott Kurashige. The Shifting Grounds of Race: Black and Japanese Americans in the Making of Multiethnic Los Angeles, 118 (Princeton University Press, 2010).

[87] *See* Report to Mayor Bowron by Alfred Cohn on several phases of the investigation into Japanese matters. Reproduced from the holdings at the Franklin D. Roosevelt Library, 3. Available at https://www.archives.pref.okinawa.jp/wp-content/uploads/roosevelt.pdf.

[88] Alfred A. Cohn, Prabook, https://prabook.com/web/alfred.cohn/2566955.

[89] *Id.*

[90] *Id.*

[91] Report to Mayor Bowron, *supra* note 87.

wrote, "when conditions become so aggravated that they become unbearable, [the Nisei (second-generation Japanese)] will surely be fit subjects for fifth-column propaganda and therefore potential sources of subversive acts."[92] Cohn emphasized that all Japanese must be removed from the West Coast: "Evacuation and/or internment of the Issei, therefore, necessarily must mean the evacuation and/or internment of these younger Nisei."[93]

Mayor Bowron in turn "helped to escalate the magnitude of the 'Japanese problem' in public eyes."[94] Japanese American scholar, Scott Kurashige wrote,

> The mayor seems to have reacted quite strongly to internal reports he solicited from police commissioner Al Cohn. In memos dated January 10 and January 21, 1942, Cohn stated that there was "no doubt that in this horde of alien born Japanese, espionage activities have been in progress for several decades. Yet he argued that the Nisei posed the "greatest menace." While the Nisei "outwardly" appeared to be "thoroughgoing Americans," Cohn discerned that "it would be foolish to look for any great degree of loyalty among them."[95]

Cohn also asserted to Togo Tanaka, an American newspaper journalist, in a City Hall meeting the month after the Pearl Harbor attacks that they both "knew [that] more planes [were] wrecked at Pearl Harbor" by *Nisei* driving trucks than by Japanese bombers.[96] His past writings and actions reflected his dangerous conspiracy theories. But his authority as a law enforcement leader made his ideas particularly influential. He used his authority as a law enforcement leader to spread his racist conspiracy theories, contributing in part to Mayor Bowron's paranoia about Japanese Americans.

B. A Community Incarcerated

This section will examine the actions of the police following the enactment of Executive Order 9066. First, it will describe the forced removal of Japanese Americans. Second, it will investigate the brutality of the Military Police against Japanese Americans in the prison camps. Third, it will analyze the aggression from the LAPD in response to the return of the Japanese Americans.

On February 19, 1942, ten weeks after the Pearl Harbor attack, President Franklin Delano Roosevelt signed Executive Order 9066.[97] Executive

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[92] *Id.*

[93] *Id.* at 4.

[94] Kurashige, *supra* note 86, at 118.

[95] *Id.*

[96] *Id.* at 119.

[97] Albert H. Small Documents Gallery, *Righting A Wrong: Japanese Americans and World War II,* The National Museum of American History, Washington, D.C.

Order 9066 did not name a specific racial or ethnic group, but rather gave the military power to decide who was a threat to homeland security.[98] It authorized the Secretary of War, or any designated military commander to establish "military areas" and exclude from them, "any or all persons."[99] In the event of a Japanese invasion of the U.S. mainland, many viewed the large Japanese American population on the West Coast as a security risk.

Under Executive Order 9066, nearly 75,000 American citizens of Japanese ancestry along with 45,000 Japanese nationals living in the United States (but long denied citizenship because of their race) were taken into custody.[100] The government told Japanese Americans to pack up their lives and evacuate their homes. They could only take what they could carry and had to arrange to store, sell, or give away everything else they owned on short notice.

Like many others, Matsunosuke's second son, Joseph Tsukamoto, received information from the War Relocation Authority about where and when to report for "evacuation."

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[98] *Id.*

[99] Washington, DC and American Lives II Film Project, LLC, "Civil Rights: Japanese Americans," PBS, September 2007, http://www.pbs.org/thewar/at_home_civil_rights_japanese_american.htm.

[100] *Righting A Wrong: Japanese Americans and World War II, supra* note 97.

[101] Joseph Tsukamoto, Matusnosuke's second-born son, was a priest at the Episcopal Christ Church in San Francisco's Japanese District. Here, he receives information on the "evacuation" under Executive Order 9066, c. April 1942. Photo taken by Dorothea Lange. Image source: Library of Congress, https://www.flickr.com/photos/library_of_congress/51691485560/. According to the Library of Congress, there are no known restrictions on publication.

Families had only a matter of days to gather their possessions, told to pack only what they could carry. They were not told where they were going or how long they would be gone. Since voluntarily leaving your home and possessions to live in a prison camp was "the truest sign of loyalty,"[102] Japanese Americans sold their homes, businesses, and other valuables for small sums of money. With their identification numbers pinned to their finest clothes, tens of thousands of Japanese Americans boarded trains to leave behind the only homes they ever knew. After six months living in manure-crusted horse stalls and other detention centers—including local jails[103]—while the prison camps were being built, they journeyed inland to live in dusty, hastily constructed barracks for three years. There they would meet unfamiliar desert flora and fauna, unfamiliar food, unforgiving weather, and even more unforgiving Military Police.

My great-aunt, Kazuko Rowe—who was seven years old at the time—remembers everyone "packing like crazy." They each filled a laundry bag with all they could carry. Her family stored a few of their possessions in the basement of a sympathetic neighbor's house and at their church. They did not have enough time to sell many of their possessions, but they did sell their grocery store to a Chinese American family for next to nothing.

When it came time to "evacuate," my great-grandparents, Ima and Nobu Yasuda, dressed up their two young children, Kazuko and Hiroshi, age four, in their hats and coats because they had no idea where they would be going. They also placed paper luggage tags with their family number, 2407, on string hanging around their necks. In May of 1942, with one laundry bag apiece, the family departed on train cars with other Japanese American families. They were shipped thirty miles from their home in West Oakland to Tanforan Racetrack in San Bruno, California.

C. The Brutality of the Military Police

Not many know about the brutality that incarcerated Japanese Americans experienced at the hands of the Military Police during World War II. Military Police are the law enforcement arm of the U.S. Army. The Army website says that Military Police, "protect peoples' lives and property on Army installations by enforcing military laws and regulations."[104] They are supposed to "control traffic, prevent crime, and respond to all emergencies."[105]

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[102] Kurashige, *supra* note 86, at 123.

[103] *See The LAPD and Japanese Americans, supra* note 85.

[104] *Military Police,* U.S. Army (April 16, 2020), https://www.goarmy.com/careers-and-jobs/career-match/support-logistics/safety-order-legal/31b-military-police.html.

[105] *Id.*

The Military Police effectively brought the war within the U.S. border by terrorizing citizens whose loyalties were in question due to racism and wartime hysteria. Nativism further propelled the war effort as state entities turned their attention to the Japanese American community.

The shootings and killings of unarmed Japanese Americans represent the most egregious use of force by law enforcement against the unjustly incarcerated Japanese Americans. This Military Police brutality against unarmed Japanese Americans contributes to the shameful legacy of law enforcement's complicity in the state violence of Executive Order 9066.[106]

There are several reported protests from the prison camps that the Military Police turned violent. One of the most violent and most well-known of these protests was a protest at Manzanar prison camp. The police feared a riot and tear-gassed the crowds that had gathered at the police station to demand the release of Harry Ueno, a man who had been arrested for allegedly assaulting Fred Tayama.[107] The Military Police fired into the crowd of protestors, killing two people and wounding ten others.[108] In the fallout of the violent conflict, a six-year-old tearfully told his mother, "Mommy, let's go back to America."[109]

In another case of Military Police violence against Japanese Americans, Shoichi James Okamoto from Garden Grove, California, was shot and killed by a sentry after a verbal altercation at Tule Lake prison camp.[110] Shoichi drove a construction truck between Tule Lake and a nearby worksite.[111] The sentry at the gate demanded that Shoichi step out of the truck and show his pass.[112] Shoichi stepped out of the construction truck but refused to show the sentry his pass.[113] The sentry responded by striking Shoichi on the shoulder with the butt of his rifle.[114] A verbal altercation ensued, and the

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[106] In Lordsburg, New Mexico, Japanese Americans were delivered by trains and forced to march two miles to the camp in the middle of the night. On July 27, 1942, during one of the night marches, two Japanese Americans, Toshio Kobata and Hirota Isomura, were shot and killed by a sentry who claimed they were attempting to escape. Witnesses testified that the two elderly men were disabled and had been struggling during the night march. However, the army court martial board found the sentry not guilty. See National Japanese American Historical Society (NJAHS) Digital Archives, *Lordsburg*, https://njahs.org/confinementsites/lordsburg-internment-camp/.

[107] Brian Niiya, *Manzanar riot/uprising,* Densho Encyclopedia, https://encyclopedia.densho.org/Manzanar_riot/uprising/.

[108] *Id.*

[109] Snyder, *supra* note 59, at 90.

110 Tetsuden Kashima, *Homicide in Camp*, Densho Encyclopedia, https://encyclopedia.densho.org/Homicide%20in%20camp/. See https://digitalassets.lib.berkeley.edu/jarda/ucb/text/reduced/cubanc6714_b256r12_0050.pdf for the Report of the Investigation Committee on the Shoichi Okamoto Incident (July 3, 1944).

111 Richard Reeves, Infamy: The Shocking Story of the Japanese American Internment in World War II, 198 (Henry Holt and Company, 2015).

112 *Id.*

113 *Id.* at 199.

114 *Id.*

sentry shot Shoichi, who was unarmed.[115] Shoichi died on May 25, 1944, when he was only thirty years old.[116] The court martial acquitted the sentry of the homicide.[117] The sentry was fined one dollar for the cost of firing the bullet that killed Shoichi since it was an "unauthorized use of government property."[118]

My family was imprisoned at Topaz prison camp, where a Military Police sentry shot James Hatsuaki Wakasa on April 11, 1943.[119] My Great-Aunt Kazuko, who was a child at the time, told me that she had heard about Mr. Wakasa's murder. The narrative that she heard was that he was walking his dog too close to the barbed-wire fence. She said her parents frequently warned her and her younger brother, Hiroshi, to stay far away from the camp perimeter.

Later in the day after the sentry shot James Wakasa, the U.S. State Department and the Spanish embassy sent representatives to investigate the shooting.[120] The representatives reported that James's body was lying five feet inside the fence, and in such a way that he "had been facing the sentry tower and walking parallel to the fence; and the wind was from [his] back making it highly improbable that he could have heard [the sentry's] challenge."[121] The Spanish representative concluded that the shooting was "due to the hastiness on the part of the sentry, who, not receiving an immediate response to his challenge, 'probably fired too quickly.'[122] The court martial charged the sentry with manslaughter but later acquitted him.[123] Below is a photograph of Mr. Wakasa's funeral at Topaz.

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[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] Kashima, *supra* note 110.

[120] *Id.* In March 1942, the United States established an official "Exchange Process" for prisoner of war negotiations with Japan and Germany. Spain served as the Protectorate Nation for Japan and Switzerland served as the Protectorate Nation for Germany. Diplomats including consulate and embassy staff in America led this Exchange Process. Since the U.S. government likely viewed the Japanese Americans imprisoned in the concentration camps as a type of prisoner of war, it makes sense that the Spanish Embassy would come to investigate this shooting and represent Japan. *See* https://www.thc.texas.gov/preserve/projects-and-programs/military-history/texas-world-war-ii/japanese-german-and-italian.

[121] Kashima, *supra* note 110.

[122] *Id.*

[123] *Id.*

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With the end of World War II in 1945 and the closing of the incarceration camps shortly after, Japanese Americans were left to pick up the pieces of their shattered lives. Some went back to their hometowns while others scattered across the country in hope of finding a new home free from racial discrimination. They all faced financial ruin and many lost irreplaceable personal property because they were only allowed to take what they could carry. Assimilating to life after "camp" was a hardship for everyone.[125] Japanese Americans faced job scarcity and racism after World War II. Even the most highly educated of the former "evacuees"[126] had trouble finding work. As they tried to rebuild their lives, however, law enforcement hostility further stigmatized Japanese Americans and made it difficult for them to return to normalcy in the post-war period.

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[124] "Topaz, Utah. James Wakasa funeral scene. (The man shot by military sentry)", Records of the War Relocation Authority, 1941–1989, National Archives Catalog, https://catalog.archives.gov/id/538190. According to the National Archives website, "access unrestricted" and "use unrestricted."

[125] The federal government resettled families, moving many of them to the Midwest and East Coast. *See generally* Greg Robinson, After Camp: Portraits in Midcentury Japanese American Life and Politics (University of California Press, 2012). The federal government also created the Japanese Evacuation Claims Act of 1948 to compensate interned families for property losses but, in the end, little money was distributed. Japanese-American Evacuation Claims Act, Pub. L. 80-886, 62 Stat. 1231 (1948) (establishing a system for examining the claims for compensation submitted by Japanese internees; monetary compensation was capped at $2,500 per person). *See generally* Frank F. Chuman, The Bamboo People: The Law and Japanese-Americans, 235–45 (Publisher's Inc., 1976); Roger Daniels: Prisoners Without Trial: Japanese Americans in World War II, 88–97 (Rev. ed., Hill & Wang, 2004).

[126] Even though the U.S. government forcibly removed Japanese Americans from their homes and made them prisoners, many called these incarcerated Japanese Americans "evacuees."

D. Picking Up the Pieces in the Post-War Period

In *Ex parte Mitsuye Endo*, the U.S. Supreme Court ruled in favor of Mitsuye Endo who claimed that exclusion from the West Coast prevented her from continuing with her employment.[127] The Supreme Court's ruling led the War Department to issue a statement saying that people of Japanese ancestry "would be permitted the same freedom of movement throughout the United States as other loyal citizens and law-abiding aliens" effective January 2, 1945.[128] In postwar Los Angeles, where many Japanese Americans chose to reestablish themselves, "there were more Japanese . . . on government relief than there had been in the depths of the Great Depression."[129]

After being released from Topaz in October of 1945, my family chose to take the train back to San Francisco, where they lived in a flat in Chinatown with three other families. My great-grandfather, Nobu, worked as a dishwasher and my great-grandmother, Ima, cleaned apartments. Both were college educated—Ima was a graduate of the University of California, Berkeley, and Nobu graduated from a Japanese university—but those were the only jobs they could find. The hostile social climate, housing shortage, and limited job opportunities created arduous challenges for returning Japanese Americans to overcome.

My family experienced economic hardship in San Francisco and decided to move to Oakland, where my grandmother, Amy, was born in November 1946. Under pressure to assimilate and prove their American-ness, Ima and Nobu gave their youngest child an American name. Both Ima and Nobu died from cancer when my grandmother was a child. They were fifty and fifty-three years old respectively. My Great-Aunt Kazuko, Ima and Nobu's first-born, turned down a college scholarship to raise her younger siblings. She worked as a grocery store cashier to provide for her family. My grandmother and her siblings suspect their parents' premature deaths had much to do with the stress and poor living conditions that they endured in Topaz and the upheaval that followed their years of incarceration.[130]

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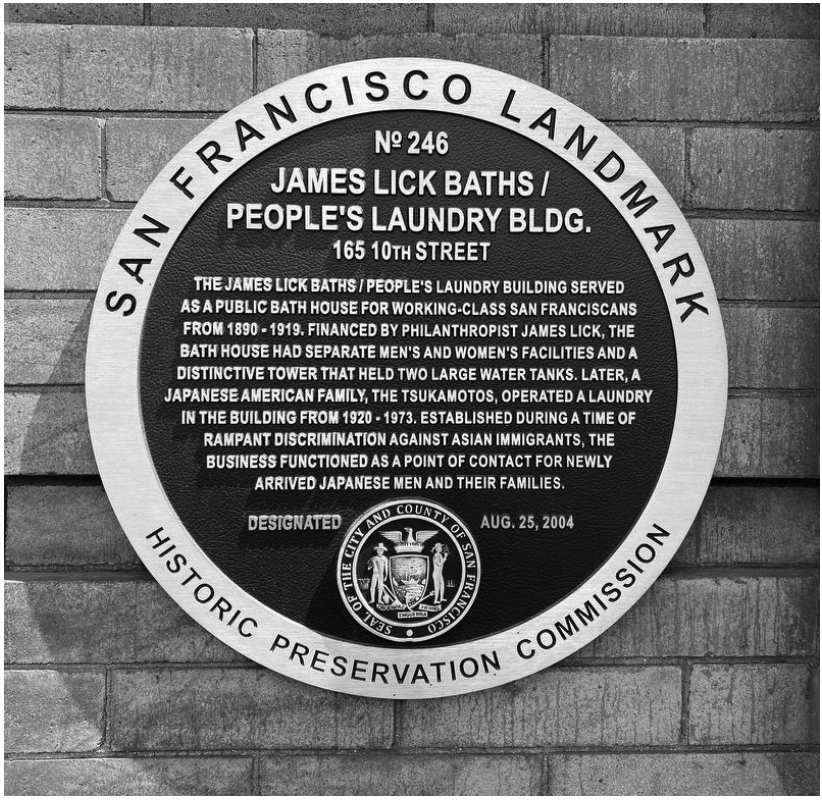
[127] *Ex parte Mitsuye Endo*, 323 U.S. 283 (1944).

[128] *The Return of Japanese Americans to the West Coast in 1945*, The National WWII Museum (Mar. 26, 2021), https://www.nationalww2museum.org/war/articles/return-japanese-americans-west-coast-1945.

[129] Daniels, *supra* note 2.

[130] For an analysis of this incarceration trauma response, see Donna K. Nagata, Jackie H. J. Kim & Teresa U. Nguyen, *Processing Cultural Trauma: Intergenerational Effects of the Japanese American Incarceration*, 71 J. Soc. Issues 356 (2015). Available at https://operations.du.edu/sites/default/files/2021-07/processing%20cultural%20trauma.pdf.

The Tsukamoto family regained ownership of their laundry business in 1946.[131] The People's Laundry remained in the hands of the Tsukamoto family until 1973, when it was sold and converted into office space.[132] Today, the building is still privately owned.[133] It became San Francisco Designated Landmark number 246 in 2004.[134]



San Francisco designated the Tsukamotos' People's Laundry as Landmark 246 in 2004. Image source: photograph taken by Andrew Ruppenstein, August, 23, 2020, and he granted permission to use here.

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[131] Sam Chase, James Lick Baths, Clio: Your Guide to History, Mar. 25, 2019, https://theclio.com/entry/13227. See also City of San Francisco, *Landmark Designation Report: James Lick Baths and People's Laundry*, 2004. Available at http://ec2-50-17-237-182.compute-1.amazonaws.com/docs/landmarks_and_districts/LM246.pdf.

[132] Chase, *supra* note 131.

[133] *Id.*

[134] *Id.*

Hardship was a common experience for the returning Japanese Americans. While they faced prejudice and aggression, the former incarcerees were adamant about moving forward and deliberately decided not to dwell on the past. This mentality helped the community rebuild, but the silence delayed healing the trauma from the atrocities of Executive Order 9066 and the *Korematsu* Supreme Court decision.[135] Shame began to grow.

E. The Case Study of the LAPD

Although Japanese Americans were allowed to return to the West Coast, their arrival was slow at first.[136] Before Executive Order 9066, approximately 36,000 Japanese Americans lived in Los Angeles County.[137] Fewer than 300 Japanese Americans returned to the formerly restricted territory a month after they left the prison camps.[138] Many felt apprehensive about returning to the West Coast due to fears of violence and discrimination. For example, city councils in Atwater, Livingston, and Turlock all expressed that they did not want Japanese to return.[139]

Los Angeles police officials immediately protested the return of Japanese Americans to Los Angeles after the U.S. Supreme Court's *Ex Parte Endo* decision that revoked the West Coast exclusion.[140] The Police Commission, with support from LAPD Chief Clemence Horrall, passed a resolution on December 20, 1944, announcing their opposition to the return of Japanese American families, arguing that "it would be impossible to vet for loyalty" and that police officers "would be incapable of preventing riots caused by white mobs."[141] One of the two votes against the resolution was that of LAPD Commissioner Cohn, who opposed the resolution on the grounds that its language was not tough enough to protect the public from the returning Japanese Americans.[142]

Commissioner Cohn argued that returning Japanese Americans should be mandated to carry identification cards.[143] Dillon Myer of the War Relocation Authority rejected Cohn's idea.[144] The LAPD Police Chief urged the War

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[135] *Korematsu v. United States*, 323 U.S. 214 (1944).

[136] *The Return of Japanese Americans to the West Coast in 1945*, The National WWII Museum (Mar. 26, 2021), https://www.nationalww2museum.org/war/articles/return-japanese-americans-west-coast-1945.

[137] *Id.*

[138] *Id.*

[139] *See* The Mass Incarceration of Japanese Americans in WW2, Silent Sacrifice Part 2, Timeline – World History Documentaries, https://www.youtube.com/watch?v=lhGcz0URFOk.

[140] *The LAPD and Japanese Americans, supra* note 85.

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

Relocation Authority to provide the LAPD with the names and addresses of all the Japanese Americans returning to Los Angeles so his forces could "better patrol" those areas.[145]

Even after Japanese Americans left the West Coast zone, the LAPD—propelled by nativism—remained active in enforcing racial exclusion.[146] The anti-Japanese *Los Angeles Examiner* reported on September 6, 1944, that LAPD officer, Sergeant Jack Sergel visited Manzanar concentration camp for judo tournaments.[147] *The Examiner* asserted that judo "instilled Japanese values" and that the judo lessons and tournaments were "a gross violation of official property."[148] To appease the newspaper, the LA Police Commission announced a board inquiry into Sergel's judo activities, but Sergel resigned from the LAPD in protest.[149]

From helping bring about Executive Order 9066 to sowing seeds of distrust about the Japanese American community once freed from the prison camps, the record shows that many LAPD leaders were relentless with their racist conspiracy theories and fearmongering.

III. INVERTING SHAME

As a result of their mistreatment both during and after incarceration, silence and shame reigned supreme within the Japanese American community after the war. Even within families, no one discussed it. My grandmother said that on the rare occasion her parents and older siblings talked about their incarceration experience, they would refer to it as "camp." For years, my grandmother thought that Topaz was like a summer camp. My family is not alone in this, as many Japanese American families refused to discuss the humiliation and hardship they endured.[150]

In the aftermath of Executive Order 9066, Japanese Americans came out of their desert prisons with a sense of shame and guilt, having been considered betrayers of their country. There were no complaints or rallies for justice because the Japanese way is to *shoganai* しょうがない (roughly translated as "it can't be helped"). *Shoganai* is an acceptance of fate because some things are outside of our control. The Japanese mentality is to accept and move on.

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[145] *Official Row Flares Up Over Freed Japs' Return*, Los Angeles Times (Jan. 13, 1945).

[146] *See The LAPD and Japanese Americans, supra* note 85.

[147] *Ban on Judo Training in Police Department Ordered by Board,* Los Angeles Examiner (Sep. 6, 1944).

[148] *The LAPD and Japanese Americans, supra* note 85.

[149] *Id.*

[150] *See generally* Violet H. Harada, *Breaking the Silence: Sharing the Japanese American Internment Experience with Adolescent Readers.* 39 J. Adolescent & Adult Literacy 630 (1996). Available at http://www.jstor.org/stable/40015654.

Shame is also a pervasive value in Japanese culture. Japanese people are generally very concerned about how their behavior appears to others. American police, on the other hand, seem to operate with zero accountability and with no shame. By highlighting the ways that law enforcement acted shamefully and in violation of their purported creed "to protect and serve," I hope to expand the conversation on police accountability and highlight how racism infiltrates law enforcement and results in state violence. By sharing my family's story, I hope to repudiate the silence and shame that has plagued generations of Japanese Americans.

In this paper, I used my family history to explain the terror and state violence that happened to the Japanese American community. This paper is about how nativism and white supremacist notions of race influence law enforcement agencies, resulting in state violence against minority groups. I am proud to be the descendant of a civil rights pioneer who was not afraid to rock the boat and stand up against discrimination. Matsunosuke Tsukamoto's story deserves to be highlighted not only because of the historical lessons we can learn about discriminatory policing and nativism, but also because it is a rejection of the notion that Asians are docile, meek, and politically passive.

The state violence I describe in this paper is an example of a community at the mercy of state actors. Executive Order 9066 was part of a continuum of a long history of discrimination and prejudice against Japanese immigrants and their American-born children. While Japanese Americans lost billions of dollars in property and net income, the most damaging aspect was the loss of their personal liberty and dignity.[151] Despite the formal apology and reparations of the late 1980s, these government actions haunt the victims of Executive Order 9066 and their descendants.[152]

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[151] The Commission on Wartime Relocation and Internment of Civilians estimates that the total property lost was $1.3 billion, and net income lost was $2.7 billion (calculated in 1983 dollars). Allison Shephard, *"Pride and Shame:" The Museum Exhibit that Helped Launch the Japanese American Redress Movement*, The Seattle Civil Rights & Labor History Project at the University of Washington (2006), https://depts.washington.edu/civilr/prideandshame.htm.

[152] *See* Civil Liberties Act of 1988, Pub. L. No. 100–383, 102 Stat. 903 (1988) (offering a formal presidential apology and granting reparations "to discourage the occurrence of similar injustices and violations of civil liberties in the future"). The Act compensated 82,210 people of Japanese descent who were incarcerated during World War II (out of roughly 120,000) with a symbolic payment of $20,000 to each. Tracy Jan, *Reparations mean more than money for a family who endured slavery and Japanese American internment*, Washington Post (Jan. 24, 2020), https://www.washingtonpost.com/graphics/2020/business/reparations-slavery-japanese-american-internment/. This came nearly four decades after their captivity. Many victims of Executive Order 9066 had already died by the time reparations came around—my great-grandparents included. While no amount of money could ever compensate for their losses, Mits Yamamoto, a Japanese American who was incarcerated at "Jerome Relocation Center" in Arkansas, told the *Washington Post* in an interview that cash compensation "[makes] the government apology feel more sincere." *Id.* He added, "You should pay for your mistakes." *Id.*

For generations, there have been overwhelming feelings of shame within Japanese American families for something that was not their fault. The state actors that terrorized Japanese Americans should be the ones that feel shame. Instead, the experiences of the Japanese American community have been cloaked in silence. Shame loves secrecy. In Japanese culture, it is common to avoid shame and to fear losing face. While one of the best ways to manage shame is to discuss it, in many Japanese American families this trauma has gone unspoken, providing an ideal breeding ground for shame. In recent years there has been an increase in scholarship about Japanese incarceration, especially as it relates to the War on Terror and the corrosive effects of state overreaction.[153] I hope that this paper will continue the work of making sure these stories are not forgotten. History has a terrible habit of repeating itself if we do not heed the warnings of those who came before us.

One of the most unsettling aspects of Japanese incarceration during World War II is how easily most Americans accepted it.[154] Many Americans, typically fueled by nativism and racist stereotypes, challenged Japanese loyalty and commitment to the war effort. Executive Order 9066 was the culmination of decades of racism and xenophobia. We must remain vigilant against racial profiling, civil rights abuses, discriminatory policing, and wartime panic. Executive Order 9066 proves the fragility of our constitutional rights. White America has a history of doing despicable things to people of color, and this could happen to any marginalized group.

While stories of the incarceration experience were not openly shared within the Japanese community or even within families, it is important to educate those who have never heard these stories. The stories of those who lived through this state violence must go on to prevent this injustice from happening again. Stories of pre-war Japanese exclusion and Executive Order 9066 are worth revisiting as the United States witnesses a spike in anti-Asian violence and confronts a racial reckoning, especially as it relates to discriminatory policing and police brutality.

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[153] *See* Eric K. Yamamoto & Rachel Oyama, *Masquerading behind a Façade of National Security*, 128 Yale L.J. F. 688 (2018); Evelyn Gong, *A Judicial Green Light for the Expansion of Executive Power: The Violation of Constitutional Rights and the Writ of Habeas Corpus in the Japanese American Internment and the Post-9/11 Detention of Muslim Americans*, 32 T. Marshall L. Rev. 275 (2007); Harvey Gee, *Habeas Corpus, Civil Liberties, and Indefinite Detention during Wartime: From Ex Parte Endo and the Japanese American Internment to the War on Terrorism and Beyond*, 47 U. Pac. L. Rev. 791 (2016).

[154] *See* Bill Ong Hing, *Lessons to Remember from Japanese Internment*, HuffPost (Feb. 21, 2012), https://www.huffpost.com/entry/lessons-to-remember-from_b_1285303.

CONCLUSION

While December 7, 1941, is a dark day in our country's history, February 19, 1942, is also a day that will live in infamy. It was the day that 120,000 Japanese Americans were betrayed by their country. This piece of American history is rarely discussed, yet it is important that we learn about Executive Order 9066 and the nativism and hysteria that led to it. From the racist rhetoric of police leaders that helped bring about Executive Order 9066 to the violence in the prison camps and the continued fearmongering upon the return of the "evacuees," the police actions during that time show how deeply rooted nativism and anti-Asian sentiment run through law enforcement and how that racism in turn can have devastating effects on the lives of ordinary people.

Executive Order 9066 stole the hopes and dreams of generations of Japanese Americans. The law enforcement role in bringing about and implementing Executive Order 9066 is a shameful legacy and should be part of the discussion about how to solve the problem of policing in America. This story of racial discrimination and policing is one that occurs over and over again in this country, especially as it relates to the criminalization of the routine activities of marginalized groups. Surfacing my family history and shifting the shame of Executive Order 9066 squarely on the U.S. government is especially important given the recent resurgence of anti-Asian sentiment stemming from the COVID-19 pandemic as our country continues to grapple with what safety and protection mean.

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Miranda Tafoya

ORAL HISTORIES

JOHN R. WIERZBICKI

Knowing Bernie:

The Witkin Oral History Project

Despite the many entreaties for him to do so, Bernie Witkin never agreed to be interviewed for an oral history about his life. One oral history came perilously close – the time Dorothy Mackay-Collins interviewed Witkin about his friendship with Chief Justice Roger Traynor for the Roger J. Traynor Memorial Collection on September 3, 1986. During the interview, in which MacKay-Collins got Witkin to begin talking more about himself than he liked, Witkin grumbled: "If we don't get on to Traynor pretty soon I'll think that you are coming here under false pretenses." He later refused to allow the interview to be published. Whatever Witkin's motives, his reticence left a significant gap in our understanding of his life and role in California law.

In January 2020, following the 25th anniversary of Witkin's death, the California Supreme Court Historical Society launched an oral history project focusing on Witkin's influence on California's legal system from those who knew him best, especially during the 1970s until his death in 1995. The primary goals of the project were to:

- Identify and record interviews with those who have the most extensive information about, and connection with, Bernie's life.
- Collect stories, anecdotes, and other personal remembrances of Bernie.
- House and preserve this material and make it available for scholars.
- Increase public awareness of Bernie's life and his contribution to California law.

The initial project team consisted of retired California Supreme Court Justice Ming Chin, legal historian and former *L.A. Times* staff writer Molly Selvin, and Witkin scholar John Wierzbicki. It also partnered with other organizations, such as the California Judges Association, in getting word out about the project. Major funding for the project was generously provided by the Bernard E. and Alba Witkin Charitable Foundation (witkinfoundation.org).

Many of those who knew Witkin well had passed away in the quarter century since his death. Despite this, the project was able to identify and obtain interviews with sixteen individuals, each of whom had significant personal knowledge and experiences to relate about Witkin. The youngest of these were in their late 60s and the oldest was 99 years old at the time of the interview. Most were in their 80s. The interviewees had known Witkin in many capacities, including as the following:

- His co-author on *Criminal Law*.
- His personal advisor in the last years of his life.
- Two justices of the California Supreme Court.
- Four California Court of Appeal Justices.
- The judicial appointments secretary for Governor Deukmejian.
- Two trial lawyers, including a former state bar president.
- Three legal editors with the Witkin Department of Bancroft Whitney.
- A collaborator on his treatises in the 1970s.
- Two brothers whose family had known Witkin since the 1930s.
- A legal journalist for *California Lawyer* who profiled him.
- Witkin's attorney during the 1970s.
- The son of Chief Justice Roger Traynor, a close friend of Witkin since the 1940s.

The major topics discussed during the interviews are listed below.

Because there exists little scholarly work about Witkin, research emphasis was almost exclusively on primary material. The Witkin Archive at the Judicial Center Library in San Francisco was the primary source of documents for research, supplemented by those provided by individuals and Witkin personal papers that were housed at other locations. From these, outlines were created, and documents selected, for the interviews.

The project adopted a set of interview protocols. The interviews were orally recorded and an initial transcript prepared from the recording, which was edited for accuracy and readability. The interview candidates had 30 days from receipt of the initial transcript to make edits or alterations. The final

transcript was then created from the initial transcript and incorporated edits. None of the interviewees were paid for their interviews, and the CSCHS owns the copyright to the final transcripts.

Interviews were conducted with the sixteen interviewees. All but one were with a sole interviewee – the exception was a combined interview with the three editors in the Witkin Department. The pandemic proved to be a barrier, but one that was overcome. Although we conducted in-person interviews where possible (with appropriate protocols), several took place using online video conferencing. Over 37 hours of recordings were obtained, with the longest interview lasting 5 ½ hours and the shortest 41 minutes. This resulted in a final transcript of about 368 printed pages (at 350 words per page).

The core mission of the California Supreme Court Historical Society is to recover, preserve, and promote California's legal and judicial history, with a particular emphasis on the State's highest court. This project fulfilled that mission through preserving knowledge about one of the most influential individuals in California history on the state's legal system. The criticality of the project was recently highlighted by the recent passing away of Witkin's co-author, Norman Epstein. Thankfully, we have maintained for future generations an important piece of California legal history, in the words of those who participated in it.

INTERVIEW TOPICS

The following are the major topics that are covered in the interviews.

- Treatises
  - o Citations to
  - o Influence of
    - on law students
    - on lawyers
    - on judges
- As writer
  - o Style and content
  - o Coauthoring *Criminal Law*
  - o Writing process
- As public speaker
  - o Qualities
  - o Engagements in Fresno
- Publishing activities

- Witkin Department at Bancroft-Whitney
- Continuing Education of the Bar
- Bill Rutter and the Rutter Group
- Center for Judicial Education and Research benchbooks

- As Employer/Collaborator
- Influence on judicial appointments
  - Under Jerry Brown
  - Under George Deukmejian
  - Under Pete Wilson
- Criminal law views
  - Controversy regarding
  - Influence on Proposition 8
- Legal Reform
  - Futures Commission
  - Judicial education
  - "Media speech"
- California Supreme Court
  - Relationship, generally
  - Advisor to Judicial Council
  - Roger Traynor
  - Rose Bird
  - Malcolm Lucas
- Other relationships
  - Ralph Klepps
  - S. I. Hayakawa
- Marriages
  - Gladys Witkin
  - Jane Witkin
  - Alba Witkin
- Personality
  - Generally
  - Sense of Humor
  - Science Fiction
  - Roller Derby
- Death and legacy
  - Generally
  - Renaming of State Law Library

INTERVIEWS CONDUCTED

James Ardaiz (Interviewed July 27, 2022)

James Ardaiz is a former Administrative Presiding Justice of the Fifth District Court of Appeal. A graduate of U.C. Hastings College of Law, Ardaiz joined the Fresno County District Attorney's office, and went on to become Chief Deputy District Attorney. He was elected a municipal court judge at age 32, and then was named as one of the youngest appellate court judges in California history. Ardaiz was the principal author of the California Three Strikes Law and created the Adult Offender Program, resulting in significant changes in criminal punishment as an alternative to incarceration. He was named California Jurist of the Year by the Judicial Council and is a four-time recipient of the Kleps Award for Judicial Administration. He retired from the judiciary in 2011 to enter into private practice.

Ardaiz on being with Witkin:

> Bernie could be a very social guy and there was no pretense to him that I ever saw, even though he was always treated very deferentially. Which I think he felt was his due. <Laugh> But among a closed circle of people, he was very much an average guy. When he walked into a room, he would know everybody and he would tell the same jokes. There were never any new jokes. But they were always funny. I don't know why. I'd heard the joke, maybe 50 times. And it was always funny.

Ardaiz on Witkin's influence:

> Bernie was a guy that, well, he made careers. I don't know that he broke anybody, but I know he definitely made careers. If you were going to go up in the judiciary, Bernie Witkin was the guy whom governors called. I know he did it for other people. There are a lot of people who owe the advancement of their careers to Bernie and probably don't even know it. He never talked to you about it. He never said, I'm going to go call so and so. He never did that.

Marvin Baxter (Interviewed November 19, 2021)

Marvin Baxter is a former associate justice of the Supreme Court of California. A graduate of Hastings College of the Law, Baxter joined the Fresno County District Attorney's office. After two years, he went into private practice in Fresno. He served as president of Fresno County Young Lawyers and the Fresno County Bar Association. Governor George Deukmejian named Baxter as Appointments Secretary and his principal advisor on all

gubernatorial appointments made to the executive and judicial branches of government. Baxter served in that capacity for six years and assisted in the appointment of more than 700 judges. He was appointed as an Associate Justice of the Court of Appeal, Fifth Appellate District, and then served as an Associate Justice of the Supreme Court of California for 14 years, until his retirement in 2015.

Baxter on replacing Chief Justice Bird and two other justices after the 1986 retention election:

> I did reach out to Bernie in that case, and I did receive his input. Another area where I thought Bernie could provide help, or at least the possibility of help, was in terms of administrative abilities. I certainly reached out to him when it was time to consider the replacement of the chief justice. Of course, the Governor himself had personal knowledge of Malcolm Lucas's abilities. But Bernie certainly confirmed that. That would've been an instance where I recall a specific conversation with him and I thought his input was very helpful.

Dave Bonelli, John Hanft, and Lee Nicholaisen
(Interviewed March, 3 2023)

Dave Bonelli is a former co-director of the Witkin Legal Institute. Bonelli worked for Bancroft Whitney as an attorney editor, and was transferred to the Witkin Department, which Bancroft Whitney had created in 1981 to support Witkin in writing his treatises. After Witkin's death in 1995, Bonelli was named founding co-director of the Witkin Legal Institute.

John Hanft is a senior principal attorney editor with Thomson Reuters. Hanft was an attorney editor at Bancroft Whitney. He was an original member of the Witkin Department and was later named founding co-director (with Bonelli) of the Witkin Legal Institute.

Lee Nicolaisen is a former attorney editor with Bancroft Whitney and was also selected as an original member of the Witkin Department at Bancroft Whitney. She and Dave Bonelli are married.

Bonelli on working in the Witkin Department:

> At Bancroft Whitney, working for Bernie was the pinnacle of the kind of work you could do in legal publishing. It was the most prestigious publication for California attorneys. So I felt like the daily work was really important for the bench and the bar of California, and I couldn't let them down.

Hanft on being edited by Witkin:

> He wanted things to be clear and concise from the beginning. But he had many style rules and peculiarities. Sometimes he would get quite agitated reviewing the manuscript because we would keep doing something that he didn't like in trying to follow the rules and hoping to be consistent. So you can see him looking at a chapter and getting more and more anxious. On page one, he would correct something you did and by the time he got to page 25, he'd be fuming: "Why do you continue to do this?" <Laugh>

Hanft on Witkin's humor:

> Bernie liked to tell jokes. He liked to be the center of attention. And his humor was appropriate for the Borscht Belt in the thirties and forties, not for the corporate environment in the eighties and nineties. Certainly not the two thousands, certainly not later. There were many circumstances where Bernie would tell a joke that was either a little off color or not politically correct. I think the tendency of all of us in the department was to let it go because he was well-intentioned.

James Brosnahan (**Interviewed November 30th, 2021**)

James Brosnahan is a Senior Trial Counsel at Morrison & Foerster in San Francisco. A graduate of Harvard Law, Brosnahan has more than half a century of trial experience, having tried more than 150 civil and criminal trials to verdict. He has been named among the top 30 trial lawyers in the United States, was inducted into the State Bar of California's "Trial Lawyers Hall of Fame," and received the Samuel E. Gates Award by the American College of Trial Lawyers, the American Inns of Court Lewis F. Powell Award for Professionalism and Ethics, and the California Lawyers Association Bernard E. Witkin Medal.

Brosnahan on Witkin's personality:

> With all of his erudition, all of his scholarship, and all of his writings, he was a party person. People really admired him, not just for his scholarship, but for his camaraderie and his jokes. I saw this for years. He could tell jokes and get a crowd going. He'd tell a funny joke about res ipsa loquitor and they'd be falling out of their chairs. He had that ability.

Brosnahan on citing to Witkin as legal authority:

> I have no memory of citing Witkin and then losing. That's an exaggeration, but you get the idea. The gravitas of the name was in some ways more important than any other judge whom you could cite. I would always try, as lawyers do, to cite a judge that held this, that really is well respected. Witkin was above all that in his persuasive gravitas, when judges heard what Witkin said. The case might not be decided. He would say that certainly. He might even say, maybe it's going to be this way or that way. But when he said it was this, then it was that. Trial judges, especially where I spent a lot of my time, didn't want to go up to the California Supreme Court against Bernie Witkin.

Ming Chin (Interviewed December 16, 2022)

Ming Chin is a former Associate Justice of the Supreme Court of California. A graduate of the University of San Francisco, School of Law, Chin served two years as a Captain in the United States Army, including a year in Vietnam, where he was awarded the Army Commendation Medal and the Bronze Star. He then served as a deputy district attorney for Alameda County, then felony trial deputy, before leaving for private practice. Chin was also the first Asian-American to serve as President of the Alameda County Bar Association. Chin served as a judge of the Alameda County Superior Court, and then was appointed an associate justice of the First District Court of Appeal, where he became Presiding Justice of Division Three. Governor Pete Wilson later appointed Chin to the California Supreme Court, where he served for 24 years. He is an author of treatises on employment litigation and forensic DNA evidence.

Chin on Bernie recommending his elevation to the California Supreme Court:

> I was astounded, frankly, that Bernie would call me at all. It was after we had a dinner in San Francisco with Bernie and Alba. That was the last day that I spent with Bernie. I was surprised that, number one, that he would call me and ask me, and number two, that he would even think of calling the governor and recommending me. He was such a good friend. I don't know how I deserved it. He was a hero to me.

Norman Epstein (Interviewed October 26th, 2021)

Norman Epstein was the former presiding justice of the Second District Court of Appeal, Division Four. A graduate of U.C.L.A. School of Law,

Epstein was a deputy attorney general with the California State Department of Justice, then the first general counsel of the California State University System. He was appointed a municipal court judge for Los Angeles County, then a superior court judge. Epstein was appointed associate justice for the Second District Court of Appeal, Division Four, and later became presiding justice for that division. He served on the Court of Appeal for 28 years and as a judge for 45 years. He was a consultant to Witkin on his two criminal treatises, then became Witkin's co-author on the combined *California Criminal Law*. He also wrote the *Digest of California Cases* and co-authored *Civil Trials and Evidence*. He received the Jurist of the Year Award from the Judicial Council, The President's Award from the California Judges Association, and the Bernard Witkin Medal from the California State Bar. Epstein passed away on March 24, 2023.

Epstein on getting a call from Witkin proposing they collaborate:

> I was told that Bernie was going to call, and he 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. He laid out what he had in mind, and how things would work, and said "All right, now you can say whatever you want." I said, "Well Bernie, could I come up to Berkeley? Could we sit down and talk together?" That's how we left it. I was so overwhelmed, even though I was tipped off about it. My wife and I went up to Berkeley and stayed with the Witkins. I was just delighted to be working for Bernie Witkin, so I really didn't expect much by way of compensation. At one point I asked what it was, and I don't remember what it started out as, but anything would have been wonderful.

Epstein on the uniqueness of Witkin:

> I know of no one in any other state that is similar to Bernie. I can't say there aren't any, or weren't any, and probably is somewhere, but not that I've heard of. Some judges, perhaps, but Bernie wasn't a judge and he never practiced law except for about a year after he graduated. But he had such a total command of the whole field of the law. The four treatises are just amazing. So it was a privilege to work for him. And we got along just wonderfully, everything about it. And with Alba as well. Looking back on it, it was probably, if not the most wonderful thing, one of a couple that ever happened to me or that I was associated with.

Arthur Gilbert (interviewed June 18, 2022)

Arthur Gilbert is Presiding Justice of the Second District Court of Appeal, Division 6. A graduate of University of California, Berkeley Law, Gilbert served as a deputy city attorney for the city of Los Angeles before entering private practice. He was appointed a municipal court judge and then a superior court judge for the county of Los Angeles. He then was appointed as Associate Justice Court of Appeal, Second District Division 6 and later presiding justice for that Division. He has served on the Court of Appeal for over 40 years. He has received the Kleps Award from the Judicial Council and the Bernard S. Jefferson Award from the California Judges Association. He writes a monthly column for the Los Angeles Daily Journal entitled "Under Submission."

Gilbert on Witkin at conferences:

> Bernie would go to conferences and he'd be a character. He'd put a glass on his head, balance it, and walk around and tell stories. He'd ask me, "What's your latest joke?" So I would tell him a joke and then he'd be telling the joke to other people, like it's his joke. <Laugh> So I would kid him and say, "Bernie, are you going to tell me one of my jokes now?"

Gilbert on attending a Witkin lecture:

> I knew from his books how he clarified legal concepts in plain English. His exposition of the law was readily understandable to me. When Bernie gave his lectures, he had an ego and liked to be center stage, but it was wonderful. He would have little clever phrases that he would use to describe what was going on. They didn't appear much in his writing; there he was a little more restrained. He was a compelling speaker. He'd be talking at the microphone and we're just scribbling, and listening, and watching him. Anytime Witkin was speaking on anything, the place was packed and I'd be there. You just had to go to hear Witkin.

Seth Hufstedler (interviewed January 6th, 2022)

Seth Hufstedler is senior of counsel to Morrison & Foerster in Los Angeles. Before graduating from Stanford Law School, Hufstedler served in the US Naval Intelligence during World War II. After graduation, he went into private practice and represented clients before California appellate courts, the Ninth Circuit Court of Appeals and the United States Supreme Court. Hufstedler also represented the California Commission on Judicial Performance in its televised investigation of the California Supreme Court. His spouse, Shirley

Hufstedler, was the first U.S. cabinet-level Secretary of Education under President Carter and the second woman named to the federal appellate bench. At the time of the interview, Hufstedler was 99 years old.

Hufstedler on Witkin's personality:

> This probably will be misunderstood, but to some extent Bernie Witkin was a clown. He wanted to be the centerpiece, and he wanted to perform, and he wanted to entertain people. That was true from the beginning.

Hufstedler on Witkin and Roller Derby:

> One of the great stories of Bernie, and you probably know parts of it because I've told it on various occasions, but Bernie was one of the world's great intellects. And yet he was interested in ladies roller derby. Who would ever connect Bernie with roller derby? But he did. It didn't ever become a terrific attraction, as you would suspect. At an early age, he got acquainted with it and Bernie would go through the newspapers and the listings of every place he could find to go watch roller derby. The night Bernie died, in fact, Bernie found a roller derby, had a great time watching it, went to bed, woke up, decided he had to go to the bathroom, and fell over dead on the way. He died happily, doing exactly what he wanted to do. At 94, and he got to watch his roller derby.

Jack Leavitt (interviewed October 18th, 2021)

Jack Leavitt is a former collaborator on Witkin's *California Evidence, California Crimes,* and *California Criminal Procedure* treatises. After graduating from the University of Illinois, College of Law, Leavitt received his masters of law from University of California, Berkeley Law. He then worked as a legal editor and in private practice. After meeting Witkin, they began collaborating, and he worked on the treatises while accepting death penalty appeal cases for indigents. After their collaboration ended in 1979, Leavitt served as a deputy district attorney for Alameda County and then a staff attorney at the 6th District Court of Appeals.

Leavitt on writing with Witkin:

> We were two bright people. The reason that he cared for me is that I did not give him tired work. But I have a self-image which is pretty strong, still is. So he and I would quarrel. We would quarrel furiously over the proper use of a semicolon and whether to begin a sentence with "however" or to have "however" after the first phrase. So yeah, we butted heads together. And he liked that.

Leavitt on Witkin's humor:

> I remember him saying: "here we are, the two of us. You are one of the greatest minds in California law, respected by thousands. And just the second smartest in this room." Did I say to you his comments about me? "Leavitt, I tell everybody that your work is excellent. Excellent. Which is far below my usual standard."

Clyde Leland (Interviewed January 17, 2022)

Clyde Leland is owner of Leland Communications, Inc., which trains lawyers on how to improve their writing. C. Leland's uncle, Henry Robinson, was a classmate of Witkin at U.C. Berkeley and they remained close friends until Robinson's death in 1973. Witkin was also a family friend of the Lelands; C. Leland grew up knowing Witkin. C. Leland interviewed Witkin in 1989 for an extensive profile published in *California Lawyer* entitled "The Ineffable Bernie Witkin at 85," and in 1994, he produced a short film about Witkin on his 90th birthday on behalf of the *Continuing Education of the Bar*. C. Leland is the younger brother of Marc Leland (also interviewed).

C. Leland on Witkin and the California Lawyer article:

> I had pretty good access. It was after that, that we really had more of a relationship. I had sent him the article for a fact-check right before it was published. He was so put off about that opening line about the fool, that he said, "I'm not going to let you publish it." I was telling him, "Well, you can't stop it." Then the Loma Prieta earthquake happened and Bernie almost lost his life. I think then he decided it's not worth fighting with people. He called me and had me come over. From then on, we were good friends.

Marc Leland (Interviewed January 20, 2022)

Marc Leland is president of Marc E. Leland & Associates, an investment advisory firm. After graduating from Harvard Law School, he joined Cerf, Robinson & Leland in San Francisco, where his uncle Henry Robinson was a partner. On Robinson's death, M. Leland became Witkin's lawyer and worked on both Witkin's personal affairs and establishing the Foundation for Judicial Education, which funded the writing of benchbooks for judges. Thereafter, Leland served as General Counsel of the Peace Corps and then Assistant Secretary of the Treasury for International Affairs under President Reagan. He presently resides in London. M. Leland is the older brother of Clyde Leland (also interviewed).

M. Leland on Witkin analyzing a case:

> It was something to watch him, how he did that, how he would take a case, and just take it apart within two seconds and decide this was what you did with it. It came out fluidly. Who could explain it?

M. Leland on Witkin's promoting judicial education:

> His view of judicial education was really far-sighted. He thought ahead on that issue, in the 1970s, that judges should have some understanding of what they're doing. Now it's accepted everywhere, same thing with congressmen, but it wasn't then.

George Nicholson (Interviewed August 30, 2022)

George Nicholson is a former Associate Justice of the Third District Court of Appeal. After graduating from U.C. Hastings, Nicholson joined the Alameda County District Attorney's Office and rose to Senior Trial Deputy District Attorney. He left to become Executive Director of the California District Attorneys Association. He then became a special (later senior) assistant attorney general. He served as a municipal court judge for Sacramento County, then a superior court judge. He then was elevated to the Third District Court of Appeal, where he served for 28 years until his retirement. Nicholson was the statewide co-chair and principal author of Proposition 8, the "Victims' Bill of Rights," which California voters adopted in 1982. That year, Nicholson ran as the Republican candidate for California Attorney General.

Nicholson on the Witkin treatises:

> Counsel often focus on what the cases say about a statute, but invariably, you've got to ask counsel, not only "What does the statute say?" but "what does the statute mean?" Witkin's treatises are kind of like that. "What does Witkin say?" and then, "What did he mean?" But, you don't default to Witkin. I don't think he expected that. Maybe he did <Laugh>, but I don't think so. He wanted you to do your own work, your own thinking. He was merely trying to help you do that.
>
> He got you into the right county when you're traveling along on a specific legal problem. He grounded your research in such a way that everything was contextual and understandable. Bernie was at the elbow of every judge and lawyer in California, just as he is still.

Nicholson on Witkin's personality:

> He was so childlike in his joy.

Winslow Small (Interviewed December 13th, 2021)

Winslow Small is a solo attorney and former advisor to Witkin on publishing matters. After graduating from U.C. Hastings, Small first went into private practice and then served as counsel in the anti-poverty program. From there, Continuing Education of the Bar (CEB) hired him as a legal editor and writer. He then joined the Center for Judicial Education and Research (CJER) as an assistant director. During that time, he worked closely with Witkin, who was a co-founder of CJER and a member of its governance board. After Small's retirement from CJER, Witkin hired him as an advisor with primary responsibility to represent Witkin to the publisher of Witkin's treatises. Small was instrumental in establishing the Witkin Legal Institute, which came into operation on Witkin's death.

Small on Witkin's relationship with CEB:

> Bernie and Curt [Karplus] became very close. Every time CEB wanted to launch a new idea, like a simulcast, or a video presentation for rural counties, they would kick it off with a presentation by Bernie. Everything that CEB did for many years, it was almost always launched by Bernie.

Small on how Witkin organized his work:

> Bernie had his famous shoe boxes and that's how he organized, he organized around shoe boxes and piles. Alba thought that was wrong. She thought it ought to be in filing cabinets, filed alphabetically. And her extensive files on their trips and other matters were amazing. So, I said to Alba, these big piles are processing piles. He goes down that pile and he just processes it that way. It's his style and it works. That was my guess about what he does, because that's the only way you can do it when you have a big pile. But the piles did have adequate organization and the end product was always meticulously organized. That's what you do with a book. The processing and organizing are more or less done at the same time. Bernie could do both. We're talking about lectures, written materials, and the books.

Michael Traynor (Interviewed December 7th, 2021)

Michael Traynor is the son of Chief Justice Roger Traynor and Madeleine Traynor. Both were early friends of Witkin (Madeleine from high school and Roger from law school) and their friendship continued throughout their lives. Michael Traynor is senior counsel at Cobalt LLP in Berkeley, California. After graduating from Harvard Law School, he joined the California Attorney General's office, then went into private practice. He has served as president of the San Francisco Bar Association, President of the American Law Institute, and Chair of ALI's Council. He received the John P. Frank Outstanding Lawyer Award from the U.S. Court of Appeals for the Ninth Circuit. He is an honorary life trustee of the Lawyers Committee for Civil Rights under Law and of Earthjustice.

Traynor on Witkin and Chief Justice Traynor:

> He was a friend of both my parents and they respected and liked him. I don't remember seeing him in the house. They did entertain a little bit, and probably exchanged dinners and saw each other that way, and certainly professionally. When my dad put Bernie on the Judicial Council, I think that was out of great regard for him.

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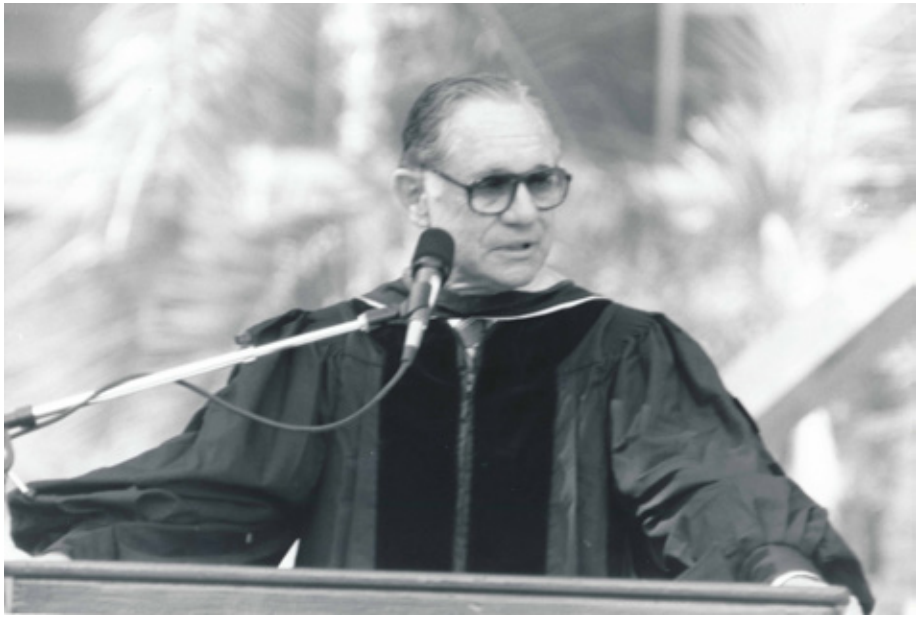
About the Author

John R. Wierzbicki is a legal writer, historian, and intellectual property lawyer. He is lead publication editor for the Witkin treatises, which are published by Thomson Reuters. He is also a member of the Board of Directors of the California Supreme Court Historical Society (CSCHS). He recently published a series of articles in the *CSCHS Review* on the early life and career of Bernie Witkin. He is working on a Witkin biography.

ORAL HISTORY BY LAURA MCCREERY
WITH AN INTRODUCTION AND CONCLUSION BY RYAN CARTER

From the 'People's Court' to the Supreme Court

Remembering The Legacy of Justice John Arguelles



John Arguelles
Associate Justice, California Supreme Court
1987-1989

John A. Arguelles (Photo courtesy of the UCLA School of Law Image Archive and Jeanine Arguelles.)

AN INTRODUCTION

John A. Arguellas' life as a judge, and ultimately a justice who played a pivotal role on the California Supreme Court, was anchored in a civility that among attorneys long earned him the nickname "The Cardinal."

It was a moniker inspired by Arguelles' gentlemanly disposition, forged through decades of jurisprudence and leadership. His journey culminated in two crucial years in the late 1980s, when he was called upon to help "rebalance" the Court amid a turbulent time in California politics.

Fast forward nearly 40 years to now: An era of relentless polarization and incivility in society - enough so that even the state's own Bar has taken steps that take effect in 2024 to promote more "dignity, courtesy and integrity" among attorneys.[1]

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[1] Justice Arguelles' approach is much needed today in an era of incivility in the practice of law. A 2021 report said the legal profession suffers from "a scourge of incivility." It was pervasive enough to persuade the State Bar of California Board of Trustees, as noted above, to "approve measures to improve civility in the profession." "State Bar of California Board of Trustees Approves Measures to Improve Civility in the Legal Profession," State Bar of California, press release, July 21, 2023, https://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-of-california-board-of-trustees-approves-measures-to-improve-civility-in-the-legal-profession. See also "Beyond the Oath: Recommendations for Improving Civility - Initial Report of the California Civility Task Force," pg. 2, California Lawyers Association and the California Judges Association, September 2021. https://caljudges.org/docs/PDF/California%20Civility%20Task%20Force%20Report%209.10.21.pdf. For related information, "Attorney Civility and Professionalism; Civility toolbox; California Rules of Court, Rule 9.7 - Revised Attorney Oath; Guidelines on civility and professionalism, Bar Associations, Courts, Articles," https://www.calbar.ca.gov/attorneys/conduct-discipline/ethics/attorney-civility-and-professionalism.

In this context, Arguelles' approach, his understated tone, and his story – whether one agrees or not with his politics – become a much-needed beacon in a fractious time.

Arguelles' journey has its roots in the Depression-era working-class suburbs of East Los Angeles.

It is from there, where from modest beginnings rooted in Depression-era American life, Arguelles' journey in the law ascended from a small private practice and civic elected life to the highest court in the state.

All the while, the man who once considered becoming an optometrist before changing course, was developing a judicial philosophy and administrative style that would make him a coveted pick for the bench among governors of differing political stripes.

In Laura McCreery's[2] expansive, 4-part series of Q&As with Arguelles in 2006, an excerpt of which we publish in part here, a picture emerges of a man who embraced a "no-nonsense" approach to his jurisprudence, which played itself out in a pivotal moment for the California Supreme Court.

As Manuel A. Ramirez – presiding judge of the Fourth District Court of Appeal – noted in a preamble to McCreery's Q&A, Arguelles' judicial career is noteworthy, in part, because he served on four court levels: the Municipal Court, the Superior Court, the Court of Appeal, and the California Supreme Court.

"Even more telling, though, is the fact that he was appointed to the bench four times by three very different governors—of both major political parties. Indeed, we could say his career is *sui generis*," wrote Ramirez, who paid tribute to Arguelles as his friend and mentor.

Arguelles would come to be known as a steady, even-handed and conservative judge, and one who took a certain pride in the fact that his ascent was propelled by forces on both sides of the political spectrum.

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[2] John A. Arguelles, "Stepping Up to the California Supreme Court: Twenty-Six Years of Judicial Service at Every Level of the California Court System, 1963-1989," an oral history conducted in 2006, Institute of Governmental Studies, University of California, Berkeley, 2009. McCreery conceived of the *California Supreme Court Oral History Project*, initially, with but four justices in mind, who by 2005-06 had retired from the bench: Arguelles, Chief Justice Malcolm Lucas, Armand Arabian and Edward Panelli. The idea, she noted, was to produce interviews with justices who served overlapping time periods with a goal of offering a richer historical account of the lives and careers of justices who were pivotal at a historic time for the Court in the mid to late 1980s. Arguelles would be the second interview in the initial series - Panelli, Arguelles, Arabian, Lucas. Her work would go on to span her oral histories for nine justices. For more, see https://www.worldcat.org/search?q=au%3ACalifornia+Supreme+Court+Oral+History+Project.&qt=hot_author and "California Leads in Oral Histories of State Supreme Court Justices," California Supreme Court Historical Society Review, Spring/Summer 2020, https://www.cschs.org/wp-content/uploads/2020/06/2020-CSCHS-Review-Spring-Oral-Histories.pdf.

It was that steady hand as an efficient administrator that made him a key figure in rebalancing the California Supreme Court after the unprecedented rise and fall of Chief Justice Rose Bird,[3] whose controversial tenure from the late 1970s to the mid-1980s was marked by an ardent liberalism that weighed heavily on voters of the era. It was an era when the electorate was more sympathetic to more conservative policy platforms, among them capital punishment.

As we'll see in Arguelles' own words, while Bird's liberalism propelled much of the swift reversals of death penalty cases from the lower courts, he'd been troubled from the start in Gov. Jerry Brown's decision to appoint a chief justice with no experience on the trial or appellate benches, let alone administering the state's highest court and its judicial system.

While we shine a spotlight here on Arguelles' elevation to the California Supreme Court, a focus solely on Arguelles' pivot to the Supreme Court and any of his assessment of the Bird era would do little justice to the journey he forged on his own path to the bench.

He was the court's second Latino justice. From working-class origins, his journey to the highest court in the state was not at all foreseeable at the beginning.

"I just personally had a wonderful career, and I happened to be at the right place at the right time, when the wind conditions were such that good things happened to me in all those years along the way," the humble jurist tells McCreery.

So, to get to his California Supreme Court moment, we need to set the table, with help from McCreery's oral history[4] to better understand Arguelles' roots and public service, which coincide with a growing post-World War II Los Angeles, a burgeoning UCLA Law School and a cascading court system.

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[3] Chief Justice Rose Bird was the first woman appointed as a justice of the California Supreme Court and the first woman to serve as Chief Justice of California, and chair of the Judicial Council. Appointed by Gov. Edmund (Jerry) Brown Jr., she led the Court from 1977 to 1987. She died in 1999, after a battle with breast cancer. (https://www.cschs.org/history/california-supreme-court-justices/rose-elizabeth-bird)

[4] McCreery's oral history interviews with Arguelles were recorded over four days in the fall of 2006 at the law firm, Gibson, Dunn & Crutcher, in Irvine, where by then he was working as Of Counsel. As McCreery notes in the preamble to the full Q&A, he was "charming and distinguished, he addressed each topic with candor and insight. Through it all, he made certain our time together was both productive and pleasurable. He later chose to edit his draft transcript thoroughly, changing or eliminating words and phrases and excising selected passages. The final transcript is a more abbreviated and formal document than the draft." For brevity, we use portions of McCreery's oral history to focus in on Arguelles' elevation to the Supreme Court and the context around the moment. For a closer look at Arguelles' life and times, UCLA School of Law paid tribute to him in a virtual panel discussion on March 22, 2022. The video of the presentation, linked here, offers up not just a discussion of his impact but also shares audio recordings of Arguelles speaking about his life and times. "Celebration of California Supreme Court Justice John A. Arguelles '54," https://www.youtube.com/watch?v=ezAVCR3bp1c. A UCLA Law audio interview with Arguelles is also at https://www.youtube.com/watch?v=VebFpRKOoRQ.

A 'HAPPY CHILDHOOD'

Arguelles' story aligns with the explosive growth of the L.A. suburbs following World War II, including the emergence of UCLA Law School and the rise of a generation of judges who as leaders would further develop the state's court system and its jurisprudence.

Despite the heights he would reach as a civic leader and jurist, it was a legal career that was anything but a given for a young Arguelles, born in working-class L.A. and raised amid modest means in an era shaped by the Great Depression and World War II.

Even with the extraordinary challenges of his era, as Arguelles describes it, his was a "happy childhood," where his and his sister Gloria Jean's father - an accountant by trade, and a Mexican immigrant – and their mother, herself trained in secretarial skills and from the Midwest – shielded their children from the harsh realities of the times.

"We were just normal happy little kids attending Winter Gardens Elementary School with our playmates," he tells McCreery. "In those difficult days, all of the neighbors in the area would help each other. We were all in the Depression together."

But it was an early life devoid of many mentors who could see him through something like a legal education.

Not that he would necessarily see that as a liability. Indeed. In a full read of McCreery's Q&A, Arguelles seems to embrace his self-made career journey.

In an interview with UCLA Law School a month before his death[5], in April 2022, he recalled his early years at L.A.'s Garfield High School, where a quote from President Garfield inscribed along the school's proscenium archway stuck with him.

"The inscription read," recalled Arguelles, ""There is no American youth, however poor, however humble, orphaned though he may be, who may not rise through all of the grades of society and become the crown, the glory, the pillar of his state, provided he have a clear head, a true heart and a strong arm.""

"It's a wonderful quote, and I tried all my life to live by it."

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[5] UCLA Law News, "In Memoriam: Former California Supreme Court Justice John A. Arguelles," April 21, 2022, https://newsroom.courts.ca.gov/news/memoriam-former-california-supreme-court-justice-john-arguelles. For a closer look at Arguelles' life and times, UCLA School of Law paid tribute to him in a virtual panel discussion on March 22, 2022. The video of the presentation, linked here, offers up not just a discussion of his impact but also shares audio recordings of Arguelles speaking about his life and times. "Celebration of California Supreme Court Justice John A. Arguelles '54," https://www.youtube.com/watch?v=ezAVCR3bp1c. A UCLA Law audio interview with Arguelles is also at https://www.youtube.com/watch?v=VebFpRKOoRQ

While he would come to value getting an education and learning a skill, just how his career would manifest was not a foregone conclusion, even by the time he enlisted in the U.S. Navy, in which he served at the end of World War II.

But buoyed by the $75 each month he received from the G.I. Bill, Arguelles would find himself at UCLA, a choice of university that came down to following a cousin's footsteps into school and the modest cost compared to a private institution such as USC.

As an undergraduate he would start carving out a path, making the daily commute in an old 1940 Chevy to campus from East L.A. to Westwood and back.

It was a winding path, to be sure, and certainly one that did not foreshadow becoming the first UCLA alumnus to serve on the state's highest court decades later.

"In 1946 I didn't know what I wanted to major in. All I knew is that I wanted a college education," he said.

While taking science classes to become an optometrist at the rapidly growing UCLA, he found that courses such as political science, government, economics and history were the ones that stirred his passion.

John Arguelles and Martha Rivas-Sanchez (center) on their wedding day on May 3, 1958, in Palm Springs, along with best man Dr. Jose de los Reyes and his wife, who was made of honor. (Photo courtesy of the UCLA School of Law Image Archive and Jeanine Arguelles.)

THAT PASSION LED TO A SWITCH TO MAJORING IN ECONOMICS.

As he tells McCreery, "My grades picked up immediately. I scored As and Bs in all my courses in economics, whereas I had been a C student in physics and chemistry. I graduated in 1950 with a bachelor's degree in economics."

And so, the course for a future that may have led to medicine instead began to shift toward law.

Graduation would lead to a low-rung job at a downtown L.A. securities firm. That would lead to a then-still nascent but growing UCLA Law School, where he was propelled by a sense that a career in law would enable him to be "in charge of my own destiny."

It was at UCLA Law[6], from 1951 to 1954, where a young Arguelles would be exposed to great legal minds of the day.

In McCreery's interview, Arguelles' recollected the faculty at the then young Westwood law school[7]: There was Roscoe Pound, by then a "legendary" legal scholar who had been dean of the Harvard Law School but in Arguelles' first year was visiting professor at UCLA, where he taught a course in equity. There was Roland Perkins, who taught criminal law. Harold Verrell[8] taught first-year property law. Richard Chadbourne for evidence. There was Ralph Rice, who taught taxation. And there was the dean of the law school, L. Dale Coffman,[9] who taught first-year torts. The young Arguelles liked him. But even Arguelles acknowledged that his confrontational style would "scare the hell out of you."

Of course, it was a very different era socially. Arguelles' graduating class in 1954 – just the third to graduate from the new school – reflected that. As he recalled – the class had 98 men and two women, and was devoid of the kind of diversity schools strive for now.

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[6] The Arguelles oral history also offers enlightening context and insights on the beginnings of UCLA Law, which opened in 1949 in temporary barracks behind Royce Hall. Eventually, the law school building was completed in 1951, and founding Dean L. Dale Coffman (whose deanship spanned 1949-58) presented the 44 members of the inaugural graduating class with their degrees in 1952. Source: "History of UCLA Law School," UCLA Law, https://law.ucla.edu/about-ucla-law/history#:~:text=On%20July%2018%2C%201947%2C%20California,1951%2C%20and%20founding%20Dean%20L.

[7] For a great history on UCLA Law, check out "History of UCLA School of Law: A History of Innovation," by Dan Gordon, UCLA Law Magazine, Volume 27, Fall 2004: https://law.ucla.edu/sites/default/files/PDFs/Publications/UCLA_Law_Magazine/UCLALawMag_Fall2004.pdf.

[8] An oral history with Verrell can be found in California Legal History, 11 Cal. Legal Hist. 1 (2016), https://www.cschs.org/wp-content/uploads/2014/09/Legal-Hist-v.-11-Oral-History-Verrall.pdf.

[9] Winston Wutkee, "From the Oral History of L. Dale Coffman, 11 Cal. Legal Hist. 1 (2016), https://www.cschs.org/wp-content/uploads/2014/09/Legal-Hist-v.-11-Oral-History-Coffman.pdf.

Among the women were Bonnie Lee Martin,[10] who later became an L.A. County Superior Court judge, and Joan Dempsey Klein,[11] who went on to become a celebrated champion of women's rights and the first woman to become presiding judge of a California appellate court.

John Arguelles (right) poses with (from left) his father, Arturo Leopoldo Arguelles; his wife, Martha Arguelles; Gov. Edmund G. "Pat" Brown; and his mother, Eva Powers Arguelles, upon announcement of his first judicial appointment to the East Los Angeles Judicial District of the Los Angeles Municipal Court, in November 1963. (Photo courtesy of the UCLA School of Law Image Archive and Jeanine Arguelles.)

[10] Martin was the first woman selected as outstanding trial judge of the year by the Los Angeles County Bar Association. Times Staff Writer, "Bonnie Lee Martin, 74; Judge in L.A.'s Municipal and Superior Courts for More Than 2 Decades," L.A. Times, April 9, 2005.

[11] Deborah Netburn and Anh Do, "Joan Dempsey Klein, a California appellate court judge and a champion of women's rights, dies at 96," L.A. Times, Jan. 3, 2021, https://www.latimes.com/california/story/2021-01-03/justice-joan-dempsey-klein-obituary.

ARGUELLES' WORKING-CLASS ROOTS WEAVED THROUGH HIS TIME IN SCHOOL.

In the summer of 1953, he was a swimming instructor for the City of Montebello, heading a team of instructors. He'd work swing shifts on the assembly line at the Chrysler Motor Company in Maywood at night.

We learn that his early jobs included: shoe salesman for J.C. Penney on Whittier Boulevard, a salesman for Thrifty Drug Store in liquor and tobacco.

A "man of the people" persona begins to emerge.

"You quickly learn to identify with the people that are out there doing those kinds of jobs," he tells McCreery. "I was not an elitist." All the while, his mother worked as a typist, paying rent, buying the groceries – a fact that Arguelles did not take for granted when all those years later he would sit down with McCreery in 2006. "She carried me," he said.

Judge John Arguelles (left) with Gov. Ronald Reagan at the time of his elevation to the Los Angeles Superior Court, September 1969. (Photo courtesy of the UCLA School of Law Image Archive and Jeanine Arguelles.)

It wouldn't be long though until he was making a name for himself. And that name would travel well, catching the attention of governors and earning a robust career.

- 1955: Admitted to the bar
- He'd soon start a private practice with his cousin, becoming a registered legislative advocate in Sacramento.
- He became president of the East Los Angeles/Montebello Bar Association.
- 1957: He was one of the founding members of the Mexican American Bar Association of Los Angeles
- 1963: He was elected to the Montebello City Council.
- Just before he was to begin serving as mayor, he was appointed to the Municipal Court, East Los Angeles District, by Gov. Edmund G. "Pat" Brown.
- 1969: He was appointed to the L.A. County Superior Court by Gov. Ronald Reagan.
- 1977-79: He was appointed by the Chief Justice to be a member of the California Judicial Council.
- 1984: Appointed to associate justice for the Second District Court of Appeal by Gov. George Deukmejian
- 1987: Appointed to the California Supreme Court by Gov. George Deukmejian

THE SUPREME COURT BECKONS

Flash forward to 1986. By then, Arguelles' judicial career, which began at age 36, was nearing a horizon. Nearing 60, the then associate justice at the Second District Court of Appeal was within a year of retirement.

But even as he envisioned more time with family, the ever-changing political zeitgeist in California at the time was beginning to play to Arguelles' more conservative brand of jurisprudence.

The rise of a Republican governor – George Deukmejian (from Southern California no less – like Arguelles) exemplified a California whose politics at the executive state level had shifted from Brown's liberalism leading into the early 1980s to Reagan-era conservatism.[12]

[12] Kevin Starr, "The Southern Californizing of Our Politics," July 6, 1986, Los Angeles Times, https://www.latimes.com/archives/la-xpm-1986-07-06-op-23269-story.html.

By 1986, Deukmajian's re-election only affirmed a brand of conservatism that contrasted with the foundations of the Supreme Court that Jerry Brown – Deukmejian's predecessor – had created.

After all, Deukmajian had built his campaigns around fighting crime, doubling down on the state's criminal-justice stance and shoring up its leaky finances.[13]

Gov. George Deukmejian and Justice John A. Arguelles, whom the then governor had nominated to serve on the California Supreme Court. (Photo courtesy of the UCLA School of Law Image Archive and Jeanine Arguelles.)

[13] Claudia Luther and Richard C. Paddock, "George Deukmejian dead at 89, public safety and law-and-order dominated two-term governor's agenda," Los Angeles Times, May 8, 2018, https://www.latimes.com/local/obituaries/la-pol-ca-george-deukmejian-dies-20180508-story.html.

It would not be long before Arguelles would soon find himself on the forefront of a historic moment for the Supreme Court: A retention election, in which the Bird Court's very survival was at stake.[14] [15]

It's in this historic moment where we pick up with McCreery and Arguelles.

We find a "no-nonsense" jurist who eschewed partisanship, proud of hard-fought tenures as a trial lawyer, a Montebello city councilman, becoming a judge at the municipal court, Superior Court and appellate levels – but ready to leave it behind.

History, it seems, would have another idea.

He was one of a fresh slate of jurists to emerge after what would ultimately be the departure of Justices Rose Bird, Cruz Reynoso,[16] and Joseph Grodin,[17] at a defining moment for the Court. Here, we find an Arguelles who could almost see the moment coming: "The governor put her in a very, very difficult position, and it didn't work out too well. It almost had disaster written all over it from the inception." In the excerpt below, McCreery dives into this moment, probing Arguelles' perspective on the rise of Rose Bird and her court. Here, we find Arguelles wary of impending "disaster," concerned that the court's integrity would be strained by an activist chief justice, appointed as a change agent, bent on overturning death penalty cases.

And from there, we go on the adventure with Arguelles, who had to make a big decision: Do you retire, or do you take up the historic task of being a justice of the highest court in the state?

Editor's Note: *Please note that portions of the original Q&A were edited for brevity. We also added footnotes, for added context. For a full version of McCreery's Oral History with Arguelles, and others, and for more information, visit the UC Berkeley Library at https://www.lib.berkeley.edu.*

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[14] In California, every four years, more than a third of California's 99 court of appeal justices face California voters for retention. Also, several of the seven justices on the California Supreme Court face retention elections every four years. The voters simply decide whether the justice shall continue to serve. If a majority of voters cast "yes" votes for a particular justice, that justice remains for another term, which is 12 years. The retention vote for Supreme Court justices is a statewide vote. "Appellate Retention Elections," https://www.courts.ca.gov/7426.htm#:~:text=Every%20four%20years%2C%20more%20than,may%20run%20against%20the%20justices.

[15] Today, and for the past 10 years, the California Supreme Court has hit a stride. Since 2011, for instance, 85% of the court's decisions have been unanimous, according to data from the California Constitution Center. That has coincided with relative calm among the justices, and the public. But in 1986, the Court was a lightning rod for public ire over capital punishment in a very different political climate: Byrhonda Lyons, "Four justices vie to keep spots on 'collegial' California Supreme Court, CalMatters, Oct. 25, 2022. (https://calmatters.org/justice/2022/10/california-supreme-court-ballot-collegial)

[16] Cruz Reynoso was the first Latino state Supreme Court justice in California history. On the Court, he is perhaps most known for authoring the landmark *People v. Aguilar*, (1984) 35 Cal.3d 785, where the court found non-English speaking people accused of a crime have the right to a translator during their entire court proceeding.

[17] Merrill Balassone, "In Memoriam: Justice Cruz Reynoso," June 14, 2021, https://supreme.courts.ca.gov/news-and-events/memoriam-justice-cruz-reynoso.

An Oral History | An Excerpt

THE BIRD COURT, THE DEATH PENALTY AND 'AN OVERNIGHT CHANGE'

McCreery:
Justice Arguelles, let's return, if we might, to the subject of the overall California court system. We had spoken yesterday about Chief Justice Don Wright[18] and the extent to which you knew him and worked with him and so on. Of course, going back to before your time on the Court of Appeal, he had retired from the California Supreme Court, and Governor Jerry Brown had appointed Rose Bird his successor as chief justice. Can you just reflect for a moment on that event, as we said, occurring when you were on the Superior Court, and what sort of impression that made upon you?

Arguelles:
It was a remarkable appointment and very unusual.

In my experience, members of the Supreme Court had worked themselves up through the judicial ranks, and I felt that that was the best way of preparing oneself for an eventual role on the appellate courts.

I knew that my own years on the trial court were invaluable in preparing me for the appellate court.

But Gov. Jerry Brown was unorthodox in many of the things that he did. As I recall he had a personal friendship with Rose Bird[19] that stemmed back to their college or law school days.

She had been a former deputy public defender and civil rightist. For the governor of California to appoint someone to the Supreme Court without

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[18] Wright was chief justice of the California Supreme Court from 1970 to 1977. In 1953, he accepted appointment to the Pasadena Municipal Court and served until 1960 when he was elected to the Superior Court of Los Angeles; and in 1967 he became the presiding judge of that court. Gov. Ronald Reagan appointed him to the state court of appeal in 1968, and then in 1970 appointed him chief justice of California. Julian H. Levy, "Introduction to the Oral History of Donald R. Wright," From remarks presented at The Chief Justice Donald R. Wright Memorial Symposium on the California Judiciary at the University of Southern California, November 21, 1985, sponsored by the Judiciary Committee of the California State Senate, et al, https://www.cschs.org/wp-content/uploads/2022/01/Legal-Hist-v.-9-Oral-History-Chief-Justice-Donald-Wright-full-text.pdf.

[19] Bird was known as one of Brown's most trusted advisors. She was the first woman to serve on the California Supreme Court and only the second woman in the nation to lead a state court, following Susie M. Sharp, chief justice of North Carolina. In 1975, before her elevation to the Court, Brown appointed her secretary of Agriculture and Services, an agency of state government that employed 18,000 persons in 11 departments. It was known as a demanding job. She became one of two women to be named to a cabinet-level rank in the Brown administration, the first in California history. Robert P. Studer, "Rose Bird Immersed in Controversy," San Diego Union-Tribune, March 1, 1977, https://www.sandiegouniontribune.com/news/local-history/story/2020-03-01/rose-bird-immersed-in-controversy.

that person having had a day of trial experience or a day of experience at the intermediate court of appeal level was extraordinary.[20]

Now, all of a sudden that person, a stranger, was coming in as the head of the California justice system. It was very interesting, to say the least.

McCreery:
What sort of tone did she set as you recall it from the Superior Court bench?

Arguelles:
With her own appointment and the addition of other Jerry Brown appointees to the Supreme Court, it was a whole different ball game. Bird was chief justice. She would preside over the Supreme Court and the meetings of the Judicial Council. She would select the members of the various committees of the Judicial Council. She would determine who would sit as pro tems on the Supreme Court if there were any reasons for certain sitting justices to recuse themselves or be absent.

The Supreme Court had always had a moderate-to-conservative approach on all matters, both criminal and civil, and she brought a more liberal perspective to the Supreme Court.

Statistically, in the area of criminal law, there was an abrupt change in the philosophy of the Bird Court towards criminal proceedings, particularly in the area of the review of death-penalty appeals.[21] Her arrival brought extraordinary change.

McCreery:
As we know, nationwide there was a fresh look being taken at the death penalty, with it suspended at a national level for a time, and then the states were free to reinstitute it as they saw fit. How did California's situation, in your view, tie in with what was happening nationally in that regard?

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[20] While she had never been a judge, what Brown did like was Bird's reputation as an innovator as he sought a successor to Wright. Earning her law degree from Boalt Hall at UC Berkeley in 1965, she became the first woman in the Santa Clara County Public Defender's Office. She had also clerked at the Nevada Supreme Court. By the time she was in the Brown administration, she had her critics who knew her as a tough bargainer. While she was serving in the public defender's office in Santa Clara, she prepared a brief that persuaded the U.S. Supreme Court to refuse to hear a case that had been appealed by the attorney general of California. The case, *People vs. Krivda*, involving a search of a garbage can, developed the concept of independent state grounds. While at the public defender's office, she founded the public defender's appellate branch. (Robert P. Studer, "Rose Bird Immersed in Controversy," San Diego Union-Tribune, March 1, 1977; but see, California v. Greenwood (1988) 486 U.S. 35, 38, 43.

[21] For a piece arguing that it was Bird's ardent opposition to the death penalty that was a catalyst for the vote against her, see Patrick K. Brown, "The Rise and Fall of Rose Bird: A Career Killed by the Death Penalty," http://www.cschs.org/wp-content/uploads/2014/03/CSCHS_2007-Brown.pdf.

Arguelles:
All I can recall about that turbulent period was that it became apparent in the months and the years that followed that the Bird Court was not disposed to carry out any of the death-penalty convictions, that there was a feeling by a majority of the members of the court that the death penalty was something that should be scrutinized carefully in our court and rarely applied.

One way of scrutinizing it was to determine whether there had been errors in death-penalty convictions of such a magnitude that the penalty should be set aside and the matters remanded for a new trial.

The Bird Court was very prone to do just that, finding prejudicial error warranting reversal that I myself felt was harmless error.

McCreery:
But you're saying the change was fairly dramatic during this period?

Arguelles:
Oh, it certainly was, extremely dramatic. It was just an overnight change.

McCreery:
What did you personally think of that, may I ask?

Arguelles:
I was always a conservative judge.

I felt that the death penalty was appropriate in certain extreme cases.

I had no quarrel with the law as it existed then. I sat as a trial judge on many death-penalty cases. I too heard the testimony in all of the trials that I presided over, when twelve citizens just like you and I, of diverse backgrounds and temperaments, unanimously, twelve to nothing, concluded that a person had committed a murder and that the circumstances of the murder were so extreme that the death penalty was warranted.

McCreery:
As a practical matter, what tangible changes did she make in the court administration system that might have affected you on the Superior Court? Or as time went on, you were elevated to the appeals court, of course.

Arguelles:
The big thing in those days that everybody seems to remember was the new approach that the California Supreme Court was taking to the resolution of death-penalty appeals and the number of reversals.

It was not leaving a good taste in the mouths of the California electorate. It was a subject of ongoing wonderment by the trial judges of California as well, including myself.

We trial judges were struggling to handle these very difficult cases, to see a trial through to its conclusion, to avoid error, to assure defendants the fairest trial we could give to them under the totality of circumstances.

It was disheartening to have our well-intended, best-effort results reversed on appeal because of perceived trial error, particularly when trial judges felt that there was an overreaching to accomplish that result. It was disheartening.

McCreery:
When you say overreaching, can you expand on that a little bit?

Arguelles:
A majority of the California Supreme Court members finding prejudicial error, when as the trial judge we had coped with the same arguments during post-trial motions and had concluded otherwise.

A lot of their decisions almost seemed to have been result-motivated. A trial judge couldn't help but feel a certain amount of resentment when the Supreme Court members reading cold transcripts weren't actually there at the trial listening to the testimony, seeing and hearing the witnesses, evaluating credibility, listening to arguments and so on.

I just felt that the trial judges were in a better position to have understood the totality of the drama that was being played out before us, to field and consider the various motions, and to have been able to evaluate whether they were sincere motions that had some meritorious muscle to them or whether they were just perfunctory arguments without basis.

Reading a cold transcript many years later, four hundred miles away, is different than having been at the actual trial scene. And to have one death-penalty case reversed after the other—a pattern emerges, and you begin to wonder. Maybe I was wrong in one particular case, maybe. I don't think so, but perhaps I was. But were all of the other judges wrong too? All of us?

McCreery:
Was this much discussed among you and your colleagues?

Arguelles:
Probably, to some extent. Yes. It just seemed like we had a Court where the majority of the members were result-oriented rather than issue-oriented and approaching death-penalty cases with a certain agenda.

McCreery:
We know that only about a year and a half later after Rose Bird was appointed, in the fall of 1978, she faced her first retention election, and a couple of others would have also been up for retention at that time. By then there was already some move afoot on the part of some persons to try to unseat her.

Arguelles:
Is that right? That early? That could also have been partially based on the fact that it was a referendum on the wisdom of Jerry Brown's appointment of a woman to head the California justice system without her having had any experience on the court.[22]

Maybe it wasn't so much the decisions that were being rendered, although that might be part of it, but also a review of the wisdom of having selected one that didn't look like she was prepared for that position.

But you tell me. Was that the basis of the opposition in '78? I wouldn't be surprised.

McCreery:
There was some at that time, and then, of course, by the time the other election came along—there was an intervening one in 1982—but by the time the '86 election[23] came along, there was quite an organized opposition and had been for some time, targeting, of course, both Chief Justice Bird and then the two of her colleagues, Justices Reynoso and Grodin.[24] But I just wondered if you remembered hearing much about attempts to make her a target at election time, … .

Arguelles:
There might have been, but I don't recall that earlier effort to unseat her. I didn't play any role in that. Judges did not get involved in that.

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[22] Friends reportedly said Bird confided in later years that she wished Brown had made her an associate justice, rather than chief justice. Brown said in an interview that she never objected to the appointment. Many believe she might have remained on the Court if she'd been an associated justice. Maura Dolan, "Ex-Chief Justice Rose Bird Dies of Cancer at 63," Dec. 5, 1999, Los Angeles Times, https://www.latimes.com/local/obituaries/archives/la-me-rose-bird-19991205-story.html.

[23] Note that the three other justices on the Court who were on the ballot did not face organized opposition, and retained their seats easily: Justices Stanley Mosk, Malcolm M. Lucas and Edward A. Panelli. Frank Clifford, "Voters Repudiate 3 of Court's Liberal Justices," Nov. 5, 1986, Los Angeles Times, https://www.latimes.com/archives/la-xpm-1986-11-05-mn-15232-story.html.

[24] Gov. Jerry Brown tapped Grodin as an associate justice for the California Supreme Court in 1982. He had been sitting on the Court of Appeal, where he authored the decision in *Pugh v. See's Candy* (1981), a landmark opinion affecting worker's rights. But his tenure on the Supreme Court would meet the same fate as Bird's in 1986. Faculty, UC Law San Francisco, "UC Law SF Celebrates Joseph R. Grodin's Legacy on 90th Birthday," Aug. 28, 2020, https://uclawsf.edu/2020/08/28/joseph-grodin-legacy.

McCreery:
No, I understand.

Arguelles:
Elected officials would pick that up and make it a political issue. They would have had a lot to work with in those particular days. There undoubtedly were many anti-Bird people, and outspoken pro-Bird people as well.

By the way, you just mentioned Cruz Reynoso and Joe Grodin. Have you interviewed them?

McCreery:
I have not, but they have been interviewed by others of my colleagues, yes. Both were just interviewed in the last couple of years.

Arguelles:
They'd have a lot to add to this. I'm sure that their experience on the court was not particularly pleasant. No one wants to be defeated at a retention election. It's just a horrible slap in the face when you go down to defeat, particularly since no California Supreme Court justice in the history of California since retention elections were instituted had ever been defeated, let alone three of them in one election.[25]

McCreery:
Let me ask you to recount your version of events in that 1986 election. Just how do you remember what transpired that resulted in the three justices losing their posts?

Arguelles:
There was a statewide hue and a cry about the Bird Court. There was a general perception by a majority of California registered voters that the Bird Court had indicated rather clearly that it was adverse to the imposition of the death penalty, despite the findings of trial jurors, and contrary to the overall sentiment of the California electorate that was in favor of the imposition of the death penalty in the extreme cases where it was warranted.

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[25] Despite their fate in the retention election, Both Reynoso and Grodin would be known for distinguished careers, even after their tenures. In 2000, President Bill Clinton awarded Reynoso the Presidential Medal of Freedom, the nation's highest civilian honor given to leaders who "have helped America to achieve freedom." Kevin R. Johnson, "Justice Cruz Reynoso: The People's Justice," https://www.cschs.org/wp-content/uploads/2022/01/Legal-Hist-v.-10-Oral-Hist-Section-Peoples-Justice-full-text.pdf. In 2020, on his 90th birthday, UC San Francisco Law celebrated Grodin's legacy of scholarship and his mark on law and public policy.

The hue and the cry was apparent. Radio talk-show hosts, magazine articles, newspaper articles, the op-ed sections of newspapers where citizens can voice their concerns, editorial policy, the rantings of public figures and members of the Republican Party from the governor on down. It was a turbulent period leading right up to the retention election itself.[26]

I imagine that Rose Bird and the two other members of her court who were up for retention that year were sleeping a bit fitfully. And then, of course, we know the election result in 1986. As I earlier said, it was a historical event to not only have the chief justice of California fail to be retained by, I think, a rather substantial margin. She not only lost her own position, but she took two of her colleagues with her.

As I recall that was the first time in California's history since the retention electionshad been enacted that a member of the court had ever failed to be retained, let alone three of them at one time. It was a significant statewide rebuff of the supreme court. It was an indication of great dissatisfaction with the court. How else could it be characterized other than that? The voters had spoken and the results were quite clear, weren't they?

McCreery:
The '86 election was unusual in that six of the seven justices were up for retention that year. That's something we don't think of in recalling it. We think of those who lost their positions at that time, but even the newest justices, Malcolm Lucas and Edward Panelli, were retained that year. But, of course, for them it was not a problem.

Arguelles:
Thank you for refreshing my recollection. Lucas and Panelli were on the court at that time. They were appointees of George Deukmejian, and they had probably written dissents to some of those death-penalty reversals. So being appointees of a governor that was leading the attack on Bird and those others that had joined her in wanting to reverse death-penalty convictions, I'm not surprised one bit that Justices Lucas and Panelli were able to avoid the wrath of the California electorate. Editorially, they probably were protected as well by the newspapers who urged their retention.

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[26] One major emotional appeal in the media campaign against Bird and her colleagues was that of Marianne Frazier, of Huntington Beach. One 30-second spot showed Frazier, the mother of a 12-year-old girl, sitting next to a framed photo of her daughter, who had been kidnapped and murdered. "But the man who kidnapped and killed her is still alive," Frazier lamented in the spot, urging voters to unseat the justices who overturned the killer's death sentence. Excerpt from Kathleen A. Cairns, The Case of Rose Bird, pg. 212, 2016, The University of Nebraska Press.

In the case of Stan Mosk[27], he had been such a veteran member of the Court that I think he was probably viewed by editorial commentators on his entire record, which was a very fine record of judicial service. He was likely viewed as a statesman whose steady hand was needed on a new court if others were to leave. You have to remember that those that were not retained had all relatively short tenures on the court, certainly not of the duration of a Stanley Mosk.

McCreery:
Just as a general principle, what did this call to your mind and that of your colleagues, the whole idea of sitting judges being targeted by people who want to see them out, and also the idea of the electorate getting to decide whether judges stay or go?

Arguelles:
I can't speak for other judges. I can give you my own reaction. It's part of the Constitution.

We have retention elections for an important purpose. California state judges are not like federal judges. We are not appointed for life. We have to face the electorate periodically, but unlike members of the House of Representatives we don't face them as often as every two years. We have longer terms of office.

I think it's appropriate that our appellate justices come up for retention elections periodically, and with very rare exceptions they have nothing to fear.

I myself came up for several elections when I was on the trial court, the court of appeal, and on the supreme court, and people were taking a look at me, too. I think that's fine, frankly. I can't see anything wrong with it. I believe it can be therapeutic.

BIRD ERA ENDS, ARGUELLES ELEVATED

McCreery:
After that particular retention election in November of '86, when the electorate decided not to retain Chief Justice Bird nor Associate Justices Grodin and Reynoso, do you recall your immediate response to that outcome?

Arguelles:
I accepted the election results like every other Californian.

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[27] The Los Angeles County Courthouse was renamed in 2002 in honor of Mosk, who was the longest serving justice on the California Supreme Court and earlier served as attorney general of California. https://live-laconservancy-wp.pantheonsite.io/learn/historic-places/stanley-mosk-courthouse-los-angeles-county-courthouse/.

McCreery:
With no idea it would affect you so directly, as time went on?

Arguelles:
I may have had some vague idea, but that was not of particular importance to me at the time of the election.

McCreery:
Can you expand a little bit?

Arguelles:
In 1986, I was within a year of retiring. By then I had been on the court for 23 years. I was a veteran trial judge and to some extent an experienced intermediate Court of Appeal justice.

I was nearing my 60th birthday. I had been on the California courts since I was thirty-six, the best years of my life as a professional, so to speak.

Although I was sitting on the Court of Appeal and enjoying my work there, I was traveling long distances every day through the heart of California traffic. I was intending at that time, I thought, to probably retire when I reached age sixty.

The governor had been kind enough to appoint me to that appellate position. Upon retirement I would open up my position to someone else that he could choose to fill my spot. I'd return to my family and Orange County. I wasn't quite sure what I would then do, but I knew that there would be many options open to me. That was my general intention.

A lot of names quickly began to surface, and mine was one of them. I knew that the work was challenging, and it was a seven-day-a-week commitment, because there's an additional component to sitting on the California Supreme Court. It's not just working with staff and getting out opinions. A justice is a very visible person. You are in demand all over the state, from a speaking standpoint.

There are certain personalities that thrive in that kind of atmosphere, the public prominence and adoration. I'm not one of those persons.

In the years that followed, after I was one of the three that the governor selected, along with Dave Eagleson[28] and Marcus Kaufman[29].

It was my informed belief that the thinking of Governor Deukmejian at that time was that the California Supreme Court, as one of our venerable

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[28] Eagleson would serve from 1987 to 1991. In 1981 and 1982, he served as presiding judge of the Los Angeles Superior Court, and was elevated from the Superior Court to the Court of Appeal for the Second Appellate District.

[29] Kaufman served from 1987 to 1990, after 17 years as an Associate Justice of the California Court of Appeal, Fourth Appellate District, Second Division

institutions in California, had been crippled as a result of the 1986 retention elections. It was just like this big, magnificent battleship that had taken a torpedo, and it was floundering in the water.

It was important that he replace the members quickly, and he decided that he could stabilize the situation quickly by selecting replacements that had not only trial experience, but had also served on the intermediate court of appeal. Persons who could step in almost immediately and acclimate themselves to the responsibilities of office.

If this was George Deukmejian's thinking, it made perfectly good sense to me.

All of us were quite experienced, yet getting close to retirement. The governor put all three of us on the court at the same time, knowing that fact. His expectation was that we would each serve a sufficient period of time to, hopefully, stabilize the court. But I don't think any of us could guarantee the governor that we would remain on the court for the long haul.

I retired in 1989, Marcus Kaufman in 1990, and Dave Eagleson in 1991, if my memory serves me correctly. Governor Deukmejian was able to name all of our replacements.

McCreery:
Because the three of you were appointed at the same time under the circumstances you describe, how was it decided what your seniority would be?

Arguelles:
Straws were drawn up in San Francisco. Representing each one of us was the attorney that was going to be the head of our individual staffs. The three staff attorneys got together, and they drew straws.

McCreery:
And you came out first?

Arguelles:
I came out first.

McCreery:
That made you number 101 of the cumulative appointees to the California Supreme Court.

Arguelles:
That's what they tell me. [Laughter] I would like to think that my seniority was based solely on merit, personality, and all of my other sterling qualifications, but it occurred simply as a result of a random draw.

McCreery:
You've described the kinds of conversations you had with Governor Deukmejian ahead of time with regard to your being near retirement age, possible length of service. Was there anything explicit arranged in that regard about how long you'd serve?

Arguelles:
No, it was very general and only after he had winnowed down the number of persons that he was considering. He had to be assured that I was willing to take the position, and I at the same time wanted to be completely candid with the governor.

He expressed what he wanted to accomplish with his appointments as to stabilizing the court, and I understood and agreed. My only comment to him was that I could not commit myself to being on the court for a long duration. I shared with him what my original plans had been. That was the extent of our conversation.

I believe Governor Deukmejian felt that he had known me sufficiently over the years that he felt comfortable with my appointment.

Knowing what a principled man he was, he certainly would never ask me to commit to a particular agenda or anything like that. I have to make that perfectly clear. Nothing even remotely approaching that type of subject matter ever came up in my conversations with him.

McCreery:
But you're saying that there were some things that clearly the court needed to take on for whatever reason?

Arguelles:
There are so many examples. The current court right now that is wrestling with such issues as same-sex marriages, abortion issues, environmental concerns.[30] It is reviewing the constitutionality of legislative enactments.

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[30] Two years after McCreery's interview with Arguelles, on May 15, 2008, the California Supreme Court held that California marriage laws' exclusion of same-sex couples violates State Constitutional rights to privacy, liberty and equal protection. But later that year, voters approved Prop. 8, a constitutional amendment to ban same-sex marriages, and the Court upheld it. It made its way to the federal courts, where in 2009 a U.S. District Court held that Prop. 8 violated the U.S. Constitution's 14th Amendment. Ultimately, a U.S. Ninth Circuit panel affirmed that Prop. 8 violated the U.S. Constitution. On June 26, 2013. U.S. Supreme Court's majority opinion in *Hollingsworth v. Perry* held that proponents of California's Prop. 8 lacked standing to appeal the lower court ruling invalidating the measure as unconstitutional, restoring marriage equality for same-sex couples throughout California. San Francisco City Attorney's Office, "San Francisco's Legal Fight for Marriage Equality," June 26, 2014, https://www.sfcityattorney.org/2014/06/26/san-franciscos-legal-fight-for-marriage-equality-2. A year later, the U.S. Supreme Court decisively resolved the matter in *Obergefell v. Hodges* (2015) 576 U.S. 644, a 5-4 decision, with the majority opinion authored by Justice Anthony M. Kennedy.

There are certain matters reflected in case opinions that the court feels it's compelled to take to establish or settle California law.

In addition, there is a vast number of cases that the court would also like to take, strictly from an interesting, academic standpoint, but time just does not permit the court to do so. Even though you might like to take them you feel the necessity of denying review and letting the court of appeal opinion stand as an expression of California law.

You are also aware that the Supreme Court has the ongoing decision to make as to whether published opinions of the intermediate courts of appeal, which become California law by virtue of their publication, are a proper expression of what California law should be or whether they should be depublished so they cannot be cited. Then, there are some instances when we have two courts of appeal in the state that might come up with a different result on the same issue.

McCreery:
And then you have to resolve that.

Arguelles:
Under those rare circumstances we have to step in and resolve that. And then, to add to the mix, there are emergency writs that are filed, in addition to just reviews from courts of appeal decisions, that we have to quickly act on. It's a fascinating variety of legal matters, substantively and procedurally, that come before the Supreme Court. I had to decide where and how I would perform my new duties on the court, which is physically located in San Francisco.

Because I didn't want to be separated for long periods from my family in Irvine, I became a commuter from Orange County. At about seven o'clock every Monday morning I would be at the John Wayne Orange County Airport, flying to San Francisco to start my work week. Like Dave Eagleson and Marcus Kaufman, I had rented a small apartment within a few blocks of the San Francisco courthouse so that I could walk to and from work without being concerned about public transportation or needing a car in the Bay Area.

I furnished the apartment rather sparsely. I purposely did not include a television set. I didn't want any of the distractions of TV. I spent my daytime hours at the court building, then walked back to the apartment. Most of the time I'd have dinner alone in my little apartment, mostly packaged market-bought frozen dinners that you could pop into the microwave oven. I would have my dinner by myself while I was reading briefs. I would do that until ten or eleven and go to bed.

Five days later, at the conclusion of the work on Friday, I would catch a flight and I would head home to Orange County. My wife would pick me up at the airport, we'd run off to the dentist or to the bank, quickly catch up on things. Then we'd usually have dinner together on that Friday night, and I would ask, "How was your week?" She'd say, "Fine. How was your week?" I'd say, "Okay. I don't have too much to report. How did our kids get by? What's new with Evan or Cathy or Jeanine?" or something like that.

McCreery:
It's a very different life.

Arguelles:
Taxing, but necessary. My wife had her own business in Orange County that rooted her there, and we adapted to our new schedule of my being in San Francisco most of the week. But we would have our get-togethers on Friday evenings, going out to dinner after we had run some errands that could only be done when I was there. Then on Saturday morning at about, oh, nine or ten o'clock, Federal Express would arrive with the copies of the petitions for review calendared for the following Wednesday morning's review.

McCreery:
You're indicating with your hands a stack about a foot high, I see.

Arguelles:
I'm exaggerating. The first Lucas calendar that we had after the retention elections, with the court floundering for months, I remember the stack was quite high. But after a while it became manageable. Nevertheless, there was enough there that required my spending most of Saturday and Sunday reading the petitions.

Frequently I also had speaking assignments on the weekends as well. I considered that an essential function of my office, to get around as a visible representative of the court. I felt that public officials that are holding office owed it to the electorate to make themselves visible and accountable. But I could only take on a certain amount of outside appearances because the work of the court came first.

I was able to balance that pretty well. My weekends were occupied with reading petitions and attending to professional assignments wherever they were occurring. On Monday morning, I was gone again. I'm on that plane to San Francisco to start the next week.

That was a very rough outline of how I spent the time that I was on the court. And, you know, one-week folds into the next week, and one-month folds into the following month, and one-year folds into the one after. It was certainly an interesting and busy time in my life.

McCreery:
In the aftermath of the '86 election and the fact that Chief Justice Lucas was elevated to lead the court, and then three of you were new, what approach did he take to leading this court in this time of great change?

Arguelles:
He did what he had to do. He took over as chief justice. I had no basis of comparison as to whether he was doing things differently—

McCreery:
I'm recording again. I'm sorry, I turned that off accidentally on you. You were talking about Chief Justice Lucas taking over as leader of the court.

Arguelles:
Yes, and you were asking me about how he handled that. I think he handled it very well. Malcolm Lucas[31] had served with Rose Bird as one of her associate justices. He was a member of the court during more turbulent times and had probably been an observer of a lot of things that could be done better. His tenure as chief justice was relatively smooth by comparison. Malcolm was a very competent man, a very professional man, both in appearance and in demeanor and approach. He had all of the credentials. He had started his judicial career as an L.A. County Superior Court judge and was there for several years. Then he went on the federal district court and was a fine, respected federal judge for additional years.

Then he was an associate justice of the Supreme Court. When he became chief justice, the bench and the bar had respected his credentials from the very beginning, and he was well received.

When he spoke, he spoke from a background of experience. That background had an element of authority that the bench and the bar could

[31] Lucas served on the high court for 12 years, nine as chief justice after Bird. He was known to have steered the court to the right. Lucas vowed "to heal the wounds" when Gov. Deukmejian elevated him to the chief justice after Bird's departure. He was known for being approachable by other justices and easing tensions on the Court after a historically tumultuous period. Under his leadership, the court reportedly began upholding death sentences at a higher rate than any other supreme court in the nation. Maura Dolan, "Former Chief Justice Malcolm Lucas, who steered state's top court to the right, dies at 89," Sept. 29, 2016. https://www.latimes.com/local/obituaries/la-me-ln-malcolm-lucas-obit-20160929-snap-story.html

identify with. In addition to his professional credentials, he was a gracious man, a kindly man, a friendly person. As chief justice he went out of his way to encourage and develop camaraderie among the seven members of his court. He engaged all of us in a number of activities where we could do things together, attending functions en masse. We didn't break up into little subgroups.

He was a fine chief justice, in my opinion. He was very concerned about taking over a court that had been wounded in the eyes of Californians, and dedicated to righting the ship, so to speak, and processing the important work of the court.

Doing it in a very efficient, professional way. I had a lot of regard for Malcolm and still do. We remain good friends.

McCreery:
Were there other specific steps that Chief Justice Lucas took to remove the court from the spotlight in the state, following that election? How did he right the ship, to use your phrase?

Arguelles:
I can't recall any of the things that he specifically did, in direct response to your question. There were probably a number of things that had that result.

My general impression, as we sit here and I think about your question for the first time, is that he led by example and that the ship was righted because experienced people filled the void. The court stabilized and once again starting generating opinions and getting the workload out.

The justices of the court were individually making public appearances representing the court, hopefully making favorable impressions by what they said to reassure the audiences that the court was alive, well, and functioning properly. The backgrounds of the various individuals that were serving on the court I felt were impressive. There was nothing to indicate that the court was operating in any way other than efficiently and productively.

One answer to your question was the chief justice felt that it was imperative that we start vigorously attacking the great backlog of death-penalty cases. The inventory of death-penalty appeals was increasing and increasing. The chief felt they should receive priority.

You know the old adage of "justice delayed is justice denied," and I feel the chief justice was aware that the results of the 1986 retention election were due in great part to the feeling by Californians that the death-penalty cases

were not being handled properly by the Bird Court. He felt that we should concentrate primarily on the oldest of those cases, even though it meant that we had to put on hold important civil matters.

McCreery:
Thank you very much. With respect to those death cases and the great backlog that you've described, within this group now of seven justices, three of you brand new and Mr. (sic.) Lucas being newly elevated, what was the nature of, or what was the range of, approaches to the death cases? How contentious was that within your circle?

Arguelles:
I don't recall any contentiousness.

There might have been some cases where there was a disagreement, and there might have been some dialogue among the justices that disagreed with each other.

But that didn't occur often, and they weren't that contentious. A lot of times the ironing out of differences might have occurred at the staff level, without the justices necessarily becoming involved themselves.

McCreery:
Did your own views of the death penalty and all the associated issues evolve at all while you were on the state Supreme Court? Did anything happen to change your own opinions?

Arguelles:

I had developed a viewpoint gradually over all of the years that I had served on the bench. I think I carried to my role on the Supreme Court a certain philosophy about the area of criminal law in general, and death-penalty cases in particular, as a result of a vast accumulation of personal experiences that I had had in presiding over homicide cases and serving on the criminal courts for so long.

Whatever attitudes I had towards cases that came before me on the Supreme Court was just a reflection of the universe of experiences that I had had on the court up until that time. By that time we're talking about twenty-three years.

McCreery:
You've spoken briefly of each of your colleagues on the Supreme Court. Where was the center of this court, as it was newly reconstituted?

Arguelles:
Center of the court?

McCreery:
We always—at least the court watchers—think of it in terms of left, right, and center, but where was the middle?

Arguelles:
I don't believe we had any justice that was categorized as a "swing vote." They talk about swing votes on the United States Supreme Court, which has nine members. People ask, who are the centrists? Who is the swing vote that's going to make it five to four one way, or five to four the other way?

When I was on the court, I didn't discern that any justices occupied that position. If anything, perhaps I did. There were some cases where I would split with the chief justice and Panelli and Eagleson, and I voted a different way. I think there were a few instances when that occurred.[32]

But more frequently, if we didn't have a seven-to-nothing opinion, we would have a 5-to-2 opinion, with Mosk and Broussard in the dissent and the five Deukmejian appointees agreeing with each other. If you were able to go back and study the many opinions that were rendered by the court during the years that I was on the court, I think you would perceive that pattern. But there were a few instances when the majority, so-called conservative Lucas Court didn't quite break down that way. I myself might have been as close to a swing vote as anyone. But that didn't occur often enough for any of us to be labeled as centrist swing votes, if you follow me.

McCreery:
We've been talking about your time on the California Supreme Court, and you made passing reference to the fact that Chief Justice Lucas had previously been a federal judge, as well as serving in the California court system. But the federal system in particular is not the usual path to the California Supreme Court, and it's a bit of a different system. Do you feel that experience had any particular effect on his leadership of the California Supreme Court?

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[32] Arguelles usually voted with the more conservative, Deukmejian-appointed bloc on the Court, and that was evident in his death penalty and tough-on-crime approach. But he did part ways from the conservative majority in notable cases, showing his more judicially centrist colors. For example, as L.A. Times Legal Affairs Reporter Philip Hager noted in a 1991 article, Arguelles joined two liberal dissenters when the court abandoned a constitutional prohibition against unlawfully obtained confessions. Philip Hager, "Arguelles Back in the Middle," March 31, 1991, L.A. Times, https://www.latimes.com/archives/la-xpm-1991-03-31-me-2393-story.html.

Arguelles:
I don't know, but I do think that any experience that one acquires at different levels of our court system is valuable. He may have had experiences on the federal court that were unique and different than those that he had experienced as a state trial judge and as an associate justice of the state supreme court that he could bring to this new role as chief justice of California. I would think that his tenure on the federal court would have been a positive rather than a negative. That's just my general reaction.

McCreery:
You also talked about the fact that some decisions the group of you made unanimously, a seven-to-zero decision. Others were a bit more split up. But in general, what was this court's view of the importance of unanimity in some instances? Was that thought to be something to be sought after?

Arguelles:
You have to understand you have seven separate, distinct individuals that are all strong-willed men. There wasn't a single one of us that was going to subjugate his individual thinking about issues or results just because it would be nice to have a unanimous opinion. It just doesn't work that way. Desirable, but not essential.

McCreery:
But recognizing that all the justices had their different styles, were some of them more likely than others to lobby their colleagues for a certain result?

Arguelles:
I would call it discussion about issues. Once again, I want to bring out that sometimes unanimity occurs as a result of discussions with the justices and their staff members, the justices just among themselves, or the staff members just among themselves. The wordings of opinions that are not clear can be smoothed out.

I think that one of the objectives in our opinions—and I'll give credit to Justice Eagleson for having stated this objective—was that our opinions should be clear and should set forth "clear, bright lines." We should try to avoid equivocating or sending out mixed signals.

McCreery:
On what occasion did Justice Eagleson articulate this, do you recall?

Arguelles:
Probably just in passing. Maybe we were traveling on the plane or something like that. Dave's opinions were always clear and crisp, and maybe he was expressing his own philosophy. But if he expressed it in that way, it made sense to me. I'm using his words. If I had been called upon to indicate my own thoughts as to what should go into an opinion, I probably would have come to the same bottom-line recommendation, perhaps expressing it a bit differently. Dave had the capacity to reduce a concept to one or two words, but I recall his saying that opinions are more valuable if they set forth the reasoning in "clear, bright lines."

McCreery:
I wonder, who in this group of colleagues were you close to, and who could you talk things over with in a personal way?

Arguelles:
Every one of them. I never had a problem in approaching any of my colleagues. I also was very close to the head of my staff, Harold Cohen, known as Hal Cohen. He was brilliant, was well balanced, a superb writer, a clear thinker, a consummate gentleman. I developed great respect for his abilities.

He realized that it was my name that was going to go on the opinion, not his, and that it was his function to assist me in resolving the issues as properly as was possible, but with the clearest expression of the reasons why I had reached an opinion as possible. We were on the same wavelength in every respect.

Years later, when my friend Ronald George[33] became a member of the California Supreme Court, he was asking for my recommendations as to how he could best assume his new role. My first suggestion to him was, "Try to get Hal Cohen as a member of your staff." I understand at the present time that Harold Cohen heads the chief justice's staff and has for a number of years. So Chief Justice Ron George owes me a great debt of gratitude for making that recommendation, in my opinion. [Laughter]

Getting back to answering your original question, I probably spent more time with the chief of my own personal staff in dialogue than I did with other members of the court.

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[33] Ronald George was appointed to the Court in 1991 by then Gov. Pete Wilson. He was chief justice from 1996 to 2011, when he retired. Gov. Ronald Reagan appointed George to the Los Angeles Municipal Court in 1972, and then Gov. Jerry Brown appointed him to the Los Angeles County Superior Court in 1977. Gov. George Deukmejian appointed him to the California Second District Court of Appeal in 1987.

I also wanted him to sell my thoughts as reflected in the opinion to the staff members of other justices. When I had fault with some of the things that I had read in prepared bench memoranda from other justices, Hal would be the one that would negotiate with the staffs of the other justices. He would say, "Now, Justice Arguelles has a problem with this particular portion of your opinion," and we'd see if we could smooth it out.

McCreery:
Was that staff-to-staff contact, then, more usual than justice-to-justice?

Arguelles:
Probably, because there were more staff members than there were justices. I didn't do head counts, but my general feeling was that there was a great deal of dialogue among the various staff members, probably to a greater degree than between the justices themselves. But I guess it depended upon the justices.

McCreery:
Their own styles?

Arguelles:
In general, if philosophically I was in agreement with the majority of the justices on the court, there wasn't much reason for me to be dialoguing with them. If I was in disagreement with some of the other justices, but it was black and white and set in stone, I would probably have concluded that it would be a waste of time to try to see if the resolution of the difference could be achieved, and it would be easier to spend my time writing a dissent. That's my recollection of my experience on the court.

I don't recall having any strong differences of opinion with, say, Justices Mosk and Broussard that would have required my going in and pounding tables or desktops, as in many instances the two of them were in accord with the other five Deukmejian appointees. I probably had as much dialogue with the other Deukmejian appointees as to how we could best smooth out a majority opinion. Then there were occasionally cases where we just frankly disagreed as to a result.[34]

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[34] See Footnote 27. In another example of Arguelles' judicial centrism, he dissented when the Court, in a 4-3 decision, upheld the capital sentence of the killer of a Riverside high school coach, *People v. Boyd*. Arguelles said the Court went too far when it decided that procedural errors did not warrant overturning the death penalty. Arguelles argued the case should be set aside and a new penalty trial held because jurors had been improperly led to believe that their personal views of the case should play no role in deciding whether Boyd should receive the death penalty or life without parole. Under Chief Justice Malcolm M. Lucas' leadership (post Bird Court), the Court's Deukmejian-appointed bloc had been united on affirming and reversing capital verdicts, until this case. Philip Hager, "Death Penalty for Killer Narrowly Upheld by Court," Aug. 12, 1988, L.A. Times, https://www.latimes.com/archives/la-xpm-1988-08-12-mn-210-story.html.

McCreery:
That's where you would write separately?

Arguelles:
Yes, I'd write separately. I might even swing over to the other side in a few instances, according to what Bob Egelko[35] tells me I did.

McCreery:
Just in terms of broad issue areas, the California Supreme Court had over many years been thought a leader in the development of new law, for example in environmental law and that sort of thing. Recognizing that you were on the court a relatively short time, did you take a particular interest in any of these broad areas of developing law?

Arguelles:
I'm sure I did. I was restricted to evaluating and considering the cases that were before the court at the particular time. I couldn't reach out, for example, to pluck out of the vast collection of undecided cases that were waiting to be resolved, and say, for example, "I'm going to take this case, and I'm going to advance it ahead of all the others so that we can work on it right now."

That's not the way things were done. We took the cases pretty much in chronological order, although there was a concerted effort made to address the large backlog of death-penalty cases that had not been resolved. The record on appeal in those cases was very voluminous; they took a great deal of time.

McCreery:
I was just wondering if you had particular interest areas that you wanted to work on.

Arguelles:
I had an interest in everything that was before the court at that time. But I can't recall that I went into the position with a thought in mind that, I want to become an activist in selecting cases in a particular area.

McCreery:
I don't mean to suggest an agenda, but I just simply wonder if the things that did come before you ever sparked a particular interest or emphasis for you.

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[35] Bob Egelko is legal affairs reporter for the San Francisco Chronicle. His coverage includes state and federal courts in California, the Supreme Court and the State Bar. He has a law degree from McGeorge School of Law in Sacramento and is a member of the bar. (https://www.sfchronicle.com/author/bob-egelko)

Arguelles:
Every case that came before me sparked an interest as to the issues in that particular case at that particular time. I don't think I was on the court long enough to say that, "I developed an interest in this unique area of law as a result of my participation in this case, and I now would like to be the author of this new case that's come along that gives us an opportunity to expand on its predecessor." I was not on the court long enough to have experienced that phenomenon. Had I stayed on the court for a longer period of time, I suspect that would have happened.

McCreery:
Do you have any knowledge of Chief Justice Lucas' views on the matter of interpreting the state constitution versus the federal, and to what extent the state constitution should be consulted first and foremost; that is, the matter of state constitutionalism?

Arguelles:
No. My guess is that Malcolm Lucas, particularly by the time I joined him, was very conversant with California state law as a state Superior Court trial judge, and as an associate justice of the California Supreme Court. His federal days were behind him, and I think he realized we had a state constitution. That was the primary bright-light guide to the manner in which conduct in California was to be viewed. I don't believe that his years on the federal court resulted in his feeling that the California constitution should have a second-place status.

McCreery:
I'm not suggesting that his service as a federal judge would have any bearing on that. I was just wondering philosophically how he stood on that.

Arguelles:
I don't know, but it doesn't make any difference how he stood, because he had six other justices working with him, and the staffs of all of these justices. If he wandered far afield in that area he'd quickly be brought back to center.

McCreery:
All right. Your own thoughts about independent and adequate state grounds?

Arguelles:
No profound thoughts. It depends upon the issue. We'd take a look at it at that time. I don't want to generalize.

McCreery:
Of course, there are certain times when you must go to the U.S. Constitution.

Arguelles:
There are times when that was necessary, of course.

McCreery:
I was only thinking that there are those who would say that the reliance on the California Constitution was somehow falling by the wayside or becoming less important than it once had been in the court's history.

Arguelles:
I don't think that that was the feeling of the court that I served on. It wasn't my feeling.

McCreery:

I wonder if—again, recognizing your relatively short service—were there other changes to the court system in California that Chief Justice Lucas was working on, that seemed of burning importance in light of the great changes in the court itself?

Arguelles:
I'm sure that there were, unique to his role as chief justice.

We have to understand that the chief justice of California wears many hats. One is to preside over the work of the California Supreme Court, which means processing its workload in every sense of the word. Another hat he wears is as chairman of the Judicial Council, which requires a great deal of interplay with the judges all over California, at every level, and with the California state Legislature.

He's concerned as chief justice with a multitude of things that don't ever touch the desks of his associate justices, who are principally concerned with getting the supreme court caseload processed.

As chairman of the Judicial Council, the chief justice must make sure that the infrastructure of the California justice system is preserved. Through him, the legislature has to understand the importance of adequate physical facilities all over the state to house judges, the comfort of the jurors, sufficient judicial compensation and benefits to retain and attract the best. These concerns are just for starters.

The chief justice has to be concerned about the burgeoning caseload of the California judiciary at all levels, in view of California's increasing population.

He has to make sure that the legislature understands the need to provide the funds to increase the number of judges in California to meet that workload and the facilities that they occupy. He has to be concerned about the access of justice to the courts on the part of all the citizens of California.

McCreery:
I just wondered, administratively, if there were other things that he was trying to change or accomplish, given that he was taking over a system that had really undergone a lot of change.

Arguelles:
He was doing a lot through the Judicial Council, administratively, and the Legislature, to address those concerns that I've just touched upon, and others, that were a necessary corollary to the work of the Supreme Court.

McCreery:
But those were removed from your day-to-day responsibilities?

Arguelles:
Yes. As an associate justice, I was just concerned about processing the work of the Supreme Court. But I was acutely aware at that time, having served on the Judicial Council, that he had all of those additional responsibilities.

Attorneys go to the court to redress grievances. They want trial departments that are open to them. They want trial judges that are willing to listen. They need jurors that are willing to serve. They have to have access to interpreters that can interpret for their non-English-speaking clients, and they're looking to the court administration to provide them with all of those services that are required so that they can best serve their clients. That can only be achieved if you have cooperation between the judiciary and the legislature.

The legislature has to provide the funds to assure all of those things are being provided, and sometimes that's hard to come by. The chief justice is our most effective representative appearing before the legislature, whether it be his annual state-of-the-judiciary address, or on other occasions. I think that Ron George[36] has currently done a wonderful job as chief justice in establishing good rapport with the legislature.

Malcolm Lucas was very effective as chief justice in those areas as well. He was well regarded. Even though many liberal members of the Legislature

[36] McCreery's oral history with former Chief Justice Ronald M. George, "Chief: The Quest for Justice in California," was named a California Book Award winner by the Commonwealth Club for 2013.

might have disagreed with some of the rulings of the California Supreme Court, nevertheless on bread-and-butter subjects they were being asked to address by the chief justice, I think he had a good rapport with them.

McCreery:
Yes, earlier this year. Thinking back now, how do you evaluate your time on the California Supreme Court?

Arguelles:
I gave it my all during the time that I was there. I hope I was viewed as a productive member of the court.

Most of the opinions that I wrote were not landmarks in California law. As an average associate justice of the California Supreme Court, I don't feel that I made my mark on the court as having authored many landmark decisions that will be cited by generations of California lawyers and judges as brilliant works of art. But I am content in the belief that I was a solid justice of the Supreme Court who, although there for a limited period of time, helped stabilize the court.

I would hope that whatever short legacy that I might have established on the court would be characterized as a man trying to do his best to come up with measured opinions, trying to achieve the right answer to complex issues before the court. I hope that I would be remembered as someone that was collegial and enjoyed a good camaraderie with his colleagues, held in respect by them and the members of his staff.

I certainly never did anything, to my knowledge, that would embarrass the judiciary or any of the people that I worked with, or the governor who had appointed me.

Even though my tenure on the court was relatively short, it was a marvelous chapter of my life, one for which I'll always be indebted to the governor for giving me an opportunity to experience.

This almost sounds like a closing statement as we're getting near the end of our interview, but in answer to your general question, these are the feelings that I have about the time that I spent on the court.

If my opportunity to serve on the Supreme Court had come to me when I was in my forties or my early fifties, or mid-fifties, rather than at, in effect, almost the end of my judicial career, I would have enjoyed a much longer tenure. I would have been able to make more of an indelible mark on California law than I did.

But that's the way things worked out. Sometimes you become the father of a child when you're in your mid-twenties, and sometimes when you're in your late fifties, and your approach to fatherhood and the responsibilities of office is a bit different, [Laughter] depending upon when this happens. But I look back as having had the great fortune of serving for twenty-six years on the California bench at four different levels, and I enjoyed them all. My relatively short experience on the California Supreme Court came at the end of my career, but it did come. I enjoyed those years, as I'm enjoying my work with Gibson, Dunn & Crutcher now as well.

ARGUELLES: A NEW CHAPTER, AFTER THE COURT

Flash forward to 1986. By then, Arguelles' judicial career, which began at age 36, was nearing a horizon. He'd gone from the municipal bench in East L.A. - a place he called "a people's court"- to associate justice of the Second District Court of Appeal. Nearing 60, he was within a year of retirement from what was already a robust and distinguished career.

Along the way, he would lead commissions formed to address crucial problems in policing and access to justice: There was the blue-ribbon committee of judges and other legal figures to assess the language needs of non-English speakers who faced the California legal system. The commission's recommendations became a model state for interpreter and language access in the state's court system, with court interpreters representing spoken languages such as Spanish, Vietnamese, Mandarin, Cantonese, Korean, Punjabi, Russian, Arabic, Farsi, and Tagalog, along with more than 50 court-certified and trained sign language interpreters.

A steady disposition. An even-handed approach to trials and sentencing. An efficient administration of his courtroom. These were hallmarks of his work.

And while he was modest about the legacy of his rulings, he made his mark as a key player in stabilizing the Court in the wake of the Bird retention election.

But it was time to step away.

As he would go on to tell McCreery: "My own ego wasn't so great that I was obsessed with the idea of holding onto a very important position forever. I didn't want to do that, as I knew that there were several good people in the wings that could do just as good a job, and they have."

And so, at 62, after 26 years as a judge, he started a new chapter. He joined Gibson, Dunn & Crutcher, where starting in 1989, he would work Of Counsel. By the time McCreery spoke with him he'd be been at the firm for 17 years.

As you might expect, with such a robust judicial career, he immediately brought an understanding of how the judiciary functions. And he brought a wise perspective on what judges are seeking to help them properly resolve cases.

"It's been a good marriage, and the fact that they've been willing to put up with me for seventeen years I guess is an indication that it's worked out," he told McCreery. "There's no indication that they're anxious for me to leave."

Just a few years into this new role, history would come calling – once again.

On March 3, 1991, George Holliday's video camera[37] captured four Los Angeles police officers beating Rodney King during a traffic stop in the San Fernando Valley, its shockwaves rippling from L.A. to the rest of the globe. Its impact would roil L.A. Tensions boiled over a year later, when a Simi Valley jury acquitted all four officers of assault and acquitted three of the four of using excessive force. The beating would spur immediate calls for major reform. And once again, Arguelles found himself as a needed presence.

L.A. Police Chief Darryl Gates appointed Arguelles to lead a commission to examine department policy. But L.A. Mayor Tom Bradley would also name his own panel, determined to get a full accounting of the operation of the LAPD, its recruitment and training, its internal disciplinary systems, and citizen complaint system. And then came a request from Warren Christopher, the former Clinton Administration secretary of state, who led Bradley's much larger commission.

"It was suggested by Warren that we merge the two groups into a single investigative body," Arguelles told McCreery. "I gave it a great deal of thought and concluded, 'He's right on this.'" So, in the spirit of representing all sides in a fractious time for L.A., the two merged their commissions, despite any possible misgivings from Bradley and Gates, who operated on opposite sides of the political spectrum.

Arguelles sensed tension with Bradley in a moment when the mayor, Christopher and Arguelles were face to face for the first time. "Whereas the mayor was very solicitous and cordial to Warren Christopher, he appeared to be distant and cool to me," Arguelles told McCreery. "So I don't think he was too happy with my participation in it."

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[37] For a good timeline of the chronology in this chapter of Los Angeles history, see this one, from the Los Angeles Daily News, on the 25th anniversary of the L.A. Riots: https://cdn.knightlab.com/libs/timeline3/latest/embed/index.html?source=1SSVmpH81l8GSbDnLn5a9lEgrLHsK_dtxvk3Lv2SErVI&font=Default&lang=en&initial_zoom=2&height=650.

But together, Christopher, and Arguelles as vice chair, and their now merged commission, would proceed.[38]

Four months after the beating, the Christopher Commission, with Arguelles as its vice chairman, would go on to find major gaps in the LAPD's use-of-force policy and in the department's ability to follow it.[39] It found that a significant number of officers repetitively misused force, ignored written policies and guidelines, underpinned by a "code of silence" that protected officers from accountability. And it pointed to the department's leadership for letting it happen. It found that racial and gender bias underpinned police interaction with the community and within the department. Such racism showed itself in routine stops of young African-American and Latino males, seemingly without "probable cause" or "reasonable suspicion," the report found. And its community relations were behind the times, spurred by the department's collective resentment of the public that fueled confrontation.

The 228-page report[40] would go on to recommend a series of reforms, from a police oversight panel with more oversight capacity, to command accountability, to a shift toward community-based policing, which emphasized more interaction with the public, problem-solving, and crime prevention over rote arrest statistics.

To this day, in an era of body-worn cameras, cell phones, and continued calls for police accountability, the report has stood as a template in which to measure progress in gaining trust with the public.

Christopher died in 2011, but Arguelles would live to see such reforms play out,[41] a process that continues.[42]

"It was an interesting experience and period in my life," he told McCreery. "I think it was a good job, another one of the many things that I've attempted to tackle in my life that I look back upon with pride as having been well done."

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[38] While the merger of Arguelles commission with Christopher's prompted its share of praise, reflecting his reputation as a no-nonsense adjudicator, it is worth noting that the Arguelles pick came with pushback from other voices. Ramona Ripston, then executive director of the American Civil Liberties Union of Southern California, publicly questioned Arguelles' role, among others. Philip Hager, "Arguelles Is Back in the Middle," March 31, 1991, L.A. Times, https://www.latimes.com/archives/la-xpm-1991-03-31-me-2393-story.html.

[39] Sheryl Stolberg and Andrea Ford, "Investigation Was an Eye-Opener for Christopher, Arguelles," July 10, 1991, Los Angeles Times, https://www.latimes.com/archives/la-xpm-1991-07-10-mn-1977-story.html.

[40] Report of the Independent Commission on the Los Angeles Police Department, Summary, July 9, 1991: https://libraryarchives.metro.net/dpgtl/publications/1991-ChristopherCommission-LAPD.pdf.

[41] Report from LAPD Chief of Police to the L.A. City Council, March 30, 2021: https://clkrep.lacity.org/onlinedocs/2020/20-0764_rpt_bpc_4-26-21.pdf.

[42] "LAPD - 30 Years After Rodney King," LAPD, https://www.lapdonline.org/newsroom/lapd-30-years-after-rodney-king-nr21061ml/.

Arguelles' blue-ribbon career would lead to many accolades, even in retirement. Among them, he was honored twice by his alma mater, with the 1987 UCLA School of Law Alumnus of the Year award, and, in 1989, UCLA's Professional Achievement Award.

In 2003, Arguelles was honored as Judge of the Year by the Orange County Hispanic Bar Association.[43]

He died at his home on April 10, 2022. He was 94 – preceded in death by his wife of 58 years, Martha, and leaving a long list of survivors and admirers grateful for his mentorship.[44]

In a memorial for Arguelles later that year, former California Supreme Court Justice Marvin R. Baxter[45] said it was clear that the late jurist's background fueled a "proven ability to relate extremely well with others."

"Simply stated," he added. Arguelles was "a man of the people."

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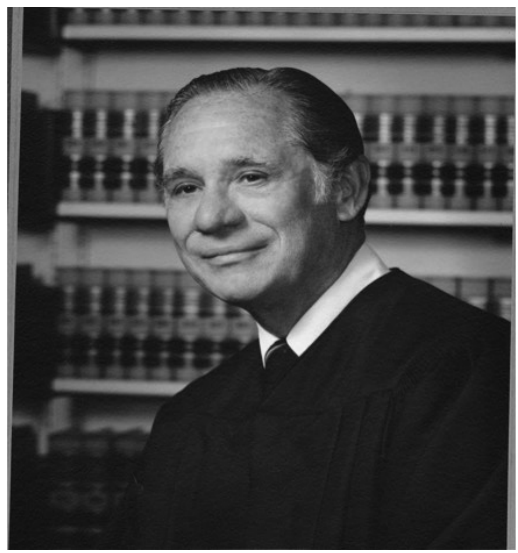

[43] UCLA Law News, "Former California Supreme Court Justice John. A. Arguelles '54 Dies at 94," UCLA Law, April 19, 2022: https://law.ucla.edu/news/former-california-supreme-court-justice-john-arguelles-54-dies-94.

[44] In the preamble to McCreery's full Q&A with Arguelles, Manuel A. Ramirez, Presiding Justice, California Court of Appeal, Fourth District, Division Two, celebrated Arguelles: "His soul has engaged friendship as he touched my life, and the lives of many others, whom he has personally encouraged, mentored, and inspired."

[45] Associate Justice Marvin Baxter served on the California Supreme Court from 1991 to 2015, a tenure that began two years after Arguelles retired.

About the Authors

Laura McCreery is a former researcher in residence, now visiting scholar at Institute for the Study of Societal Issues, Berkeley. She uses oral history methods to study California politics, government, and public policy. In addition to local and regional issues such as transportation, water policy, and land use, her interviews span all three branches of state government, including an oral history of Governor Gray Davis (sealed) and oral histories of nine justices of the California Supreme Court, including Armand Arabian, John A. Arguelles, Marvin Baxter, Ming W. Chin, Ronald M. George, Malcolm M. Lucas, Carlos R. Moreno, Edward A. Panelli, Kathryn Mickle Werdegar. Her oral history of Chief Justice Ronald M. George, "Chief: the Quest for Justice in California," was named a California Book Award winner by the Commonwealth Club for 2013. She serves as oral history adviser for Black Lives at Cal (BLAC) and assists with research, writing, and editing. She holds a B.A. in Speech Communication from San Diego State University and an M.S. in Mass Communications from San Jose State University. McCreery explains the context for this oral history in her previous work, “Preface to the Oral History of Justice Edward A. Panelli,” California Legal History, at p. 406 (2022), https://www.cschs.org/wp-content/uploads/2022/09/Legal-Hist.-v.-17-Oral-Hist.-Justice-Panelli-.pdf.

Ryan Carter graduated in 2022 from UCLA Law School and its Master of Legal Studies program, with a specialization in Public Interest Law & Policy. His Capstone paper was awarded second place in the California Supreme Court Historical Society’s 2022 Selma Moidel Smith Student Writing Competition in California Legal History. He is also an editor at the Southern California News Group. https://www.cschs.org/wp-content/uploads/2022/09/Legal-Hist.-v.-17-Student-Writing-Valley-Secession.pdf.

LARA BAZELON

Postscript

Regarding the Article Concerning the Racial Justice Clinic at the University of San Francisco School of Law, published in (2022) 17 California Legal History 27

Editor's note: *At the request of the author of the original article, we present the following postscript.*

In March of 2023, a client of the University of San Francisco School of Law's Racial Justice Clinic, Leon Benson, whose case was described in the original article at pages 43–46, was exonerated after serving nearly twenty-five years in prison for a murder that he did not commit.

In addition to providing this update, the author also wishes to acknowledge that University of San Francisco School of Law's Racial Justice Clinic was founded in 2015 by USF Professor of Law Emerita Sharon Meadows at a time when bail issues were at the forefront of criminal justice in City and County of San Francisco. In collaboration with then-San Francisco Public Defender Jeff Adachi, Professor Meadows had established the Racial Justice Clinic to complement the preexisting USF Criminal & Juvenile Justice Clinic, which she also had founded. The Racial Justice Clinic, as originally conceived, was a combination clinic / externship program. As part of the clinic, students, assisted by Professor Meadows, conducted jail visits, interviewed witnesses, and argued bail motions in connection with the San Francisco Public Defender's Office's newly created bail unit. Professor Meadows and her colleague, Kate Chatfield, also designed and held a class concerning racial bias.

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About the Author

Lara Bazelon is a Professor of Law at the University of San Francisco School of Law where she directs the Racial Justice Clinic and holds the Barnett Chair in Trial Advocacy.

A page of history
is worth a volume of logic.

Oliver Wendell Holmes,
New York Trust Co. v. Eisner (1921) 256 U.S. 345, 349.