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California Supreme Court
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California Supreme Court
Historical Society

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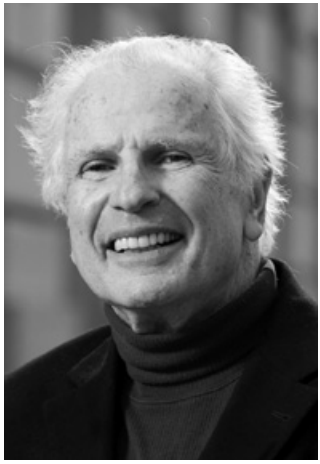
HONORING JOSEPH R. GRODIN:

The Honoree Speaks

JOSEPH R. GRODIN*



It was the inimitable Selma Moidel Smith, longtime and amazing editor of this publication, who came up with the idea for this *festschrift*, and so when she suggested I should submit something of my own, perhaps by way of supplementing the oral history that was reproduced in these pages in 2008[1] (but based on interviews conducted for the Bancroft Library in 2004[2]) I could hardly refuse. Anyway, since when does a professor decline an opportunity to get something published?

* This article is one of a group published here on the occasion of the UC Hastings College of the Law Tribute Honoring Distinguished Emeritus Professor of Law and former California Supreme Court Associate Justice Joseph R. Grodin, November 12, 2015.

[1] 3 California Legal History 1 (2008).

[2] Interviews were conducted by Leah McGarrigle, an oral historian and former student of mine, in five sessions conducted in the latter part of 2004. The edited transcript is available online or in hardbound manuscript at the Bancroft Public Library.

In the year following my oral history interviews, I retired from fulltime teaching, achieving thereby yet a new title, "Distinguished Emeritus Professor." This has led to some modest expansion of time for recreational and family activity, though I am sure my wife Janet would say not enough. I continue to teach (though only part time), I continue to engage in (a minimal) amount of ADR work, and I spend, if anything, more time at the computer aggravating my back while writing a variety of things, which I will explain.

TEACHING

Teaching has been an important part of my life since I graduated from law school in 1954. While practicing in a labor law firm headed by Mat Tobriner, later a Court of Appeal and then a Supreme Court justice, I began teaching labor law at UC Hastings as an adjunct professor, and did so for several years. In 1972, after a year at University of Oregon Law School in Eugene, I became a member of the fulltime faculty at UC Hastings, and I have taught there ever since, with time off between 1979 and 1983 for the Court of Appeal and the Supreme Court. I love teaching. I love the interaction with students, and I love sharing with them my love for the law. (Too much love, my high school English teacher would say; I say, too bad!)

I have had the good fortune, over the years, to be able to select my own teaching subjects, reflecting my own interests and values. I began teaching labor law, which is what I knew best, including public sector labor law, which was then a rapidly developing field in which I had been conducting research and writing books (including casebooks) and articles. Some of what I had written seemed actually to have been read by, and had an impact upon, judges — a pleasing rarity for academics. I had always viewed labor unions as essential, not only for the wellbeing of workers, but for the effective functioning of democracy. Sadly, after I began teaching (though I trust not as a result), union organization and membership in the private sector declined precipitously. While unionization in the public sector continued to grow, that too has fallen upon bad times, as some politicians have found it convenient to blame labor for the economic woes of state and local governments. Still, it is an important subject, not only because of the continuing significance of unions and collective bargaining, but also because it lends itself to understanding of issues of federalism and the role

of administrative agencies. It grieves me that labor law is no longer taught in many law schools.

In addition to labor law, I developed and taught the first courses at Hastings in arbitration law, employment law, and employment discrimination law. A bit later I started to teach constitutional law, which had always been an interest of mine, and seminars in judicial process, law and literature, and an experimental seminar in state constitutional law, which as I recall attracted at the time all of four students. For a few years after my retirement I continued to teach constitutional and employment discrimination law, but I soon dropped those large lecture courses in favor of a seminar called, "Current Problems in Constitutional Law."

Since I was a student in college I have been interested in questions concerning how we can debate questions of right and wrong, good and bad — the sorts of questions philosophers talk about under the heading of moral philosophy. Is there some objective anchor to such questions, or is it all a matter of subjective preferences, like those for flavors of ice cream? When I got to law school I came to see such questions through the perspective of the law. When appellate judges disagree, what is it they are disagreeing about? Is it the case, as (now Chief) Justice John Roberts famously insisted in his nomination hearing, that judges of a high court are simply referees calling balls and strikes? If not, is it appropriate to regard them as super legislators, using legal language to implement their own concepts of morality or public policy? And if neither of those metaphors is adequate to describe what it is that we expect judges to do, if the truth lies somewhere in between, then how should we talk about what they do?

The question is more than academic. The answer (if indeed we can find one) goes to the heart of how the public sees the judicial branch, and it determines (in part) how we ought to select judges, how we should evaluate their performances, and (at the state level) how we decide whether to retain them. It also has bearing upon whether we should treat judges the same as or different from legislators when it comes to campaign solicitations and contributions, attempts to influence their decisions, and limitations on unethical behavior.

Such questions became practically relevant for me when I became an appellate judge, but, like I suspect most judges, I found that the pressure of deciding particular cases left little time for introspection or philosophical

theorizing. It was not until I found myself (and two colleagues) in the midst of a retention election ostensibly aimed at the Court's decisions overturning death penalty judgments that I was forced to confront the tension between what our opponents viewed as unacceptable outcomes and what I saw as principled decision-making. During the campaign I tried to defend that distinction, but apparently without much success.

After the 1986 election I was off the Court and back in academia, with plenty of time for reflection. I began to read extensively about legal theory, to develop my own thinking through articles and a book called, "In Pursuit of Justice," and to stimulate thinking (mine and that of my students) through my teaching.

My current seminar, "Current Problems in Constitutional Law," in addition to considering current and emerging constitutional issues, addresses these sorts of problems. I co-teach the seminar with a sitting judge — for the first few years U.S. District Judge Thelton Henderson and more recently Ninth Circuit Judge Marsha Berzon. For each case we assign one of the students to read the briefs and prepare a "calendar memo" such as a real law clerk might prepare for a court in advance of oral argument. The other students are expected to reply briefly with their own thoughts. Then we discuss and "decide" the case, with the students acting as judges rather than as advocates, which is their typical law school role, and with my co-teacher and me providing questions and commentary. The class never fails to excite me, though I find that I still have more questions than answers.

OTHER ACTIVITIES: MEDIATING, LAWYERING, WRITING

For a while after I left the bench I did a good deal of arbitration and mediation, but that activity has slowed down. I still do a mediation now and then, which I enjoy. I also did some consulting on appellate briefs, but recently only for nonprofits, such as the Employment Law Center (SF Legal Aid Society) and ACLU. On occasion I have argued cases to the Supreme Court or the Court of Appeal, and authored *amicus curiae* briefs, such as in the same-sex marriage cases before the California Supreme Court.

I used to say, when asked to compare being an academic and being a judge, that there are two main differences. One is that as an academic you

get to write about anything that interests you, whereas as a judge you write mainly about the cases you have to decide. The other is that in the case of a judge's writing you can be pretty sure that someone reads it.

Despite uncertainty as to whether anyone is paying attention I have continued to write, for journals and for blogs, sometimes about legal issues that interest me (such as same-sex marriage), sometimes about the nature of judging, but mostly, in recent years, about the state constitution and its proper independent role in the consideration of constitutional claims. This journal has been kind enough to publish a number of my articles concerning the background and interpretation of provisions of the state constitution's Declaration of Rights, and just recently Oxford University Press published a second edition of a comprehensive book on the California Constitution co-authored by me and two colleagues, Professors Darien Shanske and Michael Salerno, with a Preface by Chief Justice Cantil-Sakauye. The first edition (with different co-authors) was published over twenty years ago, and since then numerous amendments and changing interpretations have rendered it virtually obsolete. And who wants to be obsolete?

THE FUTURE

> "Those who have knowledge, don't predict. Those who predict, don't have knowledge."
>
> — Lao Tzu, 6th Century B.C. Chinese Poet

I am most grateful for what life has brought me so far, and I can't predict what it will bring in years to come, but I can say what I would like to have happen. I would like to continue teaching, so long as I am able and Hastings will let me; I would like to continue writing and to voice my opinions where I think they might have some effect; and I would like to remain close to my family and close to nature. Beyond that (oh, and age-appropriate health), I couldn't ask for anything more.

* * *

HONORING JOSEPH R. GRODIN:

A Tribute to Justice Joe Grodin

KATHRYN M. WERDEGAR*

"What makes great courts is great judges."
(*The Nation*, February 19, 1973, p. 237)

The author of this perceptive observation was Joseph R. Grodin, Professor of Law at Hastings College of the Law, University of California, writing more than forty years ago. It was six years before the author himself was to be appointed to the First District Court of Appeal (1979) and, three years later (1982), to the California Supreme Court. Professor Grodin could not then have known that one day he would be among the pantheon of great judges who have made the California Supreme Court a great court.

Labor lawyer, appellate justice, supreme court justice, mentor, scholar, professor, outdoorsman, husband, father, friend — these are the roles that define Joe Grodin, and it has been my privilege to know him in a great many of them. When I was invited to write about Justice Grodin, what first came to my mind were images — visual and mental pictures of experiences

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* Associate Justice, California Supreme Court.

we have shared that reflect some of his many roles and his personal and intellectual qualities.

Monterey (Monterey County, California), and the State Constitution — Passionate about the California Constitution and with a deep knowledge and love of its origins and history, Justice Joe Grodin swept my husband David and me away from proceedings at the State Bar Convention in Monterey and escorted us to Colton Hall, the site of the first California Constitutional Convention. There we were treated to his scholarly and engaging exposition of the circumstances surrounding the 1849 signing of our first state constitution and vignettes about its original signators, Californios and Anglos both. Concerned that it not be overlooked, before our departure Justice Grodin guided us to the glass case that holds the original Spanish language copy of our first Constitution.

Bolinas (Marin County, California), and the Declaration of Independence — On July 4th of any given year, family and friends of Joe and Janet Grodin join them in Bolinas to enjoy the unconventional and colorful Bolinas 4th of July Parade, and then gather at their weekend retreat to discuss matters frivolous and profound, but most of all to recognize the document whose creation the day celebrates. "When in the course of human events," Justice Grodin begins, and then engages each guest in turn to read a segment of our founding document. Lively discussion of the meaning of its various declarations ensues, as phrases are examined and debated. In case food for thought is insufficient nourishment, an old-fashioned July 4th barbeque and refreshing beverages are offered as well.

Silver Lake (Amador County, California), and A Hikers Guide — On vacation in Amador County near Carson Pass, staying at Kit Carson Lodge, David and I venture forth to explore the beautiful Silver Lake and its environs. In our day-packs, as essential to a successful outing as our water supply and hiking poles, we put the area's only authoritative trail guide. This invaluable guide, my husband's favorite birthday present that year, was written by a frequent Silver Lake visitor and accomplished hiker. Who was the author? Joe Grodin, in his persona of outdoorsman and inveterate hiker of the Sierras. Justice Grodin, with his daughter, researched the trails over many seasons and wrote a little gem of a guidebook simply for the pleasure of others who might seek the beauty and solitude of that special area of California's high Sierras.

Justice Joe Grodin's Jurisprudence — As a member of the California Supreme Court for the past twenty-one years, I have had many occasions to research and rely on Justice Grodin's scholarship and jurisprudence. A renowned labor lawyer when he was appointed to the Court of Appeal, he authored the landmark *Pugh v. Sees Candy* case (1981) 116 Cal.App.3d 311, which established that a contract of employment, depending on the facts shown, may contain an implied-in-fact promise that the employee would be terminated only for good cause.

On the California Supreme Court his influential decisions touched on varied, often sensitive subjects, such as a therapist's duty to warn a potential victim and her young child of a patient's threat of harm (*Hedlund v. Superior Court* (1983) 34 Cal.3d 695); the conditions under which a guardian or conservator of a developmentally disabled woman can consent on her behalf to surgical sterilization (*Conservatorship of Valerie N.* (1985) 40 Cal.3d 143); the remedy for an agricultural employer's unfair labor practice of firing resident union-affiliated employees and evicting them from their labor camp housing (*Rivcom Corp. v. Agricultural Labor Relations Board* (1983) 34 Cal.3d 743); and the free speech rights of an environmental group advocating a boycott of advertisers in a newspaper whose editorial policies it criticized (*Environmental Planning & Information Council v. Superior Court* (1984) 36 Cal.3d 188).

In *Isbister v. Boys' Club of Santa Cruz* (1985) 40 Cal.3d 72, involving the then controversial question of whether a private nonprofit boys club could exclude girls, Justice Grodin, writing for the majority over three separate dissents — one claiming the decision would "strain our social fabric and send shock waves through the realm of children's organizations" (*id.* at p. 93) — concluded that the club could not. Reasoning that the club qualified as a business establishment subject to the nondiscrimination provisions of the Unruh Civil Rights Act, the majority held that the club's male-only membership policy "is an arbitrary form of discrimination prohibited by that statute." (*Id.* at p. 91.)

In a different vein, dealing not with individual rights but procedure — and critical to orderly judicial review — Justice Grodin, expressing the view of a unanimous Court, wrote the landmark opinion of *Palma v. U. S. Industrial Fasteners* (1984) 36 Cal.3d 171. There the Court set forth rules bringing order and restraint to the previously abused practice of granting peremptory writs of mandate in the "first instance," that is, without prior

issuance of an alternative writ giving the adverse party the opportunity to oppose. Considering the particular document at issue in the case, the opinion observes that it was neither writ nor order, but "a hybrid, unknown to jurisprudential taxonomy." (*Id*. at p. 182.)

In the early days of rent control, when communities were experimenting with its parameters, Justice Grodin authored two significant opinions, both upholding the constitutionality of the law in question, *Nash v. City of Santa Monica* (1984) 37 Cal.3d 97, involving the requirement of a pre-demolition permit before a landlord may level rental units, and *Pennell v. City of San Jose* (1986) 42 Cal.3d 365, concerning an ordinance that required consideration of tenant financial hardship in determining the validity of a rent increase.

Included in his legacy are numerous significant criminal cases, as well. One with far-reaching implications is *In re Lance W.* (1985) 37 Cal.3d 873, concerning whether the electorate could amend the California Constitution by enactment of Proposition 8, the initiative measure known as "Truth in Evidence." Proposition 8 mandated that no unlawfully seized evidence could be excluded in a California criminal prosecution that would not be excluded under federal law, thus abrogating the broader vicarious exclusionary rule the California Supreme Court had adopted under the California Constitution. Rejecting the argument that Proposition 8 was an impermissible revision of our state constitution, Justice Grodin concluded the electorate had the authority — and the intent — to change the law so that courts could exclude evidence unlawfully seized under either the California or the United States Constitution only if exclusion is compelled under the federal constitution.

In *People v. Cook* (1985) 41 Cal.3d 373, the Court was presented with a case of first impression involving a police helicopter flying over defendant's property looking for evidence of marijuana cultivation in his enclosed back yard. Writing for the majority, Justice Grodin rejected "the Orwellian notion that precious liberties derived from the framers simply shrink as the government acquires new means of infringing upon them" (*id*. at p. 382), and concluded that "an individual has a reasonable expectation of privacy from purposeful police surveillance of his back yard from the air" (*id*. at p. 382), and in the absence of a warrant, the search was illegal. In words that resonate today — twenty-five years later — Justice Grodin observed

that the case required the Court "to examine the contours of California citizens' entitlement to be free from the intrusive gaze of the state, in an era when the instruments of surveillance at the disposal of the police are far more sophisticated than our nation's founders would have dared contemplate." (*Id*. at p. 375.)

Beyond his jurisprudence, Justice Grodin has thought deeply about the role of judges in our society. His reflections and philosophy on the subject are valuable contributions to that perennial enquiry. His book "*In Pursuit of Justice: Reflections of a Supreme Court Justice* (U.C. Press, 1989) is a trove of wisdom that I have often consulted. In the conclusion, he states he has "attempted to convey understanding of the sort of principled creativity that . . . is the essence of the judicial function — the exercise of judgment in a disciplined way within a framework of democratic procedures and values." (p. 188) His own jurisprudence demonstrates that as a member of the California Supreme Court, Justice Grodin exercised his judgment in a creative but disciplined and principled way, leaving a rich legacy of significant decisions that touch the lives of every Californian and continue to guide courts as they confront the issues of the day.

Justice Grodin's time on the California Supreme Court was cut short by the retention election of 1986, when the electorate failed to retain three of the four members of the Court who were on the ballot. Legal scholars, other judges, court personnel, and knowledgeable observers of the court — attorneys and lay persons alike — all deeply felt the loss. Nevertheless, in his all-too-brief four years on the California Supreme Court, Justice Joseph Grodin distinguished himself as one of the great judges that make a great court.

* * *

HONORING JOSEPH R. GRODIN:

A "Founding Father" of the Doctrine of Independent State Constitutional Grounds

RONALD M. GEORGE*

When invited to contribute an article to this issue honoring Joseph R. Grodin, my first reaction was to wonder where one would begin in embarking upon this task. With apologies to Elizabeth Barrett Browning, "Let me count the ways. . . ." After all, Joe Grodin has distinguished himself in numerous ways during his long and prolific career: as a lawyer specializing in labor and employment law; as an academic teaching students at the University of California's Hastings College of the Law and publishing scholarly articles on a broad range of constitutional and other issues related to the administration of justice; as a jurist whose written opinions both as a justice of the California Supreme Court and of the California Court of Appeal have made lasting contributions to the jurisprudence of our state and our nation; as a highly regarded arbitrator and mediator; and as a steadfast advocate for expanding access to justice.

Faced with this daunting range of subject matter, I have chosen to contribute a few pages highlighting Joe's contributions to an area that, if

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* Former Chief Justice of California.

not overlooked, has not received the attention it deserves — his groundbreaking efforts in the matter of state constitutions and their corollary, the doctrine of independent state constitutional grounds. At first blush this may appear to be a dry, theoretical subject perhaps worthy of academic debate but not imbued with great practical significance. But how wrong it would be to take such a cramped view of this vital and vibrant doctrine that plays such a critical role in protecting the civil rights and liberties of the residents of California and other states where it is robustly applied by the courts.

Joe Grodin has expressed his views at great length regarding the significance of the doctrine, and my review of portions of an interview he gave as part of his oral history,[1] as well as some of his writings on this subject,[2] has been of great assistance in preparing this article. Joe credits United States Supreme Court Justice William J. Brennan, Jr. (who served previously as a justice of the New Jersey Supreme Court), Oregon Supreme Court Justice Hans A. Linde, and California Supreme Court Justice Stanley Mosk for being instrumental in developing the doctrinal foundation for this area of constitutional law. I would add Joe's name as the fourth in this pantheon of Founding Fathers.

Joe Grodin's thesis, that state constitutions occupy — and should occupy — a crucial role in our nation's jurisprudence, is premised initially on historical chronology. Each of the original thirteen states adopted a state constitution before the Constitution of the United States and its Bill of Rights were ratified. The first Constitution of California was adopted subsequent to the federal Bill of Rights as the result of our state's 1849 Constitutional Convention, and the second (and current) constitution was adopted following our 1878–1879 Constitutional Convention. Nonetheless, as Joe Grodin has observed, "At that time, the provisions of the

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[1] *Oral History: Joseph R. Grodin, Professor of Law and Supreme Court Justice,* conducted by Leah McGarrigle, Regional Oral History Office, The Bancroft Library, University of California, Berkeley (2008) 3 California Legal History 1; specifically, Interview No. 4 (November 23, 2004), pages 97–123.

[2] Joseph R. Grodin, *The California State Constitution and Its Independent Declaration of Rights* (Fall/Winter 2014) California Supreme Court Historical Society Newsletter, pages 13–14, *available at* http://www.cschs.org/wp-content/uploads/2014/05/2014-Newsletter-Fall-CA-State-Constitution.pdf; Joseph R. Grodin, In Pursuit of Justice: Reflections of a State Supreme Court Justice (1989) pages 123–130.

federal Bill of Rights did not apply to the states, so . . . the California Constitution was the primary, if not the only, protection California[ns] would have against abuse of power by the state and local governments."[3] A 1974 amendment to the California Constitution significantly reinforced the independent nature of the state charter by providing, "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." (art. I, sec. 24.) But both prior to and subsequent to the adoption of this constitutional amendment, the California courts had begun to follow an independent approach in viewing the federal constitution as establishing a floor (or minimum level) of protection of constitutional rights for Californians, while interpreting companion provisions of the state constitution as constituting a ceiling of additional constitutional protection.

In *People v. Cahan* (1955) 44 Cal.2d 434, California's high court, six years before the nation's high court came to a similar conclusion based on the federal constitution, held that the state constitutional prohibition against unreasonable searches and seizures barred the admission of improperly obtained evidence in a criminal proceeding. Despite federal constitutional law to the contrary, the California Supreme Court held that the state constitution's ban on double jeopardy did not permit a defendant in a criminal case to be retried after a mistrial granted on the trial court's own motion (Cardenas v. Superior Court (1961) 56 Cal.2d 273). In a decision later overturned by voter Initiative, the state's high court invalidated the death penalty as violative of the state charter's ban on "cruel or unusual punishment." (People v. Anderson (1972) 6 Cal.3d 628.) That Court also took a broader view of a criminal defendant's "Miranda rights" under the California Constitution than that accorded by the United States Supreme Court under the federal constitution (People v. Disbrow (1976) 16 Cal.3d 101). And the Court has interpreted the state's constitutional protection of free expression as providing a broader level of protection than that accorded by the First Amendment. (See, for example, Robins v. Pruneyard Shopping Center (1979) 23 Cal.3d 899.) The California electorate's 1972 addition of a specifically worded constitutional right of "privacy" (art. I, sec. 1), which does not appear in the federal constitution and only has been

[3] "The California State Constitution," *id*. at 13.

held by the courts to be implied in that document, has given rise to a variety of constitutional protections recognized by the courts of this state.

As California Chief Justice Tani Cantil-Sakauye has noted, notwithstanding the Supremacy Clause of the United States Constitution, California courts consider themselves charged with interpreting state constitutional provisions in a manner independent of the interpretation given to comparable provisions of the federal document, even when the state and federal charters are identically or similarly worded. In doing so, our courts give respectful consideration to the rulings of the federal high court, the lower federal courts, and the courts of other states, but are not bound by them.[4] Lest the decision of a state court not to follow the lead of the federal high court on a given issue be considered a negative manifestation of "judicial activism," Justice Grodin points out that Chief Justice William Rehnquist's opinion for the Court in the Pruneyard case, "holding that a shopping center is not subject to the First Amendment[,] in no way deprived California of the right to adopt in its own constitution 'individual liberties more expansive than those conferred by the Federal Constitution.'"[5]

Joe Grodin credits Hans Linde with developing an analytical approach to constitutional interpretation that applies the concept of judicial restraint to the resolution of constitutional issues, and Justice Stanley Mosk for being a leading advocate on the California Supreme Court for that approach. Judicial restraint, of course, traditionally requires courts to resolve issues on statutory or other non-constitutional grounds, if possible, without reaching the constitutional issue. Similarly under Linde's approach, judicial restraint requires that if the constitutional issue must be reached, courts ordinarily should attempt to resolve it on state constitutional grounds before, if necessary, reaching the federal constitutional issue. Although Grodin confesses to being initially "resistant" to Linde's approach, he became a self-described "convert" as he observed the ebb and flow in the rulings of the United States Supreme Court over the years and realized the importance of not tethering the decision-making of state high

[4] Chief Justice Tani Cantil-Sakauye, *The Truly Independent Nature of the California Constitution* (Fall/Winter 2014) California Supreme Court Historical Society Newsletter, pages 15 and 26, *available at* http://www.cschs.org/wp-content/uploads/2014/05/2014-Newsletter-Fall-Truly-Independent-Constitution.pdf.

[5] *In Pursuit of Justice*, *supra* note 2, at 125.

courts on vital issues of constitutional rights and liberties to every shift in course instituted by a changing composition of the nation's high court.[6] [6]

Having authored opinions for the California Supreme Court that relied upon independent state constitutional grounds, for example decisions involving the right of reproductive choice and marriage equality for same-sex couples,[7] I consider myself and my judicial colleagues to be greatly indebted to Justice Grodin, whose writings have afforded recognition to the importance of independent state constitutional grounds as a legitimate basis for judicial decision-making.

Justice Grodin observes that the "reliance of state courts on independent state constitutional grounds as a basis for decision has had a checkered history;" and that "[f]ew courts are consistent in the manner in which they invoke that doctrine, and this inconsistency tends to detract from the doctrine's integrity." With his customary modesty, he poses the possibility that he may not have been "blameless" in this regard.[8] Unfortunately, I must join him in my own mea culpa.

But, as noted by Justice Brennan in his Forward to one of Justice Grodin's books,[9] given the crucial role played by state courts in resolving the vast majority of the cases filed each year in the United States, as compared to the relatively small number decided in federal courts, it is essential that appropriate attention be given to the vital role of state courts in shaping constitutional and other law. Joe Grodin's persuasive exhortation to judges and lawyers that they accord consistent and due recognition to independent state constitutional grounds in the development of the law continues to serve as one of his most significant contributions to the American system of justice.

* * *

6 *In Pursuit of Justice*, *supra* note 2 at 123.

7 American Academy of Pediatrics v. Lungren (1997) 16 Cal.4th 307; In re Marriage Cases (2008) 43 Cal.4th 757.

8 *In Pursuit of Justice*, *supra* note 2 at 129, 130.

9 *In Pursuit of Justice*, *supra* note 2.

HONORING JOSEPH R. GRODIN:

Tribute to a Colleague

CRUZ REYNOSO*

Justice and Professor Joseph R. Grodin and I share family backgrounds. He's one year older than I am. Both of us had parents who immigrated to the United States, his father from Lithuania and my parents from Mexico. And we both considered Justice Mathew Tobriner a model. I had the privilege of replacing Justice Tobriner on the California Supreme Court.

Our lives diverged. Justice Grodin continued his education. I took two years to serve as a Counter Intelligence Corps agent with the U.S. Army. He graduated from law school in 1954 and I in 1958. After law school, he joined Attorney Tobriner's law firm and I accepted a position in Imperial County in the small law firm of State Senator J. William Beard, as his part-time assistant and part-time associate in the law firm.

It was not until Justice Grodin's appointment to the Agricultural Labor Relations Board that I became acquainted with his work. When the ALRB was formed I was a law professor at the University of New Mexico, in

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* Former Associate Justice, California Supreme Court, and Professor of Law, UC Davis School of Law.

Albuquerque, and I returned to California in 1976 to assume a position as associate justice on the Third District Court of Appeal. In 1976, he was appointed an associate justice by the same governor, Jerry Brown, to the First District Court of Appeal. In 1979, it was in our capacity as justices of the Courts of Appeal that I got to know Justice Grodin well. We had occasion to sit with the California Supreme Court with Chief Justice Rose Bird on several occasions, and once or twice on the same case.

Governor Brown elevated me to the California Supreme Court in March of 1982 and elevated Justice Grodin at the same time to presiding justice of Division Two of the First District. Later in 1982, Governor Jerry Brown elevated Justice Grodin to the California Supreme Court. Governor Jerry Brown had an extraordinary opportunity to have appointed six of the seven justices of the Supreme Court when he left office.

I appreciated Justice Grodin's role as a fellow justice on the Supreme Court. He and I were generally in the majority in the cases we heard. However, in one case, I was a lone dissenter. I believed that, since the issue was equitable, we had a duty to decide the case. All other justices felt the decision should be left to the Legislature. Justice Grodin wrote a concurring opinion agreeing with the issue I had raised in my dissent, but nonetheless agreeing with the majority that the Legislature should act. I appreciated his gesture which made it appear that it was a five-to-two decision rather than a six-to-one. It made me look better.

★ ★ ★

HONORING JOSEPH R. GRODIN:

Hercules in a Populist Age[1]

HANS A. LINDE[2]

A preoccupation with judges and judging has marked American views of law at least since Justice Oliver Wendell Holmes of Massachusetts made the prediction of a judicial decision the definition of law itself.[3] Unhelpful as Justice Holmes' definition is to appellate judges, the choices in decisions and in styles of explanation that our system leaves open to courts justify this otherwise rather improbable interest in judges.

Prior to their appointments to the Supreme Court, however, both Justices Holmes and Benjamin Cardozo focused American jurisprudence on the judicial function in common law appeals in state courts. They wrote at a time when explicit, contentious, and frequently amended legislation

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[1] This article is one of a group published here on the occasion of the UC Hastings College of the Law Tribute Honoring Distinguished Emeritus Professor of Law and former California Supreme Court Associate Justice Joseph R. Grodin, November 12, 2015.

Editor's Note: In response to the invitation to contribute to this special section, Justice Linde offered the following review of Joseph R. Grodin's book, *In Pursuit of Justice: Reflections of a State Supreme Court Justice* (Berkeley: University of California Press, 1989), first published at 103 Harv. L. Rev. 2067 (1990) and reprinted here by kind permission of Justice Linde. — Selma Moidel Smith.

[2] Senior Justice, Oregon Supreme Court (retired).

[3] *See* Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 457 (1897).

for civil and criminal liability was exceptional and constitutional law was marginal to legal theories. More recently the focus both on judicial action and on personal reflection has shifted to the federal bench and its public law agenda. In the states, too, most major social problems long have required not judicial but legislative solutions that often involve fiscal resources; not surprisingly, statutes increasingly occupy the attention of modern appellate courts.

Justice Joseph R. Grodin's slim and eminently readable account of his own career, *In Pursuit of Justice,* is an unusually valuable variation on previous reflections by appellate judges. One reason for its interest is the scene of Grodin's experiences: the California courts, which, like all state courts, span the whole range of common, statutory, and constitutional law. California's courts comprise the nation's largest judicial system. Over 900 California judges on general jurisdiction courts dispose of about 2.3 million nontraffic cases a year,[4] compared to the approximately 213,000 cases[5] handled by the 1,218 federal judges and magistrates in article III courts.[6]

The range of issues that California's and other states' courts face makes the agenda of the United States Supreme Court seem narrow and specialized by comparison, as of course the constitutional structure made it. As Justice Brennan stresses in the book's foreword, state courts have the final word on most private law issues, from property and commercial transactions to family relationships and personal injuries (pp. xi-xii). State courts handle issues of state and local public administration, such as education, property taxation, land use, election laws, and "home rule," that have no federal equivalent. Yet state courts also are responsible for the same large issues that have held center stage for a generation — due process, equality, privacy, freedom of expression and religion — either under the state or the federal constitution. The agenda facing courts like California's encompasses both the old jurisprudence and these contemporary concerns.

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[4] *See* 1987 Conference of State Court Adm'rs & Nat'l Center for State Courts, State Court Caseload Statistics: Ann. Rep. 88, 116, 222. If traffic and other minor violations in courts of limited jurisdiction are counted, the California statistics are 1669 judges and 15.2 million total dispositions. *See id.*

[5] *See* Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 1989, at 179 (109th ed. 1989).

[6] *See* 1988 Director of the Admin., Office of the U.S. Courts Ann. Rep. 53, 55 (compiling 1987 statistics for authorized judgeships and total magistrate positions).

The California Supreme Court in the period before and during Grodin's tenure tackled both parts of this wider agenda with energy, style, and a sense of national leadership.

In Pursuit of Justice touches on the California court's creativity in expanding enterprise liability in favor of consumers and employees.

The court used doctrines of strict tort liability, warranty, and implied covenants but also called for balancing policy considerations based on relative ability to avoid, bear, or insure against losses — an approach for which Grodin's enthusiasm exceeds mine.[7] But the book is not the California version of *The Nature of the Judicial Process*. In two chapters, titled "Common Law" and "Do Judges Make Law?," Grodin introduces readers to the classic themes most familiar to judges and law students, but he is not writing as a theorist or for theorists. Instead he offers something in shorter supply: a thoughtful, articulate, and jurisprudentially sophisticated professional's firsthand account of gaining, performing, and eventually losing judicial responsibility in practice.

A graduate of Yale Law School and the London School of Economics, Grodin joined and soon headed the San Francisco labor law firm of Mathew Tobriner, who preceded him to the California Supreme Court. Grodin briefly served on Governor Jerry Brown's Agricultural Labor Relations Board, and soon thereafter Tobriner persuaded Brown to appoint Grodin to the state court of appeals. In 1982, Brown promoted him to the California Supreme Court. Since his 1986 reelection defeat, Grodin has turned to his original choice of career, teaching law.

Except for this last transition, the bare biographical facts might equally describe a highly qualified appointee to the federal bench, who would thereafter spend a productive and uncontroversial career on the Ninth Circuit, exercising judgment within the verbal bounds set by the United States Supreme Court in federal cases and the opinions of state courts in cases under state laws. What distinguishes Grodin's story from the professional memoirs of a federal judge is the tension between judicial institutions and popular passions that characterizes many elective state courts and that ended Grodin's judicial career.

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[7] For one of our discussions of judicial method, see The Courts: Sharing and Separating Powers 42–47 (L. Baum & D. Frohnmayer eds. 1989).

California in 1934 was the first state to replace competitive election of appellate court judges with gubernatorial appointment followed by periodic retention elections, part of a proposal made by the American Judicature Society (p. 165). It rejected — rightly in Grodin's view and mine — the Society's plan to limit a governor's appointments to a list of consensus choices of a commission, which could be expected to pick traditional over unconventional nominees, and provided instead for confirmation of the governor's appointees by a commission composed of the chief justice, the attorney general, and the senior presiding justice of the appellate courts. The system has not always been unpolitical; in 1939 a conservative attorney general, Earl Warren, blocked confirmation of an eminent Berkeley professor, Max Radin, for alleged left-wing sympathies, leading to the appointment of his colleague Roger Traynor. But Grodin had no difficulties winning confirmation to the [Court of Appeal] and later to the Supreme Court, supported even by Attorney General George Deukmejian, who later as governor campaigned for the defeat of his predecessor's appointees.

The final chapter of *In Pursuit of Justice* tells the story leading to the 1986 vote that ended Grodin's service on the California court along with that of Chief Justice Rose Bird and Justice Cruz Reynoso. Grodin's account is not detailed, but some of the background of that cataclysm can be found in Preble Stolz's *Judging Judges,*[8] a critical account of the period following Chief Justice Bird's appointment in 1977 and of an ill-advised, lengthy, and needless commission investigation of political charges against the California Supreme Court while Grodin was still on the lower court. Grodin does mention that friends of Governor Brown and Rose Bird wished that Brown had started her as an associate justice, but the book does not speculate what the consequences might have been if, for instance, Justice Stanley Mosk, a former trial judge and attorney general, had become chief justice. A chief with longer judicial and political experience might have known enough to shrug off press rumors or simply deny their innuendo, and also could have rallied the state's judges and the legal profession to the defense of an independent judiciary. To thrust Jerry Brown's rather demonstratively chosen chief justice into that role was no fair test of her judicial potential. The

[8] *See* P. Stoltz, Judging Judges: The Investigation of Rose Bird and the California Supreme Court (1981).

California experience makes the case for leaving the choice of a chief justice, at least where the court has a genuinely nonpartisan tradition, to the justices themselves, who best know each others' talents and the demands of the job.

Although acknowledging that personalities matter, Grodin recognizes that the future of his court was decided by larger social developments, specifically by the shift of the public agenda to criminal law enforcement and the death penalty. In other times and other places, the fate of elected judges may have turned on passions aroused by farm foreclosures, by labor strife, by school desegregation and busing, or simply on partisanship or the organized efforts of the personal injury plaintiffs' and defense bars. In California, votes against Supreme Court judges sharply increased in 1966, after the court struck down a popularly initiated constitutional amendment barring fair housing laws as contrary to the federal Fourteenth Amendment, a decision which was later affirmed by the United States Supreme Court.[9]

During recent years the dominant focus of judicial elections, at least in the western states, has been on public expectations that the judge will function as part of the criminal justice system rather than as an umpire between the state and the accused. For state supreme courts, this means a focus on their interpretations of constitutional guarantees, most of which exist to protect individuals against government officers in pursuit of crime. In this setting, majoritarian democracy, the independence of elective courts, and the fragility of state constitutional law intersect. For good reasons, these themes occupy the final chapters of Grodin's book, and they deserve the attention of constitutional theorists, whose view of "countermajoritarian" judicial review (as of all constitutional problems) is singlemindedly fixed on the lifetime federal Supreme Court.

In 1972, the California Supreme Court held the death penalty to be contrary to the state's guarantee against cruel or unusual punishment.[10] Also during the 1970s the court sometimes applied the exclusion of evidence under the state's constitutional restraints on police arrests and searches more strictly than federal decisions under the corresponding

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[9] *See* Mulkey v. Reitman, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966), *aff'd*, 387 U.S. 369 (1967).

[10] *See* People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied*, 406 U.S. 958 (1972).

Fourth Amendment. Conservative California politicians seized upon "law and order" as a potent political issue, as candidate and President Nixon did nationally. Unlike Nixon, however, they could translate counter-libertarian populism into direct action. California not only has elective judges; it also allows amendment of its constitution by a simple majority of the votes cast on a proposal placed on the ballot by an initiative petition. In this manner Californians amended their constitution in 1972 to reinstate the death penalty and in 1982 to place in the constitution a clutter of specific procedural details under the collective heading "Victims' Bill of Rights." Similar initiatives later were adopted in Oregon. Ironically, old-line legislative institutions were more protective of people's long-term constitutional rights than populist majorities eager to sacrifice their rights to the cause of punishing criminals. Grodin notes the destructive effect that the obligation to review every death penalty case has had on the California and other state supreme courts' important work in other areas (p. 101). Moreover, as these constitutional initiatives passed, the margin by which California Supreme Court justices won retention elections steadily declined, until Bird, Reynoso, and Grodin lost their judgeships in a 1986 campaign in which the death penalty was the centerpiece.[11]

In his chapter on judicial elections and elsewhere, Grodin reflects on the conundrum of judicial "accountability" with characteristic objectivity and good sense.[12] One may, of course, observe that any kind of election inevitably politicizes the courts to some degree and that judges whose opinions, like the California courts', proudly embrace the realists' preferred style of explicit policy-making should not be surprised to have their policy choices challenged much like any legislator's. Indeed, as Grodin reports (pp. 175–76), California politicians (including Governor Deukmejian and other lawyers) advised people to vote for or against judges on the basis of

[11] Elsewhere Grodin has written that "examination of the 1986 California retention data led to the conclusion that Californians were almost exclusively concerned with the substance of the judge's decisions, particularly in death penalty cases and criminal cases," citing an exit poll showing that sixty-six percent of those who voted against Rose Bird did so because she was too "'soft on crime'" and sixty-four percent because they "'did not like her position on the death penalty.'" Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. Cal. L. Rev. 1969, 1980 nn.29–30 (1988).

[12] *See, e.g., id*. at 1982–83.

agreement or disagreement with the court's decisions, and many voters who paid lip service to an independent judiciary also agreed with that advice. This view of "accountability" implies, among other things, that judges and judicial candidates must be free to state their views on controversial issues short of the point of disqualification from a concrete case. The Oregon Supreme Court some years ago amended the judicial canon accordingly.[13]

But more is wrong with judicial elections than the effect of anticipated or subsequent popular reaction on a court's independent judgment. One thing wrong, as Grodin found to his dismay, is the financing of judicial election campaigns, a process that Grodin calls "one of the worst experiences of my life" (p. 174). The groups that targeted the three justices for defeat spent more than $7 million on a media campaign, much of it from economic interests for which the emotional issue of the death penalty served as a smokescreen for objections to California's liability case law. The less than $1 million raised for Grodin's campaign is by California standards a trivial sum for a statewide election. But there is nothing trivial about a judicial candidate's need to solicit such sums for a judicial office from lawyers and interest groups whose identities are known to the candidate and reported in campaign records.

Some see in the funding of election campaigns a more specific threat to judicial independence than in the judges' fear of voters' opinions. But campaign fundraising also reveals the ironies of pursuing reform simultaneously through abstention and disclosure: judges may not personally ask for campaign contributions, but they must accurately report and therefore know these contributions, and it is common courtesy to thank the contributors. I have heard judges agonize whether to disqualify themselves because a litigant's lawyer raised funds for their campaigns; from the perspective of a judge's colleagues, recusal to avoid an "appearance of impropriety" sometimes looks easier than working on the case. Whether fundraising by lawyers for a judge's campaign leaves with the donor or the judge any implied expectation beyond fair and conscientious performance depends on a state's political and professional culture more than on general theories.

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[13] *See* Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 2001, 2005–06 (1988).

Grodin rightly keeps his eye on the larger question of the voters' capacity to assess a judge's, particularly an appellate judge's, performance by criteria other than each voter's agreement or disagreement with the judge's "voting record" in controversial cases (p. 176), and he concludes, as others have, that popular election campaigns are too high a price to pay for periodic review of judicial performance.[14]

In Pursuit of Justice is neither an essay on modern jurisprudence for professionals nor an autobiographical apologia. In 188 pages of deceptively simple prose, written from the perspective of a sophisticated participant, the book succeeds in sketching the role, the work, and the political setting of an important, uniquely American institution that academics and the national media often dismiss as a lesser and disorderly adjunct of the nation's real judicial system — that is to say, the federal courts. Addressed to the lay reader (which ought to include first-year law students), *In Pursuit of Justice* particularly should be read and used by teachers of government, social studies, or journalism as an introduction to the world of appellate courts. The book's most important and disturbing question is left implicit: what a system that sacrifices the judicial service of an exceptionally qualified, thoughtful, and dedicated jurist like Joseph Grodin to the ambitions of politicians and the heavily financed emotionalism of a plebiscite tells us about our views of law and of a judge's role.

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[14] Grodin has written:

> These are the special risks to the integrity of the courts and the judicial function that are likely to be posed by a judicial election campaign that is conducted in accordance with the premise that judges are nothing but politicians running for office. Is there any way to have elections and avoid that risk? I am dubious. So long as there is money to be made in election campaigns by professional consultants, and so long as the thirty second television spot continues to be the most effective means of communicating campaign arguments, any prospect of debates focused on appropriate criteria seems unlikely. If this looks like an argument for doing away with judicial elections altogether, I plead guilty.

Grodin, *supra* note 11, at 1981. For further discussion of judicial elections, see Feerick & Vance, *Becoming a Judge: Report on the Failings on Judicial Elections in New York State*, 9 Pace L. Rev. 199, 202 (1989); and Hill, *Comments on Thompson and Observations Concerning Impartiality*, 61 S. Cal. L. Rev. 2065 (1988).

HONORING JOSEPH R. GRODIN:

The Roads Taken and Thoughts about Joe Grodin

ARTHUR GILBERT*

The exceptional Joe Grodin. On the one hand, he is the reflective scholar, the inspiring professor, the discerning adjudicator, the insightful philosopher, the prolific writer. On the other hand, he is the analytical lawyer, the tough negotiator doing battle in the rough-and-tumble world of labor relations. And on the other hand, he is the explorer in nature's wilderness, nourishing his soul in the surroundings of towering mountains, rippling rivers, and soothing forests. Wait a moment . . . that's three hands.

But that proves my point. There is nothing ordinary about Joe Grodin. He is sui generis. Does anyone know a philosopher who helped draft a city's plumbing code? The plumbers and pipe fitters of San Francisco can thank Joe Grodin.

Joe has managed to keep in homeostatic balance his many interests despite Governor Jerry Brown's intrusion on two occasions. The governor interrupted Joe's commune with nature in 1975 to appoint him to the newly

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* Presiding Justice, California Court of Appeal, Second Appellate District, Division Six.

formed Agricultural Labor Relations Board. At the time Joe and his wife, Janet, were backpacking in Garibaldi Provincial Park in British Columbia. It has been reported that The Royal Canadian Mounted Police were sent to find the Grodins. At the campsite Joe was reading from Lord Byron's *Childe Harold's Pilgrimage*,

> "There is pleasure in the pathless woods,
> There is a rapture on the lonely shore,
> There is society where none intrudes,
> By the deep Sea, and music in its roar:
> I love not Man the less, but Nature more . . . ."

Just then, a Royal Canadian officer approached and said, "Mr. Grodin, I presume?"

In 1979, the governor once again intruded during a sojourn with nature. Joe and Janet were preparing for a raft trip down the Colorado River during a trip to the Grand Canyon National Park. The governor was trying to reach Joe. An appointment to the Court of Appeal as an associate justice was in the offing. Great timing, Jerry. A telephone call to the local hotel where they were staying confirmed the governor's wishes. Joe and Janet then rafted down the Colorado for a week smiling all the way.

It occurred to me that, right after Jerry Brown appointed me to the Los Angeles Municipal Court over forty years ago, I also took a rafting trip down the Stanislaus River. Then, we could experience white water, roaring and frothing in some parts of the river, and then spreading out in a calm blanket of serenity in other parts. Perhaps that mutual appreciation for the outdoors created a bond.

A short time later, and in quick succession, Joe was appointed the presiding Justice of Division Two of the First Appellate District and, shortly after that, to the California Supreme Court. Either Joe had less time for hiking, or the governor's timing was better, but, on both occasions, he was readily available for the governor's call. That call could come at any time during the day or night. Perceptive potential nominees knew to keep their phone lines free during the final days of Jerry Brown's first administration.

I first met Joe the morning of December 27, 1982, the date of our mutual confirmation hearings. Joe and I were both nominees, he for the California Supreme Court, and I for the Court of Appeal. There were numerous

hearings scheduled that day for nominees to newly created positions on the Court of Appeal. The attorney general at that time was George Deukmejian, one of three members who sat on the Commission on Judicial Appointments. The other members were the Chief Justice and the most senior presiding justice of the particular district involved. The atmosphere was tense. Deukmejian voted against some of the nominees.

I suspect the nominees who received a "thumbs down" from the attorney general were those who had refused to answer a series of written questions he had sent them in advance of the hearings. Some of us responded to the questionnaire with a respectful explanation why we thought it would be inappropriate, if not ethically improper, to answer a few of the questions.

I do not know if Joe received such a questionnaire, but the vote for his confirmation was unanimous. No wonder. In his previous confirmation hearings, he had received a unanimous vote, and he had proven to be a brilliant justice on the Court of Appeal. His balanced point of view, his respect for precedent, his sound judgment and carefully crafted opinions impressed all the members of the commission.

We congratulated each other on our mutual confirmations and, through a smile and a wink, gave each other a mental high five.

During Joe's short judicial career, he made a significant contribution to our jurisprudence. A few examples include: *Pugh v. See's Candies, Inc.* (1981) 116 Cal.App.3d 311, a beautifully crafted opinion which established that so-called "at-will" employment agreements can be wrongfully terminable. My friend Professor Christopher Cameron pointed out in his, "Essay, No Ordinary Joe: Joseph R. Grodin and His Influence on California's Law of the Workplace," that Joe drew upon "well established doctrines of contract law in rejecting" what had been the "conclusive presumption of at-will employment." (52 Hastings Law J. 253 at 266, Jan. 2001)

Joe wrote important opinions in other areas of the law. On the Supreme Court, he authored *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, which established the Court's obligation to give proper notice before issuing a peremptory writ in the first instance. This decision has been cited over 1,000 times. No doctrinaire liberal as some have mischaracterized him, he wrote *In re Lance W.* (1985) 37 Cal.3d 873, establishing that the voter initiative, Proposition 8, which abrogated California's "vicarious exclusionary rule," did not violate equal protection.

His only dissent on our high court was in *People v. Overstreet* (1986) 42 Cal.3d 891. Joe disagreed with the majority who had reversed an enhanced sentence for a defendant who had committed a new crime while he had been released on his own recognizance. Joe's dissent emphasized that the purpose of the Penal Code section at issue was to "impose an increased sentence upon persons who commit additional crimes while released on bail or own recognizance." (P. 903) Conservative voters who voted not to confirm Joe, along with Justice Reynoso and Chief Justice Bird, apparently overlooked this case.

In the famous *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, he established methods for courts to use in determining whether settlements in civil cases involving multiple parties meet the legal standard of good faith.

Joe loved oral argument. My wife, Barbara, and I can attest to that, not as litigants, but as dinner companions. Dinner with Joe is an adventure, filled with enlightenment and good-natured give and take. In comparison, the acclaimed movie, *My Dinner with Andre*, is a tedious bore. Although the atmosphere was always friendly and relaxed, my mind stood at attention.

Many of these dinners occurred at the home of Professor Herb Morris. Herb and his wife, Margie, prepared gourmet meals. It was usually during dessert that we began a lively conversation covering the arts, literature, philosophy, politics, and even the law. Joe's wife, Janet, a talented and well-known artist, is, like her husband, warm, gracious, and unpretentious.

During one of our early dinners, Joe said he was thinking about writing a law review article about the California Supreme Court's practice of depublishing certain Court of Appeal opinions. I was not shy in expressing my distaste for what I thought to be an odious practice. I looked upon it as an illegitimate way our high court controlled its case flow.

Joe wrote his article, "The Depublication Practice of the California Supreme Court,: 72 Cal. L. Rev. 514 (1984). In typical Grodin style, he looked at the practice from all sides. He noted its shortcomings and candidly admitted it caused him discomfort. He ended his article with a tepid endorsement. "[I]f the choices are to grant a hearing or to deny and leave published an opinion that could lead to compounded error, the depublication alternative is preferable, though certainly not ideal." (P. 528) I hope that is a sign he will not vote to depublish this piece I am writing about him.

Joe writes so persuasively that his law review article almost convinced me that depublication can have a salutary effect. But I credit Joe's article with launching my 27-year career as a columnist for the *Daily Journal* legal newspaper. My first column entitled "It Never Happened" was a protest against the depublication rule. I guess the Supreme Court did not read it, and I suspect Joe is still not keen on the practice. Currently, depublication is used much less than in the past.

Joe's influence extends to some of the most unexpected places. My colleagues in my division of the Court of Appeal and I visited Cuba in early 1991. I had finished my drink at the La Bodequita bar where Hemingway drank and swore and drank some more. And I swore, a happy swear under my breath and made my way back to the hotel where I climbed the well-worn marble stairs to the veranda and sat in a wicker chair, comfortable, but not too comfortable, and looked up at the trees in front of the veranda where the wind gently touched the branches and let my mind run with the bulls when a hotel employee interrupted and said good naturedly, "Buena suerte viejo, she is here, La Señora is here to see you."

She stood in front of me, shielding me from the glare of the street, white from the sunlight. "Señor Juez," she said. "I have come to interview you for my radio show."

Her first question shook me out of my reverie.

"Do you know my favorite professor, Joseph Grodin?"

"You know Joe?" I asked in astonishment. Her equally astonished response was, "You know Joe?"

I began interviewing her. She had been a student of his at Hastings Law School. She practiced law for a while, and then married a Cuban and moved to Havana. "Professor Grodin taught me to think deeply about the law and how it can effect change in a civilized society," she said. "His class was fun and stimulating. He is the best." She turned off the recorder and told me she had had enough of Cuba and was returning to California. I was offered her job on Cuban radio. I turned it down. "Viejo," indeed.

Like the young interviewer, we are all enriched by the wisdom of Joe Grodin. His books and articles challenge us and compel us to see issues from a variety of viewpoints. No doubt that broad approach to deciding issues was influenced by the work of the philosopher and logician Morris Cohen. For Joe, Cohen's core message is that the true liberal always keeps

an open mind and is open to the possibility that one's own opinions could be wrong and other opinions could be right.

This approach is not advised, however, for those of you who read Joe's *High Sierra Hiking Guide* that he wrote with his daughter, Sharon. Have it handy while you hike the Sierras. You will not lose your way.

Joe has mentioned that certain exceptional jurists have been interested in broad philosophical issues. These include his mentor, Mathew Tobriner, and Benjamin Cardozo, Oliver Wendell Holmes, William Brennan, and Richard Posner. I would add Joe himself to this impressive list. And, yet, despite the depth of his academic credentials, I think Joe would agree with John Lubbock's insight, "Earth and sky, woods and field, lakes and rivers, the mountain and the sea, are excellent schoolmasters, and teach some of us more than we can ever learn from books."

Robert Frost's *The Road Not Taken* is a problematic poem often misinterpreted. The speaker looks into the future and sees himself reflecting back on a more recent past, if not the present. He misinforms us

". . . with a sigh
Somewhere ages and ages hence:
Two roads diverged in a wood, and I —
I took the one less traveled by . . . ."

Even the most adept at statutory interpretation will not have an easy time with Frost's mischievous use of language. But however one may interpret this masterful poem, it is a good reference point when we think of Joe Grodin. He can look back, not with a sigh, but a smile. He took both roads and still travels them with joy in his heart.

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HONORING JOSEPH R. GRODIN:

On My Teacher, Joe Grodin

NELL JESSUP NEWTON*

I started law school in 1973. I had worked at a labor law office (Levy & Van Bourg) as a secretary and knew Joe Grodin by reputation as one of the best and most respected labor lawyers in the Bay Area (he was then at Brundage, Neyhard, Grodin & Beeson). I lived in Berkeley and commuted for the first several weeks until I found an apartment in the city. On the first day of law school, I transferred from the bus at the old Transbay Terminal to a streetcar that was fairly crowded. I was clutching a number of law books and the guy standing next to me commented that it looked as if I were a first year student and asked where I was going to law school. I said UC Hastings and he stuck out his hand and said "Joe Grodin — I teach at Hastings." I don't think he was expecting my starstruck answer – "Joe Grodin, *the* Joe Grodin? It's an honor to meet you." I planned to be a labor lawyer so we talked about the labor law community all the way to Hastings. I also did not realize that professors in those days were extremely formal and the "Kingsfield" method of teaching predominated. This method

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of belittling students to goad them to study harder is, in my opinion, ineffective and inhumane and is no longer followed by the vast majority of law teachers. At that time it would be unthinkable to call a professor by his first name (and all but one of Hastings' professors were men at that time).

I got to know Joe very well during the second year. I was practically living in the *Hastings Law Journal* library and Joe's office was on the same floor of the building. He came by frequently for coffee and loved to sit with us and discuss labor law, constitutional law, and politics. It was the year of Watergate so we had a lot to talk about. Our civil procedure teacher had told us that presidential privilege wasn't really a procedure concept and he didn't know anything about it, but Joe spent hours talking about the legal aspects of Watergate with us. Although he was decidedly liberal in his political views, he was absolutely terrific in making us see and argue the other side. I remember going to his office furious about a decision that I felt trampled on worker's rights and I was almost mad that he didn't agree with me, but instead challenged my easy assumptions and conclusions. By the end of the second year we had asked him to become the law journal's advisor. Joe was the most cerebral of any of my professors. He was happy to discuss doctrine but happiest exploring the philosophical underpinnings of the rules as well as the impact various institutional decisionmakers had on the development of the law.

I have many happy memories of our conversations with Joe about matters high and low, from the moral and political arguments for and against public unions to the finer points of Crazy Eights, a card game the journal staff had been addicted to. He was a great advisor to the journal, keeping out of internal matters, but prepared to give counsel when we brought a difficult issue to him.

Joe was an advocate for students at UC Hastings at a time of great transition for the school — he was one of a handful (I think there were four) faculty hired on a newly created tenure-track as the school began to transition away from the "65 Club" model, which featured teaching by professors who were retired from other great law schools and served on a contract basis. Giants in their fields they were, but perhaps given the length of their service at other schools, they were not particularly focused on student learning or other concerns, at least so it seemed to us. In addition,

during the heyday of the 65 Club there was very little faculty governance, and the deans called most of the shots.

I moved to Washington, D.C. after graduation in 1976 and became a law professor myself. Although I cannot say I ever became the teacher he was, Joe was one of the role models who most influenced my teaching and my interactions with students. (And yes, to this day, when I introduce myself to a student I do so by saying, "My name is Nell Newton"). I returned to Hastings as chancellor and dean in 2009. One of the first emails I received welcoming me back came from Joe, and we had a warm relationship during the three years I served at Hastings. He was always willing to speak to groups of alumni and frequently packed the house. Naturally, he is particularly good at Q & A sessions — the harder the question and the thornier the issue, the more his face lights up as he formulates an answer that will continue the conversation. It was such a great joy to work with Joe again after so many years. I will always treasure his friendship.

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HONORING JOSEPH R. GRODIN:

Joseph Grodin's Contributions to Public Sector Collective Bargaining Law

ALVIN L. GOLDMAN*

INTRODUCTION

The Labor Law Group, established in the early 1950s, is a unique consortium of labor law professors, and usually a practitioner or two, devoted to improving labor and employment law teaching and scholarship. Its primary activities have been publication of course books and sponsorship of conferences on important new developments. All royalty income goes into a trust fund used solely for carrying on the Group's work. By luck more than by merit, I was invited to join the Group around 1969. Because I had practiced labor law for only a few years on the East Coast before entering law teaching in Kentucky and because I have never been a diligent reader of scholarly articles, the name Joseph Grodin was unfamiliar to me when, around 1971 or 1972, the late Professor Benjamin Aaron proposed him for membership in the Labor Law Group.

This article is one of a group published here on the occasion of the UC Hastings College of the Law Tribute Honoring Distinguished Emeritus Professor of Law and former California Supreme Court Associate Justice Joseph R. Grodin, November 12, 2015.

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Realizing that most of us were from the east, south and mid-west, Ben, as I recall, explained that his nominee had recently entered law teaching fulltime at Hastings and, though still a young man, had already distinguished himself as a leading California practitioner.[1] Ben most likely also noted his candidate's adjunct teaching experience, a few of his publications, and probably mentioned his doctorate from the London School of Economics. The potential value of this addition to the Group was immediately recognized,[2] and we unanimously invited him into membership with a plea to Ben to persuade him to accept our invitation. About a year later the Group met in Denver. It was there I met Joe and Janet Grodin for the first time and discovered the broad range of their interests[3] and accomplishments as well as their congenial personalities. In time, my wife got to meet them both and we developed a friendship that Ellie and I cherish.

The scope and intensity of Joseph Grodin's intellectual drive have resulted in his making important contributions to developments in a variety of areas of law. Because our relationship grew out of a shared interest in labor and employment law, this essay focuses on his work in one subcategory of that field — the law of public sector collective bargaining representation.

DEVELOPING THE LAW OF PUBLIC SECTOR COLLECTIVE BARGAINING

Prior to joining academe, Joe had published pieces dealing with private sector labor–management law. At the time he began teaching fulltime, his scholarly efforts initially shifted to public sector labor–management relations, an area of growing importance that was in need of more academic scrutiny and law school course materials. In time, as a scholar, law teacher and jurist, Joe Grodin helped meet both needs.

While on leave of absence from his law firm, Joe taught labor law, constitutional law and administrative law at the University of Oregon. Despite

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1 Joe's time in practice was especially long and impressive in comparison with the experience of all but two or three of the Group's academicians.

2 Indeed, I was awed by his credentials.

3 The Grodins' passion for music, the graphic arts, wilderness hiking and Judaic learning, occasionally are encountered in metaphors, analogies and quotations found in Joe's writings.

a newcomer's burdens of preparing for teaching in three demanding areas, he managed to co-author[4] an article[5] describing the general contours of the field of collective representation for government sector workers. The article was primarily directed at a newly adopted Oregon statute and provided what amounted to a guidebook for those operating under the state's complex public sector bargaining legislation, regulations, and attorney general's opinions. It also presented suggestions for improving the new law by removing identified statutory ambiguities, gaps, and uncertainties. Additionally, Professor Grodin and his co-author offered a number of broader observations about public sector collective bargaining laws. For example, using Oregon's experience, they noted how political and institutional rivalries often add complexities and uncertainties to these statutes.[6]

A brief footnote in the Oregon article addressed the potential value of strikes in most public sector bargaining. This was an important issue the future jurist would face a little more than a decade later. In a concurring opinion in *El Rancho Unified School Dist. v. National Education Assn.*, Justice Grodin observed that the common law justification for barring public employee strikes was based on the assumption that it interferes with the legislature's activity in establishing the terms of government employment through statutory and administrative fiat. However, he noted that by authorizing a procedure for bilateral determination of local government employee wages and benefits through collective bargaining, the legislature had removed the common law's justification for the work stoppage prohibition.[7] A few years later, in *County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn.*,[8] Justice Grodin joined the California Supreme Court's plurality opinion that took this reasoning a step further and announced that the state common law no longer assumes that a strike by public employees is unlawful "unless or until it is clearly demonstrated

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[4] Typical of Prof. Grodin's sense of decency, he gave full co-author credit to Mark Hardin, a third year law student, rather than follow the common practice of merely dropping a footnote to acknowledge the efforts of a student assistant.

Mr. Hardin had a distinguished career aiding abused and neglected children and served as Director of Child Welfare at the ABA Center on Children and the Law.

[5] "Public Employee Bargaining in Oregon," 51 Or. L. Rev. 5 (1971).

[6] 51 Or. L. Rev. at p. 9.

[7] 33 Cal. 3d 946, 963 (1983).

[8] 38 Cal. 3d 564 (1985).

that such a strike creates a substantial and imminent threat to the health or safety of the public."[9] Among other considerations, the opinion examined the economic realities of public sector collective bargaining and found that government entities that had engaged in collective bargaining had demonstrated that they have sufficient negotiating leverage so that work stoppages are a fair counter-balance for generating reasonable settlements.

When he began teaching fulltime at Hastings, Professor Grodin followed up on his Oregon study by preparing a comprehensive survey of California's primary public sector bargaining law that he published as an article in the *Hastings Law Journal*.[10] Noting that California had entered this field earlier than most other jurisdictions, he expressed disappointment that his home state's core legislation in this area, the Meyers–Milias–Brown Act, lacked a comprehensive, intelligible, and forward-looking framework for public sector labor relations. One egregious gap, he observed, was the lack of a structure for resolving questions of a labor organization's representational status — a problem he had encountered while still in law practice.[11] Another major problem was the lack of a precise list of prohibited actions that violate representational rights. These problems persisted until, gradually, over the next four decades, the California Legislature partially mitigated them by adopting amendments, consistent with some of Professor Grodin's recommendations, that a) established an administrative agency with specialized expertise to adjudicate and remedy prohibited employment practices and conduct elections,[12] b) delineated in greater detail the protections afforded the right to representation,[13] and c) provided mechanisms to facilitate bargaining impasse resolution.[14]

The California courts, on the other hand, were much quicker to embrace Professor Grodin's careful analysis of the Meyers–Milias–Brown Act's intent which gave the courts a basis for coping with critical gaps in the statutory language. They similarly were guided by his suggested approaches to

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9 38 Cal. 3d at 586.

10 J. Grodin, "Public Employee Bargaining in California: The Meyers–Milias–Brown Act in the Courts", 23 Hastings L.J. 719, 720–22 (1972).

11 *Id.* at 743-46 and text accompanying footnotes 114–119.

12 *Id.* at 728–29, 745; Cal. Gov. Code § 3541.

13 *Public Employee Bargaining, supra* note 10 at 727–28, 746–48; Cal. Gov. Code § 3506.5, 3508.5.

14 *Public Employee Bargaining* at 755–60; Cal. Gov. Code § 3505.4–.5.

interpreting particular provisions in which the language of the Act was burdened by vagueness. Accordingly, the Hastings article was cited and followed frequently by the California courts.[15]

In noting the Meyers–Milias–Brown Act's absence of statutory impasse resolution procedures, Prof. Grodin's Hastings article observed that many public employee bargaining laws provided for fact-finding with recommendations and impasse arbitration.[16] Prof. Grodin soon explored the potential value of those approaches in a study he made of a new amendment to the Nevada public employment bargaining law.[17]

The Grodin study of the Nevada statute explained that while fact-finding had been part of the state's public employment collective bargaining law for several years, a significant number of Nevada public employers had been ignoring fact-finding recommendations.[18] This led the state legislature to adopt an amendment allowing the governor, on the request of either party, to make the fact-finder's recommendations binding on all sides regarding any or all deadlocked issues in local government collective bargaining. Thus, if requested prior to the commencement of fact-finding, the

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15 Decisions citing and approving the Grodin article's analysis include *L.A. County Civil Com v. Superior Court*, 23 Cal. 3d 55 (1978) and *Public Employees of Riverside County v. County of Riverside*, 75 Cal. App. 3d 882 (1977) (holding that rules adopted by local entities must be consistent with the purposes of the Meyers–Milias–Brown Act); *Vernon Fire Fighters v. City of Vernon*, 107 Cal. App. 3d 802 (1980) (unilateral changes in terms of employment are a *per se* violation of the duty to meet and confer in good faith); *Solano County Employees' Assn. v. County of Solano*, 136 Cal. App. 3d 256 (1982) and *International Asso. of Fire Fighters Union v. Pleasanton*, 56 Cal. App. 3d 959 (1976) (injunctive relief should be granted where a local government made changes in the terms of employment without conferring with the employees' representative).

The *Public Employee Bargaining* article on the Meyers-Milias-Brown Act has been declared "the single most frequently cited authority on how the statute works." C. Cameron, "No Ordinary Joe: Joseph R. Grodin and His Influence on California's Law of the Workplace," 52 Hastings L.J. 253, 267 (2001).

16 *Public Employee Bargaining, supra* note 10, at 759.

As noted below, impasse arbitration is more commonly called "interest arbitration" to distinguish it from grievance arbitration. The award in interest arbitration is an imposed settlement of the unresolved terms of the negotiating parties' contract. The award in grievance arbitration is a judgment establishing whether one of the disputing parties was wronged, and if so, what remedy should be provided.

17 J. Grodin, "Arbitration of Public Sector Labor Disputes: The Nevada Experiment," 28 Indus. & Lab. Rel. Rev. 89 (1974).

18 *Id.* at 91.

governor could transform fact-finding into binding impasse arbitration.[19] Prof. Grodin's study observed that while other states had procedures for ascertaining whether to require the parties to submit to final, binding arbitration of a public sector bargaining impasse, Nevada's law was unique in placing this authority in the hands of an elected official.

At the time of the study there was too little data for a statistical analysis of the amendment's impact on Nevada's public sector collective bargaining system. Therefore, Prof. Grodin approached his task by examining the circumstances in which public sector bargaining impasses posed an opportunity to apply the new law, the outcomes, and the parties' own impressions of any changes in the dynamics of collective experiences under the amended statute. He also conducted interviews with neutrals involved in Nevada's arbitrated cases inasmuch as their conduct was bound to influence the parties' subsequent negotiating conduct.[20]

The Grodin study sought to ascertain whether the prospect of binding arbitration had a chilling affect on the efforts of local governments and employee organizations to resolve their differences through bargaining rather than rely on a settlement imposed by an arbitrator. He found that the evidence leaned in the opposite direction and attributed this in part to the Act's efforts to guide both the decision as to whether to require binding arbitration and the guidelines imposed on arbitrators.

The Nevada Act set out criteria to be considered by the governor when electing whether to impose arbitration in seemingly deadlocked negotiations. Although Prof. Grodin contended that those statutory guidelines were too vague to be meaningful, he found that in the first couple of years operating under the amended statute, two considerations were important in the governor's decisions to impose or not impose binding arbitration. One was the governor's impression of whether in the past the parties had given due consideration to fact-finding recommendations. The other was whether their bargaining to date was consistent with what he judged to be a good faith, reasonable effort to resolve differences at the bargaining table.[21] Prof. Grodin observed that these elusive elements in the governor's

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[19] *Id.* at 89–90.

[20] *Id.* at 99–101.

[21] A history of ignoring fact-finding recommendations was likely to result in imposing binding arbitration whereas bargaining efforts considered by the governor to

decision left the parties with considerable uncertainty that itself may have propelled them to greater efforts to reach a negotiated settlement.

Additionally, because the Act required the arbitrator to assess the local government's financial ability as well as its obligation to provide facilities and services protecting the community's health, welfare, and safety, Prof. Grodin found that, once a decision was made to require binding arbitration, the parties had further motivation to reach their own settlement. That motivation partly was to avoid the extra costs involved in presenting their case to an arbitrator whose expenses they would have to share equally. In part, too, the motivation was to avoid the costs of preparing for the arbitrator a budget-oriented presentation necessitated by the statute's emphasis on ability to pay.[22] Additionally, Grodin found that this guidance helped press the parties to do a better job of preparing for bargaining and, thereby, facilitated more productive settlement discussions.[23]

Prof. Grodin's conclusions found that the success of the amended approach was facilitated by the fact that the then-governor had a labor relations background. Therefore, the study suggested that to ensure that the system continued to function well it would be best to place the responsibility of deciding whether and when to impose binding arbitration in the hands of a person or tribunal with labor relations expertise. The Nevada law has since been amended to give this authority to a panel consisting of an accountant and a lawyer selected by the parties through the procedure of mutually striking names separately provided by the Nevada State Board of Accountancy and the State Bar of Nevada.[24] The wisdom of Prof. Grodin's suggested change, therefore, is dependent upon whether the appropriate expertise in the labor field is possessed by the persons proposed by the Accountancy Board and the Bar.

The growth of public employee collective bargaining was accompanied by an increase in work stoppages and work stoppage threats. This resulted in increased scholarly and political attention to the merits or problems of work stoppage substitutes, especially resolution of bargaining impasses by

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reveal a good faith reasonable effort to negotiate a settlement were likely to result in declining to impose binding arbitration. 28 Indus. & Lab. Rel. Rev. at 95–96.

[22] *Id*. at 97–98.

[23] *Id*. at 98–99.

[24] Nev. Rev. Stat. Ann. §§ 288.200 to .202.

impartial third parties, a procedure most commonly known as interest arbitration. Although he had previously discussed interest arbitration in his writings, in 1976 Professor Grodin published a paper that comprehensively examined the theoretical issue of whether such arbitration violates the democratic principle that "governmental policy is to be determined by persons responsible, directly or indirectly, to the electorate."[25] He explained that the issue is particularly compelling because issues involved in public sector collective bargaining "can involve significant elements of social planning."[26]

Prof. Grodin observed that, due to the complexity of modern government and the need to insulate some decisions from political intrusions, courts have been reluctant to place rigid constitutional constraints on legislative discretion to delegate legislative-type decisions. Accordingly, he focused not on what restrictions might be required by constitutional doctrine but rather on what, as a matter of sound policy, legislatures ought to do in delegating authority to interest arbitrators.[27]

At the outset of his analysis Prof. Grodin confronted what may be the politically most delicate issue respecting legislative delegation of authority for arbitrators to decide collective bargaining impasses in the public sector: How can the legislature justify authorizing non-elected persons to resolve public employment pay disputes? His succinct but compelling answer stated that the arbitration system should "presuppose a policy determination that employees should be paid whatever they are 'worth,' in the same way that public agencies purchase goods at whatever price the market dictates."[28] To help discipline the decisional process, he suggested a variety of guideposts such as the increase in the cost of living or private sector collectively bargained wages for employees doing similar work. Grodin labeled this approach "the proper wage model" and argued that in applying it an arbitrator should not weigh the public's ability to afford the result; rather, fiscal shortfalls should require the public employer to respond by reducing the affected work force and services, shifting funds from other parts of its budget, raising taxes or borrowing.

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[25] J. Grodin, "Political Aspects of Public Sector Interest Arbitration," 64 Cal. L. Rev. 678, 680 (1976).

[26] *Id*. at 682.

[27] *Id*. at 683.

[28] *Id*. at 684.

Being a realist, Prof. Grodin acknowledged a degree of artificiality in the proper wage model formula inasmuch as private sector wages for similar work often vary; the determination of whether work is "similar" often is subjective; some work is unique to the public sector; and the public sector often is the dominant source of some types of work and, therefore, the dominant influence of wage rates for its private sector counterpart. Additionally, he noted that even the more concrete cost-of-living guidepost poses a problem inasmuch as when those costs go up for employees, they also go up for government operations and, thereby, may impose a fiscal squeeze that limits the government's ability to meet all of its obligations, including providing cost of living increases for its workers.[29]

Political pressures, Prof. Grodin noted, give rise to demands that arbitrators not ignore the government's ability to pay. Thus, that requirement was common in legislation mandating interest arbitration as a work stoppage substitute. However, his survey of existing public sector bargaining laws that used interest arbitration revealed that references to weighing ability to pay were vague as to how that factor is to be taken into account.[30] Professor Grodin expressed concern that this vague requirement regarding ability to pay inevitably shifts to the unelected arbitrator the burden of making broad public policy choices.

Of at least equal concern in Prof. Grodin's analysis of public sector interest arbitration is the observation that many non-wage collective bargaining issues pose even more difficult problems of allowing social policy choices being delegated to the discretion of a non-elected decider. Examples such as school room class size or social worker case loads implicate broad educational or other policy choices while retirement and other employee welfare benefit programs can have long-range fiscal impacts that alter revenue-raising needs. This, argued Prof. Grodin, poses the need to structure the bargaining impasse system so as to preserve as much as possible the responsibility of elected officials to guide such choices, and he posed a number of suggestions toward this end. One is that statutes providing for interest arbitration should more specifically describe the weight

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[29] *Id*. at 685. Depending on the government entity's tax structure, a cost of living increase can, of course, be accompanied by increased government revenue from sources such as sales taxes.

[30] *Id*. at 687.

to be given to the public entity's ability to pay and identify the various income and expenditure elements that can be considered in weighing ability to pay.[31] He also advocated consolidating interest arbitration for all employee groups with the same public employer inasmuch as they feed from a common pie.[32]

The interest arbitration article additionally emphasizes the importance of judicial review to set aside public sector interest awards that violate the statutory constraints placed on the process. However, it also urges that initial review of challenged interest awards should be assigned to a state labor relations board in order to provide a more expeditious procedure enhanced by the benefit of specialized expertise and greater uniformity of results.[33] Further, the article warns that, because issues can change during the course of the arbitral proceeding, courts should avoid intervening prematurely. Accordingly, as a general rule they should not entertain efforts to enjoin the process on the grounds of non-arbitrability.[34]

A decision by the Michigan Supreme Court, a few years later, demonstrated the care with which Prof. Grodin had weighed the competing considerations for evaluating public sector interest arbitration arrangements. That decision, which upheld the constitutionality of the state's interest arbitration system for police and firefighter bargaining impasses, cited the Grodin article as authority for stated arguments in both the majority and dissenting opinions.[35]

DEVELOPING TEACHING MATERIALS ON PUBLIC SECTOR BARGAINING

Normally, in our country a lawyer's and jurist's foundation for understanding law and the legal process begins in law school and for many, perhaps most, that understanding is also primarily shaped by law school studies. Because most law school classes are centered on materials presented in the assigned course book, well-designed, thoughtful course books can

31 *Id*. at 695.
32 *Id*.
33 *Id*. 699–700.
34 *Id*. at 699.
35 Detroit v. Detroit Police Officers Asso., 408 Mich. 410 (1980).

be expected to significantly influence what is taught and how it is taught. Therefore, preparing course books can significantly influence developments in the particular area of law.

Within a few years after he joined the Labor Law Group, Joesph Grodin teamed with Donald Wollett to co-author the Group's revised course book on public sector collective bargaining, then a new area of law school study. The team of Wollett and Grodin provided a particularly valuable perspective inasmuch as these two scholars were also seasoned practitioners from both sides of the bargaining table. Don Wollett had been a partner in a major management firm in New York City;[36] Joe Grodin in a major union firm in San Francisco. Joe, Don, and other Group members produced further revisions of the Public Sector Bargaining book into the 1990s and, after Don retired from the task, Joe and others continued its revision and updating into the current century. Joe eventually retired from the project but its successor course book, now expanded to cover non-collective bargaining aspects of public sector employment, continues to be the source for teaching public employment collective bargaining law.

CONCLUDING OBSERVATIONS

Joseph Grodin's studies, discourses, decisions, and teaching in the area of public sector labor law are bound together by several threads that demonstrate his adherence to values and work habits he discussed in his book *In Pursuit of Justice*.[37]

Both as Prof. Grodin and as Justice Grodin, he has been faithful to the principle that legal rules ultimately are the prerogative of democratically elected representatives. His regard for legislative authority is evident in the care with which he examined the competing interests that gave rise to the compromises reached in adopting the public sector bargaining laws he studied, thereby gaining more accurate understanding of the intent of

[36] Kaye Scholer Fierman Hays & Handler. Donald Wollett had experienced both perspectives inasmuch as he represented the National Education Association for about a decade. During the course of their team effort, Wollett's understanding of public employment collective bargaining was further enhanced by his serving for several years as the New York State Director of Employee Relations.

[37] University of California Press, 1989. See, especially, chapters 9 and 10.

those laws. It is also evident in his proposals for improving them through suggested legislative changes rather than creative judicial interpretations.

Additional evidence of Joe Grodin's efforts to preserve the central role of elective government is his examination of public sector interest arbitration. There his focus emphasized how to maximize labor peace and equitable results without unduly delegating to non-elected persons the authority to shape social policies.

Finally, both as a professor and a jurist, Joseph Grodin has also directed his efforts at discovering not only what is theoretically reasonable, but also what is practical. Thus, in determining what improvements have been attempted and what reforms would be beneficial, Prof. Grodin has tried to discover practitioner insights into the effect law has on the parties' conduct. His research and discourses have not been confined to the typical academic analysis of archived decisions and documents or weighing the logic of competing arguments. Rather, his studies have reflected his respect for those who put flesh on the legal skeleton by including interviews to learn about the experiences of the officials, lawyers, and other decision-makers who work within the statutory system.

Accordingly, the integrity with which Joseph Grodin serves California, our nation, and the study of law deserves our admiration and gratitude.

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HONORING JOSEPH R. GRODIN:

Open-Minded Justice

BETH JAY*

It is a privilege and a pleasure to be asked to write about Associate Justice, Professor Emeritus, and friend, Joseph Grodin. When he was appointed to the Supreme Court in 1982, I was a relatively new member of the Court staff. I already knew him, however, because I had worked with Associate Justice Frank Richardson, on whose staff I then served, on a dissent to a majority opinion that Justice Grodin authored while sitting as a Justice Pro Tem on the Supreme Court. At the time, he served on the Court of Appeal. During the development of the opinions in the case, he and I had occasion to discuss the issues, and entered into a friendly wager about the result when the United States Supreme Court granted certiorari. I won the bet, and collected my princely winnings: an ice cream cone in the flavor of my choosing.

What I remember most about that first encounter was not the ice cream, but the opportunity to discuss with him the subject matter of the

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* Retired Principal Attorney to California Chief Justices Tani G. Cantil-Sakauye, Ronald M. George, and Malcolm M. Lucas (1987–2015), Staff Attorney for Associate Justices Malcolm M. Lucas and Frank Richardson (1980–1987).

case. We touched on not only the specific facts and issues before the court, but also on broader questions reflecting the potential for abuse of an expansive interpretation of the application of the Federal Arbitration Act. More than thirty years later, I appreciate his farsighted concern about the overuse and misuse of consumer arbitration. Those were the first of many opportunities for me to see his thoughtful, informed and always curious intellect at work.

For a while I commuted from North to South Berkeley to carpool to the Court with Justice Grodin, Justice Otto Kaus, and Alice Shore, a member of Justice Kaus' staff. There was always a risk involved, because neither jurist excelled in driving as they did in jurisprudence, but the chance to sit in the back seat with Alice and listen to the two of them argue, inquire, and simply explore the law was better than any law school class. The two of them truly "loved the law," for its challenges, intricacies, structures, and the ultimate questions of justice and the demands of judging.

The United States Supreme Court this term appears poised to reconsider its 1977 decision in *Abood v. Detroit Board of Education*, holding that employees who decide not to join a union nevertheless may be compelled to pay union fees, except for those costs related to purely political activities. In a locally grown case, *Friedrichs v. California Teachers Association* (No. 14-915), the high court will be entertaining a challenge asserting that collective bargaining in all its aspects is political in nature, and thus the plaintiffs should not be compelled to pay any dues. The breadth of the Court's decision in interpreting political speech may have far-reaching consequences for unions, and the increasing reliance on the First Amendment as a rationale for permitting actions once not thought generally governed by the dictates of that provision. My interest in the case is a result of a long-ago insightful description of *Abood* by Justice Grodin during one afternoon commute, a discourse that Alice and I listened to closely, but then noticed that the other front seat passenger seemed to be thinking very deeply with his eyes closed. It had been a long day for the jurists in the car, but I think it is telling about how engaging Justice Grodin's approach to an issue can be that some thirty years later, I remember the case, parts of his description, and the excitement that he transmitted while discussing it.

Since returning to Hastings, Professor Grodin has presided over a casual lunch before teaching. Three of us, two of his former staff members,

Hal Cohen and Jake Dear (both still working on Chief Justice Cantil-Sakauye's staff) and I, have been consistent attendees. The lunches, held at restaurants in the Civic Center area, and often including others, typically prove to be spirited discussions over plates of Thai or Vietnamese food. The subjects range from the topic assigned for the seminar he is about to teach to a critique of the latest United States Supreme Court opinions, with an occasional movie or book review thrown in. They are freewheeling explorations, with ideas put forth and shot down or supported, and the unspoken freedom to voice any idea, whether fully thought through or only a trial balloon.

I have had the good fortune to work personally and directly with excellent jurists throughout my career at the California Supreme Court. I never served on Justice Grodin's staff, but he remains one of my favorite jurists and lawyers after some thirty-five years working at the Court. For him, the pursuit of the law is a pursuit of true intellectual passion. And as a jurist, he also understood and took seriously the distinct duties and obligations of serving as a judge.

These qualities, and their significance to the continued preeminence of the rule of law in our system, recently have been sharply put into relief, as I find my assumptions about a basic common civic understanding of the role of jurists all too frequently fractured. For years, I have watched as commentators inveigh loudly against judges who act against the so-called popular will as reflected in legislation, the latest polls, or those whose views agree with the disappointed commentator's. The appearance of this strain in ever more vociferous protestations by individuals seeking the presidency, after the seminal opinion in *Marbury v. Madison*, can in no way be taken for granted.

How dare four or five unelected judges overturn the will of the people? Isn't the majority supposed to rule? Lately, similar assertions have been posed stridently by individuals who aspire to the highest offices in our nation. The fundamental value of an impartial judicial system, governed by applicable law and precedent, at times seems as antiquated as the practice of ladies wearing white gloves when they went downtown. And it is not simply politicians and commentators who have raised my concern.

The first time I read Justice Antonin Scalia's majority opinion in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), declaring Minnesota's

judicial ethics clause barring a judge's announcement of his or her views during an election unconstitutional as an infringement on First Amendment speech, I immediately thought about all that I had observed about judges in my many years working with the courts. Justice Scalia's opinion describes the exercise of impartiality by a jurist, and in doing so portrayed what seemed to me to be a cavalier acceptance that judges almost universally had essentially committed to reaching particular legal conclusions before and even after ascending the bench. Thus, impartiality in the judicial context generally refers only to bias against a party, but not as to conclusions about issues coming before a judge.

Even assuming impartiality could cover legal views, he concludes, guaranteeing such a state of mind would not amount to a compelling state interest; it contradicts common sense and experience that inform us that virtually every judge has some preconceptions about legal questions upon assuming the bench after a career in the law. Finally, as to impartiality connoting open-mindedness, he considers that to be not a common meaning of the term, and in any event concludes that, while such an approach at least suggests that each litigant might have a chance to prevail, it need not be discussed in the case at hand. He nevertheless dismisses out of hand the notion that a judge's statements announcing his views during a campaign might any way place on the successful jurist an unreasonable burden of remaining consistent with those stated views — as opposed to views stated either before the candidacy was announced or after assumption of office, whether in an opinion or in another forum.

I disagree with his approach to impartiality, for many reasons including those contained in the articulate dissents. The effect of his views have been further highlighted by retired Supreme Court Justice Sandra Day O'Connor's statements after leaving the court that she does not ordinarily second-guess her decisions, but the *White* case was one in which she had come to believe that the Court was probably incorrect. Moreover, it seems contrary to the approach taken by the justices whose working style I have most admired, including Justice Grodin. For them, the judicial role asks that they look first at the issue, next at the briefing, precedents, and applicable constitutional and statutory law, and only then decide on the outcome. Justice Scalia seems to anticipate a far less complex process: look at the issue, call up one's existing view on the matter, and then fashion an

analysis to reach that conclusion. This difference in approach was recently delineated in remarks made outside the Court following the decision in *Glossip v. Gross* (576 U.S.__, No. 14-7955, decided 6/29/15). In his dissent to the majority's affirmation of the death penalty, Justice Stephen Breyer raised several questions about the death penalty as presently conducted. Thereafter, as reported in an opinion piece in *The Los Angeles Times* ("Justice Antonin Scalia 'wouldn't be surprised' if Supreme Court ends the death penalty," 9/25/15), Justice Scalia informed an audience of Tennessee students, "If the death penalty did not violate the 8th Amendment when the 8th Amendment was adopted, it doesn't violate it today."

Justice Breyer, in contrast, in an interview conducted by Marcia Coyle on September 25, 2015, as part of the City Arts and Lectures series in San Francisco (and available online on KQED, a local PBS affiliate), responded quickly to her suggestion that he had expressed the view that the death penalty was unconstitutional in his dissent in *Glossip.* To the contrary, he stressed, the dissent had raised numerous questions and expressed an interest in the opportunity to consider such issues, but only after full briefing, argument, and consideration — and he drew a contrast to "others" who had already reached their conclusions on the constitutionality of the death penalty without the benefit of such information.

I cannot remember the specific case or question, but I can remember clearly a conversation with then-Justice Grodin about an issue before the Court in which he explained how he had wrestled with the result, because as a matter of policy he might have selected a different approach. As a matter of law, however, he felt constrained to follow the precedents and authorities that applied in the area and ultimately to reach a decision that he otherwise would not prefer. In other words, he looked at the case with an open mind. He upheld the rule of law and engaged in a process similar to that described by Justice Breyer: consider all the information before him, and reach the appropriate result in the full and proper exercise of the judicial role. This is not to say that doing such analysis will ineluctably lead to the same result for any open-minded judge — but it is to say that the process of judging with an open mind is indeed an essential part of the judicial enterprise. And Justice Grodin, as jurist and as teacher, and in his daily life, has provided an example of the way it should be done.

For the past few years, I have been fortunate to join the Grodins, along with others including Jake and Hal, on July 4th. As the sausages grill, and beer is sipped, and topics are tossed around the group, the judge brings us to a pause and we begin the reading of the Declaration of Independence. Each time it is a revelation. Each time it is a reminder of the brilliance of our founding fathers. Each time it is a reminder of how fortunate we all are that men of good will and extraordinary intellect, such as Joe Grodin, have devoted themselves to the pursuit of justice and the rule of law. And how fortunate I have been to know him.

* * *

HONORING JOSEPH R. GRODIN:

Walking with Grodin

JAKE DEAR*

My friend and colleague Beth Jay has written beautifully about the regular lunch conversations that we (with Hal Cohen) have had with Justice Grodin. She has focused eloquently on his integrity, vision, intellect, and compassion. Other contributors to this symposium, including former Chief Justice Ronald M. George, have highlighted some of Grodin's cases, theories, articles, and books — including, most recently, *The California State Constitution: A Reference Guide* (Oxford Univ. Press 2d ed., 2015) (with Michael B. Salerno & Darien Shanske), and one of my favorite books about law and process, *In Pursuit of Justice: Reflections of a State Supreme Court Justice* (University of California Press, 1989). But another book, which Justice Grodin coauthored with his daughter Sharon in the early 1980s — *Silver Lake* (High Sierra Hiking Guide No. 17, Wilderness Press, 1983), about the hiking trails of that area of the Sierra — reminds me of other dimensions, and this leads me to address him from a

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different perspective: Walking with, and learning from the man over the past three decades.

The very first walk I recall was at a staff picnic on Angel Island, in the middle of San Francisco Bay, 1985. I wish I could summon forth some poignant vignette from our long hike that day, but my lasting image was simply of us — him, his wife Janet, and his entire chambers staff — picnicking in the sun-dappled shade, and having lively conversations as the afternoon lazed by and the bay wind picked up.

Another walk, a few months later, remains with me much more clearly. The Chief had assigned him a case concerning a facial constitutional challenge to San Jose's rent control law, and after much discussion I'd prepared a draft calendar memo for his review. The judge (inside the Court we sometimes use that simpler and slightly less formal term instead of "Justice" and I'll do that here), suggested that we take a quick walk to discuss it. Foregoing a constitutional around the fairly scenic and architecturally interesting Civic Center Plaza, he guided us out the back of the 350 McAllister state building where we passed through the depressing institutional green annex facing Golden Gate Avenue and into the adjacent and rather gritty Tenderloin area. Briskly up Golden Gate, with lefts on Hyde and Turk; cross Larkin; then another left, past the monolithic wind-tunnel-inducing federal building. All the while we were discussing — he more deeply than I — intricacies of the analysis in the San Jose case. Back at the corner of Larkin and Golden Gate, with the old state building annex now back in sight, he was in full absent-minded-professor mode, and neglected to notice that the pedestrian crossing light was red. He stepped off the curb, and started to walk across as a car whizzed by, far too close for comfort. I had put my arm across his chest to slow him down, and as we can all see, it worked. To this day, I'm not sure he noticed; he barely skipped a beat on his side of the discussion. It was, after all, a quite absorbing and challenging case — eventually decided by the slimmest of margins in his resulting opinion, *Pennell v. City of San Jose*, 42 Cal.3d 365 (1986).

In November 1986 the voters terminated the judge's lease, depriving themselves of one of the most principled, brilliant, and thoughtful justices they could ever hope to grace the California Supreme Court. As a result, however, our walks in and around the Tenderloin increased, because the judge eventually resumed teaching at nearby UC Hastings. Hal, Beth, and

I have, since then, walked with him (and sometimes a guest lecturer) to and from various pre-class lunches up and down Larkin, Golden Gate, and McAllister, where over pho and various rice-dish plates of the day, we have discussed the matters of the day, as well as the topic for that afternoon's class.

After these lunches, we amble back down the street to a point where we must part in order to return to our respective buildings: He to Hastings, we to the old state building. At this point, many times over these many years I've become rather melancholy, thinking: he should be walking with us. Only recently I have started to think of it differently and more positively:

He *is* walking back with us; he's in the building, and in the Court, by virtue of the dignified example that he has lived, the wisdom that he has displayed, the books and articles he has produced, the students he has taught and mentored — and yes, by virtue of the law that he was able to leave in the Official Reports during his too-short tenure.

* * *

HONORING JOSEPH R. GRODIN:

A Trailblazer

JIM BROSNAHAN*

That night in the 1960s, almost fifty years ago, when the call came in around 5 p.m., it directed the recipient lawyers to gather at Joe Grodin's office. Three hundred and seventy-five people had been arrested on Telegraph Avenue in Berkeley. Some of them had been demonstrating, and some had been there to buy cigarettes, when they were unceremoniously rounded up. They would need lawyers. In those wild Berkeley days lawyers were not retained, they were mobilized.

From memory, that may have been the first time I met Joe Grodin. The large group of citizens had been taken to Santa Rita, a then failing institution, with some sheriffs who had returned from the Vietnam War with the idea that prisoners were to be beaten. The lawyers in Joe's office worked through the night and presented an injunction motion to Federal Judge Robert Peckham, who commanded the sheriffs to stop beating the prisoners. Judge Peckham then signed the injunction, and Santa Rita became a public issue with cries for reform.

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It was no accident we were summoned to Joe Grodin's office. At that time Joe was among the top labor lawyers, if not the leading one, on the side of the workers. Born in Oakland in 1930, Joe graduated with honors from UC Berkeley in 1951 and *cum laude* from Yale Law School in 1954. He immediately began practice as a labor lawyer, but also took the time to teach at Hastings College of the Law and the University of Oregon School of Law. Exploring his academic side, Joe got his Ph.D. in labor law and labor relations from the London School of Economics.

Surely there should be a full biography of Justice Grodin forthcoming before too long. The first chapters of Volume 1 will have to cover the scholarly student, the brilliant young labor lawyer, and his friendship with his mentor Justice Mathew Tobriner, who had worked as a labor lawyer until 1959, when Brown appointed him to the California Court of Appeal. Grodin's teaching and legal writing could be Volume 2. Two more volumes could be devoted to his time on the California Court of Appeal, his appointment to the California Supreme Court, and his judicial election, representing a tumultuous intrusion of politics, tearing off the cover of California judicial independence, which ended his judicial career. There could be a chapter on Justice Grodin's development of state constitutional jurisprudence. Joe followed another mentor, the prolific Justice Hans Linde of the Oregon Supreme Court, in his state constitutional interest. As the years went by, no one in California led more in the area of the California Constitution than did Justice Grodin. As long as I am hoping the reader will be inspired to read the full Grodin biography, I will go further and hope that contained in its pages will be a full exploration of Justice Grodin's broader legal thoughts, for they reflect many of California's developments during Joe Grodin's long career. When he discusses the Fourteenth Amendment, whether the listeners are students at Hastings, former colleagues on the bench, or lawyers having dinner, he is respected for the depth of his knowledge.

I wanted to give the reader some snippets about Justice Grodin as a legal scholar, and made the mistake of asking our firm's librarian to pull Joe's writings. It was as though I had entered the bottom of Niagara Falls for a shower. Justice Grodin has written on almost every subject in the broad book of California jurisprudence.

As I look upon his prolific writings, I am struck by how the young, determined workers' rights labor lawyer always turned to reason as his basis for expression. Additionally, his intellectual interests would not allow him to be limited to any one subject: Challenges to religious liberty. Should courts depublish opinions? Do arbitrators set social policy? How does the common law respond to social challenges? Enterprises affected with a public interest. Labor–management relations. The Taft–Hartley Act. The relationship between tort and contract. The history of our state constitution. Liberty and equality under the California state constitution. Freedom of expression. Agricultural labor in California. Same-sex relationships and state constitutional jurisprudence 2007. The constitutional right to pursuit of happiness. Appellate review procedures. The history of legal aid. Wrongful termination. How do American law and British law compare? Judicial selection, state and federal. Provocative thoughts on legal education. Privacy and the right of publicity. Pieces over time on Justice Otto Kaus, Justice Frank Sullivan, Justice Mathew Tobriner, Chief Justice Phil Gibson, Justice Jesse Carter, and Justice Frank Newman.

Justice Grodin even took his own judicial defeat and ran it through his thoughtful scholarly thinking, producing an important piece on judicial retention elections.

You can never be sure how much a graduate's legal education is going to affect his or her later achievements but, in Justice Grodin's case, I think it not accidental that when he attended Yale Law School the faculty was drenched in legal realism stressing increased understanding of the outside world. There was great early interest at Yale in the direction of emphasizing the relationship between law and social problems. John Dewey, the American philosopher of note, and Justice Benjamin Cardozo had written during the 1920s about the need to connect law and social problems. Both men were all about progress and the future. The law school that first acted on those pragmatic writings was Yale Law School. The dominant educational theme was that law should be seen as a method for progress, a kind of perfectionist institutionalism. In Joe Grodin's life, his mentor and law partner Justice Tobriner no doubt reinforced that approach. The law is not just about concepts. It is there to be of the greatest service to as many people as possible.

Matching legal rules with the people to whom they apply has always been given an empathetic quality in anything that Justice Grodin has done. But it may be the development of state constitutional law in particular that will be his lasting contribution, as it was for his teacher in this regard, Professor Hans Linde of Oregon.

Proponents of greater use of the California Constitution may believe it seems almost rude to ignore the existence, history and contribution of the early founders of California, who put the words into our Constitution for a reason. In the journal of the *California Supreme Court Historical Society*, Volume 3, 2008, Justice Grodin gives some history of what he calls, "the movement." Stanley Mosk was a strong supporter of the use of state constitutions. Justice Grodin's idea is that California courts should consider the state constitution before the judges consider the federal constitution. He shows frustration that this is not done more frequently. He believes the state constitution should come first. If California citizens and others have rights under the state constitution, they should not be dissolved by blind adherence to federal constitutional decisions. He points out the advantages of "the adequate and independent state grounds doctrine." He believes the California Supreme Court has at times ignored state constitutional principles, usually without explanation. He bemoans the advocates who appear and don't argue for state constitutional rights. He cites examples in which the federal courts send the case back to the California Supreme Court to consider state constitutional grounds. He cites *Serrano v. Priest*, involving funding of education; search and seizure cases involving search of garbage cans; and a variety of other cases involving our state's constitution. With appropriate modesty, Joe Grodin refers to his thoughts on state constitutional jurisprudence and his writing about it as "kvetching." In repeated articles he lays out various aspects of his state constitutional jurisprudential theories.

This piece does not do justice to Joe Grodin, California scholar, judge, and teacher, but it is an invitation for others to explore his enormous contribution to our state.

Is there no defect in this trailblazer? To retain my credibility, I will end with a short personal story. Joe Grodin wrote a book on the Sierras. It was a good book about the trails, lakes, views and wildlife. Many years ago I joined Joe and his daughter on a hike, west of Tahoe in the Desolation Wilderness.

We climbed up to Lake Genevieve and Crag Lake. As we went to cut back, east to rejoin our families, Joe suggested we leave the trail and take a short-cut that he knew. How could I not rely on such a naturalist, a person of deep mountain understanding? So off we went, taking a sharp left and leaving the trail behind. Within minutes we were climbing over a slide of boulders in sun-reflected heat that made me understand how a chicken feels in the oven. The rocks were so hot we didn't want to put our hands on them, though we had to because of the slant of the rock slide. It goes to show, nobody's perfect. So, I must admit, all of these years later, Joe Grodin has taught me all about the Fourteenth Amendment and one other important thing. Never, ever leave the trail, while hiking in the Sierras.

* * *

HONORING JOSEPH R. GRODIN:

About Joe Grodin

EPHRAIM MARGOLIN*

I asked some friends about Joe Grodin: Gerry Uelman describes Joe as "a renaissance man, an intellectual, engaged in politics, culture, art and law, unpretentious, modest, curious and brilliant." "Joe Grodin was a splendid Supreme Court justice and remains a terrific human being," writes Professor Larry Tribe; "my mentor and one-time boss Mat Tobriner was Joe's good friend, and any good friend of Mat's became a friend of mine. May he live forever. Okay, so maybe not *forever*, but to the closest comfortable approximation." "A more decent, fair-minded and compassionate human being is hard to imagine. California suffered a body blow when he was unfairly removed from the state supreme court," writes Judge Alex Kozinski. Len Sperry believes him "brilliant, kind, caring, generous, and well married." (Joe married Janet when she was twenty years old and they are inseparable ever since. I asked her for a one-sentence description

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of Joe. She said, "He is fascinating.") I agree with them, and still think up inadequate appellations: "elegant," "thought-full," "enthusiastic," "kind," "personally warm," and, simply, that Joe is my best friend.

As we grow older, our lifescapes narrow, but imagination expands. Herb Morris, Joe's first-year law school friend, tempered his interest in legal positivism with speculation about a "snake-less" biblical Gan Eden (paradise). I turned increasingly from trial to appellate and state bar practice and then also moved to speculation about a snake-less paradise and modern-day repopulating the Ark. Joe and I frequently used to parse biblical stories together. Studying the Book of Ecclesiastes, Joe had been literal in his dissents. Studying the Book of Exodus, Joe raised his eyebrows, one at a time, and we argued. In the universe of everyday politics, we talked about the Iran deal and America post-Iran. I felt like arguing my "case" before the court. Sometimes, Joe would suddenly move into other areas of discussion: what is my "opinion about a certain Dworkin book?" In turn, I would ask him about his take on Yuval Harari's *Sapiens* or about Assaf Gavron of Israel. A conversation with Joe resembles a modern version of a Socratic dialogue. Curious, unpretentious, brilliant. And warm. And both of us are older than Socrates but still his disciples.

As I write, Joe is reaching 85. "You are *so* young," I blurt out from my 88 advantage. "I know," he responds. By this September, Joe's second volume on the California Constitution will be published. He continues teaching at UC Hastings College of the Law, arbitrating, writing, and defying the calendar. There is nothing better than moderation, including moderation. In between, we sip our café lattes. We praise Obama's signing of the Amazing Grace, and wonder about opinions of the new judges on the California Supreme Court. Joe confesses to unease: "We are too comfortable," he says, "in an un-comfortable world." We turn to issues of *access* to justice, of *access* to politics. We worry about *fairness* in the legal delivery system (not just about *equality*). We turn to medical issues. Joe probes effective counter-arguments. He searches for substance. If our conversation turns too depressing, we shift to aesthetics: What is new in the opera, or in the latest classical music performances; what theater productions and art exhibitions should one see? Joe's interests were never monochromatic.

Fifty-five years ago, Mat Tobriner introduced me to Joe. I did not know him in law school, since he enrolled when I graduated, in 1952. I did not know

him in his London years. In the late 1950s, I was doing some minor research for Mat Tobriner. It was before Mat's law office became Brundage, Neyhart, Grodin and Beeson. Tobriner introduced me to Joe, and Joe met me with a huge smile and a thorough cross-examination. He wanted to know about my experience clerking for the Supreme and District Courts in Israel and about my work as a private secretary for Menachem Begin, head of the Irgun Underground in Israel, as Begin was emerging into his public life. I could not stop talking. He asked sensitive questions. Later, I arrogantly tried to recruit him into the local ACLU, where I briefly chaired its legal committee. He did not need my help. Never giving up, I recruited him instead into the American Jewish Congress Commission on Law and Social Action. We were several dozen Bay Area lawyers dabbling in social justice issues: devising legal attacks on racial discrimination, arguing about due process, equal protection, separation of church and state, segregation, and anti-Semitism. (He tried unsuccessfully to get me interested in labor law.) He introduced me to Janet, his wife. Each of them summered separately at the Brandeis Camp. My friendship with Joe and Janet, now fifty-five years in the making, endured, grew, and deepened.

Two thousand years ago, in *Ethics of the Fathers*, Joshua ben P'rahyah left a set of three instructions, for which he is still remembered: "provide yourself with a teacher, acquire a friend; and judge every man charitably." (Mishnah 6; my translation.) Judging every man charitably defines for me an ideal of what judgeship means. This is what Joe did when he became a judge. He turned into a great judge. But he was more than a "judge." Like Tobriner, he was also a splendid teacher. He is a good human being. A good husband. A good father. And he is a good friend.

It is normal to strive to "provide yourself with a teacher." He was what a good teacher should be. Yet, even great teachers, as rare as they are, relate to students with unilateral authority. Finding a good friend is more difficult. True friendship is less unilateral than a teacher–student relationship. Friendship implies concern for the other, consideration, devotion, perseverance, and care. It is more than Hillel's teaching of "What is hateful to you, do not do unto others"; it is doing for the other more than you would do for yourself. In this sense, having a real friend is the rarest of luck. Keeping friendship alive for fifty-five years is an amazing accomplishment. A minor miracle.

When he studied at the University of California, Joe would drive to school and give rides to other, non-driving students. Friendships bloomed.

Janet remembers that driving his car, he still seemed looking at her sitting in the rear of his car. She must have looked back. She remembers telling Joe where he parked his car for he did not remember it. When they were married and Joe became a lawyer, Janet took up dry point, monotype, wood blocks, printmaking, painting in different techniques, and ended up juried into the Library of Congress. Her art decorates their home. Joe "tried to paint," but it "was not very exciting." Painting seems the only thing he ever tried in which he did not excel. In time, they had a daughter, Sharon, "curious and verbal at nine months," a lawyer, grown into communal leadership. And, then a second daughter, Lisa, a great violinist. Lisa's recording would play in the car as we drove to Inverness; she entertained at the Lawyers' Club Retreat, and grew in stature. Sharon would join us occasionally when we studied some issue or book. In time, the Grodins multiplied and grandchildren became the apple of their eye. The Grodins seemed always together. The family celebrates holidays and travels the world together. Joe likes to travel: Aspen, Yosemite, Europe, East Coast, the Mediterranean. When Joe's junior grandchild arrived in Scotland this year, he wrote his parents in wonder that "they drive on the wrong side of the street!"

Dinners and lunches with Joe were always fun. Generally, we meet in my office or, when Janet joins us, in San Francisco around major museum exhibits or concerts. At dinner Joe acts like a chief justice, making the food secondary. He takes care of Janet, fusses about her menu, in restaurants orders carefully a balanced meal, and always initiates a sparkling platonic dialogue. As I mentioned, he is into philosophy, literature, politics, theater, art, the Hebrew Bible — What books were read? What events crowd the mind? What do I think about the latest news, what about Putin? Why does Netanyahu seem "strident"? What of Obama's style? How does daily news square with decency, logic, and general wellbeing? We visit the landscape of hearsay. And we share news about children, grandchildren, travel, the courts . . . . Sometimes we meet at the Brosnahans' jurisprudence café, with law as our subject, or with the Sperrys, where art and Len's jokes become the main course, or we meet at my home, where both of us keep searching for better tomorrows. Since Joe likes to travel, I joined the Grodins in Ireland, where he was teaching, and I delivered a lecture on some utterly forgettable subject.

As a Court of Appeal judge, Joe would sometimes discuss with me a carefully camouflaged legal issue — whatever bothered him at the time,

after altering the underlying facts, for he would never talk about his real cases deeming them privileged. This could lead to strange outcomes. On one occasion, he discussed a criminal case involving Munchausen by Proxy. I opined that Munchausen by Proxy made psychiatric sense. Several weeks later, I was horrified to read Joe's opinion. Our conversation was about the reliability of psychiatric evidence, not about its applicability to the facts of the case. When the court opinion was published, I became aware that I failed to deal with the Fry test, an important issue for the criminal defense bar. I should have thought of the *Fry* case anyway, but we talked only about the psychiatric validity of the Munchausen by Proxy doctrine, and Joe never mentioned legal issues of admissibility.

At a 1986 meeting in the Zuni restaurant, with only Joe, Jerry Marcus and myself, Joe told us that he was approached by a rightwing political advisor who offered to help Joe escape the label of the liberal "gang of four" (Chief Justice Rose Bird, Mosk, Reynoso, and Grodin), if Joe disowned Chief Justice Bird, publicly endorsed capital punishment, and joined the opposition to her reelection. Joe was not beholden to Rose Bird. He did not blindly track her positions. On one occasion, if memory serves, he upheld capital punishment on the facts of the case. He never did anything blindly. He would not lockstep. He voted his own conscience. Moreover, her doctrinaire tone was not simpatico. But, asked for my opinion, I told him that one should never abandon colleagues in their need. Self-interest should not beat loyalty. Marcus opined that loyalty to Bird might cost Joe his judgeship. With Joe it was a matter of principle.

I worried about my advice when Joe was defeated. I came to the Fairmont Hotel, where Joe and Janet awaited the result of the vote and witnessed a great judge removed from office. I saw Janet devastated by the vote. Outwardly, Joe held his feelings private. He returned to teach law at Hastings and counsel clients in labor law. There was pain. Joe never discussed that vote again. At least with me. And life went on.

As Larry Tribe put it: "May he live forever." In spite of aggravations, political and physical. May he continue to seek logic in a grimly illogical world. And may he enrich BART by frequent trips to San Francisco.

★ ★ ★

ARTICLES

IN SEARCH OF CALIFORNIA'S LEGAL HISTORY:

A Bibliography of Sources

BY SCOTT HAMILTON DEWEY*

INTRODUCTION

In the summer of 1988, Christian G. Fritz and Gordon M. Bakken published an article, entitled, "California Legal History: A Bibliographic Essay" (hereinafter referred to as "Fritz & Bakken").[1] This article discussed various key topics in the legal history of the State of California and pointed readers toward some of the essential resources then available regarding those topics. Fritz & Bakken's article also marked an early recognition of California legal history as a rich research area worthy of further exploration.

Fritz & Bakken's original essay was just over nineteen pages long. As Professor Fritz has observed recently, it was intended only as a brief introduction to its topic, and as an encouragement to additional research and researchers, at a time when American legal history generally remained relatively new as a field of study, and California legal history even newer.[2]

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[1] Christian G. Fritz & Gordon M. Bakken, "California Legal History: A Bibliographic Essay," *Southern California Quarterly*, Vol. 70, No. 2 (Summer 1988), pp. 203–222.

[2] E-mail message from Christian G. Fritz to Selma Moidel Smith, October 16, 2015.

More than twenty-seven years later, like many other fields of history in the post-1970 era, California legal history has expanded hugely, even explosively, over its still-fledgling state as of 1988. The field of legal history also has tended at times to merge with other fields of history, such that now, in addition to more traditional, "pure" legal history of matters such as courts, cases, judges, lawyers, and legal doctrine, one also routinely finds "hybrid" studies, combining legal history with, for example, social history, gender history, demographic history, labor history, agricultural history, economic history, or environmental history — among many other possibilities. Thus California legal history has grown progressively richer and more complex over the past quarter century, in ways that might have been difficult even to dream of when Fritz & Bakken offered their original introduction.

Given the growth, evolution, and maturation of the field of California legal history over the past decades, Selma Moidel Smith, editor of the journal *California Legal History*, has for some time been eager to have Fritz & Bakken's essay updated and expanded. In 2010, she wrote:

> One of the rewards of studying California legal history is that the field may be entered from nearly any perspective and pursued in nearly any area of interest. This is so because California legal history is not merely a microcosm of American legal history. It is a special case. California's eventful legal history and its position as a legal innovator have allowed it to be among the few states whose legal history is recognized as a field of study. Unlike the study of American legal history in general, it is exceptional because it has not as yet crystallized into a self-contained academic field.
>
> This circumstance gives rise to both its weaknesses and its strengths. Among the obvious weaknesses are that few university courses are devoted specifically to California legal history, and it is not recognized as a field of publishing apart from *California Legal History*. It would be difficult to name a scholar whose career has been devoted entirely to its study. And yet this circumstance also leads to one of the field's less-obvious strengths, its unique diversity of perspectives and subject matter.[3]

[3] Selma Moidel Smith, "At the Intersection of Law and Scholarship: Recent Approaches to California Legal History," *California Supreme Court Historical Society Newsletter* (Spring/Summer 2010), p. 7 (written without a byline in the author's capacity as Publica-

Accordingly, Selma informed me that her goal in asking me to undertake this project was to create a resource that would encourage scholars to pursue new research and also enable teachers to prepare course curricula in the field. The bibliography that follows represents an effort to do just that, as well as a slightly belated twenty-fifth-anniversary commemoration of the original article.

As readers will quickly discover — perhaps gleefully, perhaps glumly — this updated bibliography is a whole lot longer than the original, and seeks to be more comprehensive than the original was ever intended to be. The new bibliography also draws upon powerful new digital bibliographic research tools and techniques that remained mostly or entirely unavailable back in 1988.[4] Indeed, the whole era of microcomputing and related digital technologies that have revolutionized libraries, research, and information science in general has happened mostly since that time. Partly as a result of that transition and the expanded access to information that it has made possible, this bibliography includes a much wider range of particular topics and subtopics than the original article, along with expanded coverage of the topics Fritz & Bakken addressed.

As the length of this work approached 120,000 words (requiring about 300 pages in *California Legal History*), Selma proposed the more practical — and altogether more desirable — concept of expanding the bibliography from the pages of the journal to an independent online format. Thus, the main body of this text appears in the 2015 edition of the journal (volume 10) for general reading, but the complete results of my work — including the full body text and over 400 notes with thousands of bibliographic entries — appear online at http://www.cschs.org/history/resources/bibliography.

The benefit is self-evident: Rather than being out-of-date the moment it is published, the bibliography will become a living resource. Readers are hereby invited to submit suggestions for citations (and corrections, please) directly to me at dewey@law.ucla.edu. I have agreed to continue in the capacity of Bibliography editor and gatekeeper for an indefinite period.

Perhaps ironically, though, notwithstanding the present bibliography's greatly expanded size and ambitious — or hubristic — goal of being complete and comprehensive, it is actually only *more* comprehensive than Fritz &

tions Chair and Editor of the *Newsletter*); *available at* http://www.cschs.org/wp-content/uploads/2014/08/2010-Newsletter-Spring-Intersection-of-Law-and-Scholarship.pdf.

[4] See my "Research Notes and Concluding Comments" on this topic and several others at the end.

Bakken, and thus in a sense remains, like the original, only an introduction. That is, despite the copious lists of sources concerning myriad topics that may be found here, this bibliography, too, remains inherently and inevitably incomplete — there is, and likely will always be, even more information out there regarding California legal history than can ever be captured in a bibliography.

That is partly because, like any other field of history, California legal history is a moving target: new books, articles, and theses are being written or are already in the publication pipeline even as this introduction is being written, while existing primary and secondary materials are being found — or recognized as relevant — and added to library or archival collections, catalogs, indexes, and finding aids. Such items are not yet listed in indexes or databases to be found. So, just as one cannot put one's foot in the same river twice, this snapshot of the state of California legal history, begun in the summer of 2015, would be doomed to incompleteness at the outset and in ever-greater need of updating later, like its predecessor, if not for the new era of digital, online publishing.

This bibliography is nevertheless predestined to be incomplete for the added reason that it remains practically impossible to construct and conduct theoretically perfect searches that produce all actual relevant results (and, preferably, no irrelevant ones) on any topic, and certainly on a topic as broad and diffuse as California legal history. It is frankly daunting, even humbling, to approach a subject as broad and multi-faceted as "California legal history," to confront even a fraction of the myriad potential sub-topics, directions, and paths one may wander down in pursuit of that broad, amorphous general topic, and to recognize that law and legal history potentially touch almost all aspects of human existence and vice versa. John Muir's famous quote is singularly appropriate here: "When we try to pick out anything by itself, we find it hitched to everything else in the Universe."[5] Where, exactly, does legal history stop, and "ordinary" history, or life, begin? In terms of digital research, the proliferation of sub-topics entails a similar proliferation of potential search terms. And there is no one master database, and no one set of "correct" search terms, that will produce everything that could be appropriately characterized as California legal history — which categorization necessarily requires a

[5] *See* http://vault.sierraclub.org/john_muir_exhibit/writings/misquotes.aspx.

human judgment call, anyway. Rather, the results must be chased down using various different search terms in several different databases, and, perhaps contrary to the idealized theories of information science, in reality, if you switch databases, or even if you switch search terms or strategies using the same database, you will continue to find new relevant results that did not appear in earlier searches. Although this bibliography was compiled from many different searches in many different databases producing thousands of potentially (but not always actually) relevant results that had to be sifted one by one, along with other search techniques and many helpful suggested items for inclusion from members of the editorial board of *California Legal History*, it did not (and could not) draw upon literally every conceivable search in every available database. For this reason, too, it is inevitably incomplete.

With the caveat that this bibliography (even with ongoing improvement) can by no means be the final word on the subject, and remains only an introduction, a gateway into the field of California legal history the way Fritz & Bakken's original essay was, it is nevertheless hoped that it may serve as a helpful, useful, maybe even stimulating exposure to the vast, diverse, complex richness that California legal history has become. Indeed, hopefully some readers and researchers may come away with some of the same sort of feeling of discovery, and awe, that the author/compiler experienced — rather like Howard Carter reportedly murmered in 1923 following his first glimpses of the treasures in Tutankhamun's tomb, in response to Lord Carnarvon's question, "Can you see anything?"

"Yes, wonderful things."[6]

SPECIAL HONORS & COMMEMORATIONS

Although it is not the purpose of this bibliography to play favorites, certain scholars have made particularly notable and extensive contributions to scholarship in various areas of California history, and this bibliography seeks to appropriately recognize their efforts. For the most part, such special contributions are commemorated at or near the beginning of relevant topic headings — with the following two exceptions concerning two scholars who have made particularly major and broad-ranging contributions to California legal history in general.

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[6] *See* https://www.goodreads.com/author/quotes/202032.Howard_Carter.

IN MEMORIAM: GORDON M. BAKKEN

Professor Bakken, coauthor of the original 1988 bibliographic essay, passed away in December 2014 at the age of 71. An obituary in the Legal History Blog described him as "probably the leading legal historian of the American West of his generation."[7] Along with his wider work on the West as a region and other states or localities within it, Bakken's contributions to California legal history were extensive. In addition to his numerous publications, he chaired or otherwise served on a vast number of committees for master's theses on legal history topics that have come out of California State University, Fullerton over the past several decades, many of which appear in this bibliography.

In memory of Prof. Bakken, and in recognition of his contributions to the field, here, taken from his online curriculum vitae, are lists of his many books,* book chapters and encyclopedia entries,* articles,* and oral history interviews* specifically regarding California and its legal history. (Many of his works that concern the West more generally also touch upon California, of course.) These works also appear elsewhere in the bibliography under specific topics and headings.

LAWRENCE M. FRIEDMAN

Fritz & Bakken in 1988 noted the "path-breaking work of Lawrence M. Friedman and Robert V. Percival" in their seminal book examining in detail an example of the local history of California courts and criminal law, *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870–1910.** After many other similarly in-depth explorations of a variety of topics in criminal or civil law in several different California counties, after advising or assisting many student dissertations, theses, and research papers, and also after the passing of Prof. Bakken, probably few would deny Prof. Friedman the honorary title of the current "Dean of California legal history" — particularly with regard to the general history of courts and of civil and criminal law. In honor of his record of lifetime achievement in service of that field, here is a list of his publications specifically concerning California legal history (only a fraction of his total publication list).*

* * *

[7] Dan Ernst, "Gordon Bakken (1943–2014)," Legal History Blog, December 11, 2014, *available at* http://legalhistoryblog.blogspot.com/2014/12/gordon-bakken-1943-2014.html.

* All notes available at http://www.cschs.org/history/resources/bibliography.

SUBJECT HEADINGS IN ALPHABETICAL ORDER

ADMIRALTY

In 1988, Fritz & Bakken noted that the study of admiralty in California legal history "remains in its infancy," and they invited scholars to help the field grow to maturity.* For the most part, the searches undertaken for this bibliography suggest that relatively few scholars have taken up that challenge, and the two sources that Fritz & Bakken cited appear to remain among the few sources particularly focused on that topic* — but Prof. Fritz has identified many additional helpful resources that touch upon California admiralty law.*

AFRICAN AMERICANS

Fritz & Bakken noted in 1988 that scholarly treatment of the legal history of California's black community paled in comparison to the more extensive discussion of the legal aspects and entanglements of California's Chinese and Japanese communities,* and that is still largely true. However, in addition to the two sources cited in the 1988 article,* various others regarding California's African-American legal history have appeared or resurfaced since 1988. Regarding the 19th century, these include studies of the black experience in California during the pre-Civil War years when the ultimate fate of slavery remained uncertain and vestiges of slavery were imported into California during the Gold Rush,* along with more general discussions of California's African-American residents before 1900.* For the period after 1900, scholarship on African Americans and the law includes biographies or oral histories of several notable black judges, attorneys, or lawmakers,* along with several articles or theses mostly focused on primarily postwar developments such as affirmative action and the fight for residential desegregation.* African-American labor history and associated legal conflicts during the Second World War and shortly afterward have also stimulated several studies.* The 1992 Los Angeles riots/rebellion, together with the earlier Watts Riots of 1965 and the later Rampart police scandal, have generated a number of studies that touch upon legal and law enforcement history that is especially associated with Los Angeles' African-American community.*

* All notes available at http://www.cschs.org/history/resources/bibliography.

AGRICULTURE

From before the Gold Rush through the foreseeable future, agriculture has been and will likely remain one of California's major industries as well as a source of legal problems and litigation. Legal historians (primarily Victoria Saker Woeste) have extensively explored the business organization of agriculture and the cooperative movement;* other scholars have studied other aspects of the agricultural industry, including agricultural regulation and adjustment, the wine industry, and other topics.* Because the practice of agriculture, and resulting legal complications, are inextricably entangled with crucial inputs such as Water, Land, and Labor, *see also* the sources listed under those headings.

ARCHIVAL/BIBLIOGRAPHIC/HISTORIOGRAPHICAL

There are a number of helpful published resources providing archival or bibliographic information regarding California legal history, both generally and related to specific topics. Only a few early examples were listed in Fritz & Bakken's original article,* but since 1988, many additional resources have emerged or surfaced.* In particular, *California Legal History* has recruited scholars and archivists at various major libraries to provide overviews of their respective institutions' holdings related to the history of law in California.* *Western Legal History* has also devoted two separate issues to archival and historiographical topics concerning California and the West more broadly.* As of mid-2015, the California Judicial Center Library's department of Special Collections and Archives listed a wealth of manuscript holdings, including the papers of California Supreme Court Justices Allen E. Broussard, Ronald M. George, Joseph R. Grodin, Joyce L. Kennard, Otto M. Kaus, Wiley W. Manuel, Stanley Mosk, Frank C. Newman, Niles Searls, and Kathryn M. Werdegar, along with additional collections from California Supreme Court Bailiff Elliott Williams, Reporter of Decisions Randolph V. Whiting, Public Information Officer Lynn Holton, the papers of Bernard E. Witkin, and other collections associated with the California Supreme Court.* It is to be fondly hoped that such collections will only grow with time. *See also* Oral Histories.

ART LAW

The history of art law in California seems to have not yet generated many published traces. Yet there are some sources that address the topic.*

ASIAN AMERICANS, GENERALLY

The many trials and travails of California's Chinese-American and Japanese-American communities have long been established, major topics in California legal history. The experiences of other, traditionally smaller Asian-American communities, or of Asian Americans in general, have received less attention so far, although legal historians have started to fill those gaps, providing studies focused on Filipinos,* Koreans,* and East Indians* in California, along with other studies addressing the legal aspects and experiences of the state's Asian-American residents more generally,* including the shared experiences of detention at the U.S. federal immigration facility at Angel Island.*

BORDER

Myriad sources address legal issues relating to California's border and territory. California's portion of the international border with Mexico has received most attention,* but conflict over the state border with Nevada also has been studied,* as has the long-running argument over whether to divide California into multiple states* and the early possibility of a mega-state reaching from Utah to the Pacific Coast.* Probably the weirdest part of the story of California's borders and proposed divisions concerns the would-be State of Jefferson, to be carved out of California's northern counties and combined with contiguous counties in southern Oregon — a proposal dating back to 1941 if not earlier.*

CALIFORNIA CONSTITUTION

In 1988, Fritz & Bakken offered a relatively long list of sources concerning California's constitutions — either the 1849 Constitution,* the 1879 Constitution,* or both.* Various aspects of California's constitutional history, including issues regarding racial or other discrimination,* have by now been further explored by many different scholars,* notably including UC Hastings law professor and former California Supreme Court Justice Joseph R. Grodin,* who generously suggested many items to include under this heading. Prof. Fritz, in addition to many other helpful suggestions regarding items for inclusion in this bibliography, also offered a small library's

* All notes available at http://www.cschs.org/history/resources/bibliography.

worth of additional resources regarding the California Constitutions of 1849 and 1879 and California constitutionalism and constitutional reform in general.* *See also* Early Anglo California, among other topics and headings.

CATHOLICS & CATHOLICISM

From the earliest Spanish colonization through its surge in recent decades to become (again) the single largest religious denomination in California, the Catholic Church has held an important place in California's history, including its legal history. Scholars have addressed the contested church-state boundary in Spanish California;* the impact of Anglo-American conquest on Church property,* and especially the litigation over the Church's Pious Fund of the Californias;* the staging, and suppression, of America's first Passion Play in Victorian (and mostly Protestant) San Francisco;* and California Catholics' activism and leadership in social reforms related to racial justice, among other issues.*

CHILDREN/JUVENILES

Children's involvement with the law in various ways has not yet received the level of attention that legal historians have devoted to more established topics involving adults, but scholars have contributed research on different aspects of this topic, including juvenile delinquency and the origins of the juvenile justice system in California,* dependency and foster care,* and California Indian children and the law,* among others.* For additional sources that may touch upon the legal situation of children directly or indirectly, *see also* Family Law; Women (marriage & divorce).

CHINESE AMERICANS

In their original 1988 article, Fritz & Bakken noted that the "literature on the Chinese experience in California is quite large," and that most of it at least touches upon the discriminatory laws that fundamentally restricted and hung over the lives of early Chinese Californians.* They then offered a list of resources in which the legal historical aspects are central rather than peripheral.* Faulting certain earlier sources for not making better use of the San Francisco federal court records that provide the richest source of information regarding Chinese-Americans' legal resistance to exclusion

and discrimination, they cited the work of Charles McClain as "a step in the right direction."* Since then, McClain has taken further steps in that same right direction, producing one of the most important books focused on the various legal aspects of the early Chinese-American struggle for equality, among other publications.*

The body of scholarship regarding the Chinese-American experience has grown much larger since 1988. Some of the literature focuses primarily on law, but other sources that are not primarily focused on law nevertheless interweave significant legal historical aspects together with other elements of the story, whether relating to social history, labor history, economic history, medical history, or other topics. Although a line must be drawn to prevent including literally every source that addresses the Chinese-American experience in any way, this bibliography will draw the line somewhat less sharply than did Fritz & Bakken, and will deliberately include various useful, interesting sources in which law is significantly interwoven with other historical concerns. Also, certain sources may focus primarily on the nationwide story and on federal policies and enactments more than specifically on California and its laws; but given how much of the nation's Chinese population resided in California, the national and federal story remains to a significant extent a California story in its impacts, and some nationally/federally rather than strictly California-focused studies are included in this bibliography for that reason. Again, though, not everything can be included, and of course readers should be aware that there are many more resources out there to be found, some of which would doubtlessly enrich one's understanding of the topic even in a strictly California and legal context.

At any rate, there are many studies that focus on legal matters regarding Chinese Americans through the 1880s and the passage of the 1882 Chinese Exclusion Act,* along with other useful studies in which either the law, or California, is more interwoven around other concerns.* For the period from the 1880s through the mid-20th century, studies tend to focus on exclusion enforcement and immigration,* and on the federal immigration processing facility at Angel Island.* Other sources concerning this middle period address sundry other matters,* including prewar competition between Chinese and Japanese immigrants.* Resources regarding the

* All notes available at http://www.cschs.org/history/resources/bibliography.

postwar period include an oral interview with Judge Delbert E. Wong, the first Chinese-American judge in the continental United States, plus other examples of challenges to traditional discrimination.* There are also small clusters of articles regarding various other aspects of the legal history of Chinese Californians that do not necessarily fit neatly within the rough chronological framework presented above, such as medical issues, including public health targeting of Chinese immigrants as well as state regulation of traditional Chinese medical practices;* legal travails of Chinese women;* school segregation and desegregation;* and archival or archaeological comments regarding researching Chinese-Californian communities.* *See also* Asian Americans, Generally.

CODIFICATION

See Early Anglo California.

COURTS

Special mention must be given to the much-anticipated *Constitutional Governance and Judicial Power: The History of the California Supreme Court,* edited by Harry N. Scheiber (Berkeley, forthcoming February 2016), sponsored by the California Supreme Court Historical Society. With chapters covering each period from 1849 to 2010 — by Charles J. McClain, Gordon Bakken, Lucy E. Salyer, Harry N. Scheiber, Bob Egelko, and Molly Selvin — it is a comprehensive, fully documented history of the California Supreme Court and its influence in the state's economic, social, and political development, treating the institutional development of the Court, and more generally, of the state judiciary. There is discussion, too, of the jurisprudence of individual justices who influenced law nationally as well as the jurisprudence of the Court as a whole, in distinctive historic eras of conservative and liberal jurisprudence. The interplay of politics, socioeconomic change, and federal-state relations as major factors in the development of both the common-law and constitutional law of California receives full attention for each period of the state's history. Major cases in each of the areas of the law often receive detailed systematic analysis.

Writing in 1988, Fritz & Bakken found that "surprisingly little has been written about the history of California's state and federal courts," an omission "especially glaring" given the availability of so many California court

records.* They recommended various resources concerning the California Supreme Court,* California's federal courts,* and California's lower courts and court system in general.*

Since 1988, a wide array of additional studies of California courts have emerged, including a good many later contributions from Fritz* or Bakken.* Numerous articles have addressed the history of the California Supreme Court, some clustered in the 1996–1997 edition of the *California Supreme Court Historical Society Yearbook** or the recent 2014 edition of *California Legal History*,* among other places.* Other scholars have studied California's federal courts during the 19th century* or the 20th century,* while still other resources discuss lower California state courts in the 19th century* or the 20th century.* The California grand jury system has received scholarly attention.* Scholars also have studied special courts and institutions concerning juvenile offenders.* *See also* the partial list of publications by Lawrence Friedman, included near the beginning of this bibliography, most of which concern different aspects of the operations and decisions of California county courts from the late 1800s through the mid- to late 20th century. Although the federal Ninth Circuit stretches far beyond California, developments regarding the Ninth Circuit, including periodic proposals to split it, necessarily implicate California and its legal history.* *See also* Archival/Bibliographic/Historical; Chinese Americans; Indians; Japanese Americans; Crime; Education; Prisons; Women (among various other possible additional headings of interest; courts come up in some significant measure under most headings in this bibliography).

Because judges and their biographies or oral histories represent a major topic in themselves, they are included under a separate heading; *see also* Judges. However, there are also sources concerning other court staff who should not be forgotten, such as court administrators,* public defenders,* and court clerks, research attorneys, court reporters, or court interpreters.* For district attorneys, other prosecutors, and other non-judicial attorneys, *see also* Lawyers.

In terms of courts as spatial, geographical, architectural entities — courthouses — most published historical sources focus on the San Francisco federal courthouse of 1905, finished just in time to confront the great

* All notes available at http://www.cschs.org/history/resources/bibliography.

1906 San Francisco earthquake.* However, the California state court system and various federal courts in California maintain websites that include helpful brief historical background on courthouses as well as courts.* It is likely that some other sources exist on the histories of particular county courts or courthouses, possibly produced by county historical societies; if so, however, such sources did not appear among the results of the searches conducted for this bibliography.

CRIME

IN MEMORIAM: Professor Clare V. McKanna, Jr. of San Diego State University, a prolific scholar of the history of crime, prisons, and related racial/ethnic dimensions in California, passed away in March 2012. Although his publications include important works concerning Arizona and the West more generally, here is a list of his contributions to California legal history in particular.*

Fritz & Bakken in 1988 used a broader organizational category of "crime and punishment" and found most of the literature on the topic to be focused on either the 1850s San Francisco vigilante committees (grouped under the heading Police & Law Enforcement in this bibliography) or criminal prosecutions resulting from early 20th century radicalism and labor agitation (here more likely to be found under the headings of Labor or Radicalism, Antiradicalism, and the First Amendment).* As to crime in general, they listed a few sources concerning crime and/or law enforcement,* including Lawrence Friedman and Robert Percival's important 1981 book concerning crime and punishment in late-19th-century Alameda County.*

Both before and after 1988, Friedman and his coauthors have contributed several additional studies of the history of California criminal law.* They have been joined by many other scholars providing local or regional studies of various aspects of California crime, criminal law, and criminal justice from the days of Spanish and Mexican rule onward.* One topic of particular interest has been murder and the closely related issue of the death penalty, resulting in several major studies of murderesses* along with sources regarding murderers of the more conventional male variety and homicide in general.* The O.J. Simpson murder trial of 1994–1995 in Los Angeles County has, predictably, generated a literature all its own.* So has the Sleepy Lagoon murder of 1942 and subsequent court proceedings

from 1942–1944, in which seventeen young Hispanic men from Los Angeles were framed and convicted for the murder, then later saw their convictions overturned on appeal.* Homicides and other crimes perpetrated either by, or upon, 19th-century Chinese Californians have also drawn scholarly attention.* For more regarding murder and the death penalty, *see also* Notorious Cases; Judges (especially the unfortunate Chief Justice Rose Bird); Lawyers. Regarding lynching, *see also* Police & Law Enforcement.

Along with the aforementioned studies of homicide and crime in general, other aspects of the legal history of California crime and criminal justice have stimulated clusters of studies, including California's "three-strikes" law of 1994 cracking down on repeat offenders;* sex crimes (including obscenity);* Prohibition;* illegal gambling;* women criminals (other than those already included among the murderesses or the sex crimes mentioned previously);* crimes in which women usually are the victims, such as domestic violence and stalking;* criminal youth gangs;* and crime on California Indian reservations.* The broad category of "crime" is inherently related to many other topics; *see also* Police & Law Enforcement; Prisons; Courts; Lawyers; Notorious Cases; Women; Gays & Lesbians; Radicalism, Antiradicalism, and the First Amendment; and various racial or ethnic headings (African Americans, Chinese Americans, Indians, Latinos, etc.).

EARLY ANGLO CALIFORNIA

In addition to noting the overall dearth of historical analysis of California criminal law in 1988, Fritz & Bakken listed relatively few sources regarding the early history of Anglo-American civil law in the Golden State,* some of them not primarily focused on law but useful nonetheless.* Many scholars have since contributed to the history of the period of transition from Mexican to Anglo-American control of California* and the impact (or not) of Spanish/Mexican law and custom upon Anglo-California law.* David J. Langum has been an especially determined scholar of this transition period in California,* while John Phillip Reid has particularly focused on the early development of Anglo-California law among settlers on the Oregon and California trails before they reached California or their ultimate destinations within the state.* Even leaving aside sources

* All notes available at http://www.cschs.org/history/resources/bibliography.

specifically concerned with popular topics such as the Gold Rush, crime in early San Francisco, and the like (which appear under separate headings), there are many sources that discuss the legal history of the first few decades of Anglo California's existence,* including topics such as taxation,* the adoption of the common law and the Field Code,* and the origins of local government in Anglo California.* A 2003 special edition of *California History* that was also published separately as a book — *Taming the Elephant: Politics, Government, and Law in Pioneer California* — offers a particularly rich concentration of helpful articles covering a range of topics regarding the legal history of early Anglo California.* *See also* California Constitution (the 1849 and 1879 Constitutions form a major topic in themselves); Chinese; Crime (19th century); Gold Rush; Indians. In particular, see the many books and articles by Professor Bakken listed at the beginning of this article, the great majority of which concern the early decades of Anglo-California legal history.

EDUCATION

Fritz & Bakken, in discussing education, addressed only legal education and law schools.* But, as subsequent scholarship has shown, there is *so* much more to the legal history of California education and education law.

Discrimination, and anti-discrimination policies such as affirmative action, have been the major theme of legal historical scholarship regarding California education for decades. Various studies have focused on higher education,* including legal education.* The landmark higher-education affirmative action case of *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), has generated an extensive literature all by itself, although many of these sources focus more on the story after the case reached the U.S. Supreme Court than on the earlier proceedings and background in California.* Discrimination, segregation, desegregation, and funding equalization in the lower grades and in California education generally also have stimulated a good many historical studies.*

Along with more general accounts of the struggle against discrimination in education, scholars have focused on the particular experiences of particular racial, ethnic, religious, gender, or sexual orientation minorities. Given the special salience and significance of cases such as *Mendez v. Westminster School District of Orange County*, 161 F.2d 774 (Ninth Circuit,

1947), and the even earlier Lemon Grove Incident in San Diego County (1930–1931), the educational experiences of California's Latinos especially have drawn analysis,* although Chinese Americans,* Japanese Americans,* Asian Americans generally,* and California's Indians* have not been ignored. The searches for this bibliography mostly did not turn up sources focused exclusively on African Americans in California education, with one exception,* but the topic is covered in some more general discussions of the legal and political histories of California's black communities as well as the more general treatments listed under this heading. Other sources address the particular legal battles or experiences of Jews,* women,* and gays and lesbians* in the educational context.

Turning from the issues of discrimination and minority communities to education more generally, various sources address diverse topics from the 19th and 20th centuries.* Topics of particular scholarly interest have included the 1976 Rodda Act regarding collective bargaining for school employees,* teacher certification and tenure,* and social studies legislation.* At the higher education level, scholars have studied the constitutional status of the University of California and other aspects of the relationship between the state educational system and the state constitution.* Other sources also touch upon the legal history of the Berkeley Free Speech Movement of the mid-1960s.* The history of loyalty oaths and anti-communist policies in California education has drawn considerable scholarly attention.* Aspects of the history of legal education in California outside the discrimination/affirmative action context also have been further discussed,* including some oral history interviews along with archival documents.*

ENVIRONMENT & NATURAL RESOURCES
(INCLUDES OIL, AIR POLLUTION, COASTAL & OCEAN RESOURCES & POLICY, WILDLIFE & ENDANGERED SPECIES, PARKS & SCENIC/RECREATIONAL LAND PRESERVATION, AND TIMBER & FORESTRY, AMONG OTHERS)

Even leaving aside the categories of Land, Water, and Mining, treated separately under other headings, this category remains broad and diverse in a state as resource-rich as California. Fritz & Bakken, in 1988, only addressed

* All notes available at http://www.cschs.org/history/resources/bibliography.

the oil industry (along with mining),* and identified several helpful sources touching upon petroleum law, some of them discussing the American oil industry in general rather than California specifically.* Various other sources, mostly more recent, specifically concerning the legal history of California oil have emerged or resurfaced since 1988,* while the legal and general history of California oil likely will also be covered in some more recent general histories of the American oil industry as in the general sources listed by Fritz & Bakken — especially considering that California remained a larger producer of oil than Texas into the 1930s. There are also biographies and other works that recount the involvement of Los Angeles oil baron Edward L. Doheny in the extended litigation following the Teapot Dome scandal of 1924 (which partly involved the Elk Hills naval oil reserve in eastern-central California).*

As to other environmental issues, there are various sources that touch upon legal and regulatory aspects of air pollution, including severe copper smelter pollution in turn-of-the-century Shasta County, the development of the notorious Los Angeles smog problem in the 1940s and 1950s, and state laws establishing the RECLAIM regional clean air incentives market and the "cash for clunkers" program to retire older, heavier-polluting automobiles enacted during the late 20th century.* Along with numerous sources that deal with water more generally, some sources address the legal history of water from a specifically environmental perspective.* Some instances of toxic pollution and resulting litigation have been addressed historically,* although certain other major examples, such as the Rocketdyne-Aerojet litigation, seemingly have not been yet. Scholars have addressed the legal-historical aspects of fisheries,* as well as the protection of wildlife and endangered species.*

Appropriately in California, with its many scenic wonders, the establishment of parks and the preservation of scenic and recreational landscapes is a major focus of research. Yosemite National Park, John Muir's beloved crown jewel of the Sierras, and its legal issues have been studied,* along with neighboring Hetch Hetchy,* Sequoia National Park, Kings Canyon National Park, Mineral King, the Big Sur, the Mojave Desert, and Channel Islands National Park.* Scholars also have explored the legal and historical aspects of the California Coastal Commission, perhaps the most powerful state regulatory agency concerning land use and preservation in the United States,*

along with battles over nuclear power plant siting,* recreational trails preservation, and land use regulations more generally.* Notably, the legal history of national parks was relatively well-represented in the searches conducted to compile this bibliography; state, county, and municipal parks, which have legal histories of their own to explore, appear to have been studied relatively little so far, though there are some notable exceptions.*

The complex history and legal history of one park in particular — Redwoods National Park — has long been tightly intertwined with the wider, often bitter and frequently litigated "timber wars" regarding access to trees on public land as well as efforts to protect old growth forests on private land, and the histories of both the park and the wider wars from the late 1800s to the (sometimes vicious) late 20th-century battles over the Headwaters Forest and habitat for the Northern Spotted Owl have drawn considerable scholarly attention, along with other aspects of forestry and timber management.* Scholars have also probed other California legal-historical-environmental topics, such as environmental policymaking, the rise of historic preservationism, and the contested ownership of a celebrated meteorite.*

California is of course, famously, a place where the land meets the sea, and that interface between earth and ocean has long been integral to the Golden State's legal history as well as general history. Professor Harry N. Scheiber in particular has long devoted scholarly attention to coastal and ocean resources, policy, science, and regulatory law, with a special emphasis on the California legal and historical context.*

Again, *see also* Land, Water, and Mining, as well as sources addressing the public trust doctrine in the context of Land and Water.

FAMILY LAW

The history of California family law appears to remain relatively unexplored, but nevertheless, in addition to Prof. Jacobus tenBroek's multipart general study of the topic during the mid-1960s,* various later scholars have conducted research into a range of different particular aspects of family law, including parental custody and the legal aspects of gay and lesbian family formation.* *See also* the related headings Children; Women (marriage & divorce).

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* All notes available at http://www.cschs.org/history/resources/bibliography.

GAMBLING/GAMING

During the second half of the 20th century in California, gambling went from being an illegal activity, sometimes the target of vice squads, perhaps more often just winked at, to become a major state industry in the form of Indian casinos, with the perjorative term "gambling" now largely replaced by the more polite term "gaming." The earlier period has drawn relatively limited scholarly attention,* although the topic will come up in various broader discussions of 19th-century San Francisco in particular, but a number of books or theses have studied the rise of Indian gaming in California.*

GAYS, LESBIANS & ALTERNATE SEXUALITY

The LGBT rights movement is one that has mostly developed since the time of Fritz & Bakken's article, and most of the historical investigation of alternate gender/sexuality communities also has happened since that time. In recent decades, major political and legal fights and, ultimately, victories on issues such as gay marriage and the repeal of anti-sodomy laws have helped to energize the movement and to stimulate investigation of the communities' histories. As such, there are a number of recent dissertations and articles that concern various aspects of the legal history of the LGBT communities. Many, though not all, discuss San Francisco, and nearly all concern the postwar period,* though there are some exceptions that go back much earlier.* Along with other studies that address different angles of the topic, a number have recently appeared focused specifically on the legal history of the struggle to legalize gay marriage.* Regarding the related topics of marriage and the criminalization of sexuality, *see also* Women (marriage & divorce) and Crime (sex crimes).

GOLD RUSH (AND LAW & ECONOMICS)

Many scholars have discussed law in relation to the Gold Rush. The Gold Rush, and the legal or quasi-legal institutions that emerged in the California gold fields, have been a special object of fascination for a good many scholars who have studied the issue from a law and economics perspective,* including water rights along with mineral rights.* Other scholars have explored other aspects of the legal history of the Gold Rush, including the origins of California and U.S. mining law,* the experience of African Americans in

the gold fields,* and legal (or extra-legal) treatment of Chinese immigrant gold miners,* among other topics.* The history of the Gold Rush is inextricably interwoven with other topics from early Anglo California, so *see also* Early Anglo California; African Americans; Chinese Americans; Indians; Mining; San Francisco; and Water (among other possibilities).

HOLLYWOOD & THE ENTERTAINMENT INDUSTRY

For one of the biggest and most characteristically California industries, the film, television, and music industries so far have perhaps drawn less attention from legal historians than they deserve. Yet historians have probed various interesting, legally involved aspects of the film* and television* industries, including how court trials and judges are presented in the media.* Sadly, no resources regarding the radio or music recording industries appeared among the search results for this bibliography — which, as always, does not mean they're not out there; it only means that they proved difficult to find.

HOUSING & URBAN PLANNING

Scholars have explored various legal dimensions of housing and urban planning — particularly the racial discriminatory aspects, as presented most starkly in the history of California's Proposition 14 (1964) and its effort to repeal the Rumford Fair Housing Act of 1963,* along with development restrictions,* among other issues.* *See also* Race; Propositions and Initiatives; Local Government.

HUMBOLDT COUNTY (LOCAL HISTORY)

Gertrude Stein famously observed, "The trouble with Oakland is that when you get there, there isn't any there there."* One wonders what she might have said about the shopping-mall sprawl of Southern California and the Bay Area today. At any rate, good local history, including legal history, helps to mitigate that archetypally California syndrome by helping to create a sense of place as well as time. And in terms of local legal history, in the searches for this bibliography, two jurisdictions particularly stood out as exemplars of rich, active local history: Humboldt County and San

* All notes available at http://www.cschs.org/history/resources/bibliography.

Diego County. Perhaps it's only a coincidence that they are at opposite ends of the state, Humboldt County almost as far from L.A. and S.F. as it's possible to be and still be in California, although San Diego's separation from Los Angeles shrinks daily. If every place explored its local history as richly as these two counties, it would be a better, happier place for historians, although admittedly perhaps something of a headache for librarians and bibliographers.

Humboldt County's local legal history includes the would-be State of Jefferson;* the presence of Chinese workers during the 19th century;* notable murders and executions;* biographies of local attorneys, judges, and other court staff;* Humboldt County's Indian tribes;* and sundry other topics.* Although occasionally an outside journal includes an article on Humboldt County,* the overwhelming majority of this local historical coverage appears in the pages of the *Humboldt Historian*.

INDIANS (INDIGENOUS AMERICANS)

Fritz & Bakken did not mention California's indigenous peoples, or laws relating to them, in their 1988 article — perhaps out of a sense that Indian law, involving (at least putatively) sovereign peoples and territories, is in some ways fundamentally different from "normal" law within a state's territory, perhaps because much of Indian law and legal history in America traditionally focused (and focuses) more on other regions with more fully-established relationships between the tribes and the federal government, or perhaps because this topic was still awaiting scholarly attention. Whatever the case, there are by now many resources that illuminate how the law has affected California's Indians. Among others, Vanessa Ann Gunther has explored in depth and detail how Anglo-American law in the 19th century impacted the lives of Native Americans in Southern California in a wide variety of ways, including matters both civil and criminal, as well as laws that allowed the effective seizure and enslavement of both Indian adults and children.* Her work poignantly explains the special burdens of California's Mission Indians, not borne by most other indigenous peoples of North America: first, enslaved by the Spanish friars (under Spanish and Catholic law and regulations); then set upon by Anglo Americans with their self-serving laws and courts without even the weak and flawed but still somewhat mitigating official protection of the U.S. federal government

and federal treaties, due to California's transition to virtually instant statehood at the end of the Mexican-American War. (The general rule throughout United States territory was that however bad the federal government and the U.S. Army were in their treatment of Indians, state, territorial, and local governments were even worse.)*

But other scholars have also contributed worthy studies of many different aspects of the (generally tragic) legal history of California's Indians before 1900, including Spanish and Mexican legal understanding and (mis) treatment of the native peoples,* Anglo Americans' de facto practice of genocide against them* and enslavement of them,* the limited participation of the federal government in California Indians' affairs,* and many other topics.* In the 20th century, major topics include official federal recognition of tribes and tribal revitalization;* Indian land claims and litigation over them;* Public Law 280, a 1953 federal enactment that has caused severe jurisdictional confusion and legal problems regarding reservations, state courts, and law enforcement both in California and throughout the United States;* the Colorado River Indian Reservation;* the rise and legalization of Indian gaming in California;* legal issues involving Indian children and youth;* tribal water rights;* and other matters, some related to particular federal laws and policies to varying degrees.* Certain official documents of the State of California regarding California's Indians also surfaced, somewhat at random, in the searches conducted to assemble this bibliography;* they suggest that there might well be other such documents out there that are potentially of interest. There are also various local history resources from San Diego County* and Humboldt County* that concern California Indians and legal issues directly or indirectly. (Note: Indian tribal law of particular California tribes is likely to be tribe-specific and thus to require tribe-specific searches; at any rate, for the most part, no such tribal legal-historical materials surfaced in the searches conducted to compile this bibliography.)

Regarding a notable Native American who was not a member of a California Indian tribe, but rather a Cherokee who came to California during the Gold Rush years and became California's first novelist, see Lawyers (John Rollin Ridge).

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* All notes available at http://www.cschs.org/history/resources/bibliography.

INSURANCE

Several scholars have probed aspects of the history of insurance law in California, particularly medical insurance, title insurance, and insurance litigation in the wake of the great San Francisco earthquake, among other topics.*

ITALIAN INTERNMENT

The intense interest of historians, legal and otherwise, in the tragic history of the internment of Japanese Americans during World War II helped to stimulate interest in other, smaller, less well-known examples of internment. Of these, the most striking and researched instance in California involves the internment of Italians, particularly those who lived in San Francisco.*

JAPANESE AMERICANS

As with Chinese Americans, there is a wealth of research regarding discrimination against Japanese Americans, from the California alien land acts of 1913 and 1920 through the Japanese-American internment and its aftermath. Some of this research specifically concerns the law and legal history; some other studies are focused primarily on other matters, such as social history, labor history, agricultural history, or family history, but nevertheless include legal issues significantly interwoven with the others; and some, although often fascinating, barely touch upon specifically legal matters at all. This bibliography seeks to err on the side of inclusion rather than exclusion, and thus it sometimes includes some of the "interwoven" sources, even if they do not focus exclusively or primarily on the law or on California. As with the Chinese Americans only perhaps even more so, Japanese Americans were heavily concentrated within California's borders before the World War II–era internment and relocation; in a 1944 pamphlet protesting the internment, Carey McWilliams noted that nearly eighty percent of all the Japanese Americans in the continental United States in 1940 lived in California.* To that extent, even legal developments in Washington, DC, or internments that took place in other states such as Arizona or Wyoming, heavily impacted the lives of Californians and thus arguably fit within California legal history — but it is also impossible to include everything that has been written about the internment.

Fritz & Bakken in 1988 listed a few resources,* including Roger Daniels' 1962 book, *The Politics of Prejudice*,* regarding prewar discrimination against Japanese Americans and the alien land laws,* plus several more regarding the wartime Japanese-American internment,* including Peter Irons' important 1983 book, *Justice at War*, which helped to stimulate the reopening and reconsideration of the Supreme Court's wartime internment cases.*

Daniels and Irons have both contributed more work focused on the internment and its aftermath.* They are joined by many other scholars who have investigated aspects of Japanese Californians' legal history. The California alien land acts have been the subject of numerous monographs* and articles,* while other studies have explored other aspects of California's relationship with its Japanese-American residents,* as well as the competition that arose between Chinese and Japanese Americans for relative economic status and racial-ethnic acceptability during the prewar years.*

Fritz & Bakken's article appeared in the same year that the United States government formally apologized for the internment order and authorized reparations to Japanese-American survivors of the internment camps. The dramatic and successful campaign for reparations likely helped to stimulate additional scholarly interest in the topic that has resulted in a large number of books and other sources on the internment over the past quarter-century, some of them more focused on the law and/or California,* some of them less so but still potentially of interest to California legal historians.* One particularly notable and interesting historiographical trend in this literature is the surge in scholarly interest in those internees who, contrary to the wartime and postwar established account of docile and dutiful internees, actively resisted the internment, in some cases even to the point of renouncing U.S. citizenship in protest; such cases often resulted in legal actions and administrative or court hearings.* Similarly, there is heightened scholarly sensitivity to the contested meaning(s) of the whole unfortunate internment ordeal.* Other studies have focused on other individuals and organizations, such as the ACLU, that opposed the internment in various ways and to varying degrees.* The long postwar campaign for redress and reparations, and the reopening of the Supreme Court internment cases, have themselves also become topics for scholarly

* All notes available at http://www.cschs.org/history/resources/bibliography.

inquiry.* Along with secondary sources, there are also government documents and other primary source materials that illuminate the legal and general history of the internment.*

This bibliography generally uses the long-established term "internment" as the most immediately recognizable and distinctive label for the long and harsh ordeal to which Japanese Americans were subjected after President Franklin Roosevelt issued Executive Order 9066 in February 1942. The term itself, however, is conflicted and controversial as well as arguably imprecise and legally incorrect, as Roger Daniels, Harry Scheiber, and other scholars have forcefully pointed out. For that reason, a growing number of recent scholars use, and encourage use of, alternate terms such as "evacuation" or "incarceration" (i.e., Roger Daniels, 2002*). Notably, Wikipedia, not by any means the last word on the subject but perhaps an unusually good index of established conventional usage, presently still uses the term "internment."* To the extent that "internment" fades from general use and is replaced by alternate terms in coming years, this bibliography likely will be changed to reflect that transition. At any rate, the present use of the established if conflicted and inaccurate term emphatically is not intended to show any disrespect toward either the victims of the ordeal or its recent chroniclers.

Although most other topics are bound to pale in comparison to the high drama and passion surrounding the internment and the subsequent campaign for redress, and although there seems to be relatively little legal historical analysis of California's Japanese Americans in the postwar period outside the internment context, another, quieter victory in the postwar Japanese-American struggle against discrimination may be found in the oral history of wartime internee, Second World War combat veteran, and longtime California state judge George Yonehiro.* There is also a recent book on the life, and 1946 prosecution for treason in San Francisco, of "Tokyo Rose," a native Japanese-American Californian.*

JEWS

There is a wealth of material about Jewish history in California and the West, and a historian can only wish that every community were as fastidious about preserving their history and records. It also turns out that Jewish judges, lawyers, and lawmakers were prominent in California from

the Gold Rush years onward, such as Solomon Heydenfeldt, an early Jewish justice of the California Supreme Court from 1852–1857.* The journal *Western States Jewish History*, in particular, has published biographies of several notable early California Jewish judges,* attorneys,* and lawmakers or law enforcement officials.* Scholars also have contributed biographical treatments and oral histories of the single leading legal scholar and writer of treatises on California law, Bernard E. Witkin.* In addition to these biographies, there are numerous sources regarding different aspects of California Jews' interaction with the law, from the early statehood period,* the later 19th century,* and throughout the 20th century.* Certain topics have produced clusters of articles, such as antisemitism (mostly but not entirely during the 19th century),* Jewish resistance to Sunday "Blue Laws,"* Jewish charitable institutions,* and legal issues surrounding marriage, intermarriage, or divorce under Jewish religious laws.* For oral histories and other sources regarding Stanley Mosk, one of the great 20th-century Jewish justices of the California Supreme Court, as well as his appellate-judge son Richard Mosk and his Supreme Court colleagues Mathew Tobriner and Joseph R. Grodin, *see also* Judges.

JUDGES

Fritz & Bakken noted that studies of judges existing in 1988 tended to be biographical rather than analytical in orientation; they noted a number of studies of California Supreme Court justices* and other state or federal judges in (or from) California,* along with an already substantial cluster of studies of Justice Stephen J. Field.* They also remarked on a growing number of oral history interviews of judges, especially federal judges of the Northern District of California, conducted by the Bancroft Library's Regional Oral History Office.*

Many additional sources have by now joined those listed in the original 1988 article. In particular, several justices of the California Supreme Court have stimulated clusters of scholarly studies: in alphabetical order, Chief Justice Rose Bird;* Justice Jesse W. Carter;* Justice (and later U.S. Supreme Court Justice) Stephen J. Field;* Chief Justice Phil S. Gibson;* early Justice Solomon Heydenfeldt;* Justice Stanley Mosk (and his son, Justice

* All notes available at http://www.cschs.org/history/resources/bibliography.

of the California Court of Appeal Richard M. Mosk);* Justice Raymond Sullivan;* Chief Justice Roger J. Traynor;* and early Chief Justice David S. Terry.* Thanks to Professor Fritz, Judge Ogden Hoffman, early federal judge of the Northern District of California, also has received substantial attention.* *Western Legal History*, the journal of the Ninth Circuit Historical Society, has made a tradition of commemorating chief judges of the Ninth Circuit, including Richard H. Chambers,* James R. Browning,* and Alfred Goodwin,* while other law journals have commemorated other Ninth Circuit appellate or district judges with symposium editions.* A former Ninth Circuit judge from California who has gone on to even bigger things, U.S. Supreme Court Justice Anthony M. Kennedy, is relatively much studied, with more interest focused on his post-California days as with Stephen Field and Earl Warren.* Along with these more frequently or extensively studied jurists, scholars have produced studies or oral histories of various other California state or federal judges from the 19th* and 20th centuries,* including additional justices of the California Supreme Court.* A good many of the studies of California legal history, especially court and judicial history, have been contributed by judges and justices themselves.* As to online resources regarding the California judiciary, the California Supreme Court Historical Society web page includes links to official retirement or obituary commemorations of most California Supreme Court justices, among other resources,* while the Federal Judicial Center's History of the Federal Judiciary website offers a Biographical Directory of Federal Judges, 1789–Present, including basic biographical and judicial service records on nearly all federal judges,* and the six districts of the California Court of Appeal maintain websites with information and/or photographs regarding current sitting justices and, in some cases, former justices.* Ballotpedia, a searchable website providing information on elections and politics, provides brief biographies of most sitting California federal and state judges, as well as some senior or retired judges.* Most studies concerning judges focus on particular individuals, as Fritz & Bakken also observed years ago, but some studies address judges and judging more generally.* Regarding one of the towering figures of California and American legal history who was never a judge until after he left California — Earl Warren — see Lawyers. For often light-hearted local histories of the bar and bench from various jurisdictions, also see Lawyers. For an unusual case

of somebody who might be seen, in a sense, as an honorary member of the California state judiciary as the single most respected writer of treatises covering the whole range of California law, widely followed by judges as well as attorneys, see several articles regarding the legendary Bernard Witkin.*

LABOR (AGRICULTURAL)

Much has been written about labor issues and the law in California history. Most such scholarship focuses on agricultural labor in the postwar period,* much of it specifically regarding Cesar Chavez and the epic struggles of the United Farm Workers during the 1960s and 1970s.* Although people of many other ethnicities continued to labor in California's fields after the Second World War, notably the Filipino grape-pickers who were such an important component of the early UFW and its famous strikes and boycotts, during the postwar years California's agricultural labor force became so predominantly Hispanic in ethnic origin that the agricultural labor movement is frequently, and perhaps justifiably, viewed as primarily a major component of the Latino civil rights movement — so readers concerned with that period of agricultural labor might want to *see also* various sources under the Latinos heading that relate to immigration, discrimination, civil rights, and other such matters that were also implicated in the context of agricultural labor. For more regarding agricultural business organization and management, *see also* Agriculture; for additional sources regarding agricultural work in general, not necessarily organized or unionized labor, *see also* other headings such as Indians (19th century), Chinese Americans, Japanese Americans, and Asian Americans, Generally.

Along with postwar, predominantly Hispanic agricultural labor, historians have studied other episodes in agricultural labor/legal history involving the radical World War I–era International Workers of the World (the "Wobblies") and New Deal farm labor policies.* Legal historians also have explored labor history outside the agricultural context; much of this research focuses on the early 20th century and on Progressive-Era reforms and antiradicalism,* although other studies concern primarily postwar labor policies and reforms such as workers' compensation and equal employment opportunity programs.* Legal historians also have shown significant interest in black

* All notes available at http://www.cschs.org/history/resources/bibliography.

Californians' experience of labor and (often troubled) relationship with labor unions during the 1940s; *see also* that subtopic under African Americans.

LAND (AND REAL PROPERTY)

Fritz & Bakken devoted more than four out of the 19½ pages in their original article specifically to California land and litigation over it,* and they identified many sources.* Yet predictably, for such an important and central topic, there are by now many more studies covering a wide range of topics, most concerned with the 19th or very early 20th centuries,* but a few covering the postwar period.* Along with these sundry topics, there are many more studies of legal disputes over the Californios' land grants and of the history of particular grants and ranchos.* Several articles by Prof. Paul W. Gates regarding the history of land and law in California, some mentioned by Fritz & Bakken, some not, were collected and published in a book in 1991.* In view of the endless litigation over land titles during the 19th century, scholars have, appropriately, also studied the rise of title insurance.*

If a general characteristic of the broad, diverse topic of California legal history is that everything tends to be connected to everything else, the subtopic of land is even more that way. Thus, many other sources under many other headings also involve land to one degree or another — especially Agriculture (and Labor (agricultural)), Environment and Natural Resources (including park preservation, land use, the oil industry, and forestry among other possible subtopics), Housing & Urban Planning, Japanese Americans (and Asian Americans, Generally, particularly regarding farming in the shadow of the Alien Land Laws), Mining, Railroads (especially the shoot-out at Mussel Slough), and Water (without which most of the land is of course unusable), among other possibilities.

LATINOS

Aside from references to the 19th-century Californios and their loss of their land, Mexican Americans and other Latinos appear to be entirely missing from Fritz & Bakken's original 1988 article.* From a present-day perspective, this likely would seem a rather glaring omission in a state moving rapidly toward having a majority-Hispanic population. Yet it is also testimony to how times have changed, and academic history and legal history with them. In 1970, California's Latinos accounted for an estimated twelve percent of

the state's population,* and it took a while before the Latino empowerment movement from the 1960s onward, as well as Hispanic Californians' growing demographic presence, were reflected in legal history scholarship.

At any rate, in the interim, numerous scholars and studies have helped to fill that gap, covering a wide range of topics from the 19th and early 20th centuries* as well as the postwar period.* Certain topics concerning Latino legal history have drawn clusters of studies, including the Sleepy Lagoon murder trial of Hispanic youths in 1940s Los Angeles,* the downfall of miscegenation laws in California,* the crucial and historic role of California's Latinos in school desegregation litigation,* postwar conflict between Los Angeles police and the Chicano Movement,* the rise of Hispanic political representation especially in the form of trailblazing California state legislator Edward R. Roybal of Los Angeles,* the participation of Latinas in California's Latino/a civil rights movement,* and Proposition 187, the 1994 initiative that particularly targeted undocumented Hispanic immigrants.* As with so many other topics in this bibliography, much more of the story of Mexican-American and Latino legal history in California remains to be told, but clearly many scholars have made a good start. For more on the Latino legal experience in California involving agriculture, agricultural labor, and the rise of the United Farm Workers union, *see also* Agriculture; Labor (agricultural). *See also* Spanish/Mexican California; Border; Race & Racial Politics, Generally.

LAW & ECONOMICS

Analysis of California history from a law and economics perspective is so heavily centered on examples from the California Gold Rush that readers are advised to *see also* Gold Rush; a handful of examples of historical law and economics scholarship not entirely focused on the Gold Rush are also listed there.

LAW FIRMS

Fritz & Bakken in 1988 noted the existence of various histories of law firms,* particularly one regarding one of the largest and oldest Los Angeles law firms, O'Melveny & Myers.* They also commented on the limited scope and usefulness of such in-house publications. Law firm histories likely will long

* All notes available at http://www.cschs.org/history/resources/bibliography.

remain more self-celebratory than critical, because firms generally do not allow outside scholars and researchers to gain access to their files, many (and almost certainly the most interesting) of which concern confidential client matters. Nevertheless, at least two additional in-house histories of two long-established major California law firms — the now-defunct Heller Ehrman of San Francisco and the still-thriving Gibson, Dunn & Crutcher of Los Angeles — appeared soon after the 1988 article,* along with a recent in-house history of Los Angeles-based Sedgwick Detert Moran & Arnold,* an oral history of San Francisco-based Pillsbury, Madison & Sutro,* and a master's thesis regarding the Long Beach law firm of Ball, Hunt, Hart, Brown & Baerwitz.* Several doctoral dissertations also have appeared that study particular aspects of the history of Silicon Valley law firms and legal practice during the postwar period that saw the rapid rise of the California high-technology industry.* The history of law firms remains a potentially rich area for further study — if one can access the records. Practically speaking, most such research likely will remain either in-house or limited to 19th-century records already available in publicly accessible archives.

LAW LIBRARIES

At least some of California's law libraries and library systems have received at least some scholarly attention.* *See also* Archival/Bibliographic; Education (legal).

LAW SCHOOLS

See Education.

LAWYERS & THE LEGAL PROFESSION

Fritz & Bakken in 1988 listed a number of histories of local or statewide bar associations,* along with a few examples of memoirs of individual attorneys* and even fewer studies of the history of California lawyers from a more social-scientific perspective.*

Since 1988, various other accounts and biographies of California lawyers have appeared or resurfaced, concerning attorneys active in the 19th century* or later.* California's district attorneys so far seem perhaps to have drawn less scholarly attention than they deserve, but in addition to articles

and biographies concerning the likes of Hiram Johnson, Earl Warren and Edmund G. Brown, Sr., there are some sources regarding others who have filled that office.* Scholars also have studied the history of legal aid organizations in California (*see also* Labor (agricultural) regarding that topic).*

Some California lawyers are today remembered much more as literary figures than as attorneys — such as John Rollin Ridge, the Native-American author of what is generally considered the first California novel and one of the first novels written by a Native American;* Francisco Ramírez, the Californio newspaper editor and attorney who treasured the rights proclaimed under the (Anglo-) American Constitution but called for their fuller expression and extension, including to non-Anglos;* and Carey McWilliams, the radical reformer who championed exploited farm workers, the interned Japanese Americans, and the young Hispanic defendants in the Sleepy Lagoon case before spending twenty years as editor of *The Nation** — but all three men were trained as lawyers, and the legal profession has a right to claim them.

Some other notable California attorneys who have stimulated a number of scholarly studies include Earl Warren, who was a district attorney before being elected state attorney general and governor but who never served as a judge in California and is not included with the other Judges in this bibliography only for that reason (but U.S. Supreme Court Chief Justice Warren is of course probably the most famous Californian ever to become a judge);* Hiram Johnson, who was a district attorney before serving as state governor and a U.S. Senator;* Edmund G. ("Pat") Brown, Sr., like Warren a district attorney and then California attorney general before he became a legendary state governor;* his rather well-known son, Edmund G. ("Jerry") Brown, Jr.;* and the San Francisco-based 20th-century super-litigator and "King of Torts," Melvin Belli.* There are also a number of studies of California's women attorneys, particularly the very first and most famous of all, Clara Shortridge Foltz,* among others.*

Although most studies concern individual lawyers, there are also at least a few published accounts of local legal culture of the bench and bar from several different jurisdictions to supplement Schuck's century-old book cited by Fritz & Bakken.* *See also* Humboldt County and San Diego County for

* All notes available at http://www.cschs.org/history/resources/bibliography.

additional descriptions of lawyers and local legal culture. *See also* Courts; Judges; Law Firms; Notorious Cases (among other possibilities).

Some other California lawyer-politicians whose careers were almost entirely federal and who generally did not appear in searches regarding specifically California legal history as such, such as Representative Philip Burton or Richard Nixon, are not included in this bibliography, but readers should be aware that of course articles and biographies exist concerning such individuals and their impact upon California politics and, probably to some extent, law.* Still other notable California lawyer-politicians who were active in state politics, such as former Governor George Deukmejian and longtime Los Angeles Mayor Tom Bradley, appear not to have drawn much attention from biographers yet. *See also* Nonlawyer Politicians.

LEGAL DOCTRINE & THEORY, ODDS & ENDS

Because some items may not necessarily fit neatly in other categories, here is a miscellany of such articles regarding various topics in legal history and the evolution of legal doctrines and theory that should not be overlooked.* It also includes just a few examples of the sorts of useful discussions of historical background that may be included in legal treatises that are focused on certain fields of the law but are not primarily concerned with legal history.* (Researchers may often turn up such historical discussions in treatises or law journal articles focused on certain cases or areas of the law that likely would never show up in online searches targeting legal history in general, and nonlawyer researchers in particular should be aware of this additional search strategy for specific topics in legal history.)

LOCAL GOVERNMENT

Many scholars have studied local government in California and its associated legal historical aspects, focusing especially but not exclusively on the two principal metropolitan cities, Los Angeles and San Francisco.*

LOS ANGELES

The (ironically named, as people often point out) "City of the Angels," the younger but now even larger of California's two great metropolitan areas and legal markets, surfaces in many different headings in this bibliography,

including many sources that may not focus primarily on Los Angeles or Southern California (in the conventional sense of: Greater Los Angeles). However, for the convenience of researchers especially interested in L.A., here are various categories of sources that do concern Los Angeles directly, organized under the following sub-headings, in mostly alphabetical order: Los Angeles Attorneys, Law Firms & Bar; African Americans; Crime; Early; Education; Gays, Lesbians & Others; Housing & Urban Planning; Jews; Immigration & Internal Migration; Land; Latinos; Local Government; Oil; Police; Race, Generally; Railroads & Light Rail; Smog; Various; Water; Women & Children.* Because Angelenos typically (and perhaps imperialistically) view nominally independent nearby jurisdictions such as Pasadena or all of Orange County as really just extensions of Greater Los Angeles, some sources concerning such neighboring communities in Southern California are also included. To prevent this heading from getting too long, readers are directed to other headings in the main bibliography for other parts of the Los Angeles story, such as: Hollywood; Latinos; Notorious Cases (O.J. Simpson, the Black Dahlia case, local serial killers and celebrity murders, etc.); and Water (Owens Valley and other sub-headings).

MEDICAL

Like some other legal history research topics that have flowered over the past two decades, the legal history of medical issues was absent from Fritz & Bakken's original article but since 1988 has grown into a significant, diverse, and interesting research area including a range of subtopics such as public health, health care, medical insurance, and many others. Along with books covering vaccination and the racial dimensions of public health policy,* various scholars, including Prof. Lawrence Friedman and his coauthors,* have focused their attention on civil commitment and other medical/psychological issues requiring court determinations.* Other medical legal history subtopics that have drawn clusters of studies include different aspects of the relationship of Chinese Americans with medicine and medical or public health policy,* women's reproductive rights,* anti-smoking ordinances and campaigns,* drugs and substance abuse,* and medical insurance.* Other single books, dissertations, or articles address a kaleidoscopic range of issues from

* All notes available at http://www.cschs.org/history/resources/bibliography.

early eugenic policies and experiments at San Quentin and a 1924 veterinary emergency to stem cell research in the early 21st century.*

MINING

In 1988, Fritz & Bakken noted, "The history of law for California's mineral wealth has not been completely explored."* That would appear to be still the case, and even Prof. Bakken's 2008 book on the 1872 federal mining law focused more on other western mining regions than specifically on California.* At any rate, in addition to the various sources listed in the original article,* there have been numerous other scholarly contributions to the history of mining law in California,* which notably involves minerals other than just gold.* *See also* Gold Rush.

MONETARY POLICY & ALTERNATIVE CURRENCY

Not a major theme in California legal history, and not likely to be unless Bitcoin or something similar goes a lot farther than it has to date — but some historians have investigated instances of California challenging federal monetary policy, and legal tender, by use of alternate media of exchange.*

NONLAWYER POLITICIANS

Certain studies of nonlawyer politicians that were identifiable as especially likely to contain significant discussion of legislative and legal history are listed here.* Although not included here, there are, of course, many other biographies and articles regarding other notable California nonlawyer politicians, including the likes of James D. Phelan, James Rolph, and Upton Sinclair, among others, along with probably countless other sources concerning Ronald Reagan; some of these may also help to illuminate certain aspects of California legal history, so readers and researchers should be aware of such resources. For more regarding notable California politicians, *see also* Lawyers and (in some cases) Judges.

NOTORIOUS CASES

One ironic aspect of studying legal history is encountering numerous court cases that may have been called "the case of the century" in their day but are scarcely remembered in ours. Yet such cases that generated screaming

newspaper headlines and notoriety, locally, statewide, or nationally, are a part of legal history, and California has had perhaps more than its share. Treatments of such cases are more likely to be journalistic than scholarly in the traditional, heavily footnoted, monographic sense; yet certainly some of these "true crime" accounts are also well-researched and of relatively high quality. Some also focus intensely on the legal and courtroom aspects of the cases, and a fair number are written by former attorneys, often ex-prosecutors. The single most famous example of the latter category is *Helter Skelter* (1974) — still the all-time best-selling true-crime nonfiction book — written by Vincent Bugliosi, who was the lead prosecutor in the infamous Charles Manson murder case.* As to other, more recent "cases of the century," the interminable, televised O.J. Simpson trial of 1994–1995 spawned a sizeable publishing industry all its own;* other especially popular topics have included the 2002 murder of pregnant Laci Peterson and the 2004 trial of her husband, Scott Peterson,* and the never-officially-solved 1947 murder and mutilation of Elizabeth Short, "the Black Dahlia."* Serial killers remain objects of perennial public fascination, and California has had more than its share of them, too, whose stories have been told, including the likes of Charles Ng, Dorothea Puente, "Night Stalker" Richard Ramirez, and "Hillside Stranglers" Kenneth Bianchi and Angelo Buono, among others.* Books also have been written about many other California murders and trials, celebrity or otherwise.* Other notorious California cases not involving murder that have received book-length treatment include that of a Pasadena funeral home that stole gold fillings and illegally harvested organs from the deceased, the 1946 San Francisco prosecution for treason of California native Iva Toguri D'Aquino (Tokyo Rose), and the McMartin alleged child abuse witchhunt of the 1980s (in its day reportedly the longest and most costly criminal trial in American history), among others.* For additional notorious cases, *see also* Crime (murder and other subtopics).

OKIES

Along with the legal histories of racial and ethnic minorities and foreign immigrants, scholars have also studied legal aspects of the migration from Oklahoma to California during the 1930s.*

* All notes available at http://www.cschs.org/history/resources/bibliography.

ORAL HISTORIES

Many oral histories of judges, attorneys, court staff members, law school deans or professors, and other participants in California legal history are mixed among other headings in this bibliography (especially Judges; Lawyers; Courts; and Education). Here, however, is a list of some of the organizations and institutions that have been active in conducting, recording, and transcribing these oral histories, and that researchers may want to check for their existing oral interviews as well as periodic new additions. Although these are some major and active programs, they are not necessarily the only ones.*

POLICE & LAW ENFORCEMENT

IN MEMORIAM: In April 2011, the California legal historical community lost one of its most notable historians of policing and law enforcement, and especially of the often colorful history of law enforcement in San Francisco — Kevin J. Mullen, who rose from being a cop on the beat to deputy chief of police in San Francisco before spending his retirement as a prolific historian of the police force and city he served for decades. Here is a list of his works concerning the history of crime and law enforcement in San Francisco, California, and the West more generally.*

In 1988, Fritz & Bakken limited their discussion of law enforcement mostly to the San Francisco Vigilance Committees of 1851 and 1856 and listed a number of sources that address either or both.* Since then, additional treatments of San Francisco vigilantism have appeared and have extended the story through the First World War.*

Regarding California policing more generally, Fritz & Bakken listed a few resources.* There are now many more studies of California law enforcement, covering various topics and localities during California's early frontier decades,* the more settled period from the late 19th to the early 20th century,* and the postwar years,* along with biographies of notable early police chiefs, marshals, and detectives.* The recurring late-20th-century police scandals and crises of the Los Angeles Police Department form a substantial topic in themselves.* Various scholars have explored the interaction of police with racial, ethnic, or other minority communities.* Scholar Kevin Mullen devoted particular attention to the policing of San Francisco's

Chinatown.* Other studies focus on the experiences of women police officers in California.* Finally, scholars also have explored examples of Californians taking the law into their own hands through the extreme, disturbing, quasi-legal practice of lynching.* *See also* Crime; Prisons & Parole.

PRISONS & PAROLE

Numerous scholars have contributed studies of the history of prisons and punishment in California, including subtopics such as the original construction of the state's prisons and prison system, penal reform, juvenile justice, women prisoners, racial differentials in time served, private prisons, Supermax prisons (particularly the facility at Pelican Bay), and overpunishment.* Other scholars have studied the history of the state's parole system and policies.* *See also* Crime; Courts; Children/Juveniles.

PROGRESSIVE ERA & PROGRESSIVISM

Sources concerning California Progressives and Progressivism of the early 20th century mostly are mixed among various other topics in this bibliography. Here, however, are some sources that specifically address the Progressive Era, Progressivism, particular notable Progressives, or trademark Progressive policy issues or reforms (some of which are no longer seen as particularly "progressive").* *See also* Lawyers (Hiram Johnson), Women (suffragism and Clara Shortridge Foltz, among others), Labor, Japanese Americans (alien land acts), Chinese Americans (immigration restriction and exclusion), etc.

PROPOSITIONS/INITIATIVE, REFERENDUM & RECALL

California is somewhat famous, or notorious, for its efforts at direct democracy, the pros and cons of which have been much discussed by political scientists. Some scholars, including California Supreme Court Justice Kathryn Mickle Werdegar, have studied the history of California's initiative and referendum process overall.* Others have examined the history of particular propositions, including well-known ones such as Proposition 8 (the 2008 anti-gay marriage initiative),* Proposition 9 (the 2008 Victim's Bill of Rights Act also known as Marsy's Law),* Proposition 13 (the landmark

* All notes available at http://www.cschs.org/history/resources/bibliography.

1978 tax limitation measure),* Proposition 14 (the at least tacitly racist 1964 initiative to repeal the 1963 Rumford Fair Housing Act),* Proposition 187 (the 1994 initiative targeting undocumented immigrants for denial of public services),* and Proposition 209 (the 1996 measure that sought to abolish affirmative action),* along with less famous initiative battles concerning sundry issues such as stem cell research, mandatory education spending, the short-lived "blanket primary" election system, sex trafficking and registration of sex offenders, criminal youth gangs, and gay teachers.*

RACE, RACIAL LAW & POLITICS, GENERALLY

Although most studies tend to focus on a particular racial or ethnic group, many scholars have offered wider overviews of race and the law in California history. Many such studies concern the 20th century and especially the postwar period,* but scholars also have actively explored general racial discrimination in earlier times.* For more regarding race, racial discrimination, and racial politics and law, *see also*, of course, headings for various specific racial or ethnic groups, as well as Crime; Education; Housing & Urban Planning; and Labor, among other possibilities.

RADICALISM, ANTIRADICALISM & THE FIRST AMENDMENT

In their 1988 article, in their section regarding criminal law, Fritz & Bakken observed that other than the early work of Lawrence Friedman and his co-authors, studies of the history of criminal law in California basically focused on either the early San Francisco Committees of Vigilance or early 20th-century radicalism and antiradicalism, particularly the World War I–era bombing trial of Thomas Mooney and Warren Billings and its aftermath. They listed a significant number of sources regarding the Mooney case,* along with one focused on the trial of Anita Whitney, the radical socialist niece of Justice Stephen J. Field.*

Since then, along with additional studies of the Mooney or Whitney cases,* historians have addressed a variety of legal history topics regarding radicalism, antiradicalism, and free speech in California, including the repression of the International Workers of the World (the Wobblies) in the 1910s,* the *Los Angeles Times* bombing case of 1911 that almost cost Clarence Darrow his career,* McCarthyism and loyalty oaths in education,* and the Berkeley Free Speech Movement of the mid-1960s,* among other

eclectic and interesting topics.* Regarding the First Amendment and religion, *see also* Religion, Free Speech & the First Amendment.

RAILROADS

Except for historians of the 19th century, who are already well aware of these facts, it sometimes may be hard for historians of later periods or people in general to understand the extent to which railroads, especially the Southern Pacific, dominated California politics and government for decades as the largest landowner and the biggest, most powerful economic institution in the state. Indeed, throughout the American West, railroads, and railroad access, effectively determined whether a town lived or died, and frequently, the railroads effectively owned and controlled local governments as well as state governments, along with much of the land in a given western state. They also generally had the best, highest-paid lawyers who often wound up as judges, hearing arguments from other railroad attorneys in the frequent litigation over land titles, torts, contracts, and other matters arising from the construction and operation of the 19th century's monumental achievements in terms of both engineering and business organization.

Thus there is a major overlap between the history of railroads and California legal history in the 19th century. Some sources specifically address legal history,* while others offer broader histories of California railroads in which the legal is interwoven with other matters.* The (in)famous 1880 shoot-out at Mussel Slough, resulting from a dispute over land titles between settlers and the railroad, was the second deadliest such shoot-out in the history of the American West and has received a good deal of general and legal historical attention.* By the 20th century, as the imperial power of the long-haul railroads began to wane, legal entanglement and litigation sometimes shifted to urban light rail systems instead.* Somewhat disappointingly, outside the area of air pollution, the searches for this bibliography turned up only one relevant, California-specific example of legal history involving automobiles, even in the most car-obsessed state in the Union — so that appears to be an area of the history of California transportation law waiting to be explored.* The same goes for aviation, an industry with important, special historical connections to California.

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* All notes available at http://www.cschs.org/history/resources/bibliography.

REAPPORTIONMENT

Various scholars have examined the legal and judicial as well as political and racial dimensions of reapportionment.*

REGULATION & ADMINISTRATIVE LAW

Some scholars have looked into the history of regulation and administrative law in California. Mansel Blackford, in particular, extensively explored the early regulation of business, banking, railroads, insurance, utilities, and other industries during the Progressive Era,* while other scholars have investigated other topics from later periods, such as the history of California's Administrative Procedure Act.* The most dramatic example of regulation and deregulation from recent times — the energy deregulation that led to the statewide energy crisis of 2000–2001 — has also received attention,* along with earlier issues involving California's energy regulations.*

RELIGION & THE FIRST AMENDMENT

Historians have explored many examples of religious minorities — usually Jews, sometimes Catholics — challenging the Protestant Anglo majority's religious norms, and often winning in the end, on issues from sectarian texts in California schools to Sunday "Blue Laws,"* along with other discussions of other issues relating to other religious denominations or minorities.* Regarding free speech not associated with religion, *see also* Radicalism, Anti-radicalism & the First Amendment. *See also* Catholics & Catholicism; Jews.

SAN DIEGO COUNTY (LOCAL HISTORY)

As noted above, San Diego County, along with Humboldt County, is one of the prizewinners for the quality and quantity of its local legal history. As with Humboldt County, where the local history coverage is mostly in the *Humboldt Historian*, the *Journal of San Diego History* carries most of the local legal history of San Diego. Regarding the 19th century, articles address topics such as the 1782 map setting the boundaries of San Diego and the United States, the subdivision of a major Spanish-Mexican rancho, biographies of local attorneys and judges, the Fallbrook Irrigation District case that went to the U.S. Supreme Court in 1896, and the local enforcement of Chinese exclusion, among others.* 20th-century topics include radicalism and free speech,*

racial/ethnic discrimination and civil rights (including the first successful school desegregation case in the United States),* local Japanese-American internment,* the history of the San Diego Police Department,* and further biographies of local lawyers and judges,* among others.* San Diego has also generated unusually full, rich history regarding the fate of its local Indian tribes, including removals and relocations and Indians' experience of the criminal justice system, among other topics.* There are also several sources regarding San Diego women and the law, from criminal justice and prostitution to Clara Shortridge Foltz, California's first woman lawyer.*

SAN FRANCISCO

"Mean Old Frisco," as the older of the two great metropolitan areas and legal markets in California, appears under many different headings in this bibliography, and in a great many sources that may not focus primarily either on San Francisco or on events that transpired within its metropolitan area. However, for the convenience of researchers especially interested in "The City," here are various categories of sources that do concern San Francisco directly, organized under the following sub-headings, in roughly alphabetical order: San Francisco, Generally; San Francisco Attorneys, Law Firms & Bar; African Americans; Catholics; Chinese Americans, Exclusion, & Angel Island; Gays, Lesbians & Others; Judge Ogden Hoffman; Indians; International Law; Japanese Americans; Jews; Labor; Local Government; Mooney Bombing Case; Other Ethnic Groups; Police & Crime; San Francisco Earthquake of 1906; San Francisco Federal Courthouse; Various; Vice, Sex Crimes & Scandals; Vigilantes; Water, Especially Hetch Hetchy; Women.*

SPANISH/MEXICAN (& RUSSIAN) CALIFORNIA

Fritz & Bakken mostly did not discuss Spanish and Mexican law, other than land grants and their aftermath, in their original article,* but many sources address relevant topics such as Spain's Law of the Indies and other decrees, regulations, laws, and policies that impacted California, among other topics.* Regarding Spanish/Mexican land grants, in addition to the sources listed in the 1988 article (see under heading Land), there are now more recent publications providing an inventory of the grants and discussing

* All notes available at http://www.cschs.org/history/resources/bibliography.

the maps required under Mexican law to substantiate land grants.* More recent scholars have also contributed studies of crime in Alta California.* *See also* chronologically earlier sources listed under Indians, along with Early Anglo California; Catholics (Pious Fund of the Californias).

One particularly active scholar of the historical interrelationship between California legal history and Spanish/Mexican law who perhaps deserves special mention is Professor Peter L. Reich of Whittier Law School. Here is a list of his publications concerning that topic, along with other aspects of California legal history and historical research.*

TAX

More than one tax law professor has argued, more than semi-seriously, that everything in the law ultimately comes down to taxes. In keeping with that wisdom, legal historians have explored diverse aspects of California's tax laws. Deservedly, California's (in)famous 1978 tax-limitation initiative, Proposition 13, has drawn more attention than any other measure,* but scholars also have studied a wide range of other tax topics throughout the 20th century, from the Mattoon Act of 1925 to the Depression-Era single tax campaign to the tax philosophy of California Supreme Court Chief Justice Roger Traynor to the history of 1988 Proposition 98 regarding mandatory K-12 school spending, among others.* Given the proliferation of federal, state, and local taxes during the 20th century, most scholarship has focused on that period, but there are also studies going all the way back to the Gold Rush years.* At least one study includes discussion of the history of the perennial California state budget crisis of the last decades of the 20th century, among other policy problems.*

WATER

IN MEMORIAM: Professor Norris Cecil Hundley, a longtime faculty member of UCLA's history department, passed away in April 2013. His life's work studying the history of water use in the American West, particularly the Colorado River, made him one of the towering figures in the history of California water law. Here is a list of his major works related to that topic.*

Water law was the first topic addressed in Fritz & Bakken's 1988 article;* the present severe drought and overall California and western water crisis

almost guarantee that what has long been a crucially important topic of research in California legal history will only grow further in significance.

Fritz & Bakken listed several key works covering various aspects of the history of California water law,* among them Norris Hundley's 1975 book about the Colorado River Compact, *Water and the West*,* Mary Catherine Miller's 1982 dissertation regarding the pivotal 1886 water rights case, *Lux v. Haggin*,* and Donald Pisani's 1984 book, *From the Family Farm to Agribusiness*,* which Fritz & Bakken commended as the "most complete history of California water law and agricultural development."*

After 1988, Miller turned her dissertation on the *Lux* case into one of the crucial published works in the field,* Hundley contributed another classic book on western and California water among other works that made him the leading scholar on the modern history of the Colorado River,* and Pisani added to his earlier work to become one of the towering figures in the history of western water, land, agriculture, natural resources, and the environment.* These already identified scholars have been joined by many others who have studied major topics in the history of California water law, including the Spanish or even Roman roots of California water law;* the origins of Anglo-California water law during the Gold Rush;* the fate of Hetch Hetchy and San Francisco's water supply;* the Colorado River and the interstate compact concerning use of it;* the Sacramento and San Joaquin rivers and delta and the Central Valley Project;* the ongoing Owens Valley water wars;* the fate of Mono Lake;* groundwater;* grand schemes for transferring water from the Pacific Northwest to California;* and the public trust doctrine as applied to water rights.* Alongside these more heavily researched specific topics are many other published studies covering a wide range of specific topics or the evolution of California water law in general, and frequently also covering long spans of years or decades, regarding the 19th century (or even earlier)* and the 20th century.* There are also several helpful dissertations and theses that illuminate various other aspects of the history of California water law.* Both the Berkeley and Los Angeles campuses of the University of California have gathered oral histories regarding California water law and management.* Finally, a subject heading search for "Water rights—California—History" on WorldCat, the

* All notes available at http://www.cschs.org/history/resources/bibliography.

most comprehensive bibliographic database, revealed numerous archival documents or manuscripts relating to the history of California water law; many of the results, which might just give a person's name, do not readily indicate the relationship of the manuscripts to particular issues, regions, or localities, and many more such collections might not have been cataloged under the particular heading in question for whatever reason; but here is a small sample of the range of archival resources listed on WorldCat regarding California water law.* (A similar wealth of archival records might be available for many other subtopics in this bibliography, but not all such subtopics have a subject heading that fits them neatly and conveniently, so the resources often may be harder to find.) *See also* interrelated topics such as Land; Mining; Environment & Natural Resources.

WOMEN

With the exception of one article,* women were entirely missing from Fritz & Bakken's original 1988 article. That could never happen today. That this omission seems somewhat surprising, and quaint, is a measure of how much has changed since the 1980s, when the (mostly) post-1970 feminist movement was still young, women's history was still relatively new and women's legal history even newer, and women were still striving to gain parity in enrollment in graduate history programs and law schools, as well as on history and law faculties. What a difference more than a quarter-century makes. Suffice it to say that there are now many sources that address the relationship of women to the law in myriad ways.

For the 19th century, Prof. Bakken, with co-author Brenda Farrington, later helped to fill the omission with a book regarding prosecutions of murderesses.* Their study is joined by many others concerning female murderers, criminals, and prisoners from the 1800s through the late 20th century.* Scholars also have explored women's involvement with crime and law as victims.* Traditionally, sex crimes usually involved women in one capacity or another, and generalized vice often did as well, so *see also* Crime (sex crimes, especially prostitution). For a different sort of female criminal and criminal prosecution, see the various studies concerning Anita Whitney — a radical socialist Californian who was also the niece of Californa Supreme Court and United States Supreme Court Justice Stephen J. Field.*

But of course most women in history were never murderers or criminals, and hopefully most were not crime victims, while most women were married at some point and traditionally gained their primary claim to some sort of legal status through marriage. And, prior to recent changes in the law recognizing gay and lesbian marriages, both marriage and divorce required the presence and participation of a woman. Thus marriage and divorce, as well as related topics such as alimony and child custody, form an important area of California women's legal history that has been explored by many scholars covering topics from before Anglo-American conquest of California through California's pioneering of no-fault divorce during the 20th century.* Related to marriage, other scholars also have studied the rise and fall of anti-miscegenation laws and the role of California courts in helping to undo them.* Also related to marriage, scholars have researched issues relating to women's ownership of property, either as marital property under California's (Spanish/Mexican-derived) community property law* or as separate property.* Mary Odem in particular has explored the history of single mothers and female juvenile delinquents in California.* For more on marriage and family formation, *see also* Chinese Americans; Gays & Lesbians; Jews.

Moving from the 19th to the 20th century, new issues regarding California women's legal history appear, notably including women's suffrage, a cause in which early women attorneys such as Clara Shortridge Foltz were actively involved,* along with the inclusion of women on juries.* The later 20th century brought additional new issues and concerns such as gender bias and discrimination.*

There are also clusters of sources regarding other topics related to the legal history of women and women's rights, including women's reproductive rights* and the special burdens, or activism, of minority women.*

Along with crime, marriage, property ownership, and the other topics in California women's legal history already mentioned, there are also numerous biographies, oral histories, and other studies regarding women working in the law or in law enforcement as judges,* attorneys,* law school deans and professors,* and police officers or police chiefs.*

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* All notes available at http://www.cschs.org/history/resources/bibliography.

RESEARCH NOTES AND CONCLUDING COMMENTS

The introduction to this bibliography noted that notwithstanding its bold efforts to be complete and comprehensive, it is, inevitably, neither. Now, hundreds of footnotes later, it is perhaps appropriate to explain how and why that is so, the research processes that went into collecting, compiling, and organizing the materials listed in this bibliography, and situations and problems encountered that other researchers may confront as they conduct their own research into topics in California legal history that may take them far beyond the resources included herein.

As this bibliography is intended to be usable by everybody, not just by seasoned researchers, these research notes, too, are directed toward everybody, including, perhaps, fledgling graduate students, college students, maybe even high school students or curious novice researchers from outside the academy. Some comments as such may be relatively basic and obvious to experienced researchers. Even for such readers, though, some of these points may bear repetition.

At least one popular fallacy should be torpedoed and sunk right at the outset: although digital research tools and techniques have indeed revolutionized the research process in many ways, including historical research, they have not entirely replaced and supplanted traditional tools and techniques — especially with regard to historical research. Moreover, whether using digital resources alone or in combination with non-digital resources, an effective, comprehensive research program likely will require multiple resources, approaches, and search strategies. For most topics, there is no one-stop shopping available, and researchers must remain flexible and creative in their approaches.

As one striking example: anyone who has observed college students or law students researching topics may have seen how frequently these still relatively inexperienced researchers may conduct one or two searches in a broad academic database, or perhaps Google, and then assume that they have found all the relevant resources that exist on the topic. Given the dazzling power and extent of such databases and search engines, that is an easy misconception to fall into. It usually takes a more seasoned researcher with more experience specifically with use of electronic databases to be aware, for

example, that the database in question does not cover the most recent three to five years of publications (as with JSTOR, for instance), or only includes certain titles and not others (as with most databases), or only goes back to the 1990s for most titles that it does include (as with the legal journal databases provided by Westlaw and Lexis-Nexis). A researcher unaware of a database's limitations of chronological and title coverage could be missing a vast array of relevant material without knowing it. The same applies to coverage of different resource categories such as books, journals, and other materials — even very broad databases typically do not include or readily access all of them. Anyone who has observed and coached fledgling digital researchers may also have encountered examples of students assuming that a bibliographic database, such as WorldCat, will provide links to journal articles, or that a journal article database, such as EBSCO Academic Source Complete, will provide bibliographic information on books. Basically, they don't.

Nor are matters such as chronological, title, or format coverage the only issues. Probably the main complication for digital research remains the structuring of searches. Because most database user interfaces are now designed to be simple, straightforward, and user-friendly, they will often provide a long list of search results from almost any combination of keyword search terms. It is altogether too easy for researchers, and not just novices, to see all those results and assume that they must include everything on the topic. Yet if one burrows into the results list, one may find that many of these results are only irrelevant static: items that happen to include the targeted search terms but have nothing whatsoever to do with the targeted research topic. Unfortunately, to determine the actual relevance of results usually requires sifting through them all, one by one, adding human inspection and judgment to the computer-generated list of suggestions. Most people do not have the patience to do that, at least not for very long. With Google searches, most searchers rarely go beyond the second or third search page (i.e., 40–60 out of the 217,582 or however many results). Even with more conscientious students working with academic databases, most people have a breaking point for patience and attention span, and it usually comes well within the first 200 to 250 results. (Most people will not methodically grind through a list of 400 results, let alone 600, 800, or 2,000, because the process becomes, frankly, painful.) Many databases are designed to attempt to rank results by relevance, and many researchers rely on that functionality — but perhaps

too much. The computer that is ranking relevance cannot know just what is in the human researcher's mind; the presence of irrelevant results — often near the top of the results list — demonstrates that; and all too often, actual relevant, even crucial results may wind up buried deeper down in the results list, beyond the researcher's breaking point. Moreover, even with a well-constructed search, however long the list of search results, it often will be missing a substantial fraction of the most relevant results.

Full-text databases, which have particularly revolutionized research and can be very powerful tools when used skillfully, are also especially good at generating static that must be sifted through, and thus are only as good or focused as the search terms and strategies that a human user selects. Databases of article abstracts, representing most databases of academic journal articles, theses, and dissertations, involve different human problems and limitations: the researcher must hope that whoever wrote the abstract used the same search terms the researcher has in her mind, and included them in the abstract. Yet that hope often goes unfulfilled, and that is why, even in the same database, different search terms targeting the same or similar concepts can often produce widely different result lists. For instance, the initial research for this bibliography started out with a deliberately very broad search on a broad database with which some readers already will be familiar — America: History & Life, which includes abstracts of journal articles focused on North American history. A search for the keywords "California," "legal," and "history" produced an impressive-looking list of almost 800 results, most of them relevant to one degree or another (and including most, but interestingly not all, articles published in *California Legal History*). At least in theory, a closely parallel search for "California," "law," and "history" should have produced almost identical results, but in reality, that search produced more than 1,700 results, less than a quarter of which overlapped with the results from the earlier search. A separate search for "California," "court," and "history" produced several hundred mostly relevant additional results that mostly did not overlap with either earlier search, even though the clear majority of each results list addressed California legal history. (By contrast, a search for "California," "lawyer OR attorney," and "history" did mostly overlap with earlier searches.) Inconveniently, different abstracts used different terms for the same or related concepts, or left certain terms out altogether, requiring

multiple searches to find them. And that remains a fundamental, unavoidable limitation of digital research.

Fledgling researchers can often remain blissfully unaware of such limitations. But more experienced researchers should learn, as doctoral students typically must, to be suspicious of any results list, to be aware that plenty of additional relevant resources are likely missing, and that truly ideal, complete research results would require a potentially infinite number of searches in a potentially infinite number of databases. One way to test the limitations of a particular search is to see whether a known item, which should in theory show up in a search results list, actually does. Because Professor Fritz's doctoral dissertation concerning the history of Judge Ogden Hoffman and the Northern District of California is mentioned in Fritz & Bakken's original article, it made a good candidate for a test search for "California," "court," and "history" in the ProQuest database of dissertations and theses. That search produced a list of around 100 results, of which roughly 10% overlapped with earlier searches for "California," "legal OR law" and "history," 20% did not but were relevant to California legal history, and 70% were irrelevant static, usually because they were strictly present-oriented and did not concern history. For whatever reason, Fritz's dissertation did not appear on the list, even though it could easily be found in the database using an author name search. The search did, however, bring up a wildlife biology/ecology dissertation concerning case histories and courting practices of a species of California butterfly ("California," "court," and "history").

In some cases, researchers can improve their odds of gathering more relevant results in a single search by use of truncation — for example, if a database lets a searcher use "histor*" to search for "history," "histories," "historical," "historian," etc. The major legal search engines, Westlaw and Lexis, traditionally have allowed that. Not all academic databases do, however, or even if they do, it sometimes can be difficult to find their linked webpages giving instructions for advanced searching — and the specialized search grammar can vary widely and significantly from one database to the next. (Depending on the database, for instance, the truncation symbol might be !, ?, *, or +, and the other symbols will not work or will mean something else.) Even truncation does not solve the synonym problem, though, where, for example, a searcher seeking articles or abstracts concerning "lawyers" will not find those where the author instead used

"attorneys," and so failure to think through and identify every possible synonym or related term can lead to missing relevant resources.

In addition to the problem of researchers jumping to the improper conclusion that they have retrieved all relevant sources based upon the results of only one or a few digital searches, digital research can be misleading in other ways, too. One problem a researcher may encounter, particularly when working with full-text databases, is mis-literation: for instance, where the optical character recognition (OCR) feature in Adobe Acrobat or other software has seen the letters or symbols on a scanned page of a printed document and has turned them into something else. As an example, this bibliography originally included a listing for a book regarding the Watts Riots/Rebellion/Uprising of 1965: *The Fire This Time*, by Gerald Home. Prof. Fritz pointed out that the author's name is actually Gerald *Horne*. Enough documents online, including a number of reputable sources appearing in Google Books and citing Horne's book, had misread that name such that it was unfortunately quite easy to find the wrong version. At any rate, mis-literation can cause problems with correctly identifying search terms within an OCR-searchable document, while earlier or lower-quality scanned documents often may be available online in full text but are not searchable. Moreover, as with the Home/Horne example above, online information is so easy to copy and disseminate that incorrect information — names, citations, whatever — can also spread rapidly and create confusion among later researchers.

For all these reasons and others, conscientious digital research still is not just a quick, easy process producing complete and accurate results; it remains, as research always has been, an arduous, time-consuming, patience-testing process that requires looking in various different places in various different ways. And again, although digital research has greatly supplemented earlier research tools and techniques, it has not supplanted them, so it still behooves a researcher to make use of time-honored non-digital or pre-digital research techniques. For instance, footnote-mining — finding a relevant source, tracing the sources cited in that source, perhaps tracing additional cited sources in those other cited sources, and so on — has been around for centuries if not millennia, and it is still a good technique that can produce valuable relevant information where digital database searches might not. Where full-text journal articles are available in digital format, such footnote-mining can be done digitally, but

footnote-mining of books normally still requires an actual book, or else an e-book. Another obvious approach that should not be overlooked, and which can often be done efficiently online, is to track down the additional books and articles written by the author of a known relevant source. Scholars frequently produce more than just one piece of work on a given topic, and some spend their entire professional lives focused primarily on the same overall topic or area. (This approach was used with some authors included in this bibliography, but with hundreds if not thousands of different authors listed in the bibliography, to apply the technique to all would have been logistically prohibitive within the four-month publication deadline.) Many academic scholars as well as non-academic authors and researchers now have their résumés and publication lists posted online and readily available to the public, which can often make this a relatively easy process for identifying additional high-quality relevant sources on a topic.

This résumé-mining approach brings up another traditional research technique: sheer serendipity. For scholars do not necessarily spend their entire professional careers writing about the same thing, and some of the other items one stumbles upon in their publication lists may be valuable for other purposes — for example, a researcher who encountered Charles McClain's book on the Chinese struggle against discrimination in 19th-century California might expect to find more regarding that general topic among McClain's other publications, and would so find — but would also find that McClain had written about the California Supreme Court under Chief Justice Phil Gibson during the mid-20th century. Similarly, one researching Lucy Salyer's publication list for more about anti-Asian immigration restriction would also discover her articles about protective labor legislation and the California Supreme Court in the Progressive Era.

Perhaps the classic example of sheer serendipity, dating back centuries before the digital era, is browsing bookshelves in a library or bookstore to see what useful finds happen to turn up near a known relevant source. For instance, Larry Sipes' 2002 book on the rise of judicial administration in California did not appear in any of the book reviews in any of the journals checked for this bibliography, and also may not have shown up on WorldCat; but it did happen to be on the shelf at the UCLA Law Library near another book that did show up in the databases. Proper information science may tend to remain somewhat uncomfortable with serendipity, because at

least in theory, in a correctly organized information universe, all relevant materials should be identifiable and locatable using well-structured information searches; but reality and practicality say: find any relevant information you can, anywhere and any way you can, and run with it. The same goes for in-person (or telephone, or online) conversations with friends, colleagues, fellow scholars — another pre-digital technique that still often works remarkably well. Are legal history or general history conferences (or Internet chatrooms) still good places to serendipitously stumble upon information relevant to your research project? Yes, absolutely. People don't attend those functions just for the free bottled water and little sandwiches.

Perhaps related to serendipity — although it isn't supposed to be — is another pre-digital approach to information organization and access: subject cataloguing. For more than a century, the Library of Congress has organized and catalogued books and journals (not individual journal articles) published in America under various subject headings. Such subject headings can be extremely helpful, although also sometimes somewhat erratic, partly because the assignment of published works to particular subject headings necessarily involves human judgment calls. So, for example, a book that concerns the history of air pollution control policy and politics — social-science stuff — can get grouped with books on air pollution engineering because most books about air pollution traditionally concerned science and technology. Similarly, by a traditional cataloguing convention, if a book concerns two topics (such as Kansas and Nebraska) but devotes more than half of its pages to one of them (in this case Kansas), then the book will be catalogued under the subject heading for the predominant topic (Kansas), and it may be much harder for librarians or researchers to discover the fact that actually, thirty or forty per cent of the book focuses on Nebraska. In practice, subject headings are sometimes difficult to use for librarians, and much more so for non-librarians who are not familiar with subject headings and the way they work.

The growing orientation of modern digital information searching toward the more open-ended, user-friendly keyword search approach has tended to reduce the emphasis on more traditional, structured, less user-friendly organizational systems such as subject cataloguing, and some databases, including Westlaw and Lexis, are tending to abandon subject search functionality — or at least make it harder to find. A good, relevant subject heading search can still

be enormously helpful for identifying related relevant sources, but especially for non-librarian researchers, finding such a good subject heading sometimes can be a matter of luck. WorldCat, the world's largest bibliographic database of library holdings, allows subject search headings, and any item found on WorldCat normally will include Library of Congress subject headings. So if a researcher finds a known relevant source on WorldCat, s/he can then check the subject heading(s) assigned to that source, then run a WorldCat search for all resources with that subject heading. The results from this approach can vary widely. Sometimes a subject heading will prove to be too broad to be very helpful. Sometimes the subject heading may be scarcely populated (hardly any other sources have been assigned that subject heading). For example, in compiling this bibliography, searches were conducted for some identified official Library of Congress subject headings, including "California—law—history," "California—water—law—history," and "California—women—law—history." The first, most general search produced a list of around 700 sources, many of them duplicates (multiple listings of the same item, which can happen with annoying frequency on WorldCat due to minor variations in libraries' cataloguing of the same item), many of them archival manuscript collections, many of them already identified by other searches elsewhere but some not, some of questionable relevance. The "Water—law" subject search produced about 150 results with an overall high degree of relevance, many of which had not shown up in other searches, some of them manuscript collections. The "Women—law" search produced a list of only 28 sources, some of those duplicates, most already found from searching book reviews in historical journals. Some other subject searches targeting topics in this bibliography failed to produce usable subject headings or results.

Another useful if somewhat hit-and-miss search technique with which non-lawyers in particular may be unfamiliar is searching law journals for historical information. This can be problematic unless one is searching for specific topics, preferably with distinctive names (and search terms). Legal journal databases mostly do not use the abstract-index approach, which has its own problems as noted above; rather, the extensive journal databases of Westlaw, Lexis, and HeinOnline mostly rely upon either full-text keyword searches or searches for keywords in titles. The full-text approach is frequently problematic for being too inclusive and producing too much static, because, for example, hundreds of journal articles might contain

the words "California," "legal," and "history" somewhere within them but still have nothing to do with California legal history. The title approach is problematic for being too exclusive, in that even articles that do helpfully discuss a topic in California history may not include those or other search terms in the article titles (although if they do, that is normally a pretty safe indication that the article has a good deal to say about the targeted research topic, and with law journals, one can pretty much take "law" or "legal" for granted). Another potential approach is to search for an entire phrase, such as "California legal history," though the results can be somewhat erratic. On HeinOnline, which includes the journal *California Legal History* in its journal database, most of the 202 results were articles from that journal or articles citing articles from that journal; on Westlaw, which does not include *California Legal History*, almost half of the 69 results were articles that mostly have nothing to do with legal history but cite an article by Joseph Sax on groundwater with the subtitle, "A Morsel of California Legal History," which is included in this bibliography. Term proximity searches (for example, requiring that "California" and "legal" and "history" all appear within the same sentence) and term frequency searches (requiring that targeted search terms appear at least a certain number of times within an article) can help, but the legal journal databases nevertheless proved relatively difficult and unfruitful for general searches regarding California legal history using one approach or another.

Probably the main part of the problem for conducting historical research in law journals is that law journals and their constituent articles are, for the most part, present-minded and not especially oriented toward history. Yet ironically, that opens up some additional helpful possibilities for legal history research in law journals. First, even though most faculty-, law student-, judge-, or practicing attorney-authors of articles, notes, or comments may focus on a topic in the present, some of them also provide some helpful historical background on that present topic, and sometimes that background may be fairly extensive, with citations to other useful sources. This also often applies to legal treatises on particular topics, which by their nature seek to be current and present-oriented (and so usable by practicing attorneys and judges) but nevertheless sometimes include useful historical background on their topics. Second, any discussion of an issue in the present inevitably becomes a discussion of an issue in the past

just by the passage of time alone. So, for example, a 1913 article in the *Yale Law Journal* discussing California's anti-Japanese Alien Land Act of 1913 may or may not include much historical discussion of developments before 1913, but is itself a historical document more than a century later. Thus law journals can be rich sources of information regarding once-present topics that are now historical, such as particular major federal or state cases and court opinions, particular governmental programs or policy shifts, particular popular movements, organizations, incidents, scandals, legal doctrines, and so on. So even though law journals (and treatises) may be difficult and frustrating to search regarding relatively broad, general topics in legal history, they can be quite helpful regarding specific topics — particularly specific court cases and opinions, commentary on which is often relatively easy to find.

There are, of course, some academic law journals focused on legal history. Aside from *California Legal History* and *Western Legal History*, the journal of the Ninth Circuit Historical Society, such journals rarely discuss California, however. For instance, inspection of the contents of the *American Journal of Legal History* reveals a heavy orientation toward America's colonial and early republic periods and toward states east of the Mississippi River, while the *Journal of Legal History* especially focuses on the UK and the British Commonwealth and may have as much or more about law in the ancient world or continental Europe than it does about the United States. Any of the few articles that these or other journals (such as the *Law & History Review* or the *Law & Society Review*) have published regarding California legal history, if found, were included in this bibliography.

All of the problems described above were encountered in the compilation of this bibliography. The initial research involved running searches in several historical, legal, and general academic journal article databases, then sifting the thousands of results one by one, to determine whether they were indeed relevant and to consider how to group and organize them in related categories. With some articles, it was clear from the title and abstract alone what they were about and that they were indeed relevant, but with most articles, it was necessary, where possible, to find the article, look over its contents, and apply a sort of "minimum contacts" analysis to consider whether it was really enough about California, history, and law to justify including it in a bibliography of sources on California legal history.

Parenthetically, a note on "minimum contacts": Lawyers will already be familiar with the concept of "minimum contacts"; non-lawyers likely won't be, but need not worry about it. Briefly, it relates to the concept of personal jurisdiction in civil procedure: whether there has been sufficient contact between a defendant and the jurisdiction in question to justify requiring that defendant to answer a plaintiff's complaint filed in that jurisdiction. So, for example, can a court in California force a defendant who lives in Arizona, or Alabama, to litigate a case in California? Maybe, if said defendant owns property in California, or conducts business in California, or other relevant facts that the court must weigh.

As with perhaps most minimum contacts analysis, this analysis was very much a discretionary judgment call; a different judge might have reached different conclusions about the inclusion/exclusion of particular sources. As noted in the introduction, this bibliography is intended to be broader and more inclusive than Fritz & Bakken's original 1988 article was; yet there also have to be limits, or else the bibliography would have to include almost everything ever written about human existence within the territory of California. For example, the tragic internment of California's (and other states') Japanese Americans during World War II was an overall legal event that grew out of a more discrete legal event — Executive Order 9066. The whole human tragedy was set in motion by law. Thus, in a sense, every single human outcome related to the internment involving anyone with any relationship to California is actually part of California legal history. Yet the literature on the internment is vast, much of it involving social, ethnic, and family history with little direct relationship specifically to law. So lines had to be drawn, and judgment calls made. The decision-making process deliberately sought to err on the side of inclusiveness rather than exclusiveness, but may not always have succeeded.

With a well-organized, comprehensive search of a manageable topic, often searches in different databases, or multiple searches of the same database, will tend to start confirming each other and pulling up mostly the same results — which reassures the researcher that s/he likely has found just about everything. With this bibliography, the process worked exactly the opposite: the more searches were conducted, the more new material was found, and the results just kept broadening and spinning out further and further. It was clear that in addition to the initial general searches for "legal," "law," "court,"

"lawyer," or "attorney" plus "California" and "history," conducted across a wide range of different databases, ideally it would also be necessary to do the same with every single topic or subtopic that was identifiable within the broad field of California legal history. Yet to do that would be impossible, at least within the allotted timeframe for initial completion of the bibliography.

Ultimately, it was decided to focus on known sources of likely high-quality and relevant information, in addition to the diffuse results of all the preliminary general research. So rather than just relying on the results from the search databases, all the articles and editions of particular journals, such as *California Legal History*, the earlier *California Supreme Court Historical Society Yearbook*, *Western Legal History*, and *California History*, were gone through back to the start of the publication's run, except in the case of *California History*, where the systematic thorough checking went back to 1985. All articles were checked manually for minimum contacts regarding California and law — digitally where available, but in print where not (as with the *CSCHS Yearbook* and *Western Legal History*). A feature regularly appearing in *Western Legal History* — lengthy lists of Articles of Related Interest — was also thoroughly checked. Other journals, such as the *Pacific Historical Review*, the *American Historical Review*, the *Journal of American History*, and others, were also checked, not quite as thoroughly, with more reliance on the results of the database searches and on tables of contents for different volumes. (However, although some journal articles make it clear in their titles just what they are about, others do not.) Legal journal and treatise databases were also checked in several different ways, with somewhat disappointing results as described above but nevertheless producing significant numbers of additional relevant results, and the contents of known academic law journals with a legal focus were also checked carefully but produced relatively few additional results.

The journal abstract databases were helpful in providing information about relevant books through listings of book reviews, although predictably, some relevant books also never got reviewed. To catch as many additional relevant books as possible, searches were undertaken in WorldCat, Books in Print, the University of California library system, the Legal History Blog, even Google Books, Amazon.com, and Hathitrust, along with general searching on Google, among other places — as well as serendipitous searching of the shelves of the UCLA Law Library and main library.

Like journal articles, books were subjected to minimum contacts analysis; as a result, many quite interesting books got excluded for having too little to do specifically with California and/or the law, though some were mentioned anyway if they were interesting enough. Together with the searches for books and articles, searches were conducted for helpful and relevant websites providing information on California courts, judges, manuscript collections, and other topics and aspects of legal history.

When this searching was mostly complete, the members of the editorial board of *California Legal History* were invited by the editor to suggest additional items for inclusion, which added a good many more relevant sources that had slipped through earlier search nets.

Along with the accumulation and selection of sources to include in the bibliography, the organization of these sources also inevitably involved discretionary (hopefully not arbitrary and capricious) human judgment calls. Fritz & Bakken, in their original article, had maintained a conceptually neat structure of organization based upon traditional core areas of law. The hugely expanded volume and variety of sources in this bibliography made that approach seem no longer practical. Hence the many headings on many different topics, which mostly reflect which topics produced noticeable clusters of sources, rather than any more elegant or logical structural framework. Some topics are clearly much more major than others, but relatively minor topics such as Art Law were also included for the sake of curiosity and comprehensiveness.

Because of the volume of information to be organized, two structural features were selected. First, a format resembling a legal treatise, with a relatively brief main text accompanied by vast numbers of lengthy footnotes. Lawyers will already be familiar with this sort of text; non-lawyers perhaps not, and they might find it somewhat daunting at first glance, but it is intended to allow readers to approach the text at two different levels of depth: a reader can read the main text easily and breezily regarding topics that are not of special interest to that particular reader, then drill down into the copious footnotes on topics that are of special interest.

Second, the bibliography uses extensive, deliberate duplication and redundancy. That is to address the inescapable reality that many sources simply do not belong under just one heading. So, for instance, an article concerning Chinese women prostitutes in the 19th century will not appear

just under "Chinese Americans" or under "Women," but under both of those headings as well as, perhaps, "Crime (sex crimes)." And the reasoning behind that is based upon the further inescapable reality that most people, including most potential users of this bibliography, do not want to look in umpteen different places to find the information that matters to them; they want to find it all in one place, neatly organized, and most people probably don't have the patience to look in more than two or three places at most. So the effort was made to group as much relevant information as possible on a given topic in the same place, duplicating source citations as necessary for sources that fit within multiple topics. Where there are especially long lists of relevant sources that fit under a different topic, in some cases, rather than duplicating those lists, readers instead have been advised to "see also" the other location; but the bibliography uses a minimum of that approach and a maximum of redundancy. This is the bibliography's humble effort to approximate as nearly as possible the structure of the "semantic web" — all bits of knowledge and information conceptually linked to all other related bits of knowledge and information according to their myriad different relationships — at a time when the semantic web still remains only a visionary dream — and to avoid the "Kansas/Nebraska" problem described above. The idea is to give readers and researchers multiple relatively convenient pathways to find information that may matter to them. Time will tell how well this approach has worked.

There may be even more potential details to fuss over, but those are most of the problems, considerations, and decisions that arose in compiling what grew into an ever more massive bibliography during a frantic four-month period. As noted in the introduction, the bibliography is less than complete, less than comprehensive, and certainly less than perfect. Yet, as also noted in the introduction, there are many riches here to explore. Even if not everything is here, there is a whole lot here. It is hoped that scholars, researchers, students, and readers of many sorts may find this bibliography helpful with their various research projects and other scholarly or personal interests regarding the fascinating, sprawling, tangled web that is California legal history.

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THE LOEB FIRM

And the Origins of Entertainment Law Practice in Los Angeles, 1908–1940

MOLLY SELVIN*

I. INTRODUCTION

The story of how Edwin Loeb got his start as an entertainment lawyer, like many tales told of the studio moguls who became his clients and poker partners, has multiple versions.

One account pins Edwin's first entertainment client as "Colonel" William N. Selig, an ex-sideshow operator who turned to slapstick comedies, minstrel-themed shows and westerns. In 1890, Selig moved his operation from Chicago to what became the Echo Park neighborhood of Los Angeles and began making movies, often featuring his growing collection of exotic animals. According to a former Loeb & Loeb partner, Selig retained Edwin in 1914 or 1915 to resolve some of his legal problems after meeting him at

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a social function. Upon his return to the office, Edwin reportedly told his brother, Joseph Loeb, that he had a new client for their fledgling practice. When Joseph asked what fee he'd negotiated, Edwin reportedly replied, "I put him on retainer for $100," assuming that payment would be made annually. Much to the Loebs' surprise, however, Selig paid the brothers $100 weekly for some period — quickly demonstrating the potential profitability of entertainment work to the bottom-line conscious Joseph.[1]

Another version of Edwin's start holds that movie producer David Horsely asked for Edwin Loeb's help in the 1910s after his Los Angeles lawyers had allowed default judgments to be taken against his studio, located at Washington Boulevard and Main Street. Horsely had found Loeb after writing to a New York lawyer he knew for the name of more competent local counsel. The New York lawyer in turn queried Jesse Steinhart, a San Francisco lawyer friend who was also a friend of Edwin and Joseph. Steinhart recommended the Loebs.[2] One of Horsely's first matters with the Loebs was a dispute with the producers of what were called "L-Ko Comedies."[3] Edwin's assistance in settling the dispute so favored Horsely that one of the opposing producers reportedly told Edwin, "The way you treated us is terrible, and if we ever need a lawyer, we are coming to you." They subsequently did.

Whether either story is fact or fable is probably beside the point. Both illustrate some of the qualities that made Edwin Loeb the city's preeminent entertainment lawyer during the early twentieth century and the Loeb & Loeb firm a major power broker in the emerging movie business and the broader Los Angeles business community.

Entertainment emerged as a specialty practice initially to service the novice movie producers and the film empires they eventually built. The Loeb firm represented the major studios, including Universal, Warner Brothers, Republic Pictures, RKO, Metro Goldwyn Mayer, Samuel

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[1] Interview with former Loeb partner Howard Friedman, Oct. 19, 2010 (on file with the author) [hereinafter Friedman Interview].

[2] This section along with much of the early history of Loeb & Loeb draws heavily on Bill Colitre, "A History of Loeb & Loeb LLP from its Inception to the Present Day," typewritten manuscript (2002) (on file with the author) [hereinafter Loeb History].

[3] L-Ko comedies were one- or two-reel silent caper comedies produced between 1914 and 1919.

Goldwyn Studios, United Artists, and Twentieth Century Fox. The firm — particularly Edwin — put together their early movie deals, real estate acquisitions, and distribution arrangements and often mediated their labor negotiations. As the movie business grew and diversified, new legal issues prompted further specialization within the entertainment bar: Some firms and individual practitioners focused on the "talent" — representing the actors, producers, writers and directors who contracted with the studios. Still others developed expertise in copyright, intellectual property, labor relations, and, more recently, in new media. (And some counselors have found a profitable niche in sorting out the indiscretions and misdeeds of their celebrity clients.[4])

Loeb & Loeb was not involved in every deal or major event nor did it represent every studio, mogul, agency, or distribution company. But the firm's lawyers had a hand in most of the major disputes and developments of the pre–World War II era. Moreover, as was true of other Jewish and ethnic law firms, several Loeb lawyers, including Martin Gang, George Cohen, Alan Sussman, Lawrence Weinberg, and Robert Rosenfeld, spawned their own firms, many of which became entertainment powerhouses. Loeb & Loeb's entertainment client base still includes talent as well as movie and television producers, film funds, record companies, music publishers, private equity funds, and advertising agencies. As such, the firm's development mirrors the broader evolution and expansion of the entertainment practice.

This article charts the origins of entertainment law sub-practice by focusing on the Loeb brothers and the major legal developments in the industry from 1908 through 1940. The brothers' careers and the story of the firm they built nest within a large body of research about how lawyers, including those from ethnic minorities, pursue their careers. Their story underscores the work of some scholars and expands that of others.

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4 Two examples are Jerry Giesler (as told to Pete Martin), *The Jerry Giesler Story* (New York: Simon and Schuster, 1960) and Milton M. Golden, *Hollywood Lawyer* (New York: Signet, 1960). Golden's practice largely involved divorcing celebrities and producers, drunken clients whom he bailed out of jail, adulterous clients who wanted Golden's help to squelch publicity over their dalliances along with assorted accident and other personal injury matters. Golden used pseudonyms for his clients but insisted readers of the time would know their names.

For example, as their practice and reputations grew, the Loeb brothers came to exemplify the central role that Robert Gordon[5] and other scholars have identified for lawyers — as writing new "rules of the road" and then employing those rules to their clients' benefit. While many accounts of the early moguls portray them as having almost singlehandedly built their studios, the Loeb brothers and other leading practitioners were essential to the growth and success of their clients' entertainment and corporate enterprises. By lobbying for favorable laws and regulation, navigating those legal rules on behalf of their clients and guiding them through transactions and litigation, the Loebs were critical to the survival and growth of those companies. Their assistance also legitimized their business endeavors. The role of these counselors proved especially important to studio heads who sought not just wealth but respect as the new movie business tried to shake off its burlesque and sideshow roots.

Loeb & Loeb was long characterized as a "Jewish" firm, even though Joseph and Edwin were largely unobservant and they partnered with non-Jewish lawyers from their first days in practice. Nonetheless, as anti-Semitism constrained opportunities for Jewish lawyers beginning in the 1890s, the firm was the major Los Angeles firm that hired Jewish lawyers through the mid-twentieth century. Other scholars have documented the exclusion of Jewish lawyers from de facto Protestant firms in New York and other eastern and Midwestern cities; the rapid growth of Jewish (and other minority) firms "by discriminatory default"; and the eventual erosion of the religious identity of both WASP and Jewish firms beginning in the 1950s.[6] That pattern prevailed in Los Angeles to varying degrees at different times. Well into the 1950s, Jewish lawyers, including top graduates from prestigious law schools, were largely passed over by Gibson Dunn, O'Melveny, and the city's other white-shoe firms.[7] As a result, Jewish lawyers eager to

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[5] See Robert W. Gordon, "Legal Thought and Legal Practice in the Age of American Enterprise," in *Professions and Professional Ideologies in America*, ed. Gerald L. Geison (Chapel Hill: Univ. of North Carolina Press, 1983), 70–110; and Parts IV and V below.

[6] See, for example, Eli Wald, "The Rise and Fall of WASP and Jewish Law Firms," *Stanford Law Review* 60 (2008): 1803.

[7] For example, Howard Friedman, a Yale Law School graduate who was admitted to the California bar in 1955, joined Loeb & Loeb after other major Los Angeles firms turned him down. Friedman Interview.

expand their own practices found some of the region's major business clients and social institutions out of reach.

Yet the Loebs' story also reveals differences that help explain their financial success and influence within Hollywood, the local bar, and the broader Los Angeles community. When the brothers opened their doors, in 1909, Los Angeles was a pioneer town compared with San Francisco and a cultural and economic backwater, overshadowed in sophistication, population and wealth by its northern neighbor. The Los Angeles legal community was smaller and more fluid in those years. But the region's soaring economic and geographic growth would soon generate enormous opportunities for local lawyers whose ethnicity, for a time anyway, may have been less important than their skills and eagerness.

These differences worked to the advantage of the hometown Loeb boys, eager to grow their business in tandem with the city. It certainly helped that Joseph and Edwin were native Angelenos, unusual for white residents at the turn of the twentieth century, and part of an extended family with deep roots and important connections in the city. Their local pedigree enabled them to attract an A-list of banks and other business clients who might have been unwilling to trust their affairs to immigrants, Jews, or recent transplants to the area. By the 1930s and 1940s, the firm's book of business included many of the region's major corporate and nonprofit institutions.

At the same time, like Jewish lawyers in other cities, the Loebs pursued clients that WASP firms might have passed up; in other words, they hustled. The tawdry reputation of the movie industry in its early days may have repelled some attorneys in mainstream firms. But the Loebs — young and ambitious — had more reasons to take chances.[8]

That they were Jewish may have mattered for many of the studio heads and actors they represented. Carl Laemmle, the Warner brothers, Samuel

[8] Malcolm Gladwell makes a similar point in *Outliers* when describing several New York Jewish lawyers, many the children of immigrants, who came of age during the Depression. Excluded from WASP firms in the 1950s by anti-Semitic snobbery, they turned to unglamorous legal specialties like proxy fights. By the 1970s and '80s, when that work had become highly remunerative, the established firms that had previously turned up their noses at the business became interested. As Gladwell notes, for these New York lawyers, like the Loeb brothers and their Jewish colleagues in Los Angeles, accidents of birth and standing gave them "the greatest of opportunities." Malcolm Gladwell, *Outliers: The Story of Success* (New York: Little, Brown and Co., 2008).

Goldwyn, Irving Thalberg and Louis B. Mayer were themselves Jewish immigrants or, like the Loebs, children of Jewish immigrants. As a result, they may have instinctively felt more comfortable trusting their business affairs to *landsmen*. Indeed, because some (but not all) of the other law firms that took on entertainment clients during the early twentieth century were considered "Jewish" firms, the specialty became tagged early on as a "Jewish" sub-practice,[9] a characterization that to a large extent remains true.

The Loeb brothers' extensive service to the local bar as well as their philanthropic activities on behalf of secular and Jewish causes also contributed to the firm's stature — and certainly to its bottom line. These activities helped propel both brothers and their firm onto the top rungs of Los Angeles commerce and society, and surely served to expand the firm's business portfolio.

So while the story of the Loeb brothers — like the origins of entertainment practice — is one of skilled and ambitious Jewish lawyers, the firm's success transcends that simple ethnic narrative. The fortunate convergence of geography, family wealth and connections, timing, and just plain moxie also explain Loeb & Loeb's financial success and the firm's stability, even during the worst years of the Great Depression, as well as the brothers' lasting influence in the broader Los Angeles community. As such, this account of the firm's early dominance in entertainment law should add texture to previous scholarship on law firm organization, the role and career arc of ethnic lawyers and the firms they created, and the economic and social development of Los Angeles.

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This article proceeds as follows: Part II charts the brothers' early years; Part III focuses on their start as practitioners. Part IV charts the central role lawyers played by writing the "rules of the road" for the nascent entertainment industry between 1900 and 1940 and then employing those rules to their clients' benefit. I focus here on some of the early patent intellectual property disputes, censorship and the first efforts at labor organizing. The Loebs, particularly Edwin, were involved in much of the litigation and

[9] Two others are Mitchell, Silverberg & Knupp and Kaplan, Livingston, Goodwin, Berkowitz & Selvin (no relation ot the author).

negotiation in these areas. Part V includes observations about the role of Jewish identity in the Loebs' careers and in the Los Angeles legal community more broadly; and Part VI draws some conclusions from the Loebs' story about the role of lawyers in the movie business.

A final introductory note before we begin: Two narratives intertwine albeit imperfectly throughout this essay. The first, as noted above, locates the Loeb brothers and the firm they built at the nexus of a pioneer town poised for dramatic growth and a small, prosperous German-French Jewish community. The firm's financial success and the brothers' philanthropic activities moved them into the Los Angeles elite, reinforcing their ability to attract topflight commercial and entertainment clientele. The second narrative charts some of the new legal structures that emerged as the studios matured, including film distribution and exhibition networks, craft and talent unions, and New Deal regulatory initiatives directed at this still-young industry.

Available documents and interviews with former Loeb partners who knew the brothers and other entertainment lawyers kind enough to share their recollections permit us to explore the firm's role as entertainment law came into its own. Although few case files or case-related correspondence remain, extant first-person accounts and primary-source documents,[10] combined with secondary accounts of the rise of the studios and guilds as well as biographies of the major industry players, point toward inferences about the influence and involvement of Loeb lawyers in particular and entertainment practitioners more generally. Where I can document the firm's role I have done so; in other instances, I have drawn what I hope are judicious conclusions. Regardless, a fuller account remains to be written.

II. EARLY LIFE AND EDUCATION

Leon Loeb, a native of Alsace, France, arrived in Los Angeles in 1853 and within a few years opened a dry goods store downtown. In those years, Los

[10] Most helpful were six boxes containing daily logs, correspondence, litigation files, ledgers, and ephemera housed at the firm, referred to internally as the "History of Loeb & Loeb Vault Material." The Huntington Library also houses several boxes containing Joseph Loeb's personal correspondence, early firm ledger books, and ephemera.

Angeles included fewer than 5,000 residents[11] with whites and native Angelenos in roughly equal numbers. During the late nineteenth century, the city was a dynamic mix of Mexicans, Chinese, Japanese, African Americans, and European immigrants like Loeb;[12] boundaries between those ethnic groups were sometimes peaceful and porous, at other times fear and racism turned murderous.[13]

As a European Jew in what was then a small town, Loeb inevitably met Harris Newmark, a prominent Jewish merchant, real estate investor, philanthropist, and patriarch of one of the city's founding families. In 1879, Leon Loeb joined Newmark's family by marrying his daughter Estelle. The first of their three children, Rose, was born two years later, followed by sons Joseph in 1883, and Edwin in 1886.

That the Loeb children were born and raised in Los Angeles, near downtown and close to their influential Newmark relatives, goes a way toward understanding the brothers' later financial success. Joseph remembered playing "Indians" in the weeds with his uncle Marco (Harris Newmark's son — and Estelle's brother — who was only five years older than Joseph), and recalled how Edwin, walking their dog in the "wild" area west of Westlake (now MacArthur Park), would sink knee-deep into the pools of black crude that dotted the area.[14] The Newmark and Loeb families

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[11] *Los Angeles Almanac*, http://www.laalmanac.com/population/po25.htm. The City of Los Angeles was incorporated in 1850, the same year California entered the Union.

[12] The 1870 census counted 330 Jews or 5.76 percent of the city's population. Reva Clar, "The Jews of Los Angeles: Urban Pioneers — A Chronology," http://home.earthlink.net/~nholdeneditor/jews_of_los_angeles.htm. That number rose to 2,500 by 1900, or 2.5 percent of Los Angeles' 102,000 residents. Jewish Virtual Library, "Los Angeles," https://www.jewishvirtuallibrary.org/jsource/judaica/ejud_0002_0013_0_12766.html.

[13] See e.g., Jean Pfaelzer, *Driven Out: The Forgotten War Against Chinese Americans* (New York: Random House, 2007); Douglas Flamming, *Bound for Freedom: Black Los Angeles in Jim Crow America* (Berkeley: Univ. of California Press, 2006); Edward J. Escobar, *Race, Police, and the Making of a Political Identity: Mexican Americans and the Los Angeles Police Department, 1900–1945* (Berkeley: Univ. of California Press, 1991); William Deverell, *Adobe: The Rise of Los Angeles and the Remaking of Its Mexican Past* (Berkeley: Univ. of California Press, 2004).

[14] "Joseph Loeb, Los Angeles Attorney," Interview transcript, Oral History Program, Claremont Graduate School, 1965, 1. Around this time, Leon, as a native of France, was appointed *Agent Consulaire* or French consul for Los Angeles, although he served only a few years, resigning in 1898 in protest over the Dreyfus Affair. (Loeb had become a U.S. citizen in 1870 in response to Germany's capture of Alsace during

regularly gathered for dinner, often with assorted Franco-German friends and relatives. Rose Loeb Levi's great niece, Linda Levi, recalled those evenings as lively with marathon stag card games often conducted out of sight of disapproving female relatives.[15]

Apart from the poker and gin rummy tutorials, the Newmarks were a major influence on both boys and their father. Joseph credits Marco, a Berkeley undergraduate when Joe was in high school, with persuading him to study law. "I was going to be an electrical engineer," he recalled in 1965. "This amuses me," Loeb added, noting how easily he changed his mind "because it shows how clearly I was really cut out to be a lawyer."[16] (The two men had planned to go into law practice together but Harris Newmark successfully pressured his son Marco to enter the wholesale grocery business.)

Joseph Loeb
Courtesy The Huntington Library.

After graduating from Los Angeles High School, Joseph earned his bachelor's degree in 1905 at UC Berkeley where he was elected to Phi Beta Kappa. He took what he called "preliminary law courses" as an undergraduate "and then decided I shouldn't impose on my father by going to Harvard Law School as I intended, but go home for a year and work and then go to law school."[17] That Loeb felt he had the choice to attend law school (let alone Harvard) underscores his family's relative affluence and, notwithstanding the financial

the Franco-Prussian War. Loeb History, 1–2.) Loeb had succeeded Marc Eugene Meyer as consul when Meyer, grandfather of *Washington Post* publisher Katherine Graham, moved to San Francisco.

15 [Linda Levi], "Loeb and Loeb, Pioneer Los Angeles Law Firm, 1909–Present," 2, http://homepage.mac.com/lindalevi/PersonalAW/LOEB&LOEBSHISTORY.htm.

16 "Joseph Loeb, Los Angeles Attorney," 4.

17 Ibid., 5.

turmoil that followed the devastating Panic of 1893, the economic stability of the extended Loeb–Newmark clan.

Courtesy of Newmark family connections, Joseph Loeb became an office boy at the O'Melveny firm immediately after his college graduation. According to his oral history reminiscences, Joseph never did go to law school, instead studying for the bar while apprenticing to O'Melveny. In those years, he recalled, some offices charged would-be lawyers to apprentice but he was taken on without paying and shortly after starting work there, Henry O'Melveny began paying him ten dollars a month in return for running errands and doing clerical work. Loeb passed the bar in 1906 but stayed at the O'Melveny firm until 1907.[18]

Edwin took a different path to the law. He quit college in 1906 to work his way around the world on a trading ship. Leaving Los Angeles with a box of cigars and $340 from his parents, he visited Australia, Japan, England, and France, among other countries. Letters home during this odyssey recount his travels along with his growing skill at cards.[19] Before he returned to Los Angeles, in the summer of 1907, Edwin had planned to join the family grocery business but once back he decided that law would be more remunerative and allow him the opportunity to work with his brother. He enrolled at USC's law school but quit soon after and like Joseph, signed on with O'Melveny, working mostly as a switchboard operator and receptionist while he began his bar studies.[20]

Edwin also apparently convinced his brother that they would do better on their own, so in January 1908, Joseph Loeb and another ex-O'Melveny associate, Edward G. Kuster (a Gentile), opened their own office on Main

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[18] Ibid., 6. O'Melveny listed him among the office's "associates" following his admission to the Bar; Loeb is the only recognizably Jewish name among his contemporaries. William W. Clary, *History of the Law Firm of O'Melveny & Myers 1885–1965* (privately printed, 1966), 826–27.

[19] Letters of Edwin Loeb, notebook, Box 2, History of Loeb & Loeb Vault Material. At the time, an applicant had to demonstrate that two members of the bar had personally examined his legal qualifications. Loeb's certificate of admission states that H.W. O'Melveny, along with another firm attorney, attested to his ability. Clary, *History of the Law Firm of O'Melveny & Myers*, 157–58.

[20] Dr. Norton Stern, "Report of an Interview with Edwin J Loeb," Jan. 25, 1967, 2, History of Loeb & Loeb Vault Material.

Street.[21] Edwin worked as a clerk and office boy for both lawyers as he studied for the bar. When he passed, in January 1909, the firm was renamed Kuster, Loeb and Loeb. Two years after the three lawyers joined forces, Kuster retired from the firm and moved to Carmel, and the firm then became known as Loeb and Loeb. At the time, a grand total of five Jewish attorneys practiced in Los Angeles.[22]

III. BEGINNING IN PRACTICE

As was true in other U.S. cities, the Loebs' lineage as the educated, native sons of successful German-French families allowed them to appear more secular, distinguishing them from more recent immigrants from Eastern Europe who, along with large numbers of Midwestern Protestants, arrived in Los Angeles after World War I. The city's Jewish population also jumped, from 2,500 in 1900 to 20,000 by 1920,[23] due to a large influx of Eastern European Jews. As happened in other cities, the established Jewish immigrants were often embarrassed by and disdainful of the new immigrants' lack of English, odd customs, and obvious poverty.[24]

Moreover, the brothers' very different personalities worked to their collective advantage from the start. Edwin was the funny one, always up for a good time, according to friends and former colleagues who described him as "magnetic," "exuberant," "a great storyteller," "loved life," and "mischievous." His gregariousness undoubtedly helped the firm attract clients in the movie business where personal relationships and a flair for the dramatic, in addition to a shared ethnic identity, perhaps counted even more than in other areas.

By contrast, Joseph was formal, steady and serious, fastidious and careful — the "consummate business lawyer," according to Howard Friedman.[25] In the early years, Joseph tended to the firm's finances in addition to his clients.

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[21] Clary believed that Loeb could have remained at that largely Gentile firm. See Clary, *History of the Law Firm of O'Melveny & Myers*, 157–58.

[22] Neal Gabler, *An Empire of Their Own. How The Jews Invented Hollywood* (New York: Anchor Books, 1988), 272.

[23] Phil Blazer and Shelley Portnoy, *Wrestling with the Angels. A History of Jewish Los Angeles* (Encino, Cal.: Blazer Communications, 2007), 136.

[24] Frances Dinkelspiel, *Towers of Gold. How One Jewish Immigrant Named Isaias Hellman Created California* (New York: St. Martin's Press, 2008), 5, 160–61.

[25] Friedman also described Joseph Loeb as "dour" and even "fatalistic."

His cash ledgers and daily logs, written in a neat slanted script, detailed mundane expenses — the cost of his *Los Angeles Times* subscription, for instance, and the walking-around cash he gave his daughters — along with client fees received and the firm's bank balances. His logs also record each day's activities — cases worked on, client conversations, successes, losses, everyday details, and memorable events. His notes on a call to City Hall about uncollected garbage cans include the phone number he dialed, for future reference, and the 26-year old's impressions of the first "aeroplane in flight" he saw.[26]

Where Edwin loved to party, Joseph wrote poetry and collected Horatio Alger books. Studio heads and movie stars often began their letters to Edwin with a gushing "My dear Eddie"; correspondence to and from Joseph was more formal. Edwin had a longstanding Sunday golf date with Samuel Goldwyn at the Hillcrest Country Club while Joseph represented the firm on philanthropic boards. Joseph married once; his brother three times.[27] Joseph's discretion, caution, and legal skills built the firm's stable of corporate clients that as much as the movie studios were mainstays of the firm's practice for decades, beginning with the brothers' partnership with Kuster.

In their first years, Kuster, Loeb and Loeb did what many beginning lawyers do: everything and anything. Joseph Loeb's daily logs from 1908 through 1912 record work on divorces, wills for relatives, real estate purchases, contract disputes, and accident cases. But the young firm had strategic advantages: a Loeb cousin married into the family of Kaspare Cohn, a local wool merchant whose immigrant savings bank eventually became Union Bank & Trust Company of California, later Union Bank of California, and one of the firm's earliest, largest and most loyal clients. Joseph eventually served on the bank's board. Edward Kuster was the nephew of

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[26] "Went up on the roof with Edwin and Phil Crowds watching from the streets, window and roofs." Joseph Loeb, Jan. 4 and Jan. 13, 1909 entries, 1909 daily log, handwritten, Box 6, History of Loeb & Loeb Vault Material.

[27] In January 1909, a week after passing the bar, Joseph married Amy Cordelia Kahn of San Francisco. The couple had two daughters, Kathleen and Margaret. On their fiftieth wedding anniversary, he presented Amy with fifty roses. Edwin married his first wife, Bessie Brenner, the following year and also had two daughters, Marjorie and Virginia. He married a second time in 1938, to Ellen Van Every. In 1957, at age 70, he "eloped" to Las Vegas with Cally Alsap with whom he'd lived for the previous ten years at the Roosevelt Hotel on Hollywood Boulevard. He died in 1970 at the age of 84.

William G. Kerckhoff, a founder of Pacific Light and Power Company, and the utility also signed on with the young Loebs. The O'Melveny firm provided steady client referrals; Harris Newmark made introductions around town and advised the brothers on many matters.[28] Leon Loeb's philanthropic activities yielded other business for his sons (he was on the board of the French Hospital in what is now Chinatown, one of the first hospitals to serve the city's French community).

Early courtroom victories surely also helped to build the Loebs' business and reputation. Beginning in 1909, Joseph Loeb and Kuster represented a group of local wholesalers in their effort to eliminate a hefty surcharge the railroad companies imposed on railcars bringing goods in from San Francisco. Again, family connections helped. A Newmark uncle was president of the Associated Jobbers of Los Angeles; when another attorney declined to take the case, Loeb and Kuster got the chance. The firm won before the Interstate Commerce Commission the next year, knocking out the $2.50 per car charge and earning a whopping $25,000 fee.[29]

In another early railroad case, the young firm persuaded the State Railroad Commission, now the Public Utilities Commission, to eliminate discriminatory freight rates that penalized Los Angeles. The brothers' grandfather, Harris Newmark, considered the firm's lawyering "unusually brilliant" and the case "probably the most notable of all of the cases of its kind in the commercial history of Los Angeles."[30] Hyperbole aside, the discriminatory freight charge was a drag on local commerce and its elimination a major impetus to the region's growth.

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[28] Joseph Loeb's entries in his 1908 and 1909 daily logs include several references to advice and referrals from "Grandpa." Box 6, History of Loeb & Loeb Vault Material.

[29] Joseph Loeb Interview, 18–19. The case eventually landed at the U.S. Supreme Court which affirmed the I.C.C.'s judgment abolishing the so-called "switching charge," and facilitating business between Los Angeles and San Francisco. The case consumed a major portion of Joseph Loeb's and Edward Kuster's time beginning in the summer of 1908 and continuing through May 1910. Typical were these entries from February 10 and 12, 1909: "Switching case all day," and "Switching case at house all evening." Joseph Loeb, 1909 daily log, handwritten, Box 6, History of Loeb & Loeb Vault Material. Loeb's May 6, 1910 entry recording the young firm's victory, after the years of long hours, was characteristically understated: "Switching case decided our favor." Loeb, 1910 daily log, Box 6, History of Loeb & Loeb Vault Material.

[30] Harris Newmark, *My Sixty Years in Southern California, 1853–1913* (Boston: Houghton Mifflin Co., 1930), 637.

The firm's work for Union Bank as the region dramatically expanded in population and land mass laid the foundation for much of Loeb's lending, real estate and corporate work. In 1900, Los Angeles was the nation's thirty-sixth largest city, with a population of 102,479, as compared with San Francisco which ranked 9th with 342,782 residents. Just ten years later — a year after the firm began — Los Angeles residents numbered 319,198 to San Francisco's 416,192. By 1920, the population of Los Angeles had shot up to 576,673, edging out San Francisco, with 506,673.[31]

Annexation vastly increased the city's land mass. By 1910, Los Angeles had acquired the "Shoestring," a narrow strip of land leading from downtown south to the Port of Los Angeles, along with the harbor cities of San Pedro and Wilmington, and Hollywood. The opening of the Los Angeles Aqueduct in 1913 and the arrival of new railroad lines prompted more annexations, including large portions of the San Fernando Valley and the Westside, such that by the early 1920s, the city had more than tripled in size.

This white-hot expansion yielded steady real estate and incorporation work on behalf of clients with such fanciful names as the Wild Rose Mining Co. and the Rawhide California Mining Co.[32] This early boom and the relative absence of established corporations (compared with eastern and Midwestern cities), combined with the Loebs' deep local roots, brought the young lawyers clients who would later become major power brokers — bankers, real estate developers, and oil men as well as the studio chiefs — along with individuals who provided the brothers access to existing Los Angeles elites. This pattern differed somewhat from one that scholars have described in more established legal markets where Jewish lawyers often depended on small and mid-size Jewish clients and "Jewish" corporations to sustain their practices, as well as practice areas that WASP firms considered distasteful, including litigation and bankruptcy.[33]

Entertainment was a significant part of the Loebs' business from the start although, as noted above, the exact origin of the firm's initial involvement

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[31] See U.S. Bureau of the Census, *Population of the 100 Largest Cities and Other Urban Places in the United States, 1790–1900*, Tables 13–15, June 1998, http://www.census.gov/population/www/documentation/twps0027/twps0027.html.

[32] Others included Tampico Petroleum, Midway Field Oil Co., and the San Gabriel Valley Fertilizer Co.

[33] See e.g., Wald, "The Rise and Fall of WASP and Jewish Law Firms," 1851–53.

is unclear. Edwin's early litigation against two brothers on behalf of David Horsely over the so-called "L-Ko Comedies" did indeed prompt the producer brothers to retain Edwin in subsequent matters as they had jokingly promised to do.[34] And momentously for the Loebs, the L-Ko producers introduced Edwin to their brother-in-law — Carl Laemmle, founder and president of Universal Studios.[35]

By the early 1920s and through a chain of personal connections, the firm was representing Metro-Goldwyn-Mayer, United Artists, Universal, Loews, and other studios.[36] Edwin had become a close friend of Louis B. Mayer and by 1924, had helped him to organize the MGM behemoth. Irving Thalberg, another of Edwin's friends, was also instrumental in the consolidation of that studio.[37] Thalberg had been Laemmle's private secretary in Laemmle's New York office and in 1920, Laemmle asked the 19-year old Thalberg to accompany him on a visit to his Universal Studios in California — and to help him catch up on his correspondence while onboard the cross-country train trip. Once in California, Laemmle was apparently so impressed by his underling's acuity and maturity that he asked Thalberg to stay in Hollywood to watch over the studio.

Thalberg's ascendancy at Universal, then the largest movie studio in the world, was swift. But by 1922, after a failed romance with Laemmle's daughter, Thalberg was restless. He was already close friends with Edwin, his attorney, who introduced him to Mayer at Loeb's home. Neal Gabler writes that "all parties knew this was an audition," one which Thalberg apparently passed, joining Mayer the next year as vice president and production assistant.[38] At the same time, friction developed between Marcus Loew, the wealthy theater chain owner, and Adolph Zukor, head of Paramount Pictures. When Zukor took over the Famous-Players Lasky Corp. he made it difficult for the Loew Theaters to acquire pictures. In response, Loew acquired the Metro Film Co. in 1920 and the Goldwyn Pictures Co.

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34 See account in text at note 3 above.

35 Friedman Interview.

36 Joseph Loeb Interview, 20. See also Gabler, *Empire*, 220–23.

37 According to Scott Eyman, Edwin Loeb was at one time also the personal attorney for both Mayer and Thalberg. See Eyman, *Lion of Hollywood. The Life and Legend of Louis B. Mayer* (New York: Simon and Schuster, 2012), 250.

38 Gabler, *Empire*, 221.

in 1924. Later that year, he bought the Louis B. Mayer Picture Corp., naming Mayer as studio head and Thalberg as production supervisor. Edwin helped put the deal together.

Meanwhile, the Loeb firm had undergone its own changes. When Joseph's friend Irving Walker joined in 1914, the firm became Loeb, Walker & Loeb. In the same year, Walker married Evangeline E. Duque, from one of the oldest Los Angeles WASP families who reportedly "disapproved strongly" of his association with "a Jewish law firm."[39] When Walker eventually departed, in 1938, the firm became Loeb and Loeb again, later adopting its current branding as Loeb & Loeb LLP.[40]

During these early years, Edwin and Joseph first became involved in civic activities that reflected their individual personalities and professional interests. Their motivations were sincerely philanthropic, as evidenced by their long involvement. Yet as Parikh and Garth noted in their analysis of the career of Chicago lawyer Philip Corboy, these activities also deepened the brothers' links to local elites, further strengthening the firm's reputation and bottom line.[41] In 1927, Edwin and others founded the Academy of Motion Picture Arts and Sciences to honor excellence in the field and, as discussed below, to counter growing pressure for unionization from the industry's talent and craft workers. Loeb did the legal work to acquire the academy's state charter as a nonprofit organization and he is often credited with the idea of holding the Oscar awards. The first awards ceremony took place in May 1929 at the Hollywood Roosevelt Hotel where Edwin later took up residence.[42]

Joseph directed his energies toward the Los Angeles County Bar Association as well as a number of local charities. Originally organized in 1878 as the Los Angeles Bar Association with the goal of founding a law library, the group drifted until the early 1900s. Loeb joined in 1906 or 1907 as a brand-new lawyer and quickly became an active member. He helped

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39 Loeb History, 7.

40 Email from former Loeb partner Robert Holtzman, June 23, 2011 (on file with the author).

41 Sara Parikh and Bryant Garth, "Philip Corboy and the Construction of the Plaintiffs' Personal Injury Bar," *Law & Social Inquiry* 30 (2005).

42 See "History of the Academy," *The Academy of Motion Picture Arts and Sciences*, http://www.oscars.org/academy/history-organization/history.html; [Levi], "Loeb and Loeb, Pioneer Los Angeles Law Firm," 3; Loeb History, 11.

to revise the bylaws, eventually chaired the attorney discipline committee, and participated in a special committee that made recommendations on statewide court practices regarding attorney fees.[43] Loeb served as a trustee of the bar association from 1915 to 1921, and the Loeb firm produced two association presidents, Irving Walker in 1931 and Herman Selvin in 1951.[44]

IV. EARLY ENTERTAINMENT PRACTICE (1908–1940)

As noted above, Loeb & Loeb's earliest entertainment work involved helping to incorporate and structure a number of the major studios along with contractual matters involving those clients and others. This work drew the firm into three of the major legal issues of those early years: the long-running challenge to the Motion Picture Patents Company (MPPC), otherwise known as the Edison Trust; the Hays codes; and early efforts at industry unionization.

Legal historian Robert Gordon has identified lawyers as a driving force in the direction of large enterprises, or as what Kai Bird termed "lawyer-servant[s] to the most powerful private interests."[45] That description certainly captures Edwin Loeb's role in the emerging entertainment industry and Joseph's in the Los Angeles corporate community. Gordon focuses on the innovations or "products" that nineteenth century corporate lawyers created — "the legal forms they devised rather than their presence in the boardroom."[46] He stresses the legal-technological innovations lawyers made, focusing on such corporate "products" as new forms of security (e.g., preferred

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[43] W. W. Robinson, *Lawyers of Los Angeles: A History of the Los Angeles Bar Association and the Bar of Los Angeles County* (Los Angeles: Los Angeles Bar Assn., 1959), 155.

[44] The Beverly Hills Bar Association, founded in 1931, attracted a large number of entertainment practitioners, many of whom were Jewish. According to Friedman and Holtzman, Loeb & Loeb did not join the association until the firm opened its Beverly Hills office, in 1961, after acquiring the entertainment practice of Louis Blau. Blau represented Stanley Kubrick and Walter Matthau, among others. Email message to the author from Robert Holtzman, Nov. 2, 2011 (on file with the author); phone interview with Howard Friedman, Nov. 3, 2010.

[45] Gordon, "Legal Thought and Legal Practice"; Kai Bird, *The Chairman. John J. McCloy. The Making of An American Establishment* (New York: Simon and Schuster, 1992), 662.

[46] Gordon, "Legal Thought and Legal Practice," 78–80.

stock and convertible debentures) and organization (e.g., the trust and holding company). These new "products" and institutions offered opportunities as well as risks for corporate clients that, with their lawyers' adept guidance, could help legitimize their business enterprises, control competition, generate new revenues, and even change the course of world affairs. Development of the "poison pill" by the Wachtell Lipton firm in the 1980s is a classic example. That innovation or "product" both allowed corporations to fend off hostile tender offers and made Wachtell the go-to legal firm for takeover defenses.[47] Others, including Kai Bird, view power as emanating equally from high-level advice and brokering. John J. McCloy — Wall Street partner, Chase Manhattan Bank chairman, and advisor to successive presidents — is Bird's exceptional example.[48] In both roles, lawyers like McCloy and the Loebs set in motion a virtuous circle of sorts, amplifying their own power and influence as they did the same for their clients.

Edwin Loeb, working on behalf of his clients, helped create much of the infrastructure of the modern entertainment industry, including agreements regarding talent representation and labor organization, film production, exhibition, arbitration, revenue and royalty distribution, and copyright. Legal innovation continued throughout the twentieth century as new media emerged (for example, television and home video systems) and, if anything, it has intensified in recent decades with Internet-based communication and entertainment.

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[47] See Michael J. Powell, "Professional Innovation: Corporate Lawyers and Private Lawmaking," *Law & Social Inquiry* 18 (1993): 423 (providing a detailed history of the "poison pill").

[48] The Harvard-educated McCloy had an extraordinary career and outsize influence. He was the Assistant Secretary of War from 1941 to 1945 and a crucial voice in setting — and implementing — U.S. military priorities. McCloy helped construct the legal arguments to justify the internment of Japanese Americans as well as advised on military strategy in North Africa. In 1949, McCloy became the U.S. High Commissioner for Germany, overseeing the creation of the Federal Republic of Germany and, at his direction, the campaign to pardon and commute the sentences of Nazi criminals. Originally a partner at Cravath and later Milbank, Tweed, Hadley & McCloy, he went on to become chairman of Chase Manhattan Bank, the Ford Foundation, and the Council on Foreign Relations. As an advisor to Presidents Kennedy, Johnson, Nixon, Carter and Reagan, McCloy served on the Warren Commission and was the primary negotiator on the Presidential Disarmament Committee. Bird, *The Chairman*.

A. MPPC CHALLENGES

By the 1890s, Thomas Edison, through his Edison Manufacturing Company had acquired the rights to a new motion picture projection device, the Phantascope, which he renamed the Vitascope and marketed as an Edison invention. By 1908, when other companies had developed their own film projection systems and began to compete with Edison, he moved to copyright his productions and, in concert with nine other companies including Biograph, formed the Motion Picture Patents Company (MPPC). In an effort to control the industry and shut out smaller producers, the MPPC required competitors to buy licenses to use his cameras and filed patent infringement lawsuits against film producers, distributors and exhibitors who failed to do so. This strategy essentially reduced American production to two companies, Edison and Biograph, which used a different camera design.

Edison set a January 1909 deadline for all companies to comply with his licensing requirement, a move that drew in a number of smaller studios including Loeb client, the Selig Studios. However, several other companies, led by another Loeb client, Carl Laemmle, refused to go along. These so-called "independents" viewed the MPPC as a trust in violation of the Sherman Anti-Trust Act, and continued using unlicensed equipment and imported film stock, creating their own underground market.

Their defiance coincided with a major surge in the audience for popular entertainment and a corresponding increase in the number of nickelodeons and other theaters. The MPPC tried to bully non-licensed independents into line with patent claims. An MPPC's subsidiary, the General Film Company, underscored that intention with violence, confiscating unlicensed equipment, trying to block distribution of unlicensed films, which eventually grew to include those produced by the Disney studio, and threatening renegade theater owners with bodily harm.[49]

[49] Marc Elliot characterized the independent studios as "mostly immigrant Jewish filmmakers" led by Laemmle, and argued that the "goon squads" Edison hired, the suspicious nickelodeon fires, and the smashed arcades helped prod New York producers like Laemmle to migrate west and set up shop in California, out of range of Edison's process servers. Marc Elliot, *Walt Disney: Hollywood's Dark Prince* (New York: Birch Lane Press, 1993), 48–49. On Disney, see also, Neal Gabler, *Walt Disney. The Triumph of American Imagination* (New York: Knopf, 2006).

In court, Edison initially prevailed with judges who held that antitrust claims were not a defense to patent infringement by violating companies. Yet many independents continued to use MPPC's patented film technology, figuring that the chances of getting caught were minimal and that the profits to be reaped outweighed whatever fines or adverse judgments they might have to pay.[50] Some independents, including Laemmle's Independent Motion Picture Co. (the predecessor to Universal) and Adolph Zukor's Famous Players, launched their own productions and gradually shifted their focus from exhibition to production as the nickelodeon boom crested, around 1911.[51] By that time, there were as many independent producers as signatories to the MPPC agreement.[52]

As a result, when the Justice Department finally began antitrust proceedings against Edison's MPPC in August 1912, the company may have already lost much of its clout. Federal judges hammered the final nail in MPPC's coffin; following a 1915 decision finding that the company had violated Section 1 of the Sherman Act and the Supreme Court's 1918 decision to dismiss the group's appeal,[53] the MPPC dissolved.

The demise of the MPPC opened the way for the studio system that quickly came to dominate Hollywood production. As Alexandra Gil noted, "men like William Fox, Carl Laemmle, Adolph Zukor, Jesse Lasky, and Louis B Mayer were just small independent businessmen during the reign of the MPPC, but they began to see the opportunities available to them. Many, like Mayer and Fox, began as theater owners and exhibitors, but soon realized they liked production better."[54]

Although I was unable to find specific evidence of the Loebs' involvement in these patent and antitrust disputes on behalf of MPPC signatories

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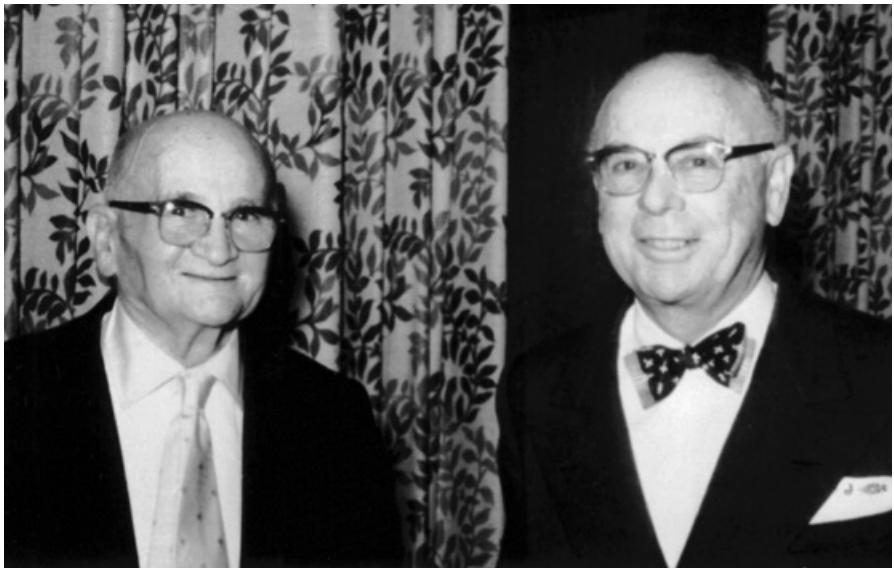
50 Alexandra Gil, "Breaking the Studios: Antitrust and the Motion Picture Industry," *NYU J. Law and Liberty* 3 (2008): 93, http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website__journals__journal_of_law_and_liberty/documents/documents/ecm_pro_060965.pdf. On the origins of the MPPC, see also J.A. Aberdeen, "The Edison Movie Monopoly," *Hollywood Renegades Archive*, http://www.cobbles.com/simpp_archive/edison_trust.htm.

51 Aberdeen, "The Edison Movie Monopoly."

52 Gil, "Breaking the Studios," 94.

53 *United States v. Motion Picture Patents Co.*, 225 F. 800, 808 (E.D. Pa., 1915); Gil, "Breaking the Studios," 95.

54 Gil, "Breaking the Studios," 95–96.



Loeb & Loeb — Edwin (left) and Joseph on the occasion of Edwin's 75th birthday, 1961.

Courtesy Loeb & Loeb LLP

or independents, the outcome clearly freed fledgling studios and Loeb clients like Universal and Warner Brothers to ramp up production on shorts as well as the new, feature length films that began to draw audiences in the 1920s. The studios' rapid expansion and vertical integration depended on the creativity of their attorneys who devised an array of new legal instruments and protocols to facilitate this growth. Those instruments — including contracts governing talent, studio and theater acquisition, production, screening, and revenue distribution — underscore assertions by Gordon and Parikh and Garth, among others, with respect to the key role lawyers have played in other economic domains by controlling competition and generating new revenues. The Loeb firm's work in this regard enhanced the stature and wealth of their clients and, in the process, burnished the firm's reputation as a power broker operating at the highest echelons of the blossoming entertainment industry. That success, in turn, reinforced their status within the broader Los Angeles economy and legal community.

The MPPC antitrust litigation also proved to be the first battle in what became a long-running war for control of film production and theatrical distribution that would continue into the 1960s (and indeed continues today

over new forms of content delivery). While these contests may seem relatively straightforward if almost quaint compared with today's complex claims over rights, profit points, intellectual property and piracy, they involved the major law firms of the day in often vicious, bet-the-company litigation.[55]

Loeb & Loeb was a repeat player, with clients on both sides of the ongoing litigation. Starting in the late 1920s, the studios' effort to vertically integrate production, distribution and exhibition triggered new claims of monopoly and restraint of trade. The government accused seven major studios of controlling almost all U.S. movie theaters, either through ownership of their own chains or "block booking," forcing independent theaters to sign contracts with the studios that required them to show a given number of films.[56] By 1940, government and studio representatives had worked out a compromise in which the studios would retain their theaters but limit block booking. Yet dissatisfaction with this deal prompted the leading independent studios to form the Society of Independent Motion Picture Producers (SIMPP) which pushed the matter back into court. Among those independents were Loeb clients Samuel Goldwyn, Mary Pickford, and Charlie Chaplin. A New York trial court gave the independents a partial victory in 1945 but both sides appealed and in 1948, in *U.S. v. Paramount Pictures, Inc.*, the U.S. Supreme Court affirmed the earlier verdicts, finding the studios guilty of violating antitrust law. Under terms of the consent decree, the studios had to divest themselves of their theater chains and end block booking by agreeing to sell all films individually.[57] The case was returned to the U.S. District Court for the Southern District of New York where the parties negotiated a stipulated judgment known as the "Paramount Decree" or the "Consent Decree." Yet the litigation continued for years afterward with Loeb & Loeb a major player. Former partner Robert Holtzman, who joined the firm in the 1950s, recalled that these cases quickly came to dominate his work for the firm and that of many of his colleagues and remained a major matter.[58]

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[55] Clary, *History of the Law Firm of O'Melveny & Myers*, 505–06, 582–85. (For example, O'Melveny represented Paramount Studios during the 1920s and '30s on labor-relations and other matters).

[56] The majors included Paramount, Universal, MGM, Twentieth-Century Fox, Warner Bros., Columbia, and RKO.

[57] Gil, "Breaking the Studios," 98–118; *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

[58] Interview with Robert Holtzman, Jan. 19, 2011 (on file with the author).

B NEW THREAT: CENSORSHIP

The demise of the MPPC freed producers from the threat of patent infringement claims yet also prompted the studio heads to join forces. Their goals were twofold: first, to create a regulatory body that would monitor quality and impose censorship standards and second, to foil efforts by talent and craft employees to organize.

Since the U.S. Supreme Court had refused, in 1915, to extend First Amendment protections to motion pictures,[59] state and local governments, already under pressure from religious and temperance groups, moved to bolster their earlier efforts to regulate movie content through censorship boards. Fears that movies glorified and encouraged amoral, even illegal, behavior dogged the young industry from its earliest days but took on new urgency for producers with the 1921 arrest and trial of silent-film comedian Roscoe "Fatty" Arbuckle for rape and murder. Although Arbuckle was acquitted of those charges after two mistrials, the incident is considered a major impetus for the decision by industry leaders in 1922 to preempt state and local censorship by hiring lawyer and former Postmaster General Will Harrison Hays to lead the new Motion Picture Producers and Distributors of America (MPPDA).[60]

Hays was tasked with "cleaning up" pictures, a role for which his conservative credentials as a Presbyterian deacon and past Republican Party chairman well suited him. His main role was to persuade individual state censor boards not to ban specific films outright and to reduce the financial impact of the boards' cuts and edits. States imposed varying standards so studios might have to produce different versions of the same film to pass muster with multiple state censorship boards. Hays initially operated by trying to intuit what different boards might accept but by 1927 had developed a set of guidelines he called, "The Don'ts and Be Carefuls," a list of eleven subjects to

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[59] *Mutual Film Corporation v. Industrial Commission of Ohio,* 236 U.S. 230 (1915).

[60] Arbuckle's arrest and other scandals involving movie actors, producers, and directors prompted a spate of resolutions in 1921 and 1922 condemning sinfulness in films from the Southern Baptist Conference, the Central Conference of American Rabbis, the General Federation of Women's Clubs, and Catholic, Episcopalian, and Methodist organizations. In 1921 alone, nearly one hundred censorship bills were introduced in the legislatures of thirty-seven states. Ben Yagoda, "Hollywood Cleans Up its Act," *American Heritage* 31 (1980), http://beta2.americanheritage.com/articles/magazine/ah/1980/2/1980_2_12.shtml.

be avoided in films, and twenty-six to be treated with special care. Among the "Don'ts" were "miscegenation," "ridicule of the clergy," and "scenes of actual childbirth;" the "Be Carefuls" included "excessive or lustful kissing, particularly when one character or another is a 'heavy.'"[61]

Compliance was difficult to enforce. By 1930, Hays' initial guidelines were superseded by the Motion Picture Production Code, drafted by a priest and lay Catholics. Under increasing pressure, producers eventually agreed to submit all scripts and completed films to the Hays office. But the staff's decisions could be overridden by an appeals board composed of studio executives and lawyers — "who, following a philosophy of mutual back-scratching in hard times, were hardly strict constructionists."[62]

The code persisted in various forms through the 1930s, successfully blocking efforts at federal censorship as well as several threatened state initiatives. But the successive codes and guidelines locked producers and their lawyers in continuous skirmishes with religious conservatives and Hays over storylines, words, and violent or provocative visuals. The advent of sound raised new challenges or opportunities, depending on one's perspective, bringing "the clink of highball glasses, the squeal of bedsprings, [and] the crackle of fast conversation to a thousand Main Streets."[63]

Censorship may have been the public rationale for the Hays office but monopoly control of the industry by the producers was its main goal, according to J. Douglas Gomery. Trade associations multiplied and flourished during the 1920s, according to Gomery, as the federal government "openly promoted" their establishment and endorsed (tacitly if not overtly) their anti-competitive goals.[64]

But disputes within the industry did surface, of course, particularly between distributors and exhibitors, and the Hays office assumed a major role here as well as industry spokesman and power broker. According to one estimate, there were some 500,000 to 700,000 contracts for film

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61 "List of 'Don'ts and Be Carefuls' adopted by California Association for Guidance of Producers, June 8, 1927," Appendix D in Raymond Moley, *The Hays Office* (Indianapolis: Bobbs–Merrill Co., 1945), 240–41.

62 Yagoda, "Hollywood Cleans Up its Act."

63 Ibid.

64 J. Douglas Gomery, "Hollywood, the National Recovery Administration, and the Question of Monopoly Power," *Journal of the University Film Assn.* XXXI:2 (1979): 47, 48.

exhibition entered into annually by 1922, with litigation over the terms of these deals growing rapidly. In response, the Hays office created arbitration boards composed of exhibitors and distributors in several major cities that heard complaints regarding violation of contract terms. During its first six years, the boards heard over 75,000 cases and the number of lawsuits filed in court dropped precipitously.[65]

For Edwin Loeb, a trusted counselor to several studio heads, the Hays office appeared to be a potential source of income along with an avenue for continued influence within the industry. In December 1931, he began to work directly for Hays; his appointment "came at the insistence of the leading producers in Hollywood and the ruling executives in the New York offices of the studios."[66] Loeb temporarily suspended his law practice to take on the assignment, presumably orchestrating some of the "mutual backscratching" among producers, between distributors and exhibitors, and with the Hays office as well as with state censors and Justice Department regulators. It must have seemed like a good idea at the time since the Depression had cut into the firm's revenue while Edwin apparently continued to spend freely on European travel and other personal indulgences.

But the Hays office, located in New York, was experiencing hard times as well, prompting Loeb to submit his resignation not long after he signed on, citing Hays's plan to cut expenses and reduce compensation. In a series of letters to Hays, other lawyers, and studio heads, he sought to collect what he believed he was owed. In April 1932, Loeb wrote Hays that he had "rendered special services to the producers [on behalf of the Hays office] for a period of eight or nine months prior to December [1931] with the understanding that a substantial fee was to be paid to me for the same." Loeb noted that he waived that fee, based on his understanding with Hays about his compensation once he formally joined the code office.[67]

"I am badly up against it as a result of not having the money," he wrote to a New York attorney friend the following year, claiming that Hays owed

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65 [anon.] "Motion Picture Arbitration System," typewritten paper, Mar. 27, 1947, Box 6, History of Loeb & Loeb Vault Material.

66 Loeb History, 12; Holtzman interview.

67 Letter, Edwin Loeb to Will H. Hays, Apr. 21, 1932, Box 5, History of Loeb & Loeb Vault Material.

him $13,946.21.[68] The office derived its revenue from studio payments for reviewing scripts and footage; Warner Brothers, for example, paid Hays $1,000 weekly in 1933 for this service. With Hays holding onto cash to meet his own expenses, Loeb's friends openly lobbied on his behalf and worked behind the scenes with the firm's studio clients to secure his back pay.

Loeb took his leave at a good time. By 1933, the Depression left some studios near bankruptcy or in receivership. In the face of stepped-up pressure from the Catholic Church and the National Legion of Decency, producers agreed to disband their liberal appeals board and levy a $25,000 fine for producing, distributing or exhibiting any picture without approval from the Hays office. That agreement would last into the 1960s.[69]

C. UNION EFFORTS AND THE FOUNDING OF THE ACADEMY

1. Craft workers

The second impetus for collaboration among the studios after the MPPC's demise was to counter the first serious stirrings among industry guilds and labor unions. Here again Edwin Loeb was a key player, this time as one of the founders of the Academy of Motion Picture Arts and Sciences, which represented producers in early labor negotiations. The Loebs' initial years in practice coincided with the first major wave of union organization in

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[68] Letter, Edwin Loeb to Bertram S. Nayfack, Esq., May 29, 1933, Box 5, History of Loeb & Loeb Vault Material.

[69] The code system broke down completely with the 1966 release of "Who's Afraid of Virginia Woolf," which included the phrase "hump the hostess" and the word "screw." But deep cracks were visible by the early 1950s; as television, with its family-friendly fare, became ubiquitous, film producers fought for audiences in part by offering more sex and violence. Meanwhile, Supreme Court decisions chipped away at the code's power and rationale. As noted above, in its 1948 *Paramount* decision, the Court ruled that studios could no longer own giant theater chains, and, in 1952, it held, contrary to the 1915 *Mutual* decision, that movies were in fact included within constitutional freedom of speech guarantees. As a result, censorship was no longer a threat and independent producers could distribute films relatively easily without code approval. So when Otto Preminger's "The Moon Is Blue" was refused a seal in 1953, in part because the script included the word "pregnant," its distributor, United Artists, resigned from the MPPDA and released the film anyway. Yagoda, "Hollywood Cleans Up its Act;" Amy K. Spees, "Founder–Keeper," *Los Angeles Daily Journal Extra*, Feb. 23, 2004, 15.

Los Angeles broadly and in the new entertainment industry in particular. For example, beginning in the summer of 1909, through negotiation and short boycotts, stage employees, musicians, electricians and projectionists won higher wages and other concessions from several local theater owners.[70] The building trades won some victories as well; by October 1911, the Los Angeles Central Labor Council counted ninety-one affiliated organizations representing approximately 15,000 carpenters, sheet metal workers, plumbers, lathers, painters, and structural ironworkers. What Grace Stimson termed "the organizing fever" among local building trades was critical to this brief notable period of union success.[71]

These early successes were tempered by the bombing of the *Los Angeles Times* building in October 1910 and the guilty pleas by brothers John and James McNamara in December 1911. These events, plus the *Times*' ceaseless campaign against the closed shop, ushered in a "trying period of readjustment, of declining membership, of waning vitality." Within a few years, the open shop had become a distinctive feature of the city's economy and remained so for decades to come — a stone in the shoes of the men and women who labored in the movie business.

As lifelong Republican voters,[72] the Loebs were likely untroubled by this anti-union push, especially since their major entertainment clients were more often the studios and theater owners, many of whom were outspoken Republicans, than the talent or craft workers. (Indeed, decades later, during the McCarthy era, the firm would loyally — and vigorously — represent their producer clients who had blacklisted writers, directors and actors suspected of Communist ties.)

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70 The "moving picture machine operators" first organized in 1907. Grace Heilman Stimson, *The Rise of the Labor Movement in Los Angeles* (Berkeley: Institute of Industrial Relations, 1955), 360, 333.

71 Ibid., 435.

72 Donald Critchlow recounts a dinner party Edwin Loeb attended in 1932 that devolved into an angry debate between supporters of Herbert Hoover and the then-presumed Democratic nominee, Al Smith. Loeb and his client Louis B. Mayer bet Irving Thalberg that Al Smith would not be the next president and put $300 down on another bet that Hoover would win reelection. Critchlow writes that those bets "reveal just how far out of touch many studio heads [and perhaps their attorneys] were with the actual political climate of the country." Critchlow, *When Hollywood was Right. How Movie Stars, Studio Moguls, and Big Business Remade American Politics* (New York: Cambridge Univ. Press, 2013), 15.

Despite the repercussions that followed the *Times* bombing, organizing efforts continued. Workers behind the camera won the earliest significant victories, followed by creation of talent guilds representing writers and actors. When studio production took off in the 1920s, the two strongest industry unions were the International Alliance of Theatrical Stage Employees (IATSE), which included cameramen, carpenters, grips and other backstage workers as well as theater projectionists, and the American Federation of Musicians (AFM), representing the musicians who played during silent movies. Both unions were affiliated with the AFL.[73]

Their first significant accomplishment was the Studio Basic Agreement, signed in November 1926 between the crafts guilds and the Association of Motion Picture Producers. The hard-won pact followed years of strikes and boycotts triggered, in part, by the studios' decision in 1921 to cut the wages of studio craftsmen and lock out between 800 and 1,200 IATSE craftsmen in an effort to break the union. This move came despite rising studio profits from movies. The basic agreement did not establish a closed shop but it granted recognition to IATSE and other craft unions, including musicians; established an eight-hour day with higher wages for Sundays and overtime; and created a mechanism for settling future disputes with producers.[74] Moreover, the advent of "talkies" so expanded the market for instrumentalists in Hollywood that by 1930, the musicians' local had become the third largest in its trade in the nation.[75]

2. Talent guilds

Creation of the Actors Equity Association in 1913 was the first significant attempt to organize talent employees, in this case, stage actors. Equity subsequently affiliated with the Associated Actors and Artistes of America that had jurisdiction over the Motion Picture Players Union representing Hollywood bit players. By the early 1920s, Equity tried to represent major film actors. The bigger film stars then belonged to the Screen Actors of America, more a social club than labor union, and with their higher compensation and visibility, they had little interest in fighting to improve the lot of their less well-paid brethren.

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[73] Louis B. Perry and Richard S. Perry, *A History of the Los Angeles Labor Movement, 1911–1941* (Berkeley: Institute of Industrial Relations, 1963), 320.

[74] Ibid., 323–25.

[75] Ibid., 326.

Twenty founders of the Academy of Motion Picture Arts and Sciences in 1927, the year of the Academy's founding. Standing, left to right, are Cedric Gibbons, J. A. Ball, Carey Wilson, George Cohen, Edwin Loeb, Fred Beetson, Frank Lloyd, Roy Pomeroy, John Stahl, Harry Rapf; seated, Louis B. Mayer, Conrad Nagel, Mary Pickford, Douglas Fairbanks, Frank Woods, M. C. Levee, Joseph M. Schenck, Fred Niblo.

Courtesy AMPAS.

Moreover, with the demise of the Edison Trust, producers essentially had no bargaining unit, leaving Equity without a negotiating partner.

In 1922, producers asked Will Hays to draft a standard contract to, in effect, represent them in talent negotiations.[76] Although Hays declined, the request is another indication of the cozy relationship between Hays and leaders of the industry he was tasked with monitoring. However, Hays did eventually gather a committee of lawyers representing the major studios to advise him on labor matters, including Edwin Loeb and O'Melveny's Walter Tuller, representing Paramount.[77]

The group's immediate goal was to foil Equity's continued efforts to organize film actors, and by May 1927, producers responded by founding the Academy of Motion Picture Arts and Sciences aimed in large part at doing

[76] Ibid., 338.

[77] Clary, *History of the Law Firm of O'Melveny & Myers*, 505–06.

that. As noted above, Loeb was one of the thirty-six original Academy founders and presumably did the legal work to secure the group's nonprofit state charter. In a photo of the founding members, he stands just behind actress Mary Pickford and the Academy's first president, Douglas Fairbanks, surrounded by other friends and clients including, Louis B Mayer, George Cohen, Fred Eastman and others.[78] Edwin's position, nearly at the center of the photo, powerfully illustrates Gordon's and Bird's characterization of lawyers as indispensable go-betweens who create infrastructures that, in turn, solidify their clients' legitimacy and stature.

Barely a month after the Academy coalesced, in June 1927, producers announced their intention to slash the salaries of all non-contract players and to "ask" contract players to swallow a pay cut. Predictably, the move was a boon to Equity's organizing efforts, so much so that Fairbanks quickly stepped in and helped persuade producers to postpone the salary cuts. Under Fairbanks's leadership, the Academy began negotiations that, by December 1927, produced a basic agreement covering independent actors, writers and directors.[79]

Yet that contract failed to address abusive working conditions, including workdays of up to twenty hours and workweeks as long as eighty hours, lack of pay for rehearsals, and lump sum payments with no stipulated production termination date. These defects, along with the absence of compulsory arbitration of disputes, emboldened the nascent talent guilds. As sound films continued to draw New York stage actors to California — many of whom were militant unionists — dissatisfaction festered on both sides. By June 1929, Equity had called a strike and ordered all members — as well as non-member film actors — to stop working for producers who did not agree to a closed shop.

The strike lasted through the summer but ultimately failed because the more influential Hollywood actors didn't recognize Equity's claim to represent them. Once again, the Academy stepped in and by February 1930, had negotiated a new standard contract with a committee of twenty-one actors and all the major producers that remedied several of the defects in the 1927 agreement. Players won an eight-hour day with provisions for

78 [Linda Levi], "Loeb and Loeb, Pioneer Los Angeles Law Firm," 3; Loeb History, 11.

79 Perry and Perry, *A History of the Los Angeles Labor Movement*, 338–39.

overtime and compulsory arbitration and, in exchange, actors agreed not to strike for the period of the contract. In February 1931, all sides voted to renew the agreement for four years.[80] I have not found specific evidence of Edwin's role in these negotiations but given his considerable involvement in the Academy, it's hard to imagine he was absent from the process or unhappy with the outcome.

In these early years, the Academy was both a promoter of film achievement and technical innovation as well as the producers' de facto bargaining arm. These dual roles initially worked to the producers' advantage. And while neither Edwin nor his brother were likely strong unionists, the Academy's desire for harmonious labor relations — as opposed to an all-out war to preserve the open shop — likely dovetailed with Edwin Loeb's personality and go-along-to-get-along approach to practicing law. However, as the Depression cut severely into studio profits and triggered layoffs, actors and writers chaffed at what they saw as the Academy's role as, essentially, a company union. In 1933, under the aegis of the short-lived National Recovery Act (NRA),[81] they revived the languishing Screen Writers Guild and the Screen Actors Guild to push back against a new round of threatened salary cuts.

Edwin Loeb may have played a key role here as well. Under the NRA, an industry appointee drafted and administered the governing codes for each industry and among other responsibilities, set wages, hours and working conditions. Some former Loeb partners have speculated that Edwin's role as Will Hays' west coast chief meant he also served as the NRA's film "czar" but I found no evidence for that claim. Raymond Moley's account of the Hays office does not mention Loeb but does refer to New York lawyer Sol A. Rosenblatt, tapped by Washington as "Division Administrator" to "co-ordinate the efforts of the three branches of the industry to devise the film code."[82] Other

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80 Ibid., 342.

81 The U.S. Supreme Court declared the mandatory code provisions of the NRA to be unconstitutional in *Schechter Poultry Corp v. United States*, 295 U.S 495 (1935).

82 Moley, *The Hays Office*, 203–04. Hays' own memoirs do not mention Loeb either. Will H. Hays, *The Memoirs of Will H. Hays* (New York: Doubleday & Co., 1955). Moley himself was an interesting fellow. Recruited to Roosevelt's "Brain Trust" while a Columbia Law School professor, he advised the New York governor in his 1932 presidential run and then became a powerful figure in FDR's first administration as a speechwriter, penning such phrases as "the Forgotten Man." Moley initially lauded Roosevelt's New

accounts are consistent.[83] Yet even if he wasn't formally appointed as film "czar," Loeb was on the Hays payroll during this period and his role as an intermediary if not a regulator is another indication of his status as a trusted industry broker.

By 1935, the National Labor Relations Act replaced the NRA, explicitly granting employees the right to form and join unions, and obligating employers to bargain collectively with unions selected by a majority of the employees. Notwithstanding the law, labor relations remained bitterly confrontational. The Screen Actors and Screen Writers Guilds won NLRB certification by the late 1930s but anger over compensation and working conditions continued to simmer and sparked grinding organizing campaigns among new employee groups, for example, animators. Studio heads — including Loeb client Irving Thalberg[84] — believed they could hold the line on contract concessions.[85] Louis Nizer represented Fleischer Studios during the 1930s as it battled animators; Gunther Lessing, Walt Disney's longtime general counsel, carried out the company's ruthless response to animators who struck that studio in 1941.[86] And although many ultimately

Deal for having "saved capitalism in eight days" but beginning in 1933 became one of the sharpest conservative critics of Democratic economic policy. In 1970, President Richard Nixon awarded Moley the Presidential Medal of Freedom.

83 Gomery wrote that in July 1933 NRA head Hugh Johnson appointed Rosenblatt as deputy administrator in charge of drawing up the motion picture industry code; Gomery, "Hollywood, the National Recovery Administration, and the Question of Monopoly Power," 50. Rosenblatt is elsewhere referred to as "NRA Division Administrator" and a "loyal New Dealer." See "Cinema: Stars and Salaries," *Time*, July 30, 1934, http://www.time.com/time/magazine/article/0,9171,754385,00.html; Thomas Doherty, "A Code is Born," *Reason.com*, Jan. 2008, http://reason.com/archives/2007/12/04/a-code-is-born.

84 Thalberg swore he would die before accepting the Screen Actors Guild. In 1936, Thalberg died and in 1937, the studios accepted defeat and signed the first meaningful agreement with actors according to "SAG Timeline," Screen Actors Guild, http://www.sag.org/sag-timeline.

85 By the 1930s, the studio heads explicitly linked their fight against union representation to the broader campaign against communism and fascism, justifying efforts to achieve an open shop and, of course, the witch-hunts of the Blacklist years, per Critchlow, *When Hollywood was Right*, 42–65.

86 See Tom Sito, *Drawing the Line: The Untold Story of the Animation Unions from Bosko to Bart Simpson* (Lexington: Univ. of Kentucky Press, 2006); Elliot, *Walt Disney*; Gabler, *Walt Disney,* 356–74. More than Edwin Loeb, Nizer represented celebrities as well as the studios in contract, copyright, libel, divorce, plagiarism, and antitrust

recognized the Hollywood craft unions and talent guilds, the anti-Communist witch hunts of the late 1940s and 1950s were their opportunity to retaliate, blacklisting and/or firing activist employees in an effort to weaken the unions. In some instances, studio lawyers orchestrated these anti-union campaigns.

V. THE ROLE OF JEWISH IDENTITY

This brief review of the origins of entertainment law situates Edwin Loeb as a major player, and Joseph Loeb as a comparable authority in the Los Angeles bar and the broader business community. As such, their experience was both typical and different from Jewish lawyers in Los Angeles and elsewhere.

In his study of Wall Street law firms in the late 1950s, Erwin Smigel explored how the broader social currents of the time — especially, heightened anti-Semitism — determined the career paths of "minority" lawyers in those firms — particularly, Jewish lawyers. Those few Jewish lawyers invited to join mainline Wall Street firms typically had Ivy League pedigrees and faced a higher bar to hiring and promotion than did their Gentile counterparts. While the large Wall Street firms represented the largest corporate clients, Smigel found that smaller corporate firms founded by Jewish or other minority lawyers generally represented smaller businesses, often headed by members of the same ethnic group.[87] Heinz and Laumann found a parallel stratification among Chicago lawyers: Those with elite social and educational pedigrees were more likely to practice in the white-shoe firms that

matters. His role in the Fleischer strike may have been a somewhat uncomfortable one for Nizer whose personal politics trended center-left. For instance, his efforts on behalf of John Henry Faulk, the CBS radio and television personality linked by an ultra-conservative publication to a communist conspiracy, was widely credited with breaking the back of blacklisting in broadcasting. In 1962, Nizer won a $3.5 million libel judgment for Faulk — later reduced to $550,000 on appeal. He also served as general counsel for the Motion Picture Association of America and helped develop the group's movie ratings system. Eric Pace, "Louis Nizer, Lawyer to the Famous, Dies at 92," *New York Times*, Nov. 11, 1994, http://www.nytimes.com/1994/11/11/obituaries/louis-nizer-lawyer-to-the-famous-dies-at-92.html?src=pm.

[87] Erwin O. Smigel, *The Wall Street Lawyer. Professional Organization Man?* (New York: Free Press, 1964), 65, 173–75. At the time of his research, Smigel found that African-American lawyers faced overt racism and near total exclusion from the top firms.

ministered to larger corporate and organizational clients while small-firm lawyers, often ethnic minorities or those from families with lower socio-economic status, made up another "hemisphere" and were typically left with individual clients and/or small organizations.[88] The Loeb brothers founded their own firm rather than try to remain with O'Melveny or the city's other top firms, yet from their earliest days in practice could claim a roster of blue chip, corporate clients. While their representation of the first film moguls may have initially resulted in part from ethnic affinity — consistent with the pattern Smigel and Heinz and Laumann identified — the Loebs' legal skill and creativity clearly helped propel the studios into powerful corporate conglomerates whose business the established firms soon courted.

Parikh and Garth's study of Chicago lawyer Philip Corboy illustrates important parallels with the Loebs' careers, namely how lawyers can change the nature of practice, often advancing their clients' as well as their own interests. The son of poor Irish immigrants, Corboy lost out on a job with a top defense firm to a far less qualified but better-connected candidate — despite having just graduated as valedictorian of his law school class. He eventually became a personal injury lawyer, growing his practice by consciously elevating the reputation of personal injury lawyers from that of bottom-feeding ambulance chasers and creating avenues to new clients.[89] Through leadership roles in Illinois bar associations and the Chicago Democratic machine, by lobbying the Illinois Legislature, and through key appellate victories and steady referrals, Corboy and his partners generated an extraordinarily lucrative practice. They also helped to change ethical rules that favored business development by corporate lawyers but penalized P.I. practitioners, for example, rules allowing lawyers to pass out their business cards at country clubs but barring the practice in emergency rooms. Legislative lobbying and courtroom victories liberalized Illinois tort law by expanding the field of possible defendants in product liability, medical malpractice and construction injury cases as well as by raising the ceiling on possible recoveries.[90] Like Corboy's philanthropic and legislative activities, Edwin Loeb's professional and personal involvements, most

88 John P. Heinz and Edward O. Laumann, *Chicago Lawyers. The Social Structure of the Bar* (rev. ed.) (Evanston: Northwestern Univ. Press, 1982, 1994).

89 Parikh and Garth, "Philip Corboy."

90 Ibid.

notably his work on behalf of the Academy of Motion Picture Arts and Sciences, allowed movie producers to shed their early sleazy reputation and established their attorneys as key industry players.

Yet when laid against the Loebs' history, previous scholarship on lawyers' careers does not fully account for the influence of time, place, and birth. True, the brothers' successes and those of their firm flowed from the two men's considerable legal and personal skills, and, like Corboy, from their record of philanthropy and civic involvement. In this, the Loebs were no different than successful attorneys everywhere who consciously cultivate their "book of business" by leveraging their business and social contacts and through good works. But the brothers were also remarkably fortunate in their family connections, their ability to straddle the shifting ethnic lines in Los Angeles, and to have entered law practice at a moment when religious identity may have been less salient in Los Angeles than in other cities.

The brothers' sincere philanthropic interests were an important element in Loeb & Loeb's success. Joseph Loeb was an active board member of the Los Angeles Bar Association from his first years in practice and remained involved throughout much of his career.[91] The local bar was only one of dozens of civic, educational, and corporate groups to which he devoted significant time, energy and money over his career.[92] Edwin Loeb concentrated his charitable and philanthropic involvement more narrowly on the entertainment industry where he may have been motivated as much by bonhomie as a sense of professional obligation.[93] Joseph and to a

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91 Joseph Loeb retired from active practice in 1970 and died in 1974.

92 That long list includes Town Hall (Board of Governors), Los Angeles Tuberculosis and Health Association (Board of Directors), Welfare Federation of Los Angeles (Board of Directors), University of California Alumni Association, Friends of Claremont Colleges, Friends of the Huntington Library, Indian Defense Association (Los Angeles Board of Directors), California State Board of Education (gubernatorial appointee), American National Red Cross, Los Angeles Athletic Club, California Republican League, Union Bank (Director), Los Angeles Civic Light Opera Association (Board of Governors), Arthritis Foundation (Founder and first president, Southern California Chapter), and the Community Chest.

93 His activities included the Motion Picture Relief Fund of America, Inc. (Life Member) and the Academy of Motion Picture Arts and Sciences (Life Member). He was also active in the Los Angeles Athletic Club, the Los Angeles Stock Exchange, and the California Yacht Club.

lesser extent Edwin were also active in Jewish philanthropies including the United Jewish Welfare Fund, the Federation of Jewish Welfare Funds, the American Jewish Association, the Jewish Orphan's Home of Southern California (now Vista Del Mar Child Care Services), B'nai B'rith of Los Angeles, the American Jewish Committee, National Conference of Christians and Jews, and Cedars of Lebanon Hospital. For both men, civic and philanthropic involvement provided entrée to and eventually significant influence in Los Angeles' increasingly Gentile legal and business institutions.

Notwithstanding their Jewish charitable activities, the brothers' religious identity was complicated. As noted above, neither brother considered himself a practicing Jew. Edwin often described himself as an atheist.[94] Former Loeb partners characterized Edwin and Joseph as having consciously cultivated a "non-Jewish image." With only a handful of Jewish lawyers in Los Angeles when Joseph Loeb first hung his shingle, non-Jewish lawyers including partner Edward Kuster were part of the firm from the earliest days. Others included Irving Walker, Carl Levy, a Catholic (despite his name), Dwight Stephens, John Cole, and Leon Levi, the firm's long-term managing partner who was a Seventh Day Adventist. Beyond a commitment to recruiting the best lawyers regardless of religion, those hires may have also reflected a desire, perhaps unconscious, to dilute their "Jewishness," in order to attract the broadest array of corporate clients. Neal Gabler and others have noted that the studio heads also deliberately downplayed their Judaism as a defense against anti-Semitism and allegations of dual loyalty as well as to draw the broadest audience for their movies. Yet when

94 At Edwin Loeb's 70th birthday, Rabbi Edgar Magnin of the Wilshire Blvd Temple exhorted him, in front of the assembled guests, "All right, it's time to return to the fold." Holtzman recalled that Loeb was annoyed. Holtzman interview. The Loebs' grandniece Linda Levi grew up with a similar distance from institutional Judaism.

> As far as organized religion goes it was almost non-existent in our family. I knew that I was Jewish, but we never went to temple, never celebrated Jewish holidays, and seldom ate Jewish food. In fact we celebrated Christmas with a big tree. I always went to school on Jewish holidays. All my young life, on Christmas Eve, and Christmas day, our friends and relatives had parties, open houses and many had big trees. Most of them were Jewish and if they had a religious affiliation they were likely to be Reform Jews.

Linda Levi, "Growing up as a 'Newmark' in Los Angeles, 1935–1950. A Memoir," *Western States Jewish History*, XXXIX:3 (Spring 2007): 75–76, http://lindalevi.org/history/Growing_up_a_Newmark_in_Los_Angeles_1935-1950_by_Linda_Levi.pdf (23–24).

Adolf Hitler rose to power, some, like Carl Laemmle, helped to rescue many European Jews — at some risk to his reputation and fortune.[95]

As white Protestants became an overwhelming majority by the early twentieth century, groups that had once mingled freely began to go their separate ways. Discrimination and ostracism was not as severe in Los Angeles as elsewhere but social exclusion, which had been merely "noticeable" in previous years, now became more apparent.[96] Harris Newmark was a charter member of the California Club but resigned when the club began to exclude Jews.[97] The immigrant Jewish studio heads, so anxious to prove themselves as Americans, felt that sting particularly keenly. Like the Loebs, many tried to avoid outward displays of religion, but when they were still excluded from the mainstream social and civic organizations, they created their own, including the Hillcrest Country Club and the Concordia Club, along with a number of benevolent societies.

Far more serious than being rejected for club membership was employment discrimination. While exclusion and "quotas" were not as strict as in other cities, jobs in WASP banking, retail, and insurance establishments were generally off limits to Los Angeles Jews. Elective office was also generally beyond reach.[98] Notwithstanding very real discrimination, the Los Angeles bar may have been more open to Jewish attorneys than in New York

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95 Neal Gabler, "Laemmle's List: A Mogul's Heroism," *New York Times*, Apr. 11, 2014, http://www.nytimes.com/2014/04/13/movies/unlike-his-peers-a-studio-chief-saved-jews-from-the-nazis.html.

96 Dinkelspiel, *Towers of Gold*, 160–61. In elementary school, Linda Levi "became aware of anti-Semitism in my neighborhood and my school. Most of the kids on the 800 block of Rimpau [in Hancock Park], the ones I played with, were Catholic. I understood that our friendship began and ended with playing sports. I was never invited into their homes, and I felt their parents were remote. If I wanted to play with one, I either joined a game or went in front of their houses and yelled out 'Billy' can you play? Of course the situation was vise [sic] versa. They were never asked into my house." Levi, "Growing up," 84 (32).

97 The *Los Angeles Blue Book,* also known as the *Society Register of Southern California,* listed 44 Jewish members in 1890, 22 in 1921 and none for many years thereafter. Jewish Virtual Library, "Los Angeles."

98 That was less true during the 1870s when city voters elected Isaiah M. Hellman as treasurer (1877) and Emil Harris as police chief (1878). "The Jews of Los Angeles." Appointive office, however, may have been different. For instance, in 1943 Governor Earl Warren appointed Joseph to the California State Board of Education where he served until 1956.

City, Chicago or even San Francisco. In addition, the Loebs' early successes, deep personal and familial connections, their longstanding ties to Gentile firms such as O'Melveny as well as their own roster of non-Jewish partners gave the firm establishment respectability. So when anti-Semitism intensified in Los Angeles, the Loebs continued to flourish. As such, Loeb & Loeb doesn't fit easily into one practice "hemisphere," but instead, from its first decades, combined big clients and smaller ones, mainline corporations as well as "ethnic" enterprises.

VI. THE LOEB FIRM AND THE ORIGINS OF ENTERTAINMENT LAW PRACTICE IN LOS ANGELES

The entertainment industry, like the Loeb firm, emerged in Los Angeles from a serendipitous mix of timing, sun and personal connections. Climate and wide-open opportunity lured the immigrants who would build the major studios at the same moment that a desire to escape Edison's infringement suits propelled them from New York and other eastern cities. The Loeb brothers were waiting for them in their office at the corner of Fourth and Main Streets, eager and affable, and already making a go of their small practice.

In many respects, the story of the Loeb firm as entertainment law pioneers and traditional corporate counselors conforms to the empirical findings of scholars who have examined the rise of law firms. Yet, the brothers' family heritage along with the role of geography and the historical moment in which they lived suggest a narrative that is more complex and less easily pigeonholed.

That they were Jewish may have initially helped draw many of the Loebs' entertainment clients, but as the mist-shrouded stories of Edwin's first clients indicate, not all of those early clients were Jewish nor, apparently, was it determinative that Edwin and Joseph were. Apart from religious or cultural ties, then, the brothers' family network and their effectiveness in front of and behind the scenes cemented their success. While Edwin's politics were generally more consonant with those of his clients than opponents on the picket lines or in court, his skill as a conciliator and dealmaker, even during early bitter labor battles, burnished his personal reputation and that of his firm. Loeb clients were key players in the early major industry disputes including the wrangling over industry integration, distribution agreements,

and unionization. Edwin acted as both the glue and grease in these matters. By bringing parties together, forging agreements, softening the impact of the Hays codes, defusing labor hostilities, he and his counterparts helped the industry to expand. In this regard, he played a role no different from that of successful corporate attorneys everywhere who facilitate, moderate and counsel their clients.

As movies became a major cultural force in the early twentieth century, Loeb and other early entertainment practitioners could claim credit for helping legitimize a business long considered disreputable. Their success also enhanced their practices and personal influence, allowing them to attract new clients in that industry and beyond. But the reverse was also true: that the Loeb brothers could early on claim mainstream corporate clients including local banks, real estate, mining, oil and railway companies, further enhanced their reputation and power with their studio clients.

The story of Hollywood's rise is often told as a form of singular accomplishment: The studio chiefs traveled west, built their dream factories, and their acumen and labors — theirs and theirs alone — made them rich and powerful beyond measure. Even in Neal Gabler's thorough account of the Jewish studio heads,[99] the critical role that Edwin Loeb and his contemporaries played in their clients' success by building the infrastructure of one of the most legalized industries is largely absent.

I hope this modest effort is a first step toward a fuller narrative.

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99 Gabler, *Empire*.

LAURA'S LAW:

Concerns, Effectiveness, and Implementation

JORGIO CASTRO*

As a litany of stories attest, there is an ongoing mental health crisis in America, and the current mental health care "systems" are not adequately addressing it. The latest surveys indicate that nearly 40 percent of adults with severe mental illnesses[1] such as schizophrenia and bipolar disorder receive no treatment, and that 60 percent of all adults with a mental

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[1] "Serious" or "severe" mental illnesses are principally those designated by the Diagnostic and Statistical Manual of Mental Disorders as psychotic disorders, with schizophrenia and bipolar disorder the most common. *See* Kendra's Law: Final Report on the Status of Assisted Outpatient Treatment, New York State Office of Mental Health, March 2005 [hereinafter "Final Report"] (84% of Kendra's Law AOT individuals had a diagnosis of either schizophrenia or bipolar disorder).

illness receive no treatment.[2] Current state mental health laws and policies are roundly criticized as not being anywhere near sufficient in addressing the challenges posed by severe mental illness.[3] The challenges of dealing with severe mental illness continue to loom over communities.[4] One type of program that has been proposed to help meet this challenge is assisted outpatient treatment (AOT),[5] known in California as Laura's Law.[6]

HOW LAURA'S LAW HELPS

Specifically, Laura's Law targets a subset of the population of people with mental illness who are falling through the cracks. There is a portion of that population who do not accept treatment voluntarily because of "anosognosia," the medical term for a lack of awareness of their illness.[7] As a result, they do not avail themselves of treatment services.[8] This makes intuitive

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[2] Liz Szabo, *Cost of not caring: Nowhere to go,* USA Today, http://www.usatoday.com/longform/news/nation/2014/05/12/mental-health-system-crisis/7746535/.

[3] There are various ways of expanding access to treatment, including involuntary treatment. For example, several states have civil commitment standards that are broader than California's. *See, e.g.,* Wis. Stat. § 51.20(1)(a)(2) (Wisconsin state civil commitment statute with a broad definition of "dangerous" and "grave disability" that recognizes potential for deterioration). Many of these proposals have merit. However, they are outside the scope of this paper.

[4] Alex Emslie & Rachael Bale, *More Than Half of Those Killed by San Francisco Police are Mentally Ill,* KQED News, Sept. 30, 2014, *available at* http://ww2.kqed.org/news/2014/09/30/half-of-those-killed-by-san-francisco-police-are-mentally-ill.

[5] Here as in other controversial areas, proponents and opponents use different terms to describe the legal procedure in question. Opponents often will describe it as "involuntary outpatient commitment." Proponents often use the terms "assisted" or "assertive outpatient treatment," as does the California Welfare and Institutions Code. Other terms include preventive assistive community treatment, community outpatient treatment, and preventive outpatient treatment, among others. *See* Rachel A. Scherer, Note, *Toward A Twenty-First Century Civil Commitment Statute: A Legal, Medical, and Policy Analysis of Preventive Outpatient Treatment,* 4 Ind. Health L. Rev. 361, 369–70 (2007). This paper will generally use assisted outpatient treatment or "AOT."

[6] Cal. Welf. Inst. Code § 5345.

[7] This is an issue contested by opponents of Laura's Law. *See infra* Part "Opponents' Arguments." This paper adopts the view of the proponents, supported by medical studies, that anosognosia is a real neurological medical condition. *See infra* Part "Proponents' Arguments."

[8] Sometimes individuals do not seek or continue treatment because of the undesirable side effects of medications. Reducing or eliminating undesirable side effects often

sense: if someone subjectively doesn't think they are ill, they will not seek out "unnecessary" treatment. That "lack of necessity" leaves this population unengaged with treatment options until they are brought in through the involuntary system of care. In California, as in other states, the current standards for involuntary hospitalization require the person to be a danger to self or others, or be gravely disabled.[9] Section 5150 of California's Welfare and Institutions code allows someone to be held up to 72 hours. However, if someone no longer meets the criteria — as may often happen when someone comes in as a danger to herself or others and has the opportunity to "calm down," or start to receive some of the effects of medication for her illness — she has to be released.[10] This process of admission, stabilization, discharge,

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requires finding the right type of medication or the right dosage, as individuals respond to medications differently. This can only be done with continued engagement and supervision with a competent prescribing physician and competent treatment team, which is Laura's Law's goal. Sometimes individuals do not seek or continue treatment if they find the treatment is limited and does not meet their needs. Laura's Law provides for a "whatever it takes" model, providing appropriate services to meet the client's needs.

[9] Cal. Welf. Inst. Code § 5150; *see also* Megan Testa & Sara G. West, *Civil Commitment in the United States,* 7 Psychiatry (Edgmont) 10, 30–40 (2010), at *Shift to Dangerousness Criteria as the Standard for Civil Commitment*. On October 7, 2015 California enacted AB 1194, which clarifies that "the individual making that determination [for involuntary hospitalization] shall consider available relevant information about the historical course of the person's mental disorder if the individual concludes that the information has a reasonable bearing on the determination, and that the individual shall not be limited to consideration of the danger of imminent harm." AB 1194, 2015-2016 (Cal. 2015), *available at* http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB1194. Many counties had been construing § 5150 to require imminent danger, which resulted in uneven and decreased application of § 5150 in many appropriate cases. Opponents argued that the bill is "unnecessary" and "suggests that consideration of historical course alone can lead to a finding of present danger." Letter from Margaret Johnson, Advocacy Dir., Disability Rights California, to Assemblyman Rob Bonta (Apr. 6, 2015), *available at* http://www.disabilityrightsca.org/legislature/Legislation/2015/Letters/AB1194EggmanOpposeApril62015.pdf.

[10] *See e.g.,* Demian Bulwa, *Killing Reveals Mental Health Care Fight,* SF Chronicle, Oct. 16, 2014, *available at* http://www.sfgate.com/crime/article/Killing-reveals-mental-health-care-fight-3781958.php ("What they really want to know is: Did he hit you? Did he damage something? They'll keep him as long as he's exhibiting that behavior in the hospital. If he's not, the revolving door continues." Candy Dewitt describing her son Daniel Dewitt's nine § 5150 holds.); Meredith Karasch, Note, *Where Involuntary Commitment, Civil Liberties, and the Right to Mental Health Care Collide: An Overview of California's Mental Illness System,* 54 Hastings L.J. 493, 493 (2003) [hereinafter

decompensation and re-admission constitutes a "revolving door" in which the individual uses costly emergency services and does not receive long-term stabilization or treatment. The requirement of dangerousness to self or others for involuntary hospitalization does not align with medical treatment needs for an individual.[11] Dangerousness is under-inclusive, as both proponents and opponents point out that, broadly speaking, people with mental illness are less or at least no more likely to be violent.[12] Once the danger has passed, hospitals have no legal authority to continue holding the individual. Thus, an individual still in medical need of treatment to prevent relapse and deterioration (and to decrease symptoms and increase quality of life), who often does not have the ability to understand they have an illness because of the neurological deficit of anosognosia, will be released from an involuntary hospitalization and not receive any treatment at all.

Further, the power to remove medical treatment decision-making power from the individual and vest it with someone else can generally only be exercised when the person is gravely disabled.[13] Grave disability means "a condition in which a person, as a result of a mental health disorder, is unable to provide for his or her basic personal needs for food, clothing,

"Collide"] (describing the case of a man caught in the revolving door of hospitalization, jail, and the streets back in 2003, and its commonness even then).

[11] *See* The California Treatment Advocacy Coalition & The Treatment Advocacy Center, A Guide to Laura's Law: California's Law for Assisted Outpatient Treatment, Sept. 2009, *available at* http://www.treatmentadvocacycenter.org/storage/documents/ab_1421_--_final-_updated_booklet-_sept_2009.pdf (criticizing the Lanterman–Petris–Short Act (LPS), passed in 1967, as "tak[ing] no account of what has since been learned about these illnesses, the vastly different framework of present mental health services, or the diversity of effective medications that are now available").

[12] *See infra* note 53.

[13] Cal. Welf. Inst. Code § 5350 et seq. (LPS conservatorship); Treatment Advocacy Center, *Facts About Common Laura's Law Misconceptions,* http://www.treatmentadvocacycenter.org/storage/documents/ll-qa-2012.pdf. There are other limited circumstances where a treatment decision is exercised by someone other than the individual (i.e. the health care provider), such as an emergency situation "when there is a sudden marked change in the patient's condition so that action is immediately necessary for the preservation of the life or the prevention of serious bodily harm to the patient or others, and it is impracticable to first obtain consent." Cal. Admin. Code, tit. 9, § 853. As noted before, once the patient's condition changes so that the emergency no longer exists (as happens when someone calms down after receiving medication, or even exhaustion), the health care provider can no longer force treatment.

or shelter."[14] Because many people with even severe mental illness who are homeless are still able to find food and clothes from dumpsters, and bridges and doorways to sleep beneath, they do not qualify for conservatorship.[15] Thus, treatment decision-making power is left with someone who lacks the full capacity to make the decision. While Laura's Law does not impose a true conservator-like substitute decision-maker, it does use the power of the judicial system to persuade, influence, and coerce the individual to engage in necessary treatment when he otherwise would not.

This paper will describe Laura's Law, various arguments made for and against its adoption, its effectiveness and its constitutionality, and some of the challenges to its implementation. The paper argues for statewide adoption in California of Laura's Law as part of a comprehensive mental health treatment system, and suggests that other states considering a similar statute also adopt assisted outpatient treatment.

BACKGROUND ON LAURA'S LAW

Laura's Law is a California statute that allows for court-ordered AOT for people with a serious diagnosed mental illness, "plus a recent history of psychiatric hospitalizations, jailings or acts, threats or attempts of serious violent behavior towards [self] or others," among other requirements.[16] The law was modeled on New York's Kendra's Law, as well as other states'

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[14] Cal. Welf. Inst. Code § 5008; *see also* Conservatorship of Guerrero, 69 Cal. App. 4th 442 (1999) (individual cannot be found gravely disabled merely because he will not accept voluntary treatment, or because he may relapse and become gravely disabled in the future).

[15] In California, a judicial finding of grave disability requires proof beyond a reasonable doubt and a unanimous jury. *See* Conservatorship of Roulet, 23 Cal. 3d 219, 235 (1979). This is a very difficult standard to meet, and does not comport with Supreme Court precedent or a large number of other states' standards. *See* Collide *supra* note 10, Sec. III.

[16] *Laura's Law,* Wikipedia, http://en.wikipedia.org/wiki/Laura's_Law. *See also,* Gary Tsai, *Assisted Outpatient Treatment: Preventive, Recovery-Based Care for the Most Seriously Mentally Ill,* http://mentalillnesspolicy.org/states/california/Aotbygary.pdf ("court-order programs are community-based, recovery-oriented, multidisciplinary services for seriously ill individuals who have a history of poor adherence to voluntary treatment and repeated hospitalizations and/or incarcerations"); Laura's Law Home Page, Mental Illness Policy Org, http://mentalillnesspolicy.org/states/lauraslawindex.html ("allows courts — after extensive due process, to order a small subset of people with serious mental illness who meet very narrowly defined criteria to accept treatment as a condition of living in the community").

AOT laws.[17] Laura's Law is currently set to expire in 2017, but has been extended twice before, in 2006 and again in 2012.[18] Although it is a state statute, each county was left with the option of implementing the section, or not doing so.[19]

IMPLEMENTATION OF LAURA'S LAW BY COUNTY

Counties have been slow to opt in to Laura's Law. Nevada County was the first county to opt in to Laura's Law in 2008.[20] As of October 27, 2014, six counties have either implemented Laura's Law, or authorized its implementation.[21] Many other counties are currently researching the issue and scheduling votes for implementation.[22] Assemblymember Marie Waldron

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[17] 2002 Cal AB 1421 (stating that the Senate Committee on Rules commissioned a RAND Corporation Report on "involuntary outpatient treatment" in other states); *see* John Borum et al., The Effectiveness of Involuntary Outpatient Treatment: Empirical Evidence and the Experience of Eight States 15, *available at* http://www.rand.org/content/dam/rand/pubs/monograph_reports/2007/MR1340.pdf (studying Michigan, New York, North Carolina, Ohio, Oregon, Texas, Washington, and Wisconsin).

[18] Cal. Welf. Inst. Code § 5349.5.

[19] National Alliance on Mental Illness San Francisco, Laura's Law: A Review and Invitation to Discuss 1, http://www.namisf.org/files/news/LaurasLaw_August2012.pdf.

[20] Resolution Authorizing Implementation in Nevada County of Laura's Law as of April 22, 2008, *available at* http://mentalillnesspolicy.org/states/california/nv-countyaotresolution.pdf; *see also Nevada County: First in the State — Assisted Outreach Treatment Program,* YouTube (April 25, 2011), https://www.youtube.com/watch?v=_2p6_CvklYg (Nevada County's short description of the history of Laura's Law's implementation in their county).

[21] Teri Sforza, *OC Approves forced treatment for seriously mentally ill,* Orange County Register, http://www.ocregister.com/articles/law-613983-laura-treatment.html (Orange); Marisa Lagos, *Laura's Law passes easily in S.F. supervisors' vote,* SF Chronicle, http://www.sfgate.com/bayarea/article/S-F-supervisors-pass-Laura-s-Law-to-treat-5607612.php (San Francisco); Sarah Dowling, *Yolo Supervisors vote to fully implement Laura's law,* The Daily Democrat, http://www.dailydemocrat.com/breakingnews/ci_25965055/yolo-supervisors-vote-fully-implement-lauras-law (Yolo); Abby Sewell, *L.A. County to Expand Laura's Law mental-illness treatment program,* LA Times, http://www.latimes.com/local/countygovernment/la-me-lauras-law-20140716-story.html (Los Angeles); Gus Thomson, *Laura's law now part of Placer County Mental Health Tool Chest,* Auburn Journal, http://www.auburnjournal.com/article/8/26/14/laura%E2%80%99s-law-now-part-placer-county-mental-health-tool-chest (Placer).

[22] Vivian Ho, *Laura's Law mental-health debate rages in Bay Area: Alameda County delays mental-health program,* http://www.sfgate.com/default/article/Laura-s-Law-

recently introduced a proposal in the state assembly to require that all California counties implement Laura's Law, among other provisions.[23]

Concerns over funding of Laura's Law have been a barrier to its implementation for some time. The recent deluge of counties moving to opt in to

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mental-health-debate-rages-in-Bay-Area-5271446.php (Alameda); *Compare* Douglas & Linda Dunn, *Supervisors have a chance to fix broken mental health system,* Contra Costa Times, *available at* http://www.contracostatimes.com/opinion/ci_26657331/guest-commentary-supervisors-have-chance-fix-broken-mental, *with* Amy Yannello, *Contra Costa's outrageous delay on mental health treatment law,* SF Chronicle, Oct. 21, 2014, *available at* http://www.sfgate.com/opinion/openforum/article/Contra-Costa-s-outrageous-delay-on-mental-5838344.php (Contra Costa County postponed a vote on implementation, without sufficient explanation.); Lara Cooper, *Santa Barbara County Supervisors Move Forward on Laura's Law,* http://www.noozhawk.com/article/santa_barbara_county_supervisors_move_forward_on_lauras_law (Santa Barbara); Megan Tevrizian & Andie Adams, *County Supervisor Works to Implement Mental Health Law,* http://www.nbcsandiego.com/news/local/County-Supervisor-Works-to-Implement-Lauras-Law--273127881.html (San Diego); Kathleen Wilson, *Ventura County panel evaluating Laura's Law,* http://www.vcstar.com/news/local-news/county-news/ventura-county-panel-evaluating-lauras-law_31033592 (Ventura); Adam Randall, *Mendocino County Board of Supervisors to Revisit Laura's law,* Ukiah Daily Journal, http://www.ukiahdailyjournal.com/news/ci_26895279/mendocino-county-board-supervisors-revisit-lauras-law (Mendocino). As of October 8, 2015, seven more counties have voted to opt in to Laura's Law: Adam Randall, *Laura's law implementation to be delayed in Mendocino County,* Ukiah Daily Journal, http://www.ukiahdailyjournal.com/general-news/20150619/lauras-law-implementation-to-be-delayed-in-mendocino-county (Mendocino, noting that implementation has been delayed until Jan. 2016); Kurtis Alexander, *Contra Costa County adopts mental health care law,* SF Chronicle, http://www.sfgate.com/bayarea/article/Contra-Costa-County-votes-to-embrace-Laura-s-Law-6060304.php (Contra Costa); Joshua Stewart, *County backs forced care of mentally ill,* San Diego Union-Tribune, http://www.sandiegouniontribune.com/news/2015/apr/21/county-backs-law-for-treatment-of-mentally-ill/ (San Diego); Alexander Nguyen, *County Supes Unanimously Voted to Adopt Laura's Law,* San Mateo Patch, http://patch.com/california/sanmateo/county-supes-unaminously-voted-adopt-lauras-law (San Mateo); Kyle Harvey, *Kern County adopts "Laura's Law" for mentally ill,* BakersfieldNow.com, http://www.bakersfieldnow.com/news/local/Aiming-to-increase-treatment-for-mentally-ill-Kern-County-adopts-Lauras-Law-319124681.html (Kern); *El Dorado County adopts Laura's Law,* Lake Tahoe News, http://www.laketahoenews.net/2015/08/el-dorado-county-adopts-lauras-law/ (El Dorado); *LIVE TWEETS: Board of Supervisors to negotiate union contract,* Record Searchlight, http://www.redding.com/news/local-news/live-tweets-protest-against-heroin-precedes-supervisors-meeting (Shasta).

[23] AB 59, Dec. 9, 2014, *available at* http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_0051-0100/ab_59_bill_20141209_introduced.htm.

Laura's Law directly flows from the recent passage of SB 585, which amended Laura's Law to clarify that various state funding sources, including the Mental Health Services Act (also known as Prop. 63 or "MHSA") would be available as funding sources.[24] The California Legislature passed MHSA in 2004 with the purpose of expanding the system of care services to children, adults, and older adults with serious mental illness.[25] The recent clarification is in line with the purpose and intent of MHSA. Other prospective sources of funding include the Helping Families in Mental Health Crisis Act (HR 3717), a bill introduced by former psychologist and Congressman Tim Murphy aimed at overhauling many aspects of U.S. mental health systems.[26] Although this bill was not brought for a vote in the last Congress, Congress did include the grant program for demonstrations of AOT in the Protecting Access to Medicare Act.[27] This pilot program will grant up to $1 million per county or other eligible entity to start, implement, and measure and report outcomes of an AOT program. These funding sources can alleviate the burden for counties having to invest initially from their own general funds in order to implement Laura's Law.

LAURA'S LAW ELEMENTS AND PROCEDURES

Laura's Law is a robust and narrowly tailored statutory scheme. Under Laura's Law, an adult cohabitant, close relative, director of a facility or hospital

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[24] Cal. Welf. Inst. Code § 5349.

[25] California Mental Health Directors Association, The Mental Health Services Act of 2004 Purpose and Intent, http://www.cahpf.org/GoDocUserFiles/422.MHSA%20purpose%20and%20intent.pdf (in addition, the purpose and intent of MHSA is to "reduce the long-term adverse impact on individuals, families, and state and local budgets resulting from untreated serious mental illness" and "increase integration of mental health services and outreach to individuals most severely affected by or at risk of serious mental illness, and expand programs that have demonstrated their effectiveness"); *see also,* California Department of Health Care Services, *Purpose of MHSA Initiative,* 1–2, "Background," http://www.dhcs.ca.gov/services/MH/Documents/MayLegReportFormat4_14_08_V8.pdf.

[26] H.R. 3717, § 103(f). For more on the bill and Congressman Murphy's efforts as of today, *see* Wayne Drash, *I ask members of Congress to look those Newtown families in the eye,* CNN.com, http://www.cnn.com/2014/12/11/us/tim-murphy-mental-health-profile/ (last updated Dec. 13, 2014).

[27] P.L. 113–93 § 224, *available at* http://www.gpo.gov/fdsys/pkg/PLAW-113publ93/content-detail.html.

providing mental health care, mental health provider supervising or treating the person, peace officer, or parole or probation officer supervising the person[28] can "petition for an order authorizing assisted outpatient treatment" that "may be filed by the county mental health director, or his or her designee, in the superior court in the county in which the person who is the subject of the petition is present or reasonably believed to be present."[29] The director then conducts an investigation and files only if she determines there is a reasonable likelihood all necessary elements to sustain the petition can be proved by clear and convincing evidence.[30] Those necessary elements include that the person be eighteen years of age or older, be diagnosed with a serious mental illness, be unlikely to survive safely in the community without supervision, have a history of a lack of compliance demonstrated by two or more hospitalizations in the last thirty-six months or one or more acts or threats of serious violence within the last forty-eight months, have refused to voluntarily participate in treatment, be substantially deteriorating, be in need of treatment to prevent a relapse or deterioration, and be likely to benefit from treatment, as well as a finding that AOT is the least restrictive placement to ensure recovery.[31] The person has the right to be represented by counsel at all stages, and upon election the court will appoint a public defender or attorney to represent them.[32] Within five court days the court will conduct the hearing (in absentia if the person fails to appear despite "appropriate attempts" to notify that person of the hearing) and may examine the person in or out of the courtroom.[33] The court requires that a mental health treatment provider examine and testify at the hearing.[34] The court can request that the person consent to the examination, and if the person refuses and the court finds

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28 There had been a proposed amendment to allow discharging staff from a treatment facility to petition for an order. 2013 Bill Text CA A.B. 2266. That bill drew opposition from opponents of Laura's Law and has stalled in committee.

29 Cal. Welf. Inst. Code § 5346(b)(1), (2).

30 *Id*. at (b)(3). This appears to be a subjective judgment by the mental health director.

31 *Id*. at (a). For a discussion of these elements, and a comparison with other states' AOT statutes, *see generally* Note, *supra* note 5, at 369–70.

32 Cal. Welf. Inst. Code § 5346(c).

33 *Id*. at (d)(1).

34 *Id*. at (d)(2).

"reasonable cause" to believe the petition is true, the court may then order anyone designated under Section 5150 to take the person to a hospital for examination by a mental health treatment provider.[35] The person has many procedural rights at the hearing guaranteed by the statute, including the right to present evidence, call witnesses, cross-examine witnesses, and appeal the court's decision.[36] Upon hearing the relevant evidence, and determining that all elements are met and that there is no less restrictive treatment option, the court shall order AOT for a period not to exceed six months.[37] The court is limited to ordering the treatment recommended by the examining mental health treatment provider.[38] Any advance directive (Cal. Prob. Code Section 4650–4701) shall be considered in formulating the treatment plan.[39]

Next, if the person refuses to meet with the treatment team, the court may order the person to do so, and the team "shall attempt to gain the person's cooperation with treatment ordered by the court."[40] If the person refuses, they may be subject to a Section 5150 hold.[41] The statute then grants a licensed mental health provider who has found in their clinical judgment that the person (1) has refused to comply with court-ordered treatment after efforts were made to solicit compliance, and (2) may be in need of involuntary admission to a hospital for evaluation, to then initiate the Section 5150 process that governs any involuntary hospitalization.[42] This is the "stick" in the court-order process meant to persuade compliance with the court order. Patients generally, understandably, have an aversion to the involuntary Section 5150 process — which is why it can be an effective motivator. The statute explicitly states that failure to comply with a court order for AOT alone is not sufficient for either involuntary civil commitment

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35 *Id.* at (d)(3).

36 *Id.* at (d)(4)(A)-(I).

37 *Id.* at (d)(5)(b). It is unclear why the "least restrictive alternative" is included here again, as it is already one of the required elements.

38 *Id.*

39 *Id.* As an aside, the advanced directive statute explicitly prevents the authorization of consent to commitment or placement in a mental health treatment facility. Cal. Prob. Code 4652(a).

40 Cal. Welf. Inst. Code § 5346(d)(6).

41 *Id.*

42 *Id.* at (f).

or contempt of court.[43] The court does not apply strong legal action except through the Section 5150 process.

Petitions for continued AOT may be made by the director of the treatment team at the end of the order with a determination that further treatment is needed.[44] Such additional treatment cannot exceed 180 days.[45] Every 60 days the director of the team must file an affidavit that the person still meets AOT criteria.[46] The person has a right to a hearing to assess whether she still meets the AOT criteria, with the burden of proof on the director.[47] And during each 60-day period, the person may file a petition for a writ of habeas corpus.[48]

During the petition process but before a court order requiring AOT, the person may voluntarily agree to treatment under a settlement agreement not to exceed 180 days.[49] Such an agreement requires a finding by a licensed examining mental health treatment provider that the person can survive safely in the community.[50] This provision encourages the person to agree to the treatment before the court hearing process begins, using the court hearing itself as a "stick." Although the statutory structure is complicated, it attempts to use the court hearing process and the judicial officer as tools to encourage engagement and compliance with treatment.[51]

OPPONENTS' ARGUMENTS

Laura's Law engenders controversy for what opponents argue is forced medication in violation of an individual's right to refuse treatment, and

43 *Id.* at (f).
44 *Id.* at (g).
45 *Id.*
46 *Id.* at (h).
47 *Id.*
48 *Id.* at (i).
49 Cal. Welf. Inst. Code § 5347.
50 *Id.* at (b)(1).
51 For a description of the functioning of the court administering Laura's Law provided by the presiding judge in Nevada County, Tom Anderson, *see History of Public Psychiatry — Part III: Assisted Outpatient Treatment,* YouTube, Jul. 15, 2014, https://www.youtube.com/watch?v=Y19oGFK2fw4.

that the law has the potential for civil rights abuses.[52] Opponents of Laura's Law often argue that most people with mental illness are non-violent, and only a very small minority of people with mental illness commit violent acts.[53] They have also challenged claims of "lack of insight" into illness as "often no more than disagreement with the treating professional."[54] Opponents also often argue that a full range of voluntary mental health services, as required by law, should be available before resorting to AOT programs such as Laura's Law.[55] Finally, they argue that empirical studies show that AOT has not been shown effective in reducing hospitalization or other adverse outcomes.[56]

PROPONENTS' ARGUMENTS

Proponents of Laura's Law argue that many of the most serious cases of mental illnesses, such as schizophrenia and bipolar disorder, are not being treated because people suffering from those illnesses often do not realize they are ill and lack insight into their condition ("anosognosia"), and thus

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52 Kirk Siegler, *The Divide Over Involuntary Mental Health Treatment,* NPR, http://www.npr.org/blogs/health/2014/05/29/316851872/the-divide-over-involuntary-mental-health-treatment [hereinafter Divide]; *see also Position Statement 22: Involuntary Mental Health Treatment,* Mental Health America, http://www.mentalhealthamerica.net/positions/involuntary-treatment.

53 Divide, *supra* note 52.

54 Bazelon Center, Position Paper on Involuntary Commitment, http://www.bazelon.org/LinkClick.aspx?fileticket=BG1RhO3i3rI%3d&tabid=324; *see also,* Ann Menasche & Delphine Brody, *AB 1421: Involuntary Outpatient Commitment,* 17, Disability Rights California and California Network of Mental Health Clients (labeling the claim as a "myth"). This difference in "viewpoint" on the existence of anosognosia underlies much of opponents' opposition to AOT and Laura's Law, and their claims that more voluntary mental health services are a superior policy answer.

55 Leslie Napper & Leslie Morrison, *Mentally Ill need full range of voluntary services,* Sacramento Bee, Oct. 11, 2014. *But see, Facts About Common Laura's Law Misconceptions,* http://www.treatmentadvocacycenter.org/storage/documents/ll-qa-2012.pdf ("The availability and completeness of community services are irrelevant for people who are unable to recognize they are ill and/or to seek services voluntarily.").

56 Mental Health America, *Position Statement 22: Involuntary Mental Health Treatment,* n.8, http://www.mentalhealthamerica.net/positions/involuntary-treatment; *see also,* Bazelon Center for Mental Health Law, *Outpatient and Civil Commitment,* http://www.bazelon.org/Where-We-Stand/Self-Determination/Forced-Treatment/Outpatient-and-Civil-Commitment.aspx ("[T]here is no evidence that it improves public safety.").

actively resist seeking out or "voluntarily" acquiescing to treatment.[57] Also, proponents argue that treatment early on for psychotic mental illnesses reduces repeated psychotic breaks and thus reduces the brain damage associated with psychotic breaks, which produces better long-term outcomes for the affected people.[58] Proponents often criticize treatment providers who oppose Laura's Law as having self-interested motives to select easier patients and cases to handle.[59] In addition, they argue that existing funds coming from California's Mental Health Services Act can and should be used for Laura's Law, consistent with the purpose of Laura's Law to prevent and treat "severe" mental illness.[60]

Furthermore, proponents argue there is a community-wide financial benefit to adopting Laura's Law. Nevada County reported a savings of $1.81 in public expenditures for every $1 spent on implementation of Laura's Law.[61] Other counties estimate similar systemic savings.[62] Another

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[57] Dunn, *supra* note 22 ("In the past 20 years, more than 60 large scientific studies affirm that 50 percent of those with serious mental illness are extremely vulnerable because they do not realize they are seriously mentally ill and actively resist treatment."); *see also,* The Anatomical Basis of Anosognosia — Backgrounder, *available at* http://www.treatmentadvocacycenter.org/about-us/our-reports-and-studies/2143 (summarizing multiple studies correlating brain changes with lack of awareness of illness); National Alliance on Mental Illness, *Involuntary Commitment and Court-Ordered Treatment,* http://www.nami.org/Content/ContentGroups/Policy/Updates/Involuntary_Commitment_And_Court-Ordered_Treatment.htm ("There are certain individuals with brain disorders who at times, due to their illness, lack insight or judgment about their need for medical treatment.").

[58] *Id.; see also,* Mental Illness Policy Org, Laura's Law home page, http://mentalillnesspolicy.org/states/lauraslawindex.html ("[T]ime is brain . . . . Treatment can prevent the deterioration.").

[59] Mental Illness Policy Org, *Analysis of Orange County Health Care Agency Response to Board of Supervisors Request for a Plan to Implement Laura's Law,* http://mentalillnesspolicy.org/states/california/analysishcareport.pdf.

[60] *Id.* at 4 ("OC has been allocated [a] total of $556,272 million in MHSA revenue ($75 million FY 11–12) but gives much of it [to] programs that do not focus on 'severe mental illness.' ").

[61] Nevada County Grand Jury, Laura's Law in Nevada County: A Model for Action — Saving Money and Lives, *available at* http://www.nevadacountycourts.com/documents/gjreports/1112-HEV-AB1421LaurasLaw.pdf.

[62] *See* Amy Yannello, *Contra Costa's outrageous delay on mental health treatment law, available at* http://www.sfgate.com/opinion/openforum/article/Contra-Costa-s-outrageous-delay-on-mental-5838344.php (citing financial analysis for board of

financial benefit to counties, proponents argue, is that Laura's Law will stabilize individuals enough to complete the Medi-Cal enrollment process where they otherwise would not. This would bring in more federal funds for treatment and leave more county money for other services generally.[63]

EVALUATION OF ARGUMENTS

AOT PROGRAMS HAVE BEEN FOUND CONSTITUTIONAL AND DO NOT VIOLATE CIVIL RIGHTS OR UNDULY RESTRICT CIVIL LIBERTIES

The form of AOT in New York known as Kendra's Law has been declared constitutional unanimously by the state's highest court.[64] In that case, the patient alleged that the statute violated his due process right because there was no requirement of a finding of incapacity (i.e. incompetence) before a court could issue an order under Kendra's Law.[65] The court found that because there was no forced medication administration, a showing of incapacity was not required under existing state precedent.[66] Thus the court reasoned that Kendra's Law's process only needed to satisfy due process.[67] The Court of Appeals explained that, while under existing state precedent a person of adult years and sound mind has a right to control their medical treatment, "these rights are not absolute."[68] Rather, the right has to be balanced against compelling state interests, including the state's "parens patriae

supervisors that "an initial investment of roughly $7.6 million could save the county $12 million to $16 million if it adopted Laura's Law"); *see also* Facts About Common Laura's Law Misconceptions, *supra* note 13 ("[M]ost people who qualify for Laura's Law will also qualify for medi-cal and federal support such as SSI as well as realignment mental health services.").

63 *Id*.

64 *In re* K.L., 1 N.Y. 3d 362 (N.Y. Ct. App. 2004); *see also* Final Report Appendix 2 ("[I]t is now well settled that Kendra's Law is in all respects a constitutional exercise of the State's police power, and its parens patriae power.").

65 *In re* K.L., 1 N.Y. 3d at 368–69.

66 *Id*. at 369–70.

67 *Id*. at 370. ("If the statute's existing criteria satisfy due process — as in this case we conclude they do — then even psychiatric patients capable of making decisions about their treatment may be constitutionally subject to its mandate.").

68 *Id., citing* Rivers v Katz, 67 N.Y. 2d 485 (N.Y. Ct. App. 1986).

power to provide care to its citizens who are unable to care for themselves,"[69] and "authority under the police power to protect the community from the dangerous tendencies of some who are mentally ill," recognized by the Supreme Court.[70] In balancing, the court found that Kendra's Law's impingement on liberty was light, and the state interests weighty. The court found that "the restriction on a patient's freedom effected by a court order authorizing assisted outpatient treatment is minimal, inasmuch as the coercive force of the order lies solely in the compulsion generally felt by law-abiding citizens to comply with court directives."[71] The court then also found that, in any event, the patient's right to refuse treatment generally is outweighed here "by the state's compelling interest in both its police and parens patriae powers."[72] It emphasized that the statutory requirement of finding by clear and convincing evidence that the patient would either become a danger to themselves or others, or deteriorate, "properly invoked" the state's interests in its police and parens patriae powers.[73]

The patient also alleged an equal protection violation because of the lack of a finding of incapacity for him to be subject to court order under Kendra's Law. He claimed that the law treated those subject to court orders under Kendra's Law differently from those subject to guardianship proceedings or involuntary commitment statutes who still needed to be found incompetent

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69 *In re* K.L., 1 N.Y. 3d at 370.

70 *Id., citing* Addington v. Texas, 441 U.S. 418, 426 (1979).

71 *In re* K.L., 1 N.Y. 3d at 370.

72 *Id*. What is interesting is that patients subject to AOT still have the right to refuse treatment. There is no forcible medication authorized as part of the court order, and the penalty for non-compliance with the court order is merely transportation to an appropriate facility for an evaluation for an involuntary civil commitment.

73 *Id*. at 371–72. Specifically, the court listed several required elements for treatment under Kendra's Law:

> the patient is in need of assisted outpatient treatment in order to prevent a relapse or deterioration which would be likely to result in serious harm to self or others . . . the patient is unlikely to survive safely in the community without supervision; the patient has a history of lack of compliance with treatment that has either necessitated hospitalization or resulted in acts of serious violent behavior or threats of, or attempts at, serious physical harm; the patient is unlikely to voluntarily participate in the recommended treatment plan; the patient is in need of assisted outpatient treatment in order to prevent a relapse or deterioration which would be likely to result in serious harm to the patient or others; and it is likely that the patient will benefit from assisted outpatient treatment.

to receive forced medication.[74] The court again emphasized that a court-ordered assisted outpatient treatment plan "simply does not authorize forcible medical treatment."[75] Thus Kendra's Law did not treat its assisted outpatients differently from those in guardianship proceedings or involuntary commitment. They were treated equally with regard to forced medication.

Next, the Court of Appeal analyzed the patient's claim that Kendra's Law's failure, post court order, to "provide for notice and a hearing prior to the temporary removal of a noncompliant patient to a hospital violates due process."[76] Here the court undertook a straightforward application of the *Mathews* balancing test and "conclude[d] that the patient's significant liberty interest is outweighed by the other *Mathews* factors."[77] The risk of erroneous deprivation of liberty is minimal because of judicial findings by the clear and convincing evidence standard prior to the court order.[78] And since the court is "not . . . better situated than a physician to determine whether the grounds for detention . . . have been met[, a] preremoval hearing would not reduce the risk of erroneous deprivation."[79] The court then found that the third part of *Mathews* balancing also weighed for the state because of the state's strong interests in both "removing from the streets noncompliant patients previously found to be, as a result of their non-compliance, at risk of a relapse or deterioration likely to result in serious harm to themselves or others," and "warding off long periods of hospitalization" that "tend to accompany relapse or deterioration."[80] Requiring another hearing would unnecessarily delay treatment and thus would be detrimental to the patient. And, as a matter of statutory functionality, the removal provision was critical as the "mechanism by which to force a noncompliant patient to attend a judicial hearing in the first place."[81] Thus, the Court of Appeal found that the removal provision met due process requirements.

Finally, the patient alleged a violation of the Fourth Amendment prohibition against unreasonable searches and seizures because of the "lack of

74 *Id*.
75 *Id*.
76 *Id*.
77 *Id*. at 373.
78 *Id*.
79 *Id*.
80 *Id*.
81 *Id*. at 374.

requirement that [a] physician have probable cause or reasonable grounds to believe a noncompliant assisted outpatient is in need of involuntary hospitalization" before removal.[82] But the court pointed out that the requirement that the determination be made in the "clinical judgment" of a physician already "necessarily contemplates that the determination will be made on the physician's reasonable belief."[83] Thus, the Court of Appeals found no constitutional violation there, or anywhere else in the statute.

Because Laura's Law is almost entirely modeled on Kendra's Law, and retains the same elements relied upon by the Court of Appeals in *In re K.L.,* there is no reason to believe it would not successfully withstand a federal constitutional challenge in California.[84] While it is true that the California Constitution's right to privacy has been interpreted by the California Court of Appeal to confer upon the "individual the freedom to choose to reject, or refuse to consent to, intrusions of his bodily integrity,"[85] the reasoning from the New York Court of Appeals is relevant just the same.[86] There is no forced medication under either Kendra's Law or Laura's Law,

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[82] *Id.*

[83] *Id.*

[84] *See also,* John K. Cornwell & Raymond Deeney, *Preventive Outpatient Treatment For Persons With Serious Mental Illness: Exposing the Myths Surrounding Preventive Outpatient Commitment for Individuals with Chronic Mental Illness,* 9 Psychol. Pub. Pol'y & L. 209, 219–25 (2003) (discussing arguments that AOT statutes satisfy Equal Protection, Substantive Due Process, and Procedural Due Process constitutional concerns.).

[85] Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 1137 (1986). The California Supreme Court has not yet taken up the precise question. In *Bouvia,* the Second District Court of Appeal found that the right to refuse treatment for a competent adult allowed plaintiff Bouvia to remove a nasogastric feeding tube that was providing life-sustaining treatment. Scholars view *Bouvia* principally as a "right to die" case. However, the court focused on her unbearably painful circumstances in commenting, "we cannot conceive it to be the policy of this state to inflict such an ordeal upon anyone." *Id.* 1143–44. As this paper has discussed only in brief, people with severe mental illness are subject to incredible rates of revolving involuntary hospitalization, incarceration, and homelessness; alarming increased rates of victimization including violent assault and rape; and the subjective terror of persecutory delusions, hallucinations and psychotic depression driving many to suicide, all while often their very serious illnesses prevent them from recognizing the need for and availability of medical care. This author too cannot conceive it to be the policy of the state to inflict such an ordeal upon anyone.

[86] California's case law analogous to New York's case law recognizing the right of a patient not adjudicated incompetent to refuse psychiatric medication in non-

and thus there is no intrusion of bodily integrity. Quite simply, patients do have the right under Laura's Law to refuse treatment.[87] Indeed, the patient works with the treatment team in tailoring the treatment plan. Thus the patients are exercising control over the course of treatment. Laura's Law, like Kendra's Law, is facially constitutional.

Supporters also argue that AOT enhances civil liberty. They argue that AOT prevents "trans-institutionalization" of people with mental illness to prisons and further loss of liberties by preventing deterioration — avoiding locks, restraints, seclusion, or actual forced medication. A successful Laura's Law intervention avoids the further impingement on individual freedom and autonomy inherent in incarceration. It also avoids the increased likelihood of victimization in prison.[88] In addition, the threshold for forcible administration of medication is actually lower for an individual in prison, given that the state has a compelling interest in meeting its affirmative duty to treat its prisoners and maintain a safe prison environment.[89] In prison, the requirements are that the inmate be a danger to himself or others, and that treatment is in the inmate's medical interests.[90] There is no need for either a finding of incompetence or an emergency situation, as is required during a civil commitment.[91] To the extent that AOT seeks, as

emergency situations, *Riese v. St. Mary's Hospital & Medical Center,* relies heavily on that New York case, *Rivers*.

87 Furthermore, *Addington* still requires a balancing of the patient's right to refuse treatment against compelling state interests. *See supra* note 70.

88 *See* Cynthia L. Blitz, et al., *Physical Victimization in Prison: The Role of Mental Illness,* 31 Int'l J.L. & Psychiatry 385, 385 (2008); *see also* David Mills et al., *When did prisons become acceptable mental health care facilities?,* Stanford Law School Three Strikes Project, https://www.law.stanford.edu/sites/default/files/child-page/632655/doc/slspublic/Report_v12.pdf ("[F]or example, they are much more likely to be sexually assaulted than other prisoners. Some prisoners react to the extreme psychic stresses of imprisonment by taking their own lives. Tragically, rates of suicide inside prisons and jails are much higher among the mentally ill."). There is also evidence that people who are more symptomatic and sicker generally are victimized at greater rates. *See* E. Fuller Torrey, The Insanity Offense: How America's Failure to Treat the Seriously Mentally Ill Endangers its Citizens 138 (2008). "The corollary to this fact is that if you treat them and reduce their symptoms, you reduce their chances of being victimized." *Id*.

89 *See* Washington v. Harper, 494 U.S. 210 (1990).

90 *Id*. at 227.

91 *See* Riese v. St. Mary's Hospital & Medical Center, 209 Cal. App. 3d 1303 (Cal. App. 1st Dist. 1987).

a matter of public policy, to prevent people with severe mental illness from landing in jails and prisons, it seeks to prevent more severe curtailment of an individual's civil liberties and thus protects them.[92]

LAURA'S LAW DOES NOT TARGET PEOPLE BASED ON MENTAL ILLNESS ALONE

While "data shows it is simplistic as well as inaccurate to say the cause of violence among mentally ill individuals is the mental illness itself," mental illness "is clearly relevant to violence risk," but "its causal roles are complex, indirect, and embedded in a web of other arguably more important individual and situational cofactors to consider."[93] A recent study found that future violence was more closely associated with other particular factors such as past violent acts, substance abuse, and environmental factors.[94] In analyzing the MacArthur Study from 1999 in light of continued research and literature, the authors state, "the relationship between diagnosis and violence, we believe, is still an open question . . . ."[95] Those authors did find that the predictors of violence for people with mental illness "are more similar than different" to the predictions of violence in the population as a whole.[96] Those predictors also included alcohol and substance abuse.

It should be noted that there are studies which still show an indication that violence is more prevalent within certain diagnoses and symptoms of mental illness. A national study of patients with schizophrenia found that patients with particular clusters of positive psychotic symptoms, such as persecutory ideations, were more likely to be violent.[97] A recent Australian study found

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92 For a more thorough discussion on the concept of autonomy, *see* Dora W. Klein, *Autonomy and Acute Psychosis: When Choices Collide,* 15 Va. J. Soc. Pol'y & L. 355, 388–89 (author argues that mental illness itself limits autonomy more than involuntary treatment).

93 Eric B. Elbogin, Sally C. Johnson, *The Intricate Link Between Violence and Mental Disorder,* 66 Arch. Gen. Psychiatry 2 (February 2009).

94 *Id*.

95 E. Fuller Torrey et al., *The MacArthur Violence Risk Assessment Study Revisited: Two Views Ten Years After Its Initial Publication,* 59 Psychiatric Services 2 (Feb. 2008).

96 *Id*. at Conclusion.

97 Jeffrey Swanson et al., *A National Study of Violent Behavior in Persons with Schizophrenia,* 63 Arch. Gen. Psych 490 (May 2006). Part of the study's conclusion was that "violence risk management must include a focus on the whole person in the community environment" which is what Laura's Law does.

those diagnosed with schizophrenia, while overwhelmingly not violent, were still more likely to be violent than a control group of people without schizophrenia.[98] These studies suggest that, while it is erroneous and an oversimplification to say that people with mental illness are violent or at a higher risk of violence, it is equally erroneous to conclude that there are not subsets of the population of people with mental illness who do present an increased risk of violence. Laura's Law, with its requirements of an act of serious violence or involuntary hospitalization (resulting from serious violence) aims to reach such subpopulations and reduce acts of violence, among other negative outcomes.

STUDIES OF AOT DEMONSTRATE ITS EFFECTIVENESS

Multiple studies have shown that AOT is effective in reducing negative outcomes as well as increasing the subjective well-being of the individuals subject to the process. The New York State Office of Mental Health's Final Report on the status of Kendra's Law found that people subject to that AOT program had generally good subjective experiences of the programs. Although about half reported feeling angry or embarrassed by the experience, 62% considered the court-ordered treatment "good for them."[99] The large majority of people reported that the pressures exerted on them helped them get well and stay well (81%) and gain control over their lives (75%), and the pressures made them more likely to keep appointments and take medication (90%).[100] This report strongly suggests that the informally coercive effect of AOT provides benefits to the person that the person subjectively appreciates. In fact, whether an individual subjectively feels coerced depends more on the participants in the process than on the process itself.[101] Specifically, the patient's view depends on her belief that others acted out of concern, treated her respectfully and in good faith, and afforded the patient an opportunity to tell her side of the story.[102] Results

98 T. Short et al., *comparing violence in schizophrenia with and without comorbid substance-use abuse disorders to community controls,* Acta Psychiatrica Scandinavica, 1–1 (2013).

99 Final Report 20–21.

100 *Id.*

101 *See generally* J. Monahan, *Coercion in the Provision of Mental Health Services: The MacArthur Studies,* 10 Research in Community & Mental Health 13, 26–67 (1999).

102 *Id.*

from the Final Report showing that the vast majority feel confident in their case manager's ability to help them (87%), and that they both "agree on what's important" (88%),[103] coupled with the structure of AOT (representative attorney listening and representing the person, judge engaging directly with the person, individualized treatment team working with the person) strongly suggest that a person subject to AOT will subjectively feel less coercion than opponents contend. Another study suggested that multiple stakeholder groups, including individuals with psychoses, were willing to accept the perceived coerciveness of outpatient commitment in order to gain improved outcomes.[104]

The Final Report also found an enormous reduction in several negative significant event categories. The report found large reductions in incarceration (87%), arrest (83%), psychiatric hospitalization (77%), and homelessness (74%) for those individuals in AOT compared to those same individuals before AOT.[105] Further, they were less likely to threaten suicide or harm others (47%), physically harm themselves (55%), or threaten to harm others (43%).[106] These numbers suggest strong support for the claim that AOT achieves its goals.

One independent analysis of the effectiveness of Kendra's Law in New York (the Community Outcomes of Assisted Outpatient Treatment, or "COAOT study") found that people under court-ordered AOT experienced improvements compared to a control group in areas of serious violence perpetration, suicide risk, and illness-related social functioning.[107] Specifically, there was a 4.31 times greater likelihood of perpetration of serious violence for those not under AOT. The study also found that the AOT group reported "marginally less stigma and coercion than the control group."[108]

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103 Final Report, 21.

104 Jeffrey Swanson et al., *Assessment of Four Stakeholder Groups' Preferences Concerning Outpatient Commitment for Persons With Schizophrenia,* 160 Am. J. Psychiatry 1139, 1139 (June 2003).

105 *Id*. at 17–18.

106 *Id*. at 16.

107 Phelan et al., *Effectiveness and Outcomes of Assisted Outpatient Treatment in New York State,* 61 Psychiatric Services 2 (2010), http://www.ncbi.nlm.nih.gov/pubmed/20123818 [hereinafter COAOT].

108 *Id.; cf.* Bruce Link et al., *Stigma and coercion in the context of outpatient treatment for people with mental illnesses,* 67 Social Science and Medicine, 3, 408–19

Most studies of outpatient commitment "have been naturalistic or quasi-experimental" and "subject to bias from selection and confounding."[109] Thus, many of the objective studies designed to offer empirical data on the results of AOT suffer from shortcomings, but those shortcomings generally apply across all studies. Indeed, there are serious ethical problems in creating a true experiment that would randomly assign individuals to either AOT or not when they all meet the criteria of AOT. In the case of the COAOT study, the study designers "used a propensity score analysis to achieve the strongest possible causal inference without a randomized experimental design."[110] The COAOT study should be viewed as a valuable empirical study that supports the adoption of AOT. In addition, a "study of studies" published in 2004 found that "on balance, empirical studies support the view that [AOT] is effective under certain conditions" while acknowledging the fact that controversial views continue to permeate the field.[111]

Studies of Kendra's Law generally have displayed results indicating its effectiveness.[112] In particular, a 2011 quasi-experimental study indicated that outpatient commitment under Kendra's Law is associated with a reduced risk of arrest for patients under AOT orders compared to patients not under AOT orders, and for patients under AOT orders compared to

(Aug. 2008) ("We found that improvements in symptoms lead to improvements in social functioning. Also consistent with this perspective, assignment to mandated outpatient treatment is associated with better functioning and, at a trend level, to improvements in quality of life. At the same time . . . findings showing that self-reported coercion increases felt stigma (perceived devaluation-discrimination), erodes quality of life and through stigma leads to lower self-esteem.") The authors recommend that "future policy needs not only to find ways to insure that people who need treatment receive it, but to achieve such an outcome in a manner that minimizes circumstances that induce perceptions of coercion." *Id*. The importance of the participants' working with the individual so as to reduce this feeling of coercion appears to be of strong importance.

109 COAOT, *supra* note 107.

110 *Id*.

111 Marvin S. Schwartz & Jeffrey W. Swanson, *Involuntary Outpatient Commitment, Community Treatment Orders, and Assisted Outpatient Treatment: What's in the Data?,* 49 Cal. J. of Psychiatry 585–91 (2004), *available at* https://ww1.cpa-apc.org/Publications/Archives/CJP/2004/september/swartz.pdf.

112 *Kendra's Story: Her Killer Speaks for the First Time,* aired Feb. 1, 2013, http://archive.wgrz.com/news/article/198510/13/Kendras-Story-Her-Killer-Speaks-For-The-First-Time.

those same patients before AOT.[113] These studies, while not ideal research, are still valuable and reliable and show data indicating that AOT is associated with better outcomes for patients.

Critics of AOT cite the Oxford Community Treatment Order Evaluation Trial (OCTET) study published in April 2013 as contradicting claims of effectiveness from an AOT program.[114] In that study, participating patients leaving psychiatric discharge were either randomized to "community treatment orders" and were subject to clinical monitoring and rapid recall assessment, or they were randomized to "§ 17 leave" and were subject to recall for assessment but received significantly less extensive monitoring and for shorter times.[115] The study authors interpreted their results as showing "in well coordinated mental health services, the imposition of compulsory supervision does not reduce the rate of readmission of psychotic patients."[116] Here, proponents of AOT distinguish this study as inapplicable to AOT, because the CTO is a "purely administrative order" issued by a clinician and not a judge.[117] As such, it lacks the critical "black robe effect."

> The theory behind the black-robe effect is that a judicial process and a judge's imprimatur increase the likelihood that the patient will take to heart the need to adhere to prescribed treatment. It is not a single factor but a host of related ones that combine to send a potent message: the ritual of being summoned to court and taking part in a hearing, the recognition that a fair-minded third party has listened to both sides and ultimately agreed with clinicians that assisted treatment is warranted, the cultural perception of the

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113 B.G. Link et al., *Arrest outcome associated with outpatient commitment in New York State,* Psychiatric Services 2011; 62:504–08, http://ps.psychiatryonline.org/article.aspx?articleid=116189.

114 T. Burns et al., *Community treatment orders for patients with psychosis (OCTET): a randomised controlled trial,* Lancet 381:1627–33, 2013

115 *Id*. *See also* Michael Rowe, *Alternatives to Outpatient Treatment,* Journal of the American Academy of Law and Psychiatry Online, Sept. 2013, http://www.jaapl.org/content/41/3/332.full.

116 OCTET *supra* note 114, at Interpretation.

117 Treatment Advocacy Center, *No Relevance to Assisted Outpatient Treatment (AOT) in the OCTET Study of English Compulsory Treatment,* May 2013, http://treatmentadvocacycenter.org/storage/documents/Research/may2013-octet-study.pdf [hereinafter No Relevance].

> judge as an authority figure, and the inclination of many judges to use their bench as a sort of civic pulpit.[118]

There are other reasons to discount the validity of the study. The OCTET study compares groups undergoing different forms of mandatory treatment, with neither a court order nor judicial administration. It does not compare court-ordered treatment to voluntary treatment. Additionally, the study included a substantial number of subjects who had not refused treatment.[119] However, non-compliance with treatment is a requirement under AOT. Further, patients whose families felt very strongly that their loved one needed treatment were excluded because of an unwillingness to risk her assignment to the non-CTO group, and a substantial number of patients who were eligible for the study refused to participate in the initial interviews.[120] Both of these groups, which self-selected out of the study, are likely to be among those subject to AOT orders — in the first case because of an indication of the seriousness of the illness, and in the second because of their non-compliance with the study program. Their exclusion casts further doubt on OCTET's applicability to AOT programs that require serious mental illness and non-compliance with treatment. Thus, the study lacks the external validity to compare it to AOT. It offers few or no generalizable results.

LAURA'S LAW'S EFFECTIVENESS

Nevada County, the only county to have fully implemented Laura's Law, currently provides the only Laura's Law test jurisdiction in California for evaluation. The county showed results that indicate the effectiveness of Laura's Law in a California county. Looking at the twelve months pre-treatment versus twelve months post-treatment for patients via AOT/ACT,[121] Nevada

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118 *Id*.

119 *Id*. at 3 (sample of 200 patients found 30% had "no history of non-compliance or disengagement from treatment.") (*citing* J. Williams, *Are community treatment orders being overused?,* The Guardian, Oct 27, 2010).

120 No Relevance, *supra* note 117, at 3 (*citing* T. Burns et al., *Community treatment orders for patients with psychosis (OCTET): a randomized controlled trial,* The Lancet, April 2013).

121 The numbers reflect both those using ACT through AOT and those using it voluntarily. The study found that AOT outcomes are similar to ACT outcomes. Further,

County found decreases in the number of psychiatric hospital days (46.7%), incarceration days (65.1%), homeless days (61.9%), and emergency interventions (44.1%).[122] Those significant decreases indicate that Laura's Law has a significant effect in preventing adverse outcomes, and the institutionalization and accompanying loss of liberty of those patients.[123]

IMPLEMENTATION CHALLENGES

THE POLITICS OF MENTAL HEALTH

Just as there were political challenges faced and compromises made to pass Laura's Law in the state legislature,[124] there are serious political challenges to passing Laura's Law county by county.[125] Often, opponents or those ambivalent about AOT will cite concerns regarding racial disparities in enforcement or cultural competency of assessment and treatment, and the nature of the hearings provided to individual patients as reasons to deny or delay opting in. While those are serious concerns, the evidence strongly suggests that enforcement of Laura's Law does not unfairly discriminate based on race, employs cultural competency in its implementation, and handles hearings in an appropriate manner for the individuals.

AOT is used to engage those patients who will not engage in ACT voluntarily, which is a separate population. *See supra,* note 57.

122 Michael Heggerty, Assisted Outpatient Treatment (W&I Code 5345) (AB 1421) "Laura's Law": The Nevada County Experience 31, Nov. 15, 2011, *available at* http://mentalillnesspolicy.org/states/california/nevada-aot-heggarty-8.pptx.pdf.

123 Laura's Law 2015 Annual Report indicated a decrease in psychiatric hospital days of 77.6%, in incarceration days of 100%, and in homeless days of 79.5%. A consumer satisfaction survey rated overall satisfaction with the AOT Program at 78.3%. *See* Friday Memo for 4/17/2015, "Laura's Law 2015 Annual Report," MyNevadaCounty.com (Apr. 17, 2015 2:25 PM), http://www.mynevadacounty.com/nc/ceo/Pages/FridayMemo-20150417.aspx#id-879.

124 *See generally,* Paul Applebaum, *Law & Psychiatry: Ambivalence Codified: California's New Outpatient Commitment Statute,* 54 Psych Servs. 1, 26–28 (Jan. 2003).

125 A full discussion of the politics of enacting AOT is outside of the scope of this paper. For more information, *see, e.g.,* Amy Yannello, *The case for Laura's Law: An Open Letter to Citizens and Elected Officials,* https://www.beaconreader.com/amy-yannello/the-case-for-lauras-law-an-open-letter-to-citizens-and-elected-officials (describing Contra Costa county's political battle).

LAURA'S LAW DOES NOT RACIALLY DISCRIMINATE

There has been concern that African Americans and other minority groups have been over-represented in the AOT program in New York.[126] Partly in response, the New York State Office of Mental Health commissioned an independent evaluation of Kendra's Law that found "no evidence that the AOT Program is disproportionately selecting African Americans for court orders, nor [] evidence of a disproportionate effect on other minority populations . . . . Our interviews with key stakeholders across the state corroborate these findings."[127] The study's authors concluded that, at first glance, African Americans appeared to be overrepresented in relation to the total population.[128] However, when conducting a deeper statistical multivariable analysis, the results showed that "differences are dependent on context," and that when the most relevant populations for AOT are analyzed, there was *no appreciable racial disparity*.[129] From this the authors infer that the seeming overrepresentation of African Americans compared to the total population "is influenced by a number of 'upstream' social and systemic variables such as poverty that may correlate with race," but saw "no evidence suggesting racial bias in the application of AOT to individuals."[130]

In another publication, the authors of the same independent study noted that to the extent that selection is based on clinical appropriateness and need, and not on "systemic, legal, and regulatory factors that treat minorities differently than their nonminority counterparts; or [] discrimination, bias, stereotyping, and clinical uncertainty within the system," a *difference* should not be considered a negative *disparity*.[131] Given the results of the

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126 *See* New York Lawyers for the Public Interest, Inc., *Implementation of 'Kendra's Law' is Severely Biased,* 2–5 (April 7, 2005), *available at* http://www.prisonpolicy.org/scans/Kendras_Law_04-07-05.pdf.

127 John Monahan et al., New York State Assisted Outpatient Treatment Program Evaluation vii, Duke University School of Medicine, Durham, NC (June 2009).

128 *Id*. at 13.

129 *Id*. at 14.

130 *Id*. at 14–15.

131 Jeffrey Swanson et al., *Racial Disparities In Involuntary Outpatient Commitment: Are They Real?,* 28 Health Affairs 3, 816–18, Exhibit 1 (2009) [hereinafter "Racial Disparities"] (adopting a 2002 Institute of Medicine report which "argues that 'disparity' should be reserved for that portion of the difference in health care quality that is attributable to (1) systemic, legal, and regulatory factors that treat minorities

program evaluation, it does not appear that those systemic or discriminatory problems are present. The more closely the study analyzed individuals who would actually be subject to AOT, the closer those individuals' proportional representation in AOT matched their ratios relative to the general population.[132]

In that same publication, the authors of the independent study opined that "whether this overrepresentation under court-ordered outpatient treatment is unfair depends on one's view: is it access to treatment and a less restrictive alternative to hospitalization, or a coercive deprivation of personal liberty?"[133] Thus, to the extent there even is a *disparity* in the ratio of African Americans and other minority groups treated compared to the total population, whether one views that disparity negatively (as discriminatory) depends on whether one views AOT negatively. Opponents of AOT have, not surprisingly, attempted to cast that difference as a negative.[134] As a corollary, even if proponents of AOT were to believe that there was a disparity in AOT's application, it is unclear that they would view that as negatively "unfair" for African-Americans with severe mental illness. It is entirely possible to see that from their point of view, that disparity favors a group with the advantage of appropriate AOT treatment. Whether this point continues to be a source of contention in the future may simply be in the eye of the beholder. As the success of AOT programs becomes clearer, the concern that the effect of the programs is negative and unfair will likely dissipate.

A lot of the concern regarding racial disparities in the AOT population in New York's experience can be attributed to a longstanding distrust of

differently than their nonminority counterparts; or (2) discrimination, bias, stereotyping, and clinical uncertainty within the system.").

132 *See supra* note 126.

133 Racial Disparities, 816.

134 *See, e.g.,* Jennifer Friedenbach, *Laura's Law a looming disaster for mentally ill,* SF Examiner, June 8, 2014 ("This law was implemented in New York, and studies found *disturbing disparities* among people of color — African-Americans and Latinos were *forcibly* treated at much higher rates.") (emphasis added); Jasenn Zaejian, *Current Research on Outpatient Commitment Laws,* Mad in America, *available at* http://www.madinamerica.com/2014/02/current-research-outpatient-commitment-laws-lauras-law-california%E2%80%8E/ (summarily dismissing the Swanson study's conclusions and asserting that the data "clearly indicates prima facie racial discrimination").

law enforcement among minority racial groups generally and legitimate concern that certain elements of law enforcement act prejudicially in their enforcement discretion.[135] These are certainly important concerns. However, the AOT process is not controlled by law enforcement. Law enforcement officers are only one of a number of categories of reporters who can petition the county mental health director to conduct an investigation and subsequently petition the court for AOT proceedings.[136] Indeed, police are one of the primary sources of referrals. However, the decision as to whether an individual qualifies for AOT ultimately depends on professional psychiatric health judgments using objective medical standards for diagnosis, and then an independent judge's finding of all of the requisite statutory elements by clear and convincing evidence. The decision to initiate the AOT process and the decision to issue a court order are not made by law enforcement. While that is a key distinction, there can still be legitimate concerns regarding those who are making treatment decisions.[137]

CONCERNS ABOUT CULTURAL COMPETENCY

Cultural competency is key to effective implementation of Laura's Law. Cultural competency is defined by the U.S. Department of Health and Human Services as "a set of values, behaviors, attitudes, and practices within a system that enables people to work effectively across cultures" and "refers to the ability to honor and respect the beliefs, language, interpersonal styles, and

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135 This is putting it mildly. The recent fatal police officer shooting of Michael Brown and fatal choking of Eric Garner, and subsequent non-indictments have fueled nationwide protests and brought the national spotlight to problems between law enforcement and the African-American community. *See* Natalie DiBlasio & Yamiche Alcindor, *'Justice for All,' 'Millions March' draw tens of thousands of protestors,* USA Today, Dec. 14, 2014; Meagan Clark, *More Protests Planned This Week For Eric Garner, Tamir Rice, Mike Brown,* International Business Times, http://www.ibtimes.com/more-protests-planned-week-eric-garner-tamir-rice-mike-brown-1740395. As of a recent update to this paper, the in-police-custody death of Freddie Gray has ignited protests in Baltimore. *See* Sheryl Gay Stolberg & Stephen Babcock, *Scenes of Chaos in Baltimore as Thousands Protest Freddie Gray's Death,* NY Times, April 25, 2015, *available at* http://www.nytimes.com/2015/04/26/us/baltimore-crowd-swells-in-protest-of-freddie-grays-death.html?_r=0.

136 Cal. Welf. Inst. Code § 5346(a).

137 *See generally* Jonathan Metzi, The Protest Psychosis: How Schizophrenia Became a Black Disease (2010).

behaviors of individuals and families receiving services, as well as staff who are providing such services."[138] Cultural competency is critical because

> [c]ulture counts when it comes to diagnosis and treatment of mental disorders. How people manifest their diseases, how they cope, the type of stresses they experience, and whether they are willing to seek treatment are all impacted by culture. Stigma also is greatly influenced by culture. . . . Professionals also are influenced by culture. Our culture impacts upon how we hear things when we talk to patients. It can interfere with our ability to make accurate diagnoses and can even impact our judgment about treatment. This is a major component of disparities in quality of care.[139]

Indeed, the President's New Commission on Mental Health in 2003 found that there were many challenges that needed to be addressed for minority groups to gain both better diagnosis and better access to treatment.[140] To address those challenges, there are federal laws that mandate non-discrimination in availability of services for programs receiving federal funds.[141] At the state level, the California Department of Health has ordered all county mental health departments to create cultural competency programs.[142]

Laura's Law itself mandates that counties that opt in must have a service planning and delivery process that considers "cultural, linguistic, gender, age, and special needs of minorities" and must provide "staff with the cultural background and linguistic skills necessary to remove barriers to mental health

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138 National Alliance on Mental Illness, Multicultural Action Center, http://www.nami.org/Content/NavigationMenu/Find_Support/Multicultural_Support/Cultural_Competence/Cultural_Competence.htm (last visited May 12, 2015).

139 David Satcher, *The Connection Between Mental Health and General Health, in* The President's New Freedom Commission on Mental Health: Transforming the Vision, 11 (The Carter Ctr. ed., Nov. 5–6, 2003), *available at* http://www.carter-center.org/documents/1701.pdf.

140 President's New Freedom Commission on Mental Health 49 (July 22, 2003), *available at* http://govinfo.library.unt.edu/mentalhealthcommission/reports/FinalReport/downloads/FinalReport.pdf.

141 California Department of Mental Health, *Cultural Competence Plan Requirements CCPR Modification* 27–28, http://www.dhcs.ca.gov/services/MH/Documents/CCPR10-17Enclosure1.pdf.

142 California Department of Mental Health, *Cultural Competence,* http://www.dhcs.ca.gov/services/mh/pages/culturalcompetenceplanrequirements.aspx (last visited May 12, 2015).

services as a result of having limited English-speaking ability and cultural differences."[143] They also must provide "services [that] reflect special need[s] of women from diverse cultural backgrounds."[144] The statute also requires that "individual personal services plans shall ensure . . . age-appropriate, gender-appropriate, and culturally-appropriate services" designed to enable a number of positive psychosocial outcomes for the individual.[145] Thus there are substantial cultural competency requirements for the provision of mental health treatment and associated services built into the mandate of the statute. Their effective implementation presumably will provide necessary cultural competency in the treatment that Laura's Law aims to provide.

PRIVACY OF LAURA'S LAW HEARINGS

Another possible concern with the implementation of Laura's Law is the privacy of its hearings. In order to gauge how the court should decide this issue, we should analyze how current conservatorship court hearings under the Lanterman–Petris–Short Act (also known as "LPS," codified in the California Welfare and Institutions Code) are structured. In the leading case on the privacy of court hearings under LPS, the California Court of Appeal for the Sixth Appellate District granted a writ of mandate in *Sorenson* commanding the Superior Court of Monterey County to vacate and issue a new order denying two newspapers access to the trial records of Christopher Sorenson's LPS conservatorship jury trials.[146] The newspapers' interest emerged after Sorenson was charged with killing his mother, her death occurring eight days after the conclusion of his second LPS trial.[147] The appellate court held that Section 5118 of the Welfare and Institutions Code makes LPS jury trials presumptively non-public.[148] This finding constitutes an exception to California Code of Civil Procedure 124, which states that the sittings of every court must be public.[149]

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143 Cal. Welf. Inst. Code § 5348(a)(2)(B).

144 *Id*. at (a)(2)(I).

145 *Id*. at (a)(4). Such services are qualified "to the extent feasible." *Id*.

146 Sorenson v. Superior Court, 219 Cal. App. 4th 409, 415 (2013).

147 *Id*.

148 *Id*. at 416 ("[T]hey are not special proceedings for which there is a qualified First Amendment right of public access.").

149 Cal. Code Civ. Proc. § 124. There is an exception for family law matters. Cal. Fam. Code § 214.

In *Sorenson,* which applies to LPS court trials,[150] the court reasoned that an LPS jury trial is "not an ordinary civil proceeding," and so the right of access recognized by the California Supreme Court in ordinary civil proceedings did not apply.[151] Further, the court noted, "there is not such a tradition of openness or utility associated with having the proceedings public to support a finding of a constitutional right of access."[152] The lack of historical right of access, added to the plain language of the statute, the fact that the state mandates that all records be confidential, and the fact that the LPS Act itself specified a right to privacy, suggested to the court that there was no public right of access to LPS trials, and that closed proceedings were favored.[153] Utility concerns of "enhancing the conduct, accuracy, and truth-finding function of trials" by making them public were found substantially weaker in the situation where the purpose of the proceeding is the mental health of the individual.[154] Likewise, the therapeutic value of open proceedings regarding criminal matters did not apply here for the appellate court.[155] The court reasoned that although openness would serve the purpose of preventing abuse of judicial power, it could theoretically apply to *any* proceeding, and because Section 5118 allowed for any party to demand that the proceeding be public, it had an "escape valve" that would facilitate that goal if needed.[156] The court buttressed its holding by citing a patient's constitutional right to privacy under the California Constitution, and the protections of the psychotherapist–patient privilege.[157] Finally, and perhaps most strongly, the court noted, "a conclusion that LPS trials are presumptively public proceedings would cause proposed involuntary conservatees to suffer the embarrassment and stigma of public scrutiny to their alleged mental difficulties and to their personal psychiatric records."[158]

All of the court's analysis in *Sorenson* applies directly for Laura's Law hearings. Given that AOT proceedings are relatively recent and are

150 *Sorenson,* 219 Cal. App. 4th at 443.
151 *Id*. at 430–31.
152 *Id*.
153 *Id*. at 433–34.
154 *Id*. at 434–35.
155 *Id*. at 436.
156 *Id*.
157 *Id*. at 444.
158 *Id*. at 448.

decidedly different from an "ordinary civil proceeding," the same analysis should apply here. The fact that Laura's Law is contained, along with the Lanterman–Petris–Short Act provisions, in the California Welfare and Institutions Code argues more strongly for applying the same reasoning. The legal analysis supports finding that Laura's Law hearings should be presumptively private. And as the *Sorenson* court pointed out, privacy of proceedings makes sense as a policy matter. Privacy of proceedings protects the individual from public scrutiny and embarrassment during a time when their illness will be highlighted in detail. The focus during the Laura's Law hearing should be on providing the individual with the needed support and therapeutic coercion to maximize the potential for successful treatment. Outside observers will not add anything toward that goal.

COUNTY SAVINGS FROM IMPLEMENTATION SHOULD BE USED FOR OTHER MENTAL HEALTH SERVICES

One thing on which all sides can agree is that mental health services are currently underfunded. For example, the Behavioral Health Court in San Francisco (a diversionary court that seeks to place people with mental illness who have been arrested for crimes in needed treatment facilities and programs) often faces a lack of currently available space in those programs and facilities. Lack of adequate funding for psychiatric hospital beds, residential treatment facilities, community clinics and other community-based resources is a challenge to both voluntary and involuntary users of such resources.[159] Since 2008, $4.5 billion has been cut from mental health care

[159] Bernard J. Wolfson, *Psych patients pack emergency rooms,* Orange County Register (Oct. 25, 2014), *available at* http://www.ocregister.com/articles/psychiatric-639758-patients-emergency.html ("A severe shortage of psychiatric hospital beds, tight space at residential facilities and less help at community clinics has turned E.R.s into virtual boarding houses for psych patients."); *see also,* E. Fuller Torrey et al., The Shortage of Hospital Beds for Mentally Ill Persons 2, http://www.treatmentadvocacycenter.org/storage/documents/the_shortage_of_publichospital_beds.pdf ("The total estimated shortfall of public psychiatric beds needed to achieve a minimum level of psychiatric care is 95,820 beds."). The California Hospital Association in Sacramento reported, "California's bed rate is an appalling one bed for every 5,975 people, as of 2011, worse than the rest of the nation's average of one bed for every 4,758 people." Joanne Williams, *Feature: Beds of Unbalance,* Pacific Sun, *available at* http://www.calhospital.org/news-headlines-article/feature-beds-unbalance (last visited May 12, 2015).

funding.[160] Currently, nearly half of California counties have no psychiatric inpatient beds available.[161] Given the potential for Laura's Law to save county funds that can be diverted to providing more resources overall,[162] and its ability to bring treatment of severe mental illness further to the forefront of public discourse, it is an important policy that should continue to be carefully implemented.

Overall, successful implementation of Laura's Law will often depend on a strong and sustained good-faith collaboration among the county mental health director, the judge presiding, the treatment team, and local community groups of interest, such as the National Alliance on Mental Illness. Their effective cooperation and coordination is needed to assure that counties implement Laura's Law in a just, fair, and therapeutic manner.

CONCLUSION — IMPLEMENT LAURA'S LAW/AOT

Assisted outpatient treatment offers more than hope. Multiple studies have provided evidence of its effectiveness. Laura's Law, as a version of assisted outpatient treatment, retains all the necessary elements of AOT. The evidence on Laura's Law in particular directly points toward its success in California. There is every reason to believe that Laura's Law has and will work for the small population of people with severe mental illness it targets for treatment. AOT has passed legal muster, and Laura's Law is constitutional as well. Beyond legal tests, Laura's Law is sound public policy that will help reduce the worst outcomes for people with severe mental illness, and provide support and treatment for those who need it most. It is a policy proposal that offers a desperately needed option for families and communities crushed under the heavy financial weight and profoundly heavier emotional and psychological toll of untreated and poorly treated severe mental illness. There are implementation challenges and concerns, as there are with every piece of legislation. But they should not be and are

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160 60 Minutes, *Nowhere to Go: Mentally Ill Youth in Crisis,* Jan. 26, 2014, *available at* http://www.cbsnews.com/news/mentally-ill-youth-in-crisis/.

161 California Healthline, *Report: Calif. Hospitals Lack Beds for Those With Mental Illnesses,* http://www.californiahealthline.org/articles/2014/4/15/report-calif-hospitals-lack-beds--for-those-with-mental-illnesses.

162 Jeffrey Swanson et al., *The Cost of Assisted Outpatient Treatment: Can It Save States Money?,* Am. J. Psychiatry, AIA 1–10 (July 2013).

not a barrier to adopting Laura's Law. It is true that Laura's Law is not a silver bullet that will solve all the challenges faced by people with mental illness and our communities, but it is another tool in the toolbox for our communities to use in fixing our broken mental health system.

* * *

INVERSE CONDEMNATION:

California's Widening Loophole

DAVID LIGTENBERG*

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This paper was awarded second place in the California Supreme Court Historical Society's 2015 CSCHS Selma Moidel Smith Law Student Writing Competition in California Legal History.

* J.D. Candidate, Class of 2016, UC Davis School of Law. Thanks to John Ormonde for his insight and editing thoughtfulness; Toussaint S. Bailey for his introduction to a fascinating legal issue; and my wife, August, for allowing me the hours for research and writing.

INTRODUCTION

In 1789, directly influenced by Thomas Jefferson, France's Declaration of the Rights of Man stated:

> Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights.[1]

Known as the "harm principle" and formalized in 1859 by John Stuart Mill in his seminal work, *On Liberty,* this principle contends that "[t]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[2] Much of civil law, springing from English courts of equity, adheres to this principle: when someone causes another harm, the law should provide a remedy.[3]

It was under color of this principle, in 1879, that California constitutional delegates included a progressive damages clause as a supplement to the takings clause of California's constitution.[4] In the event that a government did not proactively and intentionally "take" private land, but indirectly caused it to be damaged or unusable, the California constitutional delegates felt that

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[1] DECLARATION OF THE RIGHTS OF MAN art. 4 (Fr. 1789); *see also* GREGORY FREMONT-BARNES, ENCYCLOPEDIA OF THE AGE OF POLITICAL REVOLUTIONS AND NEW IDEOLOGIES, 1760–1815, at 190 (2007).

[2] JOHN STUART MILL, ON LIBERTY I.9 (1859), *available at* http://www.econlib.org/library/Mill/mlLbty1.html; *see also* Richard Warner, *Liberalism and the Criminal Law,* 1 S. CAL. INTERDISC. L.J. 39, 39 (1992).

[3] *See* John J. Farley, III, *Robin Hood Jurisprudence: The Triumph of Equity in American Tort Law,* 65 ST. JOHN'S L. REV. 997, 1000–01 (1991).

[4] *See* CAL. CONST. art. I, § 19 (2014).

the interests of private owners warranted a remedy.[5] Perhaps today, this looks like a strange remedy for a situation that appears to fall squarely under the umbrella of tort law. In 1879, however, the doctrine of sovereign immunity shielded the State of California from tort liability — a privilege not waived until 1963 with the enactment of The California Tort Claims Act.[6]

Since its inception, the damages clause has taken on a life of its own through inverse condemnation claims, creating something of a quasi-tort.[7] While possibly appropriate at the time of ratification, such a broad interpretation is inconsistent with California's modern statutory scheme.[8] Furthermore, the modern application of the damages clause has eviscerated what remained of the traditional concept of sovereign immunity doctrine without a clear legislative directive.[9]

If the doctrine of sovereign immunity is to act as a bar for claims against the state, it cannot have the quasi-tort of inverse condemnation drilling a hole directly through its center. When California waived sovereign immunity in 1963 with the passage of the Tort Claims Act, the Legislature struck the proper balance of public accountability and sovereign immunity.[10]

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[5] *See* 3 E.B. Willis & P.K. Stockton, Debates and Proceedings of the Constitutional Convention of the State of California 1190 (1881).

[6] California Tort Claims Act, Cal. Gov't Code §§ 810 *et seq.* (Lexis 2014); *see* Austen L. Parrish, *Avoiding the Mistakes of Terrell R.: The Undoing of the California Tort Claims Act and the Move to Absolute Governmental Immunity in Foster Care Placement and Supervision,* 15 Stan. L. & Pol'y Rev. 267, 281 (2004).

[7] *See, e.g.,* City of Pasadena v. Superior Court, 228 Cal. App. 4th 1228 (2014) (using language from *Albers, Holz, Customer Co.,* and *Regency* to determine an inverse condemnation claim); Regency Outdoor Adver., Inc. v. City of Los Angeles, 39 Cal. 4th 507 (2006) (holding that damage as part of the construction of a public improvement satisfies an inverse condemnation claim); Customer Co. v. City of Sacramento, 10 Cal. 4th 368, 376–80 (1995) (clarifying that just compensation "encompasses special and direct damage to adjacent property resulting from the construction of public improvements"); Holz v. Superior Court, 3 Cal. 3d 296 (1970) (adequately stating a claim for inverse condemnation for damages from construction of a rapid transit system); Albers v. Cnty. of Los Angeles, 62 Cal. 2d 250, 263 (1965) (defining public use as "improvement as deliberately designed and constructed").

[8] *See generally* California Tort Claims Act (allowing tort claims against the government based on legislature-defined parameters).

[9] *See, e.g., Pasadena,* 228 Cal. App. 4th (allowing the possibility of strict liability against the city for damage from a falling tree); *Albers,* 62 Cal. 2d (finding a county liable for property damage resulting from a landslide caused by the construction of a road).

[10] *See* Parrish, *supra* note 6, at 283–87.

Inverse condemnation, on the other hand, provides a remedy that amounts to strict liability against the government without any benefit of legislative gravity or deliberation.[11] Because of the presumption against the waiver of sovereign immunity, courts must be cautious in extending strict liability without a clear directive from the Legislature.[12]

In *City of Pasadena v. Superior Court*,[13] the extremes of inverse condemnation appear writ large, i.e., full-fledged strict liability against the government.[14] That means liability without any need to prove carelessness or fault, a standard usually reserved for "hazardous" activities.[15] Such an extreme standard is an indication that it is time to end the damages clause experiment[16] and to reformulate an appropriate eminent domain standard.

Part I of this article explores the history of eminent domain and how and why California introduced a damages clause to its constitution.[17] Part II tracks and analyzes the modern case law, showing that the current doctrine of inverse condemnation is exactly what the enactors of the damages clause feared that it would become — broad to the point of excess.[18] Part III contrasts the damages clause with the California Tort Claims Act, which is sufficient to render inverse condemnation no longer necessary.[19] Part IV explores the possible legislative and judicial solutions to remedy the loophole in California's sovereign immunity — abolition of the damages clause, judicial overruling of the overbroad case law, or specifying *intentional* damage in application of the damages clause.[20]

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[11] *See Pasadena,* 228 Cal. App 4th at 1234; *Albers,* 62 Cal. 2d at 262.

[12] *Cf.* Peter M. Gerhart, *The Death of Strict Liability,* 56 Buff. L. Rev. 245, 246 (2008) (arguing that strict liability is a "superfluous doctrinal container for addressing non-intentional harms," and "a doctrinal shadow" that should be done away with).

[13] *See generally Pasadena,* 228 Cal. App. 4th (considering whether a street tree, maintained by the city, that fell on a private house during a windstorm may create an action in inverse condemnation).

[14] *See id.*

[15] *See Strict Liability Definition,* BusinessDictionary.com, http://www.businessdictionary.com/definition/strict-liability.html (last visited Jan. 27, 2015).

[16] *See infra* Part II.B.

[17] *See* discussion *infra* Part I.

[18] *See* discussion *infra* Part II.

[19] *See* discussion *infra* Part III.

[20] *See* discussion *infra* Part IV.

I. THE "DAMAGES CLAUSE"

Any child can describe the rank unfairness of having something taken away. And we all know that as one matures, "takings" don't get any sweeter, even when provided with some compensation. Perhaps that explains why eminent domain tends to draw public scrutiny and, often, public ire.[21] The furious legislative scrambling after *Kelo v. City of New London,*[22] probably the most attention-grabbing, modern eminent domain case from the U.S. Supreme Court, evinced the population's demand in this area for transparency and protection.[23] *Kelo* held broadly that so long as a government has a legitimate public purpose, it may exercise its eminent domain power.[24] The Court referenced the "hardship that condemnations may entail," but it also recognized that a state's citizens are free to place further restrictions on the power of their state to "take" property.[25]

As recognized in *Kelo,* states can go beyond the protection of the federal constitution by "carefully limit[ing] the grounds upon which takings may be exercised."[26] In 1870, Illinois did exactly that — providing in the Illinois Constitution that "property could not be taken *or damaged* for public use without just compensation."[27] The State of Illinois thereby enacted the nation's first damages clause.[28] California, along with about half of the other states, soon followed suit.[29] Since then, California's damages clause has blazed a trail of case law leading to the vast expansion of inverse condemnation claims and an unjustified and unintended infringement on the State's sovereign immunity.[30]

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[21] *See, e.g.,* Thomas J. Miletic, Comment, *One Step Forward, Two Steps Back: How California's 2008 Constitutional Amendment Changed the State's Eminent Domain Power,* 39 Sw. L. Rev. 209, 211 (2009) (pointing out how an eminent domain case drew anger and political reaction).

[22] Kelo v. City of New London, 545 U.S. 469 (2005).

[23] *See* Miletic, *supra* note 21, at 211.

[24] *See Kelo,* 545 U.S. at 488–89.

[25] *See id.* at 489.

[26] *Id.*

[27] Ill. Const. Art. I § 15 (2014) (emphasis added).

[28] *See* David Schultz, *Taking of Private Property for Public Use, in* 2A Nichols on Eminent Domain § 6.01 (2014); *see also* Ill. Const. art. II, § 13 (1870).

[29] *Id.*

[30] *E.g.,* City of Pasadena v. Superior Court, 228 Cal. App. 4th 1228, 1234 (2014); Regency Outdoor Adver., Inc. v. City of Los Angeles, 39 Cal. 4th 507, 515–16 (2006);

A. THE HISTORY OF EMINENT DOMAIN

Dutch natural law philosopher Hugo Grotius coined the phrase "eminent domain" in the early 1600s to describe the inherent power of governments to take property.[31] British common law firmly established this power, which immigrated to the United States with the colonists.[32] Well before ratification of the Constitution, colonial governments routinely took private property.[33]

As ratified, the Fifth Amendment states, "nor shall private property be taken for public use, without just compensation."[34] This "just compensation requirement," which goes hand in hand with the modern understanding of eminent domain, was practically nonexistent in colonial America.[35] In fact, no state pursued the requirement's inclusion in the ratified Bill of Rights.[36] The just compensation requirement was proposed by James Madison in order to hinder the ability of the national government to take property wantonly, as was routinely done throughout the colonies.[37] "The rights of property," he wrote, "are committed into the same hands with the personal rights. Some attention ought, therefore, to be paid to property in the choice of those hands."[38] Thus, given the common law background, the Fifth Amendment does not create or grant the power of eminent domain — an inherent power of government — but limits such power by requiring just compensation.[39]

In the following century, the courts applied the just compensation clause restrictively and for the most part limited it to straightforward eminent domain proceedings.[40] The concept of inverse condemnation,

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Customer Co. v. City of Sacramento, 10 Cal. 4th 368, 376–77 (1995).

31 Daniel P. Dalton, *A History of Eminent Domain,* Pub. Corp. L.Q., Fall 2006 1, 1.

32 *Id.*

33 *Id.* at 3.

34 U.S. Const. amend. V.

35 *Id.*

36 William M. Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment,* 94 Yale L.J. 694, 708 (1985).

37 *See* Dalton, *supra* note 31, at 4.

38 The Federalist No. 54 (James Madison).

39 *See* Peter J. Kulick, *Rolling the Dice: Determining Public Use in Order to Effectuate a "Public-Private Taking" — A Proposal to Redefine "Public Use",* 2000 L. Rev. Mich. St. U. Det. C.L. 639, 644 (2000).

40 *See* Jed Rubenfeld, *Usings,* 102 Yale L.J. 1077, 1082 (1993).

however, was created to allow compensation under a unique situation: when the government took property but failed to initiate the proper proceedings.[41] Through the nineteenth century, inverse condemnation suits arose occasionally, but courts decided them narrowly along strict principles, namely limiting a "taking" to "the actual physical appropriation of property or a divesting of title."[42]

B. THE PURPOSE OF THE "DAMAGES CLAUSE"

In 1879, just compensation for the governmental taking of land in California, as at common law, was restricted to a physical invasion of property.[43] The Fourteenth Amendment incorporates the Fifth Amendment protections under the takings clause and applies them to the states.[44] As mentioned, however, states can go beyond the federal protections.[45] The California Constitutional Convention of 1878–1879 did exactly that by broadening the reach of the just compensation clause, enacting article 1 section 19 of the California Constitution which reads in relevant part: "Private property may be taken or damaged for a public use and only when just compensation . . . has first been paid to . . . the owner."[46] The addition is referred to as the "damages clause."[47]

At the time of the damages clause's enactment in 1879, there were concerns among the legislators regarding its potential application.[48] Delegate Samuel M. Wilson of San Francisco pointed out that the Committee of the Whole had thoroughly discussed the question and rejected the addition.[49] Unfortunately, the records of the Committee of the Whole's debate (and

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41 *See id.*

42 *Id.*

43 Customer Co. v. City of Sacramento, 10 Cal. 4th 368, 379 (1995).

44 *See, e.g.,* Agins v. Tiburon, 447 U.S. 255, 257 (1980); Dolan v. City of Tigard, 512 U.S. 374, 406 (1994).

45 *See* Kelo v. City of New London, 545 U.S. 469, 489 (2005).

46 CAL. CONST. art. I § 19 (2014).

47 *See Customer Co.,* 10 Cal. 4th at 379; *see also* Schultz, *supra* note 28.

48 WILLIS & STOCKTON, *supra* note 5, at 1190 (debating the merits of including "or damaged" in the eminent domain provision).

49 *Id.; see generally Inventory of the Working Papers of the 1878–1879 Constitutional Convention,* CAL. STATE ARCHIVES 53 app. (1993), https://www.sos.ca.gov/archives/collections/1879/archive/1879-finding-aid.pdf (listing the full names of the constitutional delegates).

therefore the exact rationale for that conclusion) do not exist, as the Constitutional Convention voted on the sixth day of the convention against employing a shorthand reporter.[50]

Some of the indicated reasons for enacting a damages clause included protecting citizens against situations where state action might damage a home by public use or economic change rather than physical damage.[51] Delegate Wilson recognized the danger of a broad interpretation of the damages clause:

> Now, to add this element of damage is to enter into a new subject. It is opening up a new question which has no limit. You take the case of street improvement, and this question of damage will open up a very wide field for discussion. . . . I regard it as very dangerous to undertake to enter into a new field.[52]

These delegates clearly recognized that inclusion of a damages clause could open up a new and sweeping area of law far beyond the justice that they could hope to bring about.[53]

Delegate John S. Hager, a proponent of the damages clause, cited a particular situation in San Francisco where the Legislature authorized the cutting of a street immediately adjacent to and between houses.[54] The construction project left houses on either side of the street high above the street level and in danger of sliding off those newly made cliffs.[55] Delegate Morris M. Estee further explained that the houses were "absolutely destroyed, and yet not a foot taken."[56] In light of this example, Delegate Estee concluded: "when a

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[50] *See Constitutional Convention: Sixth Day,* The Sacramento Bee, Oct. 4, 1878, (Second Edition) (While some delegates stood up "manfully" for the reporters and printers, others refused to "rob the people by having a mass of useless trash written and printed." Delegate Dowling of San Francisco, "in a fiery, energetic manner," added that he would not want to "fan[] the vanity of some long-winded and eloquent members by having their speeches printed.")

[51] Willis & Stockton, *supra* note 5, at 1190.

[52] *Id.*

[53] *See id.*

[54] *Id.; see generally Inventory of the Working Papers, supra* note 49 (listing the full names of the constitutional delegates).

[55] Willis & Stockton, *supra* note 5, at 1190.

[56] *Id.; see generally Inventory of the Working Papers, supra* note 49 (listing the full names of the constitutional delegates).

man's property is damaged it ought to be paid for. . . . I think it is the best we can get."[57] At a time when no other options for compensation existed, that might very well have been true. Hence, the amendment passed 62 to 28.[58]

In opposition, Delegate Wilson pointed out that the proponents' intentions were totally unfounded on any hard evidence and their damages clause would be little more than an experiment,[59] an experiment that other states were already trying with, as yet, no conclusive results.[60] It would take time to see whether such an addition brought about the justice hoped for or whether it opened the doors for something totally unintended.[61] Delegate Wilson concluded ominously, "In twenty years from now our children can refer to them and if they have worked well, that will be an argument."[62]

As the damages clause's effect on inverse condemnation actions has grown, it is time to consider which side was correct in 1879. As Justice Brandeis stated in 1932, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[63] As far as the coupling of inverse condemnation and the damages clause, it is time to end the experiment.

II. GROWTH OF A LOOPHOLE: THE CURRENT STATE OF INVERSE CONDEMNATION IN CALIFORNIA

Six years after the ratification of the damages clause, the Supreme Court of California considered it for the first time in *Reardon v. San Francisco*.[64] The court began by considering the case's outcome without applying the new constitutional amendment.[65] They remarked that the law was "well settled,"

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[57] Willis & Stockton, *supra* note 5, at 1190.

[58] *Id.*

[59] *See id.*

[60] *See id.*

[61] *See id.*

[62] *Id.*

[63] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

[64] Reardon v. San Francisco, 66 Cal. 492, 501 (1885).

[65] *Id.* at 497–98.

and that municipal work done lawfully incurs no liability.[66] The Court posited that the traditional doctrine, while appearing unjust, "rests upon the soundest legal reason."[67] While improvements are ultimately the responsibility of the state when made for the public trust, "it is the prerogative of the state to be exempt from coercion by suit, except by its own consent."[68] *Reardon* recognized that any recovery in such a situation would be, by definition, a direct contradiction of sovereign immunity.[69] In sum, the Court determined that the new damages clause presented such a waiver.[70]

The Court then shifted focus to determine what exactly the delegates intended the new "damages" to include.[71] After all, it must mean something more than what the takings clause had already protected: "it will occur to any one reflecting on the import of the clause, that if it is not an additional guaranty to the common and usual one, its insertion was idle and unmeaning."[72] At common law, there was a high burden on the complaining party because the property owner yields his right "to the promotion and advancement of the public good."[73] California's damages clause, however, failed to define the causal requirement.[74] In addition, if the standard were to mirror that of recovery from private parties at common law, it would only allow recovery for negligence — damage done with "usual care and skill" being "*damnum absque injuria*," or damage that does not violate a legal right.[75] The court determined that the damages clause does not simply mirror private rights of recovery at common law.[76] It found that the clause provides compensation for an owner "where the damage is directly inflicted, or inflicted by want of care and skill, as where the damages

66 *Id.* at 497.
67 *Id.* at 498.
68 *Id.*
69 *See id.*
70 *See id.* at 500–01.
71 *Id.* at 501.
72 *Id.* at 502.
73 *Id.* at 504.
74 *See id.*
75 *Id.; see Damnum Absque Injuria Definition,* Merriam–Webster, http://www.merriam-webster.com/dictionary/damnum%20absque%20injuria (last visited Oct. 19, 2014).
76 *Reardon,* 66 Cal. at 501.

are consequential, and for which damages he had no right of recovery at the common law."[77]

The rule set forth in *Reardon* proved the most prolific interpretation of the new damages provision in the following years.[78] In 1965, *Albers v. County of Los Angeles*[79] cited *Reardon* in a holding that would affect inverse condemnation suits in California to the present day.[80] Discussing the construction of public improvements, the Court held that any physical injury to real property "proximately caused by the improvement as deliberately designed and constructed" warranted liability, no matter whether it was foreseeable.[81] The Court minimized reasons for opposing this formulation and decided that our system does not give enough deference to individuals as opposed to communities.[82] For their sake, the government should pay for property "which it destroys or impairs the value."[83] Thus, *Albers* created a general rule of strict liability that continues to persist for inverse condemnation damages.[84] Interestingly, while *Albers* provides the applicable rule, the case itself never rises to naming it "strict liability."[85] Rather, in *Akins v. State,*[86] the court introduces the term by closely analyzing the rule set forth in *Albers* and referring to it as "a general rule of strict liability."[87]

In 1941, an important and controversial exception to this strict liability rule originated in *Archer v. Los Angeles*.[88] *Archer* narrowed the *Reardon* rule, finding that the damages clause did not create an open bill to recover

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77 *Id.* at 505.

78 *See* Albers v. Cnty. of Los Angeles, 62 Cal. 2d 250, 257 (1965). For cases between *Reardon* and *Albers* that followed *Reardon's* rule, see also, e.g., *Youngblood v. Los Angeles Cnty. Flood Control Dist.,* 56 Cal. 2d 603, 608 (1961); *People v. Symons,* 54 Cal. 2d 855, 862 (1960); *Bauer v. Cnty. of Ventura,* 45 Cal. 2d 276, 283 (1955); *Clement v. State Reclamation Bd.,* 35 Cal. 2d 628, 636 (1950).

79 *Albers,* 62 Cal. 2d. 250.

80 *Id.* at 257.

81 *Id.* at 263–64.

82 *See id.* at 263.

83 *Id.*

84 *See* Akins v. State, 61 Cal. App. 4th 1, 20 (1998).

85 *See generally Albers,* 62 Cal. 2d (abstaining from use of the term "strict liability" in the entirety of the opinion).

86 61 Cal. App. 4th 1.

87 *Id.* at 20.

88 19 Cal. 2d 19 (1941).

from the government.[89] The Court reasoned that the damages clause did not create a new cause of action "but [gave] a remedy for a cause of action that would otherwise exist,"[90] meaning, the Court would assess the state's liability in the same manner as the liability of a similarly situated private person.[91] Thus, under *Archer,* parties suing government entities "have no right to compensation under article I, section 14, if the injury is one that a private party would have the right to inflict without incurring liability."[92] Later, *Belair v. Riverside County Flood Control Dist.* pointed out that *Archer* was little more than a narrow exception to the *Albers* rule.[93] The Court recognized that "different policy considerations . . . inform the public and the private spheres."[94] It held that within *Archer*'s exception for "privileged activity," the government entity "must at least act reasonably and non-negligently" to avoid liability — seemingly disregarding the strict liability standard.[95]

Modern cases have further broadened the recovery rights under the doctrine of inverse condemnation. Considering the judicial history of the damages clause in inverse condemnation actions, courts have summarized that it "encompasses special and direct damage to adjacent property resulting from the construction of public improvements."[96] When the incidental consequence of deliberate government action is physical injury, the damaged or destroyed property can be considered "appropriated for 'public use.'"[97] In order to recover in such a situation, the defendant government must have participated in "planning, approval, construction, or operation of a *public project or improvement* which proximately caused injury to plaintiff's property."[98]

This standard presents a substantial open issue in modern inverse condemnation proceedings: What exactly is a "public project"?[99] In 2006, in

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89 *See id.* at 24.

90 *Id.*

91 *See id.*

92 *Id.*

93 *See* Belair v. Riverside Cnty. Flood Control Dist., 47 Cal. 3d 550, 563 (1988).

94 *Id.* at 565.

95 *Id.*

96 Customer Co. v. City of Sacramento, 10 Cal. 4th 368, 380 (1995).

97 *Id.* at 415 n.7 (Baxter, J., dissenting) (emphasis added).

98 Wildensten v. E. Bay Reg'l Park Dist. 231 Cal. App. 3d 976, 979–80 (1991) (emphasis added).

99 *E.g.,* City of Pasadena v. Superior Court, 228 Cal. App. 4th 1228, 1235 (2014); Regency Outdoor Adver., Inc. v. City of Los Angeles, 39 Cal. 4th 507, 522 (2006).

Regency Outdoor Advertising, Inc. v. City of Los Angeles,[100] the Court's ruling depended on whether trees planted by the city along a public road were a "public Project."[101] Regency, an owner of roadside billboards, brought an inverse condemnation action against Los Angeles after the city planted palm trees that blocked the view of some of its billboards.[102] The Ccourt found that "[i]f [a] street is improved so as to be more useful, or ornamented so as to be more beautiful, the public is benefited generally."[103] Further, it found that "[t]he planting of trees along a road is, in general, fully 'consistent with [the road's] use as an open public street,' and in fact may enhance both travel and commerce along the street."[104] The Court concluded that the city was not liable because Regency had no right to visibility, but it found that the planting of trees still amounted to a public work.[105]

As mentioned, *City of Pasadena v. Superior Court* demonstrates what has become a broad and problematic interpretation of the damages clause.[106] In *Pasadena,* a severe windstorm toppled a tree lining a public street, damaging the home of James O'Halloran.[107] His insurance company brought an inverse condemnation action, requiring proof that the tree was part of a public improvement and that it proximately caused the damage.[108] *Pasadena* relied heavily on those statements in *Regency* where the Court found that city-planted trees were part of a public improvement.[109] In light of *Regency,* the *Pasadena* court concluded that whether trees are a public improvement was a triable issue of fact.[110]

After determining that the tree could amount to a public improvement, the court turned its attention to proximate cause and decided that it was not relevant to their review because the appellant failed to preserve the issue.[111]

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100 *Regency,* 39 Cal. 4th 507.
101 *Id.* at 522.
102 *Id.* at 512.
103 *Id.* at 522.
104 *Id.*
105 *See id.*
106 *See supra* notes 13–14 and accompanying text.
107 *Id.* at 1231.
108 *Id.* at 1236.
109 City of Pasadena v. Superior Court, 228 Cal. App. 4th 1228, 1235 (2014).
110 *Id.* at 1232, 1235.
111 *Id.*

Nonetheless, the court took the opportunity to clarify the *Albers* test, stating that "injury . . . proximately caused by the improvement as deliberately designed and constructed" is sufficient for recovery.[112] Under the test, if a public improvement is "deliberately designed," it is the proximate cause of all damage incident to its existence.[113]

Through this progression of the case law, inverse condemnation has grown to strict liability against government entities for any damage caused by a public work.[114] Society should encourage cities to make safe and non-negligent public improvements; currently the law is doing otherwise. In sum, under the current law, cities should think twice before planting reasonably safe trees.

III. INVERSE CONDEMNATION VERSUS THE CALIFORNIA GOVERNMENT TORT CLAIMS ACT

The enactment of the damages clause clearly indicates the value that the delegates of the 1878–79 California Constitutional Convention attached to private property.[115] Because there was no possibility for a tort claim at the time, this seemed an appropriate and narrow way to mete out justice.[116] Since *Albers,* however, far from simply providing landowners the right to recover for governmentally damaged property (as Delegate Hager's San Francisco example suggested), the damages clause has reached beyond the traditional bounds of tort law.[117] The negligence principle dominates tort law and does the work of asking questions of reasonability.[118] Those questions function as a safeguard for defendants — after all, it makes sense that a person should not be liable in a situation in which

112 *Id.* (quoting Albers v. Cnty. of Los Angeles, 62 Cal. 2d 250, 263 (1965)).

113 *Id.*

114 *See id.;* Akins v. State, 61 Cal. App. 4th 1, 20 (1998); *Albers,* 62 Cal. 2d at 263.

115 *See supra* Part I.B.

116 *See* Willis & Stockton, *supra* note 5, at 1190.

117 *See generally supra* notes 54–55 and accompanying text (summarizing Delegate Hager's point); *Albers,* 62 Cal. 2d (broadening inverse condemnation claims to strict liability).

118 *See* Gerhart, *supra* note 12, at 246.

they acted without malice or without carelessness.[119] Within the realm of inverse condemnation, strict liability robs governmental defendants of those safeguards.[120]

Even more glaring is the issue of justice. While justice demanded a remedy for property owners in 1879, this was largely because no other option existed and the value of personal property was great enough to create one.[121] Today, another remedy does exist, and its contours are more reasonably measured (by standard negligence principles) to ensure just recovery.[122]

A. SOVEREIGN IMMUNITY

Whether recovery comes by tort or by inverse condemnation, the traditional obstacle for such claims was the state's sovereign immunity. The doctrine of sovereign immunity derives from the British prohibition on suits against the crown.[123] While the colonies differed in their adoption of the doctrine, the issue was of enough concern that it sparked extensive debate concerning its inclusion in the Constitution.[124] At the framing, the degree to which the Constitution, specifically article III, acknowledged sovereign immunity remained uncertain.[125] The Supreme Court's 1793 decision in *Chisholm v. Georgia*[126] resolved some of the uncertainty.[127] In *Chisholm,* drawing from language of article III, the Court allowed a South Carolina citizen to file suit against the State of Georgia.[128] The decision provoked outrage in Congress — it overturned the result with passage of the Eleventh Amendment less than three weeks later.[129]

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119 *See generally* William L. Prosser, Handbook of the Law of Torts 4 (1941) (pointing out that torts include direct interferences with the person and various forms of negligence).

120 *See supra* Part II.

121 *See* Willis & Stockton, *supra* note 5, at 1190.

122 *See* California Tort Claims Act, Cal. Gov't. Code § 810 (2014).

123 *See* William Blackstone, Commentaries *244.

124 Katherine Florey, *Insufficiently Jurisdictional: The Case Against Treating State Sovereign Immunity as an Article III Doctrine,* 92 Calif. L. Rev. 1375, 1385–86 (2004) [hereinafter *Insufficiently Jurisdictional*].

125 *See id.* at 1386.

126 2 U.S. 419 (1793).

127 *See* Florey, *Insufficiently Jurisdictional, supra* note 124, at 1386.

128 *See id.*

129 *See id.* at 1386–87.

The Supreme Court had little occasion to consider the Eleventh Amendment's language, "that no state shall be liable to be made a party defendant in any of the judicial courts . . . at the suit of any person or persons," until the late nineteenth century.[130] In the definitive case of the time, and since, *Hans v. Louisiana*[131] held in 1890 that the doctrine of sovereign immunity completely barred suits by private citizens against states.[132] While some authority has eroded the absolute nature of the *Hans* decision,[133] *Seminole Tribe v. Florida* reaffirmed its formulation of state sovereign immunity in 1996.[134] The Supreme Court has thus repeatedly affirmed, in some form or another since the adoption of the Constitution, that states have inherent immunity from suit by private citizens.[135] In a situation where the government damaged the property of a private owner, sovereign immunity would allow absolutely no recourse.[136]

The ideals of democracy do not seem to fit well with that exclusion, based heavily on the conception that the state, like the British king, was technically incapable of doing any wrong.[137] Called the "sovereign-essentialist" view of sovereign immunity, this is an open admission that this doctrine, in many respects, is basically equivalent to the conceit that the sovereign is above the law.[138] While this axiom as a historical justification

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130 *See id*. at 1387 (quoting U.S. Const. amend. XI).

131 Hans v. Louisiana 134 U.S. 1 (1890).

132 *See* Florey, *Insufficiently Jurisdictional, supra* note 124, at 1388–89.

133 *See generally* Ex parte Young, 209 U.S. 123 (1908) (holding that state officials may be sued in federal court for injunctive relief in order to prevent a continuing violation of federal law).

134 *See* Florey, *Insufficiently Jurisdictional, supra* note 124, at 1389 (citing Seminole Tribe v. Florida, 517 U.S. 44 (1996)).

135 *E.g., Seminole Tribe,* 517 U.S. at 54; *Hans,* 134 U.S. at 10; Chisholm v. Georgia, 2 U.S. 419, 452 (1793) (holding that states have such immunity but have waived it as a concession to the federal government).

136 *See, e.g.,* U.S. Const. amend. XI ("no state shall be liable . . . at the suit of any person or persons"; *Seminole Tribe,* 517 U.S. (affirming that suits against unconsenting states are barred by the Constitution); *Hans,* 134 U.S. (holding that the Supreme Court cannot exercise jurisdiction over any case in which a state is sued).

137 *See* William Blackstone, Commentaries *237; Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine,* 43 Wake Forest L. Rev. 765, 785 (2008) [hereinafter *Penumbras*].

138 *See* Florey, *Penumbras, supra* note 137, at 786.

for sovereign immunity seems to have been generally accepted, its transition from king's prerogative to the American state is without "adequate explanation."[139]

A second explanation for the necessity of state sovereign immunity is that the state, the authority that creates the law, cannot be subject to that same law.[140] This theory is attributed to Justice Holmes who advocated its practical rationale.[141] However, commentators have claimed that the rationale is "legally and historically unsound," not to mention inappropriate "when every civilized community . . . should by statute consent to be sued and to admit its pecuniary responsibility for the torts of its agents."[142]

In that vein, while "[t]he Government is not liable to suit unless it consents thereto,"[143] the ideals of justice and democracy allow (and possibly encourage) government consent. For example, people will want a possibility of recovery if the government damages their property and are therefore more likely to vote in favor of candidates and measures that allow that recovery. As the logic goes, government exists for the benefit of the whole public and it is reasonable to expect that the whole public bear some of the burden of the injuries wrongly inflicted by the government.[144] Thus, it might be reasonable to expect the government to waive its sovereign immunity in situations of great public interest — like the damage of private property.[145] Of course, like much of the law, the manner in which this is accomplished spans a broad spectrum of possibilities, some more problematic and unjust than others.

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139 Edwin M. Borchard, *Governmental Responsibility in Tort, IV,* 36 Yale L.J. 1, 33 (1926).

140 *See id.* at 17.

141 *See* Edwin M. Borchard, *Governmental Responsibility in Tort, V,* 36 Yale L.J. 757, 757 (1927).

142 *Id.* at 757–58.

143 Price v. United States, 174 U.S. 373, 375–76 (1899).

144 *See* Parrish, *supra* note 6, at 282. Ironically, *Pasadena v. Superior Court*'s original plaintiff was the insurance company covering the damaged home. *See* 228 Cal. App. 4th 1228, 1228 (2014). So the argument for the spreading of the burden of the injuries is something of a moot point when insurance exists to cover them. While this argument would carry more weight for an uninsured homeowner, the reality that the insurance company can wield this strict liability against governments is significantly more ominous.

145 *E.g.,* California Tort Claims Act, Cal. Gov't. Code §§ 810 *et seq.* (Lexis 2014).

B. CALIFORNIA GOVERNMENT TORT CLAIMS ACT

The California delegates clearly considered private property important enough in 1879 for California to waive sovereign immunity in favor of recovery for intentional takings and damage.[146] Other types of injuries were not within the waiver; for example, personal injuries caused by the state such as medical negligence in a state hospital or defamation by public school district employees.[147] It was not until 1963 that the state formally recognized that other harms caused by the government merited similar protections to property.[148]

Two separate California Supreme Court decisions in 1961 paved the way for this change by effectively abolishing sovereign immunity by judicial decision.[149] *Muskopf v. Corning Hospital District*[150] addressed the question of sovereign immunity head-on when the plaintiff argued that the doctrine should be discarded.[151] The plaintiff filed suit against the hospital district, claiming that the hospital's negligence resulted in further injury of her already injured hip.[152] The hospital district demurred on the ground that it was immune as a state agency exercising a governmental function.[153] The trial court sustained the demurrer.[154] Finding injustice, the California Supreme Court discarded the traditional sovereign immunity doctrine, calling it "an anachronism, without rational basis, [that] has existed only by the force of inertia."[155]

In *Lipman v. Brisbane Elementary School District,*[156] the Court made a similar holding.[157] Following *Lipman,* the California Legislature enacted a moratorium statute suspending the effects of both decisions while they

146 *See* Willis & Stockton, *supra* note 5, at 1190.

147 *See* Lipman v. Brisbane Elementary Sch. Dist., 11 Cal. Rptr. 97, 98 (1961); Muskopf v. Corning Hosp. Dist., 11 Cal. Rptr. 89, 90 (1961).

148 *See* Parrish, *supra* note 6, at 281.

149 *See id.* at 281–82.

150 *Muskopf*, 11 Cal. Rptr. 89.

151 *See id.* at 90.

152 *See id.*

153 *See id.*

154 *See id.*

155 *Id.* at 92.

156 11 Cal. Rptr. 97, 98 (1961).

157 *See id.* at 101.

studied whether the government should indeed waive sovereign immunity in the context of valid tortious injury caused by the state.[158] The Legislature appointed a Law Revision Commission and, while the Commission acknowledged the need to limit governmental liability, it recognized the harshness and injustice of absolute immunity.[159] It offered that justice demanded compensation for injuries that were the result of wrongful or negligent acts or omissions, regardless of whether the government was responsible for such actions.[160] Accordingly, they recommended the Legislature follow the lead of the California Supreme Court in *Muskopf* and *Lipman* and abolish sovereign immunity.[161]

The abolition and resulting structural change of this decree stirred up significant policy debates.[162] Arguments against liability for tort focused on separation of powers and the handicapping of governmental actors for fear of liability.[163] On the other side, liability could also deter negligent activity and "manifestly" create fairness by eliminating a governmental "license to harm."[164] The Legislature balanced these considerations with the passage of the California Tort Claims Act,[165] though favoring liability over immunity.[166] The Act provides that "liability for resulting harm is the rule, and immunity is the exception,"[167] and it advances two theories of liability.[168] Government actors may be either directly liable for failing to discharge a mandatory duty or derivatively liable for the acts or omissions of their employees.[169]

Recalling the initial question — to what extent does the California Tort Claims Act provide relief for damage to private property? — The government entity does not damage property by failing to discharge a mandatory

158 *See* Parrish, *supra* note 6, at 282.
159 *See id.*
160 *See id.*
161 *See id.* at 282–83.
162 *See id.* at 283.
163 *See id.* at 285–86.
164 *See id.* at 286–87.
165 Cal. Gov't Code §§ 810 *et seq.* (Lexis 2014).
166 *See id.* at 287.
167 *Id.* (quoting Scott v. Cnty. of Los Angeles, 32 Cal. Rptr. 2d 643, 652 (1994))
168 *Id.* at 288.
169 *Id.*

duty, and one cannot assert a negligence cause of action directly against a government entity.[170] Instead, one can only sue the government by way of the negligent acts or omissions of governmental employees.[171] The Act provides that their government employers are liable under the doctrine of *respondeat superior* for negligent action within the scope of their employment.[172] Thus, general tort law considerations such as the duty of care — which contains the requirement of foreseeability — define liability under the California Tort Claims Act.[173]

C. COMPARISON OF INVERSE CONDEMNATION AND GOVERNMENT TORT CLAIMS

Liability differs under the laws of inverse condemnation and Government Tort Claims. The first difference comes in the form of governmental protections in the California Tort Claims Act.[174] After weighing the policy concerns surrounding the waiver of sovereign immunity, the Legislature allowed suit against the government for tortious acts but reserved certain immunities and protections for the state.[175] In this way, maintaining some thoughtful immunity seeks to protect government's ability to pursue public works without the chilling effect of possible strict liability.[176] Comparatively, courts ruling on inverse condemnation actions need not consider such immunities because it supersedes them.[177]

A second difference comes from the fact that one remedy is grounded in a statute and the other in the California Constitution. Addressing the Constitutional right directly, *Rose v. State* points out that it is "elementary that the legislature by statutory enactment may not abrogate or deny

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170 *See* Arvo Van Alstyne updated by John P. Devine, *General Principles of Public Entity and Public Employee Liability, in* California Government Tort Liability § 9.50 (4th ed. 2014) [hereinafter *Public Liability*].

171 *See id.*

172 *See id.* at § 9.7; *see also* Gov't § 815.2(a).

173 *See* Van Alstyne, *Public Liability, supra* note 170,at § 9.50.

174 *See* Van Alstyne updated by John P. Devine, *General Immunities of Public Entities and Employees, in* California Government Tort Liability § 10.1 (4th ed. 2014).

175 *See, e.g.,* Parrish, *supra* note 6, at 287–88 (mentioning public employee discretionary immunity and alluding to other "strictly construed" governmental immunities).

176 *See id.* at 285.

177 *See* Van Alstyne, *Public Liability, supra* note 170, at § 9.62.

a right granted by the Constitution."[178] In that vein, "the framers of the Constitution did not intend to grant a right which the legislature by its refusal or neglect to enact proper remedial machinery therefor might take away or deny."[179]

As far as similarities, both causes of action require "proximate causation" as one of their elements.[180] However, inverse condemnation has no requirement for breach of a standard of care or foreseeability.[181] "Thus *any* actual physical injury to real property proximately caused by a public improvement as deliberately designed and constructed is compensable [in inverse condemnation]."[182]

Inverse condemnation actions apply to considerably more specific situations than Government Tort Claims, yet policy considerations behind them are practically indistinguishable.[183] Nevertheless, courts are careful to distinguish between them in their decisions. *Pac. Bell v. City of San Diego*[184] points out the "public use" language in the Constitution as the major difference,[185] that is, "if the injury is a result of dangers *inherent in the construction of the public improvement* as distinguished from dangers *arising from the negligent operation of the improvement*."[186] The Court provides an example from a case involving flooded property.[187] If an act like forgetting to close a sluice gate damaged the property, that act would amount to negligence.[188] If a deliberate act carried out with the purpose of fulfilling a public object or project, like raising a ditch bank, caused

178 123 P.2d 505, 513 (1942).

179 *Id.*

180 Van Alstyne, *Public Liability, supra* note 170, at § 9.62.

181 *See* Aetna Life & Cas. Co. v. City of Los Angeles, 216 Cal. Rptr. 831, 835 (1985) (citing *Albers*).

182 *Id.*

183 *See, e.g.,* Albers v. Cnty. of Los Angeles, 62 Cal. 2d 250, 263–64 (1965) (applying inverse condemnation analysis to public works as deliberately designed and constructed); Van Alstyne, *Public Liability, supra* note 170, at § 9.50 (indicating that the Act applies to situations of governmental employee negligence).

184 96 Cal. Rptr. 2d 897 (Cal. Ct. App. 2000).

185 *Id.* at 905.

186 *Id.* (quoting *House v. L.A. Cnty. Flood Control Dist.,* 153 P.2d 950, 956 (Cal. 1944) (Traynor, J., concurring) (italics in original)).

187 *Id.*

188 *Id.*

the damage, that act would fit the scope of inverse condemnation.[189] "The damage to property [in the flood scenario] resulted not from immediate carelessness but from a failure to appreciate the probability that, functioning as deliberately conceived, the public improvement as altered and maintained would result in some damage to private property."[190] In other words, inverse condemnation only applies to situations where public works damage private property without any negligence.

1. Discarding Mens Rea

A fair counterargument points out that these two legal avenues necessarily address distinct legal situations. If inverse condemnation and Government Tort Claims actually perform two distinct functions, it still begs the question whether the older protection (inverse condemnation) is still necessary in a society that allows tort claims against the government. Even if these two methods for recovery occupy their own unique situations, the problem is that inverse condemnation has run amok with strict liability. *Pac. Bell's* reasoning points to inverse condemnation's appropriateness because it functions in situations of "a failure to appreciate the probability that, functioning as deliberately conceived, the public improvement as altered and maintained would result in some damage to private property."[191] According to the Court, damage resulting from negligence has no place in an inverse condemnation proceeding.[192]

This distinction only makes sense as long as the inverse condemnation occurs as "a deliberate act."[193] The government must have intended to do or create something and then gone about its implementation, thus fulfilling both "deliberate" and "act." Similarly, the 1879 delegates referenced a deliberate act — the grading of a street that rendered adjacent property worthless — as impetus for the damages clause in the first place.[194] However, in inverse condemnation, this deliberate act is not the same as a *mens rea* —

189 *See id.*

190 *Id.* (italics omitted).

191 *Id.* (quoting *Customer Co. v. City of Sacramento,* 10 Cal. 4th 368, 382 (1995)).

192 *See id.*

193 *See id.*

194 *See* Willis & Stockton, *supra* note 5, at 1190.

the intention to do wrong or to knowingly cause harm.[195] In contrast, some courts find that the *mens rea* required for a valid inverse condemnation action is "a failure to appreciate the probability that [the action] would result in some damage."[196] Thus, whenever the government acts intentionally, although non-negligently, it runs the risk of incurring strict liability under inverse condemnation.

Interpreting the cause of action to dispense with a *mens rea* requirement runs contrary to much of the legal system.[197] "[*Mens rea*] is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."[198] Courts should dispense with the requirement of *mens rea* only when there is "a clear legislative intention to do so."[199]

Such disregard of any *mens rea* requirement remains problematic in an inverse condemnation setting because, while those interpretive standards apply specifically to situations of strict liability, they also confine themselves to criminal law.[200] Not to mention, while exceptions are rare, they are restricted to " 'public welfare offenses', i.e., statutes whose purpose is regulation of 'industries, trades, properties or activities that affect public health, safety or welfare.' "[201] Thus, while inverse condemnation now amounts to strict liability, its being a civil cause of action means that *mens rea* is not necessarily an assumption of its construction. Even if that were the case, it would likely fall under the exception of "public welfare offenses," considering its strong public motive to protect private property.

2. The Effect of Strict Liability

Another counterargument reasons that the delegates intended whatever strong and broad protection for private property that arose from the damages clause. Whether or not the framers intended strict liability with no *mens rea* is a hard argument to make, given the little history left to attest

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195 *See Mens Rea Definition,* Merriam–Webster, http://www.merriam-webster.com/dictionary/mens%20rea (last visited Dec. 17, 2014).

196 *Pac. Bell,* 96 Cal. Rptr. 2d at 905 (quoting *Customer Co.,* 10 Cal. 4th at 382).

197 *See* United States v. Launder, 743 F.2d 686, 689 (9th Cir. 1984).

198 Morissette v. United States, 342 U.S. 246, 250 (1952).

199 *Launder,* 743 F.2d at 689.

200 *See id.*

201 *Id.*

to their intentions. That still leaves the question of whether a negligence regime would better support the justice they had in mind.[202] After all, the only intention that remaining history leaves for certain is that delegates seemed to find the social value of private property high enough to suspend sovereign immunity to protect it.[203]

Strict liability casts a wider net than ordinary negligence because it makes the actor responsible for all harm it proximately causes.[204] Even when the actor achieves a reasonable amount of care in the action, resulting damage falls within the scope of liability.[205] The goal in administering this type of liability is to impose an economic incentive to encourage safety through responsibility.[206] For the most part, the law confines strict liability torts to "ultrahazardous activities."[207]

Similarly, under the current law, inverse condemnation protects citizens of the state from property damage caused by non-negligent government actions.[208] Granted, if the government is engaging in inherently dangerous activities, perhaps it should be subject to a strict liability standard — but inverse condemnation proceedings can result for liability far beyond actions that are inherently dangerous.[209]

Even avoiding that implication, strict liability applies to situations where the risks created are so great that no reasonable care could make them unavoidable.[210] In such cases, residual risk amounts to little more than bad luck and lacks a clear rationale for why the cost of damage should fall on the injurer rather than the victim.[211] "If we are to give human agency a central role in our theory of torts . . . then we would want to think carefully about how we allocate the losses from risk that is beyond human agency."[212] Further, strict

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202 *See* Gerhart, *supra* note 12, at 246 (arguing that a negligence regime sufficiently accomplishes all the legitimate "work" that might be attributed to strict liability).

203 *See supra* Part I.B.

204 *See* Gerhart, *supra* note 12, at 251.

205 *See id.*

206 *See id.*

207 *Id.* at 247.

208 *See supra* Part III.C.1.

209 *E.g.,* City of Pasadena v. Superior Court, 228 Cal. App. 4th 1228, 1235 (2014); Regency Outdoor Adver. Inc. v. City of Los Angeles, 39 Cal. 4th 507, 522 (2006).

210 *See* Gerhart, *supra* note 12, at 264.

211 *See id.*

212 *Id.* at 269.

liability applies even in situations where an actor has made reasonable non-negligent decisions.[213] This is dangerous because it is "impossible to force people to make more than reasonable decisions."[214] Thus, the rule imposes a cost for activity but cannot make actors behave more than reasonably.[215] "[O]nce a reasonableness decision is made the expected harm is less than the cost of more precautions. To penalize the reasonable act runs the risk of losing the benefits of action without reducing the cost of the action."[216] In other words, applying this to inverse condemnation, strict liability could actually incentivize governments to provide less care in the construction of public works than under a standard of reasonableness.

IV. SOLUTIONS

One solution to the impropriety of strict liability inverse condemnation is to abolish it and allow property owners to recover as best they can with a government tort claim. The negligence standard rather than strict liability and the remnant possibilities of immunity would limit its application.[217] Additionally, it would avoid all the policy pitfalls and absurd incentives that the current strict liability scheme produces.[218] Cities could once again plant trees and build bridges without the concerns of strict liability.

Alternatively, the damages clause could operate under a modified negligence standard, either by some clarification to the amendment or by judicial ruling overturning *Albers* (which introduced strict liability to inverse condemnation).[219] If, indeed, the sanctity of private property remains a valid rationale for the damages clause, then a modified negligence standard would keep its constitutional status (avoiding the potential for legislative change[220]) while dealing with it more specifically than the broader California Tort

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213 *Id.* at 271.

214 *Id.* at 272.

215 *See id.*

216 *Id.* at 272–73.

217 *See* Van Alstyne, *Public Liability, supra* note 170,at § 9.50; *see, e.g.,* Parrish, *supra* note 6, at 287–88 (mentioning public employee discretionary immunity and alluding to other "strictly construed" governmental immunities).

218 *See supra* Part III.C.2.

219 *See supra* notes 79–87 and accompanying text.

220 *See supra* Part III.C.

Claims Act could. Such a standard, as advocated by Professor Gerhart, would not only consider traditional reasonableness but also activity-based reasonableness.[221] That additional consideration would ask "whether the defendant's activity-based decisions were reasonable."[222] Such a question could avoid the problem in the Tort Claims Act of no direct liability for government agencies.[223] By not simply confining recovery to injurious actions but broadening it to governmental decisions that brought those actions about, governments could be held liable for decisions that proximately damaged private property — so long as their reasonableness was weighed.[224]

A third option, and the one that seemingly conforms to the intent of the creators of the damages clause, is that only intentional damage be covered.[225] The example discussed by the 1879 delegates supports such an interpretation. There, as discussed above, the city cut a road between two rows of houses, suddenly setting them on ad hoc cliffs and destroying their utility and value.[226] The harm in their example was not attenuated — they based the damages clause on a situation foreseeable to the point of being intentional.[227] The courts have long recognized that such a high degree of certainty is equivalent to intentionality.[228] Based on the example and the presumption against the waiver of sovereign immunity, it is likely that the delegates only intended liability for governmental actions that knowingly caused harm to private property. Accordingly, limiting inverse condemnation to intentional or highly foreseeable damage would also effectively fix the problem.

V. CONCLUSION

California enacted a damages clause in order to fulfill a major function of the law — to prevent harm. However, years of inverse condemnation lawsuits and occasional overzealous judicial legislation have created a loophole in sovereign immunity. Inside that loophole, actions in inverse

221 *See* Gerhart, *supra* note 12, at 246.
222 *Id.*
223 *See id.*
224 *See supra* Part II.
225 *See* Willis & Stockton, *supra* note 5, at 1190.
226 *See supra* notes 54–58 and accompanying text.
227 *See supra* notes 54–58 and accompanying text.
228 *See* Model Penal Code § 2.02(2)(b)(ii) (2015).

condemnation are subject to a regime of strict liability with little functional rationale for its severity. The definition of "public work" applies so broadly that roadside trees falling can trigger this strict liability. Observers are left to wonder how far this ability to recover will extend. With no negligence at all, could governments be strictly liable for freak city bus accidents or levee breaks? For a bridge collapse during an earthquake? Without the traditional standards for negligence guiding these cases, governments could easily be on the hook for ever more outlandish damages, simply because damage was "proximately caused" by a public work.[229] A more appropriate way around the shield of sovereign immunity exists in modern law with the benefits of legislative gravity, standards of reasonableness, and occasional well-considered immunities.[230]

While the damages clause sought to protect the sanctity of private property, as an experiment in justice it went awry when it grew to liability on any government act that might damage property, whether foreseen or unforeseen, negligent or reasonable. Delegate Wilson argued that only time would be able to tell if the damages clause would grow into something unintended. Now, with the benefit of that time and hindsight, we see that it outgrew the intentions of the 1878–1879 delegates. It is time to close the loophole.

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229 *See* City of Pasadena v. Superior Court, 228 Cal. App. 4th 1228, 1235 (2014); Akins v. State, 61 Cal. App. 4th 2, 20 (1998); Albers v. Cnty. of Los Angeles, 62 Cal. 2d 250, 263 (1965).

230 California Tort Claims Act, Cal. Gov't. Code §§ 810 *et seq.* (Lexis 2014).

ORAL HISTORY

CRUZ REYNOSO

ASSOCIATE JUSTICE
OF THE CALIFORNIA SUPREME COURT
(1982–87)

JUSTICE CRUZ REYNOSO:

The People's Justice

KEVIN R. JOHNSON*

One of the leading Chicano civil rights leaders of his generation, Cruz Reynoso has been said to be the Latino equivalent of the late U.S. Supreme Court Justice Thurgood Marshall, the first African American appointed to the U.S. Supreme Court. Needless to say, Reynoso is nothing less than an icon in the national legal community.[1]

From humble beginnings, Reynoso rose to greatness. Raised in a working-class neighborhood in Southern California, he attended segregated schools as a youth. With optimism and a zest for life, he persevered and pursued a higher education, first at a community college and later at Pomona College and the University of California, Berkeley School of Law. Young Reynoso served his country in the Counterintelligence Corps of the United States Army for two years.

Cruz Reynoso began his legal career in private law practice serving the Mexican-American community in El Centro, California, a remote, rural agricultural town near the U.S./Mexico border. Why El Centro, one might ask? Reynoso went there because he sensed that the Mexican-American

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[1] The documentary film, "Cruz Reynoso: Sowing the Seeds of Justice" (Ginzburg Video Productions, 2010) provides some of the highlights of Reynoso's illustrious career.

working-class community needed the help of a lawyer. He became that lawyer, not just for El Centro but for a generation of Latinos.

In the 1960s and the early 1970s, Cruz Reynoso led the fight for the rights of the rural poor, including but not limited to farm workers, as director of California Rural Legal Assistance (CRLA).[2] An innovative legal services organization, CRLA was at the vanguard of the national war on poverty. In making CRLA a national force, Reynoso earned a national, if not international, reputation. His fight for the rights of the poor did not go unchallenged and in fact faced determined opposition from the highest levels of the state government, including popular conservative Governor (later President) Ronald Reagan.

As is well known, Reynoso ultimately served as a distinguished jurist, first as an associate justice of the California Court of Appeal, Third Appellate District (1976–82) and later as an associate justice of the California Supreme Court (1982–87). A person of many "firsts," Reynoso was the first Latino justice on the California Supreme Court, which alone would have sealed his place in history.[3] A contentious, highly controversial, and some might say "dirty," campaign in the 1986 confirmation election led to the removal of Justice Reynoso, along with Associate Justice Joseph Grodin and Chief Justice Rose Bird, from that court.[4] Thinking it inconsistent with the ethical duties and obligations of a judge, Reynoso did not mount an election campaign.

In all of his professional activities, Cruz Reynoso has striven to promote the public good. Besides his work as an attorney and jurist, he has taken on important high-profile, public service assignments to ensure that the rights of minorities were protected. President Jimmy Carter appointed Reynoso to serve on the Select Commission on Immigration and Refugee Policy, which, after careful study, recommended reforms to the U.S. immigration laws.[5] The recommendations contributed to major immigration reform legislation passed by Congress in 1986.[6]

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[2] *See* Michael Bennett & Cruz Reynoso, *California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice*, 1 Chicano L. Rev. 1 (1972).

[3] *See* Cruz Reynoso, *Brief Remembrances: My Appointment and Service on the California Court of Appeal and Supreme Court, 1976–1987*, 13 Berkeley La Raza L.J. 15 (2002).

[4] *See* Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. Cal. L. Rev. 2007 (1988).

[5] *See, e.g.,* Staff Report of the Select Comm'n on Immigration and Refugee Policy (1981).

[6] *See* Immigration Reform and Control Act, Pub. L. 99-603, 100 Stat. 3445 (1986).

From 1993 to 2005, Reynoso served as a member of the U.S. Commission on Civil Rights, which investigates the most serious civil rights matters arising throughout the United States. During his tenure, the commission investigated alleged voting improprieties in Florida in the contested, and razor close, 2000 presidential election. The outcome of the presidential election — the election of President George W. Bush — turned on the vote in Florida. The commission's investigation and report raised awareness of the glaring voting rights issues raised by that state's election scheme.

Although never one to pursue personal ambition, much less awards and accolades, Reynoso has received too many awards and accolades to mention here. He has attained the highest available public recognition for his distinguished career. 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." In awarding the medal, President Clinton stated:

> Cruz Reynoso is the son of Mexican immigrants who spent summers working with his family in the fields of the San Joaquin valley. As a child, he loved reading so much, his elementary school classmates called him *El Profe*, the Professor.
>
> Later, some told him to put aside his dreams of college, saying bluntly, they will never let you in. But with faith in himself and the values of our country, Cruz Reynoso went on to college and to law school but never forgot his roots. He worked for the Equal Employment Opportunity Commission and led the pioneering California Rural Legal Assistance Program. In 1976 he was appointed Associate Justice of the California Court of Appeals and rose to become the first Latino to serve on the State's highest court.
>
> Today, he continues to labor in the fields of justice, serving as Vice Chair of the U.S. Civil Rights Commission, opening new doors for Latino lawyers and teaching a new generation of students the world of law. Not long ago, the person his classmates once called *El Profe* was voted by his own students Professor of the Year.[7]

[7] William J. Clinton, Remarks on Presidential Medal of Freedom (Aug. 9, 2000), available at http://www.presidency.ucsb.edu/ws/?pid=1482.

In addition to his civil rights and judicial work, Reynoso served as a distinguished law professor for many years. He initially served as a faculty member at the University of New Mexico Law School. After his time on the California Supreme Court, Reynoso returned to law teaching. He first went to UCLA School of Law. A few years later, Reynoso became the inaugural holder of the UC Davis School of Law's Boochever and Bird Chair for the Study and Teaching of Freedom and Equality.[8] I helped convince Reynoso to come to UC Davis and to be closer to his ranch south of Sacramento, where his wife Janeene continued to live while Cruz taught at UCLA.

It seems entirely appropriate that Cruz Reynoso ended his professional career at UC Davis School of Law (although he remains very busy in retirement, including serving as an investigator on a variety of civil rights matters). As a court of appeal justice, Justice Reynoso dissented from a majority opinion finding that the Law School's race-conscious affirmative action admissions plan was unconstitutional:

> King Hall, the University of California at Davis School of Law, from whence this lawsuit emanates, was named in honor of Martin Luther King, Jr., a black minister. Through the moral force of his character and faith he inspired America to seek after justice, and he shared with America his dream of a true and abiding equality among all racial, ethnic and linguistic groups who call this land their own. We have paid homage to his ideals by naming a law school in his honor. But we honor his dream with greater warmth when we march that added step or two, as did he, toward the mountain top of equality. King Hall took that step.[9]

The California Supreme Court ultimately agreed with Justice Reynoso.

Besides the many professional achievements, Cruz Reynoso is one of the humblest and most decent people one could ever want to meet. Devoted to his family, community, and faith, he is all that we could aspire to want in a revered historical figure. He continues to attend meetings of the UC Davis

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8 *See* Cruz Reynoso, https://law.ucdavis.edu/faculty/reynoso.

9 DeRonde v. Regents of the Univ. of California, 102 Cal. App. 3d 221 (1980) (Reynoso, J., dissenting), *rev'd,* 28 Cal. 3d 875 (1981). Reynoso later wrote about the concept and importance of diversity in American law. *See* Cruz Reynoso, *Ethnic Diversity: Its Historical and Constitutional Roots*, 37 Vill. L. REV. 821 (1992).

La Raza Law Students Association and serves as a mentor and inspiration to law students. And, even in retirement, Cruz Reynoso serves as the social conscience of the UC Davis law faculty as well as the state and the nation. Unlike some who have fought tough battles for years in the trenches, he is not bitter but remains quick to laugh, talks philosophically about the challenging times in which we live, and maintains optimism about what the future holds for social justice in America.

* * *

ORAL HISTORY AND THE CALIFORNIA STATE ARCHIVES

BY NANCY LENOIL*

We appreciate this opportunity to showcase the work of the State Government Oral History Program with the publication of the oral history interview of former Associate Justice Cruz Reynoso. It is also a pleasure to work once again with the California Supreme Court Historical Society. We have had a long relationship with the Society through its grant to digitize the working papers of the 1879 Constitutional Convention,[1] and through articles prepared by Archives staff, particularly Court Records Archivist Sebastian Nelson.[2] Readers of *California Legal History* will also be familiar with the article on our holdings in this field that I was proud to co-author with Society Board Member John Burns, my predecessor as

* California State Archivist and Chief, Archives Division, Office of the Secretary of State.

[1] Laren Metzer, "State Archives Digitizes Constitutional Convention Papers," *California Supreme Court Historical Society Newsletter* (Fall/Winter 2008): 22–23; available at http://www.cschs.org/wp-content/uploads/2014/08/2008-Newsletter-Fall-State-Archives-Digitizes-Papers.pdf.

[2] Sebastian A. Nelson (Court Records Archivist), "Nineteenth-Century Supreme Court Resources in the California State Archives," *California Supreme Court Historical Society Newsletter* (Spring/Summer 2013): 17–19; available at http://www.cschs.org/wp-content/uploads/2014/05/2013-Newsletter-Spring-State-Archives-Resources.pdf.

State Archivist.[3] It is, therefore, especially appropriate for us to authorize the publication of Justice Reynoso's oral history in this journal.

The State Government Oral History Program (SGOHP) was established at the California State Archives in 1985 to enhance the historical understanding of legislative and executive processes and policymaking in California. Government Code section 12233 requires the California Secretary of State to conduct a regular governmental history documentation program to provide through the use of oral history a continuing documentation of state policy development as reflected in California's legislative and executive history.

This systematic and disciplined effort to record history, and preserve and make it available for future research supplements the official record. It serves to document California's institutional memory and provides much needed content in a digital age when paper files increasingly give way to either non-recorded conversations or electronic documents that can be easily erased.

Since 1986, the SGOHP has completed over 200 interviews. Interview subjects are people who have had a significant role in California state government: former members of the legislature, constitutional officers, agency and department heads, and others who have shaped public policy and/or are identified as being influential in political and public developments at the statewide level. They were selected on a non–partisan basis, with the goal of illuminating key aspects of California government history. Interviewees include Supreme Court Justices Stanley Mosk, Frank C. Newman, and Cruz Reynoso.

Earlier this year, the Center for California Studies at California State University, Sacramento provided the funding for completion of an oral history interview with the late William (Bill) Hauck who held a number of positions in state government including Deputy Chief of Staff to the Governor, Chief of Staff to two Assembly Speakers, and Chair of the Constitution Revision Commission and Co-chair of the California Performance Review Commission. The interview was donated to the State Archives for inclusion in the Archives' State Government Oral History Program. The

[3] John F. Burns & Nancy Lenoil, "The First California Statute: Legal History and the California State Archives," *California Legal History* 4 (2009): 443–76.

Center for California Studies has recently completed another interview with former Legislative Analyst Elizabeth Hill which will also be donated to the State Government Oral History Program.

The oral history interviews supplement the historical records in the Archives and provide researchers with a broader and more complete picture of California government than can be gleaned from documents alone.

Further information about the State Government Oral History Program and a catalog of available transcripts is available at http://www.sos.ca.gov/archives/admin-programs/oral-history/.

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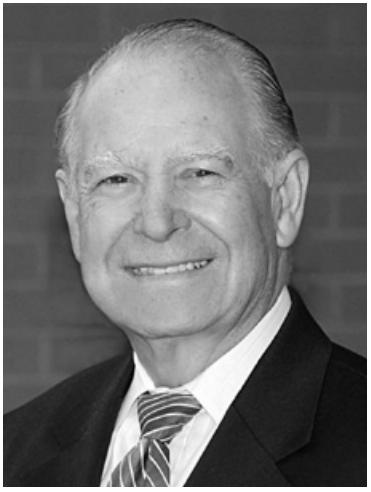
Oral History of

JUSTICE CRUZ REYNOSO

EDITOR'S NOTE



Cruz Reynoso

The oral history of former Associate Justice Cruz Reynoso was conducted from 2002 to 2004 by Germaine LaBerge of the Oral History Center of the Bancroft Library, University of California, Berkeley, in partnership with and under the auspices of the California State Archives, State Government Oral History Program.

 It is presented here in condensed form, intended to focus on matters directly related to Justice Reynoso's life and judicial career. It has received minor copyediting for publication.

— SELMA MOIDEL SMITH

LABERGE: I am sitting in King Hall at UC Davis with Justice Cruz Reynoso. I know, just from reading a couple of things, that you were born 1931, May 2. Why don't you tell me the circumstances that you know of. Where? What number you are in the family.

REYNOSO: I was born on that date, in the outskirts of a then little town by the name of Brea in Orange County. I was the third child born to my parents. The two older were boys also. Then, after that, there were several other children, so I ended up with five brothers and five sisters. I was born at home. Most of my mom's children, that I can remember, were born at home. And my father, at that time, was — and continued to be for many years — a farm worker. He and my mother had come from Mexico, from the state of Jalisco. They came to this country in the late 1920s. I was born in '31.

LABERGE: What were your parents' names?

REYNOSO: My dad's name is Juan, and my mother's Francisca. I never met my grandparents. Apparently they died when I was still pretty young, in grammar school.

LABERGE: What was your first language?

REYNOSO: Spanish. Yes, we spoke only Spanish at home. When my parents came, I am not quite sure how they made their way to the U.S., but they were obviously getting here through the shortest possible way, because they crossed the border in Arizona. My dad started working for the Union Pacific, I believe, Railroad. He and my mother, made their way to California with his working on the railroad. He worked as a laborer, laying down the ties — railroad ties — that needed to be corrected. In those days, the workers lived in boxcars, literally. So, he and my mother lived in a boxcar. When they got to California, then he quit the railroad, and started working in the orange groves of Orange County.

LABERGE: And your mother. Did your mother also work in the orange groves, or was she at home with the kids?

REYNOSO: No, she was always at home. Well, I say always, except during the Second World War we traveled to the Central Valley to pick fruit, and at that time, she would work with us picking fruit. When I was growing up, she was always at home.

My first recollection is of living in a house in the outskirts of Brea. We lived there for several years. My father appeared to have been — I know he was

— a very hard worker, and a very dependable worker. He became what is referred to in Spanish as "trabajador de planta," which means "a steady worker." It meant, that even though I was born in 1931, just as the Depression was getting into its worst years, my father always worked. He was never unemployed.

Brea had very few — in fact, I remember only one other Mexican family. They lived near where we did. So we grew up, we children grew up speaking only Spanish at home, but everything that we did outside the house was in English. We played with our neighbors in English, and we thought in English, and we talked in English. I remember that some of our neighbors would give us the Sunday comics, which we were able to read. Of course, we didn't have, in those days, any bilingual education so the concept of immersion that some people are very much in favor of, it appears to me probably does work under the right circumstances. The right circumstance was that everybody around us, except the other family and we, spoke English. So, we grew up speaking English as well as Spanish.

When we went to school, I don't remember having any problems with the teachers. Even in kindergarten, I don't remember their ever having to repeat things, or feeling that we didn't — or a sense that we didn't understand what the teacher was saying. We just simply learned it as youngsters, so by the time that we went to school, apparently we knew it perfectly well.

LABERGE: And at home, did your parents know any English when they came to the United States?

REYNOSO: No. They knew no English, and my dad only learned what he needed to know, particularly for work purposes. Later on in his life, when he tried to learn some English in a more formal way, he would say in Spanish, "El español me olvidé. El inglés nunca aprendí. Quede mudo," he would say. "I have forgotten my Spanish, I never learned English, I am now speechless." [laughter] But no, neither of my parents ever learned English sufficiently well to be comfortable with it. My mom learned even less.

In growing up, my parents continued with what they knew of their religion, in terms of being very religious. My mom seemed to have some doubts about religion, at least the way it was practiced in Catholicism. My dad never did. We routinely went to Mass every Sunday. We would go to two churches. Mostly, my recollection is we would go to a barrio in La Habra. The barrio was populated completely by Spanish-speaking persons — immigrants and Chicanos.

Everything there was done in Spanish and Latin. We would go sometimes to Fullerton, where everything was in English, but mostly, I believe, we went to La Habra. There were two or three barrios in — outside the city limits of La Habra, literally on the other side of the tracks. And there was a church there.

I do recall that during the Depression, there were a lot of hobos, nowadays called homeless people. Many of them would come to our house. I remember reading an article which said that the hobos in those days had signs and insignias and messages they would leave for one another, indicating which houses would be responsive to them. If that's true, we must have been on that list, because an awful lot of hobos would come to our house. I remember, because my mother would always put out a great feast for them. Carnes, meats, and tortillas, frijoles, beans, and everything. We would complain to our mother that she fed the hobos better than she fed us, and she would deny it. She would say that we were lucky to have a father who was working during the Depression so that we had a roof over our heads, clothing on our shoulders, and food on the table. We had a duty to share with others. I still remember our protest and her response.

LABERGE: But, also, that that was inculcated in you at an early age.

REYNOSO: Oh, very much so. From Dad, you know, I remember the import that he placed on working hard and being honest with the people you work for, but expecting also to be paid an honest day's wage for an honest day's work. That was very much a part of the culture that my parents came from.

LABERGE: Were you ever in charge of the younger children?

REYNOSO: Not in terms of giving them instruction, and so on. If the parents would leave, they would expect that whoever was older would be sure to take care of the younger children. But I don't think that our family was as hierarchical as some other families were. We had neighbors where the younger children were simply expected to obey whatever the older child did. I don't think our family was ever quite that strict. But whenever the parents left, or something of that sort, whoever was the oldest child was expected to be in charge.

There's an element of sadness in that regard that perhaps we will go more into detail later. But a time came when things went very awry with the family. My parents separated, and neither was at home. At that time, I was in college and my oldest brother was married, my immediate older brother was in the military, and my parents had left, leaving the children, then, by themselves.

I had a younger brother, a couple years younger than I, who was then the oldest child living at home because I had left home. I went through a lot of struggles in terms of deciding whether or not I should go back to the house to become head of the household. For a variety of reasons, I was persuaded that it was better for me to continue with my schooling, but I have always had a sense of guilt about that because my younger brother really became the head of the household, and I should have. I think I did the right thing, even now, but you never know. One of my younger brothers eventually ended up on narcotics and in prison. Maybe if I had gone back, I might have been able to prevent that. I mean, you never know.

LABERGE: Up to that time you had never felt any discrimination, as a little kid?

REYNOSO: I really didn't. Personally, I don't know that I have for most of my life. From time to time, things have come up that seem to be discriminatory in statements, sometimes not necessarily directed at me, but directed at those like me. Well, for example, when I was maybe age thirteen, my family and I were picking grapes in the Central Valley and I asked the field foreman how long the grape picking season would last. He asked me why I was asking, why I was interested. I told him that we always got back to school late and had to work doubly hard to catch up. He said, "Why, you're the first Mexican kid I have talked to that was interested in education." It made me so mad that I told myself that someday I'd go look him up, and I'd have my college degree in my left hand, and I'd hook him in the nose with my right hand. Of course, I never went back, but those clearly were discriminatory remarks. But I don't know if they were necessarily directed at me. Another time, in high school, I remember a boy called me a "dirty Mexican," and I just felt sorry for him that he was so ignorant. More often, I saw a discrimination against others who were Mexican or Mexican American. Some very direct. I was the leader of a Junior Y group of Mexican American boys.

I had been asked to be the leader of this small group of boys, and we would meet, I forget whether it was once a week or once a month, and, on one occasion, the boys were — I drove by downtown La Habra. There was a school dance going on at a hall, and two of the little boys who were in my group were standing in front, and I turned around and stopped, and asked them why there weren't going to the dance. It was a school dance.

LABERGE: Were you planning to go?

REYNOSO: No, no. This is a dance for junior high children. I was in high school at that time. They said that they were not allowed to go in because they were Mexican. I said, "You've got to be wrong. This is a school dance." I went in and talked to the gentleman in charge, whom I knew because he had been my scoutmaster. He says, "Yeah, we're not letting them in because they are Mexican and we are afraid there will be trouble if we let them in." So I found out who was sponsoring this service club, and found out who the officers were, and I went to see the officers.

LABERGE: Were the officers students, or were they adults?

REYNOSO: Oh, no, no. Those who were sponsoring it was a local service club like the Kiwanis. They were all business people. I went to look them up, one by one, to tell them about what had happened, and that I didn't think that was a good way to run a school dance. I was, of course, a high school kid, and they weren't very appreciative of my bringing that to their attention. It was the first experience, I think, I ever had of being invited to leave somebody's office. But, I must say, neither did I hear that there were such dances that didn't allow Mexican kids after that. So maybe it did some good.

LABERGE: Obviously you had an understanding and a sensitivity that it was hurting other people and that you were going to do something about it.

REYNOSO: Of course, and it may be hurting me also, but not directly. Even yesterday's morning paper reported the election returns. It may be coincidental, but there were three Supreme Court justices on the ballot and the one that got the fewest number of votes was the person with a Spanish surname, Carlos Moreno. It may be accidental, but I saw that when I was on the ballot, and we see that now. The percentages are smaller, just two or three or four percent. I don't read into that great prejudice, but you do see those differences that you are reminded that you are part of a group that sometimes is disadvantaged in society.

At age seven, we moved from Brea to rural La Habra, let's put it that way, to a little barrio called Alta Vista about a mile or mile and a half from downtown La Habra. My father had bought a small house in the barrio. I was chatting with a gentleman who knew the history of the barrio. He said the barrio was actually established, like, ten years before we moved there, and the houses had been taken from sort of a labor camp and moved to that area, which was owned by a gentleman. By the time we moved there, it was an established barrio. About fifty homes in a rural area, and my dad had bought a

house and then expanded it because, even now, it's a tiny house. We moved during the summer. We had never been before in a barrio. It was all Mexican and Mexican American, except for, at that time, one black couple that lived in the barrio. Then, later, another black family moved in that had two little boys. So we were in a quite different environment.

When it was time to look for a school, my two older brothers and I, who were the ones who were old enough to go to school, looked for a school in La Habra, and we found a place that looked like the school we were used to in Brea. It was two stories, and had a playground — brick, if I remember correctly. So, we went to sign up for school, and they told us, "No, you can't. You are not supposed to go to this school. You are supposed to go to another school." That was Lincoln School; we were supposed to go to Wilson School. We said, "Okay." So we went to Wilson School, half a mile away and they said, "Yeah, this is the school you are supposed to go to." We noticed that all the youngsters there looked Mexican or Mexican American. We asked, "Well, why are we being sent to this school?" We were told that we were being sent to that school to learn English. Since my brothers and I already knew English perfectly well, we were moderately suspicious that maybe there was another reason. Then we noticed that there were houses that abutted upon the fence of the school, where Anglo-American families lived. They were being sent to more distant schools. As you might guess, we shortly figured out that we were going to a segregated school. In those days, there were indeed many segregated schools in California where there were concentrations of Mexican immigrants and Mexican Americans. Brea did not have a sufficient number of Mexican and Mexican-American families, so we did not have segregated schools in Brea. It was a very geographic, idiosyncratic decision-making on the part of the local governing boards. The segregated school we would not have recognized as a school because it was a series of small wooden structures. It didn't look familiar to us as a school. As it turned out, I rather liked the wooden structures because each class met by itself, and you couldn't hear the kids in the other structures, but it obviously was not as nice, physically, as the other school.

LABERGE: What did you think about the education, reflecting back?

REYNOSO: Reflecting back, I think we got a perfectly fine education, actually. My greatest interest when I was in grammar school, was not to do poorly and not to do well. Because those who did poorly got harassed, and got called

some not very kind things, and those who did very well got harassed. So I tried very hard not to do too well, and not to do too poorly. I succeeded until the fifth grade. I don't know why, but my suspicion is that it has to do with my being interested in reading. I ran into a series of books on dinosaurs, and then ran into a series of books on merchant marines — a merchant marine who traveled all over the world and had all kinds of adventures, and so on — and I started reading and reading. I think that may have caused me to suddenly do very well in school.

LABERGE: Without knowing you were.

REYNOSO: That's right. So, sure enough, the kids started harassing me. The greatest insult was to call a person a profe, short for professor, so they called me "profe." I had I don't know how many fights protecting my honor [laughs] after I started doing well. I remember a great fondness, actually, for the teachers. I thought they tried hard to teach us.

LABERGE: And the teachers, were they Anglo?

REYNOSO: All the teachers were Anglo except, near the end of my stay there, we got our first Mexican-American teacher. The one and only. In fact, as I look back, he was the only Mexican-American teacher I ever had from K through law school. We were all very excited about his coming. I think that inspired me to think about going to college, and maybe being a teacher, which I thought of as a grammar school youngster. Even though I was not in his class, he played basketball with us. I remember he volunteered a lot of his time. I've met him several times since that time.

I should just jump forward fifty years. When I was appointed to the [California] Supreme Court, I got a letter, and this letter said, "When I was a teacher at Wilson School, fifty years ago, I had a student by the name of Cruz Reynoso. Would you be he, by chance?" I wrote back and said I was. His first name was Candelario; they called him "Candy." I think Mendoza, but I'll look it up. A wonderful person, still alive. Now on a school board in Southern California and runs a newspaper. Later became, I believe, a school administrator, after teaching for many years. He remembers, very fondly, that school because it was his first teaching job. He was there just a year or two and then he went into the military during the Second World War. But I remember him very fondly, and being inspired to finally see — I had never seen — a Chicano as a professional. And to see that somebody could be a

teacher, and he tells how he was received with such great enthusiasm by the parents of the children. How the children were all admonished to obey him, and do what he said. So, he remembers those days very fondly.

However, I thought that the atmosphere that was created by segregation was a socially unhelpful atmosphere, let's put it that way. There were some conflicts. For example, in that school, and apparently other schools, they had showers for the children. I guess they felt or they knew that some of us didn't have — we had running water, but we didn't have an inside bathroom in the barrio when we first moved there. So, I guess they had that as a facility for the children. But mainly, I saw that, through segregation, the stereotypes that folk have of one another continued. There was a family in the barrio where we lived, who succeeded, during the Second World War, in buying a house in La Habra, which is mostly Anglo. I remember we kids talked about it and we were convinced that they would be attacked physically, and maybe killed. That's the sort of divisiveness that segregation, I think, brought about. I also saw that the communities, the barrios, were not well served. We did not have sewers, and we did not have inside plumbing for a while — later we put that in. We didn't have sidewalks; we didn't have curbs. Generally, folk who were not in the in, politically, didn't get well served by the community.

Most importantly, I was interested in the psychology of it. We sort of understood, generally, that it was our role in society to be the workers and not to be the professionals, not to be the folk who ran things. It seemed to me that many of us sort of accepted that. So that most of the boys that I grew up with simply assumed that they would quit school at age sixteen and start working in the orange groves of Orange County. Now, I never accepted that, though there was even some domestic pressure to do that.

LABERGE: You mean for you, from your family?

REYNOSO: Sure. My mother had always had a dream, she would tell us, that when her boys got older — because in our family there were a group of boys, then a group of girls, then it got mixed up — it was her dream that the boys would grow up and start working so we would have more income in the family. She'd say, "Look how lazy my boys turned out to be. Instead of working, they're out there reading books." [laughter] Well, you have to be pretty determined or convinced that that was not what you wanted to do. My dad, on the other hand, would say, "You know, I really don't care what you do when you

grow up, so long as what you do is honorable." He would have been happy if we had been honorable farm workers or honorable lawyers.

LABERGE: Did either of your parents live to see you on the Supreme Court?

REYNOSO: Yes, oh yes.

LABERGE: How wonderful.

REYNOSO: Indeed, I was told — Dad didn't tell me this, actually; someone else told me that — Dad belonged to a group called a mutualista, a group mostly of immigrants that are formed for mutual support. He belonged to such a group in Los Angeles, and on one occasion, I am told, he was presented with a plaque or something for being the father of the first Chicano Supreme Court justice, and I'm told that tears welled in his eyes.

One of the motivations for my being a lawyer was the reality that I saw that there weren't lawyers around to serve people like my parents. I could see that other kids were — it seemed to me — twice as smart as I was, but they fell by the wayside as soon as they got to be age sixteen. Few of them spoke about going on to college and all that. So, no, I saw that very quickly. I saw that very often we accepted the role that society had given us, and I didn't think that was right. I saw very few Latinos in positions of authority; this teacher was the one exception. None of the businesses were owned by Latinos, none of the elected officials were, and so on. I didn't think it was accidental. So, I early concluded that segregation was not a good way to run a society or a school.

If something didn't seem just to me, it really hurt inside, and I felt sort of compelled to try to do something about it. As with my youngsters in the Junior Y incident. The people in the barrio would complain that they didn't receive rural delivery service of the mail, and I just accepted that as part of the scheme of things. But then, an Anglo family, son of a well-known rancher at that time, built a house in an orange grove no more than a few city blocks from where our barrio was. We were now a mile, mile and a half from town. The rural delivery route man would go all the way out to his house, deliver the mail, go all the way back and wouldn't travel another couple of blocks to deliver mail to our barrio.

LABERGE: So, where would you go get the mail, to the post office?

REYNOSO: Yes, we would go to the post office. I just didn't think that was fair. And the people always complained about it, so I figured, well, we should do

something about it. I went to see the postmaster and I asked her why we didn't receive rural delivery when this family was receiving rural delivery. She said well that wasn't her decision or her business; if I was concerned about that, I should write to the postmaster in Washington, D.C. So I said, "Well, all right, I will write to the postmaster." So I went around and put together a petition.

LABERGE: How old were you?

REYNOSO: Thirteen maybe. I got all the adults in the barrio to sign the petition asking for rural delivery. They all just smiled at me, you know. They said, "Oh, this upstart kid." They knew nothing would happen. My dad used to refer to me in the Spanish term of "metiche." Metiche is a person who is always putting his nose in other people's business. He considered this government business. Nonetheless, he signed the petition, and I sent it off to the postmaster.

LABERGE: This took quite a bit of research to get the address, the name, all of that.

REYNOSO: Yes, I don't know where I got the name, but obviously I had it. I sent off the letter with the petition. Then I get a typewritten response, addressed to Mr. Cruz Reynoso. That's the first time anybody ever had to refer to me as "Mr." And a typewritten letter! It said, "Dear Mr. Reynoso, we have received your letter, and we will look into it." Nonetheless, two or three months later we get notices in our boxes to prepare our homes for rural delivery. I think all the adults were shocked. But to me, it was sort of a confirmation of what I was reading in our textbooks, that we are a democracy, that government responds to requests, to petitions, and people have a right to petition their government, and all that. So to me, it was sort of an early confirmation that, if you act on your beliefs, not always but sometimes good things will happen. To me that was an inspiring experience.

Many years later, and this sounds even a little bit silly to me, but I had been in favor of civil rights and against discrimination all of my life. During the McCarthy era, that wasn't always an easy thing to argue for because so often you would be called a "Communist" or a "fellow traveler" if you believed in civil rights. I was in the military when *Brown v. Board of Education* came down in 1954, and I remember thinking to myself that the Supreme Court was practically speaking to me directly saying, "Cruz, you've been right all these years to have believed that segregation was not the right thing for this country, et cetera."

LABERGE: Now, what about the Catholic Church and its role in your life?

REYNOSO: When we grew up we were always quite loyal in attending Mass every Sunday. We went to special training for the first Communion and confirmation, and that sort of thing. I accepted all of the moral teachings of the Catholic Church and Christianity. I think that it had a very strong influence in my own notions of right and wrong and the responsibility that a person has in society. On the other hand, during my teenage years, I had qualms about some of the teachings, some of the detail of the teachings — the power of the pope, and some other teachings. I particularly didn't like some of the priests who spoke against Protestants and Jews, and so on. So I started falling away from the Catholic Church, I think, in my teenage years. By the time I got to college, I don't think I was attending Mass, and then I married a woman who is a Protestant, and I have been attending her church, which is actually a conservative Baptist Church, since that time. But I have never joined, because I think that, while I accept the precepts in terms of how we are supposed to live our lives, some of the details of, I suppose, practically any religion, are hard for me to accept. One time, an old German priest took me aside because he had heard that I was the head of that Junior Y group, and he forewarned me about the YMCA, how it was simply a big web that was meant to bring us poor little Catholics into the web, and make Protestants out of us. He was so intolerant that I think it was one of the many things that started turning me against some of the Church structure, let me put it that way.1

LABERGE: Well, tell me more, if you can, about the Y and how you got involved in that. Was this in downtown? Was it a segregated group?

REYNOSO: Let's see. Maybe I should bring you up to date on that. The segregated school went only to the sixth grade. Then we went to an integrated school for the seventh and eighth grade in another part of La Habra. There again, I felt the disservice to the Latino community, because we were forewarned not to speak Spanish. We were told that it was our duty to tell on somebody else who spoke Spanish. I didn't agree with that. I am sure that they did it well-intentioned, but I viewed it as sort of an attack on our culture, our language, our families. Nonetheless, I graduated from the eighth grade, and went to high school. High school we attended in Fullerton, which was a distance away.

Meanwhile, as I indicated, I started working on odd jobs — working, I remember, helping clean the backyard of a lady for the weeds, just hoeing.

Then helping some people do some gardening and all that, before starting to work more formally picking oranges. We started picking oranges — again, when I look at my grandchildren I can hardly believe it, but I think we were seven or eight or nine when we started, maybe ten. We would work in the orange groves, and they would refer to us little boys as "ratas" or rats because we were too small to carry the ladders. We would have sacks, and we would pick the oranges and put them in the sack, and then put them in boxes. We were so small that all we did was pick the bottom of trees. I think that is why we were called rats. We were nibbling at the bottom of the trees. Then, when we got to about age fourteen, we would be like adults. We would start carrying the ladders, and then my younger brother came and worked as my rat.

Then, during the summers, we went to work up north. There I saw a lot of the injustices that farm workers had, including sometimes concerns as to whether or not they'd get paid at the end of the picking season. The housing arrangements were terrible. For several summers we lived in tents. The tents, in turn, were put in an area that was dry, but as people stepped on it, it was moist underneath. So, we had summer colds. Another time, we lived for a portion of the summer in a barn. We cleaned out a part of the barn and lived in a barn.

LABERGE: This was in the Central Valley?

REYNOSO: In the Central Valley, around Fresno and Sanger. So I saw much of what I considered injustices. Then, went to high school. We used to catch a bus, like at seven in the morning, to go to high school. In high school I joined the Y. And apparently, it must have been a very active Y, because they had a professional who worked with the Y and asked me whether I was willing to take over this group. I agreed to do so. And by that time, I must have been at least sixteen, because I had my own car.

LABERGE: The leader must have recognized something in you to ask you to be the leader of this group.

REYNOSO: Well, among other things, I was the only Latino active in the group. This was a Latino group, so I assume that was one of the attractions, but yes, he must have had some confidence in me.

I am trying to put together an autobiography. I had a summer student do some research, and did find something that I do not recall. He found a story, dated around 1948, when I would have been a senior, saying that I and some other people were organizing a group in La Habra of Mexican Americans to

worry about voter registration and voter education and so on, and I don't remember that. I was always very interested in that. I had thought, quite mistakenly, that as soon as eighteen-year-olds got a chance to vote, they would be anxious to vote, but history hasn't shown that to be true. But I know I was very anxious to be able to vote, and all that. To me it was a big deal. In terms of work — we didn't start going up north until I must have been about eleven.

LABERGE: And the whole family would go?

REYNOSO: The whole family would go. Before that, the work that I had done was those odd jobs that I mentioned to you, and then working picking citrus — mostly oranges, because lemons were picked by older boys and older men. Lemons were picked in such a way that you gauged them, and you picked only the ones that were a certain size. So it is a little bit more complicated than picking oranges. I just picked oranges, and then we started working, started going up north probably when I was age ten or eleven. The big jobs we had was picking grapes and picking plums. On one occasion, we did come as far north as Tracy, and we worked in thinning tomato fields. That is, with hoes we would cut the weeds. Then, on another occasion, we did topping of onions, near Stockton. It's the only time that I got sick while working. The onion fields have no shade to them, as you know, and you top onions by picking them up and cutting the tops off, and putting them in sacks. It must have been a very hot day, because I started feeling sick and my dad asked me to quit and go sit in the shade by a truck, and I did. I remember, when I got home that night, I had lines of salt going down my face. I think, as I stopped quickly, the sweat just cooled off and I had these lines of salt. My dad, I think, decided that was not the type of work that we wanted to do, and we went back in the Sanger area.

The whole family would come up. In picking prunes or plums, everybody worked. At that time, there was a baby in the family, and the baby would be taken out to the orchards and one of the little children would stay with the baby, and my mother and all of my brothers and sisters and I would pick plums.

I should tell you, though, that there were some incidents up there that I think influenced me. We were all picking plums and there was sort of a murmur going around the workers. I didn't quite know what was going on, but I knew something was happening. Then, all of the sudden, everybody stopped working. I think what happened was that they had learned that other ranchers were paying half a penny, I think, or a penny more per box than we were

getting. They thought that was unfair, and there was a sit-down strike. The grower then had no choice, even though he was very mad, wondered who he could fire, but couldn't find anybody to fire so he actually negotiated with the men and agreed to pay another half cent or another cent a box, and everybody went back to work. I was just so impressed that here we were farm workers, seemingly with no power, but then by working together you did have power. I am sure that it influenced me in terms of my current thinking that my faith really still lies with citizens and residents getting together and figuring out what's best for them.

LABERGE: Isn't that amazing.

REYNOSO: Then, at about age fourteen, my next job was to work as a pinsetter in a bowling alley. In those days they had boys and men setting the pins; they weren't done automatically. I got a job in Whittier, which was a little ways from where we lived. Then I started working at a bowling alley in Fullerton, in high school. While I was there then, I think I was a sophomore, my high school teacher was married to an artist. She was my high school art teacher, and he was looking for an assistant and she recommended me, and I was hired to be his assistant. So, I started working Saturdays for him. I would work Saturdays for him and then Friday nights and Sundays I would work at the bowling alley.

LABERGE: What did you do for the art teacher's husband?

REYNOSO: He had experimented with different ways of making a living. By the time I met him, he was designing wallpapers. This was after the Second World War with a big boom in construction going on. He was a full-time designer of wallpapers, dealt with people back in New York mostly. He was sufficiently successful that he needed some help at that point. My job was to be a renderer. That is, I did not design the wallpapers but once they were designed, several parts of it had to be painted in different colors for different color combinations. So he would do the design, and then I would do the painting of the — either the edges of the design, or he would do little samplers with different colors and I would do those. By that time, I had left home and I was living with a friend in Fullerton, where the high school was. Then, I think at the end of that school year, I went to live with the Randalls, my teacher and her husband. I quit the bowling alley, then I worked weekends, Saturdays and Sundays, as an assistant to Mr. Randall. I really became like part of the family. In fact, I've always considered them like my second parents. That helped me

a great deal too, incidentally, because I had always been in a Mexican household, and here they were Anglos. In fact, Mrs. Randall's ancestors went back to the *Mayflower*. So I learned very much about the Anglo world. I think that helped in my life's experiences after that. They did not have children.

LABERGE: So, they probably really adopted you.

REYNOSO: Yes, yes. They were a wonderful couple. As I say, I was like their adoptive child. They often said that I was the first of a series because, after that, they didn't live with them, but they always had young people working for them. I worked with Mr. Randall then on and off through junior college and even college, not law school. I lived with them the first year of law school, after I got out of the Army, but I didn't help him with his artwork.

I remember the Second World War very well. One of the lasting impressions I actually have is airplanes. Hearing airplanes roaring above us. When they would come by in formation, there would be dozens, maybe sometimes hundreds, and you could hear the roar from miles away, and they would fly over. I was always interested in art. I was going to be an artist at one time. I liked cartooning, and I remember all the cartoons. I could even draw them for you now. Of how Tojo was — very simple cartoons. Tojo was, I believe, the prime minister or premier of Japan, and he was the one that was characterized as the enemy person. He was the person we were supposed to hate. On the German side, there was Hitler, who was then president and dictator of Germany, and we were supposed to hate him. They all had different characteristics. Tojo wore glasses, so he had big glasses in his cartoon and big teeth, and Hitler had hair growing over one of his eyes and a big square mustache, and that characterized him. Then, Mussolini, who had a big chin, and he was the premier of Italy. I would draw them with great gusto at that time.

And then, too, during the war my dad quit working as a farm worker for a little and worked in the shipyards in Wilmington, near Long Beach, building warships. What impressed me at that time is that I asked him what type of work he did, and he brought home some samples of what he did, which was very complicated electrical work they would put on grids. What impressed me was that he hardly spoke any English, he didn't read any English, and yet, with proper instructions — he was always a hard worker — with proper instructions and with color-coded wires, he was able to do very complicated work. I have always been impressed by what employers and companies and

industry can do if they really want to put people to work, and the excuses they use very often when they don't want to put people to work.

LABERGE: Any other impressions from the war?

REYNOSO: I very much remember the message from Franklin Roosevelt of why we were fighting the war. He had four freedoms, and I remember that very clearly. I remember that one of the four freedoms was "freedom from want." I guess that struck me because we were poor, and we had just got through the Depression and that meant something. Of course, I remember all the posters, all the soldiers. I didn't know too much about what was going on between the *pachucos* and the Navy boys in Los Angeles. Terrible fights between Mexican-American youths and sailors in Los Angeles. We would just hear rumors about it. Then, the calendars. Mexican-American families so often have calendars they pick up in stores. I remember calendars of FDR with President Manuel Avila Camacho of Mexico, an American and Mexican flag. So far as I knew, all of my parents and the community and all that were very supportive of the Second World War, and we were all very patriotic.

There is one other thing and that is that the Bracero Program got started with great numbers during that time. A large bracero program was set up near the Imperial Highway, which was just a physical block or two away from our little barrio. I used to go and spend hours with the men there, talking about the progress of the war. Apparently, I kept up with the battles, and so on, because we had long discussions. They would ask me about what was happening in the Pacific front, and in the European front, and all that. We would talk about the progress of the war, and all that. I remember those discussions very fondly.

LABERGE: Why would they ask you? Because you had read the newspapers?

REYNOSO: I guess so. I guess so, because they felt that I was keeping up more with what was going on. I was always interested in public events. Apparently, I was very interested in the war and kept up with what was happening. I had decided I was going to be an artist, but I may have been thinking about the possibility of being a lawyer, because I took Latin the first two years of high school, and I seem to remember thinking that I took Latin in case I decided to be a lawyer because I understood that you needed more Latin to be a lawyer. Actually, it is not true, but that's what I had heard. So I took Latin the first two years of high school, and then Spanish the second two years.

LABERGE: Spanish Literature?

REYNOSO: No, just plain Spanish. I was already with the Randalls and I had borrowed, I remember, their new Packard, which I thought was the most beautiful car in the world. I think I was going on a date and I put on the radio, and the annual state of the nation address by the president of Mexico came on. I listened to it, and I couldn't understand half of it. He was talking about political and economic situations, and using words that I didn't understand. I thought to myself, if I am going to say that I know Spanish, I better be able to understand the president of Mexico. So I took plain Spanish.

I did well in high school — but I had to work hard at my Spanish to do well. But I had also taken — no, maybe it was in college that I took a semester of French. I guess it was in college. At any rate, I talked to the teacher about that, and the discussion went like this. I said, "Teacher, in courses where students study a language other than English, they are normally given some credit for proper pronunciation, but I notice that in this class we don't get any credit for proper pronunciation." And the teacher said, "Oh, no. I think it would be unfair to give you credit for that because you already know it." I thought, well that sounds fair in a way, but it is interesting how the rules always seem to be such that you don't get credit for what you know, but you get a lack of credit for what you don't know. It was just an interesting byplay, because I have always felt that whoever is in charge makes the rules to favor themselves. Here was just one other rule that seems fair at one level, but unfair at another, in terms of how you grade.

Living with the Randalls obviously expanded my wings in terms of the many interests they had in the arts and literature.

LABERGE: Were you like a family? Did you have dinners together?

REYNOSO: Oh yes, we always ate together. That is where we got into all kinds of discussions on history and art. We would have books spread out all over this table, and so on, and argue about those things and discuss them. That was a great learning experience for me. I think I belonged to the Latin club for the first couple of years, and did the Spanish club later. I played a little bit of basketball, and I went out for track for a little while. In my senior year, I think, I was elected vice president of the class.

LABERGE: This school, Fullerton High School, was not segregated?

REYNOSO: No. No, it was not segregated. Then, later I went to Fullerton Community College.

LABERGE: Where did that impetus — when did you know that you were going to be going to college, that that was what you wanted to do?

REYNOSO: I don't know, but I think I had decided very early that the only way to get ahead was to go to college, because I remember simply assuming that I would be going to college. This is even before going to the Randalls. At that time, we had a pretty good public education system going through college, so I had assumed that I could go to a public college, and just work the way I had when I was in high school.

Then my experience at Fullerton was quite different than in high school. Mostly by accident, actually. There was a practice then of asking the speech teacher to have one of their students be in charge of the first class of the freshmen at the junior college. I had delivered a couple of talks already, I remember one of the talks was on cartooning. I guess the teacher was impressed with my speech-making because he appointed — nominated me to be in charge of that meeting. Students came from all high schools around Fullerton. They didn't know one another. About the only person they knew was the person standing on the stage, so I opened the nominations for president, and somebody said, "Well, we'll nominate you." [laughter] So, before I knew it, I was nominated and elected freshman president. That got me very involved in student government, and it was really quite an expanding experience actually. Then, since I was freshman class president, I ran for student body president the next year, and I was elected, so I was student body president. I was very active in student government, which meant that we traveled a lot to Sacramento and other places for meetings. Of course, I represented the students before the administration. A gentleman by the name of Dr. Robert Swenson was the men's dean, and just a wonderful person — and I guess our advisor at the student council.

One day, in my second year as president of my junior college, as a student, a gentleman showed up, and he was the dean of men of Pomona College. We sat and talked for two or three hours, just about everything. At the end of that time — I never knew why he came, my suspicion has always been that Dr. Swenson invited him to come over to meet me, maybe meet some other people, I don't know. All I know is that I met with him for a long time, and at the end

of that discussion he says, "Well Cruz, if you apply to Pomona College and you get admitted, we will give you a full scholarship." I figured, well I've got nothing to lose. I hadn't paid attention to private colleges. So, maybe he, maybe Dr. Swenson told me about it being a small liberal arts college that had a very good reputation, and so on. So, anyway, I got admitted and I got a scholarship.

LABERGE: You continued to live with the Randalls all during junior college?

REYNOSO: Yes, yes. That was really my home until I got married. By the time I got to junior college, either as a senior in high school or very early on, I had decided that I was going to go to law school, rather than be an artist. I enjoyed art a lot, but I felt that I needed a profession where I would be more active. The Randalls were disappointed with that, but somewhere along the line I decided to go to law school. I remember they were saying, "Well, if you are going to go to law school, you at least need to meet a lawyer." They took me to meet their lawyer, and I chatted with him for half an hour or so. I'm sure that's why I took speech and debate and all that, because those are things that I conceived of as being important in law school.

Pomona was a very different experience than Fullerton. At Pomona, I concentrated far more on my studies. The last semester I think I got all A's but one. Summers I worked with the Randalls. The Randalls were the only people to come to my graduation. I think my family didn't have much of a sense of what it meant.

I hope to be going in May to the fiftieth anniversary of graduating from Pomona. But I would say that those were the two main differences that I saw. I ran into quite a few — not that many, but several — foreign students, and invariably they all came from the upper classes. They were quite different than my folks, who had come to this country — and their relatives and friends who had come to this country — simply to eke out a living, and then became part of this country. So it was a different experience growing up or being at Pomona College in terms of my classmates as compared to the public schools I had attended.

LABERGE: I bet when you go back for your anniversary, you're probably the most famous in your class.

REYNOSO: That's probably true. [laughter] Pomona gave me an honorary degree, and probably doesn't give too many honorary degrees to their graduates. So, if we make it, it will be nice to go back.

LABERGE: How do we get from Pomona to the Army, and how did you make that decision?

REYNOSO: It is not difficult, actually, because I had a student deferment. So when I graduated, I called the draft board and I said, "I graduated," and they said, "Come on down." [laughs] I think the term that was used at that time was a "volunteer draftee." So I was drafted into the Army, sent to, at that time, Fort Ord, in Monterey, which is where the training ground was for the western region, then went through basic training there. Then, near the end of the basic training cycle — which lasted eight weeks, if I remember correctly — I was asked whether or not I'd be willing to go into the Counterintelligence Corps. Apparently, they make that decision based on test scores. I thought it sounded interesting so I told them yes, and then they said, "Well, if you are willing to do that, then you have to stay in basic training for another cycle because it takes time to do your background check, your security check." I agreed to do that, so we went through an advanced basic training of another eight weeks, if I remember correctly. Then, apparently, I was cleared, and I was sent to Fort Holabird, in Baltimore, to be trained to be a Counterintelligence Corps agent. They had us fill out forms asking where we wanted to go after we graduated, and I was pretty adventuresome so I put down that I wanted to go overseas, anywhere, even if it meant going to Korea. I also mentioned that my preference overseas was South America because I spoke Spanish and all that, and much to my surprise one of the officers came to me and apologized that they weren't sending me to Latin America. I forget exactly what he said, but he indicated that he thought that I would have been the perfect person to be sent to Latin America, but I was being sent to Washington, D.C. What we did there, and it does fit within counterintelligence, is that one of our major jobs — of which I spent most of my time actually — was doing background investigation of civilian employees of the Army. I did have at least one really interesting assignment, again working with another officer. I say "another officer" — actually, I never became an officer. Though people didn't know it, and they treated me like an officer because I was in civilian clothing. I was actually a "specialist second class," which is something akin to a corporal, which is only above a private first class, which is only above a person that has no standing at all in the military. [laughter] But this fellow and I had to do a security check of the White House. That was fascinating.

LABERGE: That must have been interesting for you just to be in Washington, to be someplace else other than California, in a whole new environment.

REYNOSO: Washington was still a segregated city at that time. This was '54 now. I remember this fellow and I were working in the White House, or in what's now called the White House Annex next to the White House. It was lunchtime, so I saw a little restaurant across the street and I said, "Why don't we go over there?" And this fellow, who had African-American friends, said, "Well, I don't think you want to go there," because he knew my own feelings. I said, "How come?" and he said, "It is a segregated restaurant, Blacks aren't allowed," so we skipped that.

By that time, I knew enough about the Army to know that they could do it if they wanted to, because I had seen occasions where there had been fights or some other problems in establishments near the fort — nightclubs, and so on — and it would be declared off-limits. And in an area that has a lot of soldiers that was terrible for the business. If they had declared the movie houses off-limits to soldiers, I'll bet you that they would have integrated in a few minutes because they needed that economic support. So, I felt very badly that the military was, from my point of view, unwilling to protect our civil rights, and yet there was no question that we were soldiers, we were in uniform. The most important thing that happened back East was that I met my wife in Washington, D.C.

LABERGE: Tell me that story and the George Washington [University]. How you met your wife.

REYNOSO: What happened, in terms of George Washington, was that after I had been in Washington for a little while and saw the pattern of my life. I saw that I had evenings free, which was not something very usual for students who have to be studying all the time and so on. Then I was a little bit afraid that I would lose my student skills by being out-of-pocket for a couple of years and then going back to law school. I decided to take a couple of courses, at night, at GW. So that's what I did. I took a history course and an economics course.

LABERGE: Had you already applied to law school?

REYNOSO: No, but I had planned to go to law school. Meanwhile, after I had been in several apartments, two of us decided to go into a boarding-house on Sixteenth Street, a few blocks north of the White House, and I met my wife there. She was an employee, a clerk, with the FBI. Interestingly, she

had been recruited by the FBI. I have never heard of anybody else being recruited the way she was. I am sure it must have been a program at that time, because Hoover always had an affinity for Southern folk, and my wife was raised in east Tennessee. She had graduated from high school, had done very well, but she came from a very poor family. It is interesting that, even though there were no racial or other differences where she grew up, there clearly must have been some economic differences, because she was never encouraged by any teacher to go on to college or to think about college. She thought she might like to go, nonetheless, but she had to work to save some money. So she started working, first for an uncle in a restaurant, and then worked in a store in Oak Ridge, Tennessee, in a five-and-ten, as a clerk. While she was at that store, a well-dressed gentleman approached her and said, "Would you like to go work for the FBI in Washington, D.C.?" It became clear to her that she had already been checked out. They had checked with her school and other people, who had apparently highly recommended her, and so, even though she had never applied or anything, they recruited her. She thought about it, and she said, "You know, that might be an interesting thing to do." So she accepted and went to Washington. At that time, the FBI was a very paternalistic organization, literally. Which had good and bad qualities to it, of course, but for my wife they turned out to be good qualities because they gave them a list of places where they could go to live that had been approved — apartments and boardinghouses and all that. They really were very concerned that the young people they apparently recruited or worked for them, were well protected and all that. So, she to this day, has very warm feelings towards the FBI.

LABERGE: What is her name?

REYNOSO: Jeannene, and she is sensitive about the spelling of her name because there are a hundred different ways of spelling Jeannene.

LABERGE: There are. What was her maiden name?

REYNOSO: Harness.

LABERGE: You met then, but were you married before you then went to law school?

REYNOSO: No. Well, you know, we came from very different backgrounds, and we weren't engaged, weren't planning to marry. Then I came to law school, and she came out to visit on one occasion. I was still living with the Randalls

in those days. Then, during the summer — I really had forgotten this, but on one occasion, Mr. Randall said something like, "Isn't it cheaper to just marry the girl than spend all that time on the phone?" [laughter] So, I thought, "You know, that makes sense." I think that I proposed on the phone and she accepted.

LABERGE: How do we get from there to law school? What did you have to do?

REYNOSO: You know, it's funny, but I only knew of three law schools in California. That shows you how little I knew. I knew of Berkeley, UCLA, and Stanford. I applied to all of them, and I was admitted to all of them, and that's before the LSAT [Law School Admission Test]. But Stanford was too expensive and UCLA was in Southern California, and I wanted a change of atmosphere, so I went to Berkeley. Many young people, including my own children, are very impatient to grow up and all that. Somehow, for some reason, I didn't seem to have that. That is, I knew that I went to law school because there were a lot of people that needed help that I could give, and I knew that those needs would still be there when I graduated. So, I was looking forward to becoming a lawyer, and I went to law school to become a lawyer. I didn't have the foggiest notion about teaching law or clerking or doing anything else, other than being sort of a traditional lawyer, and my hope was to go to a small town. In fact, that's what I ended up doing. I thought that, in fact, Boalt Hall gave me a good education, and I did learn those things. Boalt, at that time, had a moot court exercise for first year students, and we did very well in that, and got first prize and honorable mention or something like that.

LABERGE: Any of the professors, particularly, who influenced you or do you have any memories of wonderful lectures or — ?

REYNOSO: Actually, I enjoyed [William] Prosser. He was always a funny guy.

LABERGE: He taught Torts?

REYNOSO: He was the tort guy, yes. We used his casebook. Torts to me was interesting because it was the law, but you could always see the public policy behind the law, and you could see that the law, in a way, uses terminology that sounds very scientific, but in fact is not. There are policy reasons behind those rules, but once the rules are made, the law often pretends that it is beyond public policy. It is sort of like a God-given rule, you know. I think that I was able to see much of how the law functions in torts. Then we had a gentleman whose name was something like Llewellyn, I forget.

LABERGE: [David W.] Louisell?

REYNOSO: Louisell had come from Minnesota. He was, I think, the most warmhearted person, professor, that I had in terms of his sensibilities. But the professor that I really liked most was Frank Newman. When I was there he taught Equity. That was the only goal, he had practically forgotten that. And I was fascinated by Equity because that dealt with right and wrong, and it called on judges to exercise their notions of right and wrong. Not only did the subject matter fascinate me, but Frank Newman was the only professor that invited all the students to his house, and I still remember that very favorably. So, I really liked Professor Newman.

LABERGE: Were you on the Court at the same time with him?

REYNOSO: I was. Yes, yes. But I don't know how much any of the professors sort of influenced me. I don't think my basic notion of right and wrong and those sort of things really changed.

LABERGE: What about other minority students in your class? Were you the only Latino? Were there any women? Were there any African Americans?

REYNOSO: In my class, when we started there was an African American who dropped out. I heard that he went back to school later on. So, for most of the time that I was there, there were no African Americans in my class. There was one Asian American, and yours truly as a Latino. There was a grand total of two minorities in the class. I had always remembered three women in our class, but I was recently reviewing or looking again at our graduation picture and there appear to be four women. So, that was the diversity that appeared in our class.

We didn't have minority organizations. We didn't have political organizations. The whole thrust, practically, of the sixties in organizing those types of organizations really did not exist when I was in law school. And, I must say that, as I indicated earlier, I knew there were all these issues around, but I knew that there would be time to face them. The only extracurricular activity that I remember, that had a social base to it, was in politics. Governor [Edmund G. "Pat"] Brown was then running for his first term as governor. That was the year that the Democrats took over the state. It had been a Republican state most of the century. So, it must have been in '56, yes, that Pat Brown and all the other Democrats were elected. There was a Latino running on

the statewide ticket. He was running for secretary of state, and I had met a lawyer in San Francisco who was running his northern campaign, and so he got me involved a little bit. I had a big poster in my carrel, and I would get a lot of kidding about it. He was the only Democrat to lose that year. I felt that things were not quite right, politically, when every other Democrat got swept into office, and [not] the only Chicano candidate for secretary of state.

LABERGE: What was his name?

REYNOSO: His name was Henry Lopez. I knew him very well, then and for a long time afterwards, actually. Brilliant guy who had graduated from Harvard. Grew up in Denver, and was very active politically for a while after that, including the Kennedy campaign.

LABERGE: You've done a lot of teaching. Tell me some about the approach you take with your students.

REYNOSO: Well, it is certainly more informal and more conversational than the classes that I had, and I am sure that's based on my own notions of what I liked and didn't like about teaching in law school. I should tell you that I first started teaching on a part-time basis. When I was the director of California Rural Legal Assistance [CRLA], I got a call from the law school at Berkeley, Boalt Hall, asking if I would teach a seminar on — I forget what it was called; whether it was Poverty Law, or Latinos in the Law, or something of that sort — but I had agreed to do it, based on the cases that we were then handling in CRLA. So, I taught a seminar and I enjoyed it. Then I got a call from UCLA, and they asked me to teach a seminar, which I did. Very much the same sort of seminar, and I enjoyed that. Then I think I was asked to teach a seminar in Chicano Studies at Berkeley, and that was a little bit interesting because, at that time, they had a student committee that met with professors who were going to teach, and they wanted to be sure, I think, that the professors were well qualified in Latino and Chicano culture, I guess. And clearly the young people there didn't know who I was or my background. So when we started talking, and they found out what I was doing and so on, why, then I passed! [laughter]

At that time, too, maybe the last year or two that I was the director of CRLA, I started getting phone calls from not only Berkeley and UCLA, but from other law schools asking whether I was interested in teaching. And I confess that I had never dreamed of being a law teacher when I went to law school, because I had gone to law school to become a lawyer. But I kept

getting these phone calls. One time a professor from New Mexico came and visited with me in San Francisco and we must have spent an hour or so talking. Shortly thereafter, I got a letter from the dean in New Mexico, "We had a report from this professor, he was very impressed with you, and we would like you to come to visit the law school in New Mexico." They said, "It is not a recruiting trip, because we don't have any openings now, but we would just like to get to know you and get to have you know us." And so I did go out for two or three days, I forget.

LABERGE: This is in Albuquerque?

REYNOSO: This is the University of New Mexico in Albuquerque. I visited with them and with the law school, and I must say that I was really taken, both by the people that I met and by the law school itself. They were doing many things that I thought were the right things to do, including the fact that they had a very active clinical program. The students not only learned in the classroom, but then learned by doing, if you will. I was pretty impressed by them. Then, when I got back to California, either several weeks or several months later, I got a letter from the dean. And it is the type of letter of which, the type of which I have never received before or after. It was really a warm letter where he said, "Well, we unexpectedly had an opening, and the folk here really liked you, and we would like to offer you a job as a law professor." And then it went on to detail. "We would hope that you could come next fall." I think they even told me how much I would be earning and how much I would be teaching. It was just warm and yet specific at the same time. That was a new experience for me, because I had had the experience of people calling and sort of asking whether I would be interested in that or something else, but never quite that specific.

I was impressed by that letter, and I discussed it with my family and with the board — because by that time at CRLA we had gotten through big battles with Governor Reagan and things were going smoothly. I had been with CRLA for about four years, and I had never conceived of myself as staying as a poverty lawyer for the rest of my professional life. I discussed it with our board chair, and we agreed that if I were to leave, that was probably a good time to leave because things were going smoothly and so on. Eventually I accepted the position in New Mexico. I must say that my wife was not particularly excited about going to New Mexico, but we did go.

LABERGE: What did you teach?

REYNOSO: In New Mexico, I actually taught courses different than what I am teaching now. My basic courses were Constitutional Law and Labor Law. And then I taught a series of seminars and other courses on Consumer Law and Poverty Law and on Real Estate Law in New Mexico. In fact, it turned out that that seminar that we had on Real Estate Law had to do with the old system of land ownership in New Mexico. And all of the students who signed up were Spanish speaking. They all had an interest in that. So, we decided to conduct the class in Spanish. I knew something about it but I had to educate myself. Actually, I had read quite a bit about it because that was the basis for much of the political turmoil at that time. There was a fellow by the name of [Reise] Lopez Tijerina, and there had been actually some violence in New Mexico over the ownership of land, particularly of communal land. But then, when I was there, I not only taught seminars. One summer I was asked to teach one of the courses — and I was a classroom teacher; I wasn't a clinician — but I was asked to teach a clinical program course. Since that time, New Mexico has been particularly good on allowing professors who are classroom professors to teach clinical programs and visa versa, which I think is a good way of doing it. Incidentally, the letter said they would make a tenure decision on me in two years. Basically, they would be making it on things that I had done before I got there, I suppose. But, anyway, they did make the decision, and I was tenured in two years. In the UC system it takes a little bit longer.

The summer program that I taught was actually a misdemeanor clinical program, where the students handled cases of folks accused of criminal misdemeanors. And it was really exciting to see the students do the preparation they did, and it was just misdemeanors, so the judges very often didn't get a really well-crafted written motion and all that. I used to tell them that we wanted them to learn how to do it right. Then, if they wanted to take shorthand shortcuts, as do many private attorneys, they could do that later. But we wanted them to do it completely. So they would often file pre-trial motions and all that, which I am sure the judges in that court weren't very used to. I remember one time when I was with one of the students, and she said "May it please the court, I have a pre-trial motion to make," and the judge leaned over, put his glasses down, and said, "Oh, I'm sure you do, counsel." [laughter]

I had been a practicing lawyer at that time for some years. So I thought that was a very important part, and I have found that to be true even now.

When I was a judge, I would have externs and very often they would comment to me how valuable it was in their learning to finally put all those theories to work in those cases as the issues came up of: What evidence is admissible; what isn't? What standard of care do the judges use? Were the instructions given by the trial court judge proper or improper? And all of that. Their experience with me was a practical experience. And that helped them also get back into the classroom and find out how important — what their learning in fact is. Whereas, when you don't have that experience, it is just harder to put it all together.

I came back to become a judge, and then, when I left the judiciary, I started practicing law again. And practiced for two or three years, and then I got a call from UCLA, asking if I would be willing to teach there. So I started teaching at UCLA, and I was there ten-and-a-half years before coming to Davis, two, two-and-a-half years ago. I came here for two reasons. One, because they offered me a very nice academic chair for the Study and Teaching of Freedom and Equality [Boochever Chair]. I figured that no lawyer could say no to that. And then secondly, my family home is still in Sacramento County. So it made a lot of sense for me to accept this position, and I have been very pleased here.

LABERGE: Next, I have down that you were — well, two things. That you practiced law, and that you were a legislative assistant to State Senator [William] Beard.

REYNOSO: Yes, yes. I called the law school. It will give you a sense of how things have changed — the associate dean was also the placement officer at that time. So, I talked to the associate dean, and he says, "Well, I've got this list of people who are interested in hiring." The first place we went to was El Centro. They had an opening for a lawyer and for an assistant. The Legislature had just approved, for the first time, a regional assistant, a representative, for the state senators. And that was to be a half-time job. I went down and I met one of the partners. There was just two partners, the senator and another partner. We liked the area. We were on our way to Santa Cruz to interview with a lawyer when we decided that the job in El Centro looked pretty good. So we called the lawyer in Santa Cruz, maybe one other place, and cancelled the appointment, called the lawyer in Bakersfield and told him that we had accepted another job, and started practicing law in El Centro.

LABERGE: And what were you going to be doing?

REYNOSO: The job was to be a half-time job as the assistant to the senator, and a half-time job working at his law firm. With respect to the senator, it was my job to meet constituents, to go out to meetings, and all that sort of thing. It was a perfect job for me, because I was new in town and that gave me an entrée to meet all of his friends and all that. Very quickly, I seemed to know practically everybody in Imperial Valley. I practiced law at this firm, and I did all kinds of things. I sometimes mention to my students that there is a whole field of law that I had never heard about when I went to law school called "workers' compensation," and because I was the only native-speaking, Spanish-speaking lawyer in town, many of the farm workers who got injured on the job started to come see me. Then it turned out that many lawyers didn't like accepting workers' comp cases, so they started referring workers' comp cases to me, and before I knew it — by the time I ended my practice in El Centro, probably a quarter of my work was workers' comp work, an area that I didn't even know existed. So I always forewarn my students that they still have a lot to learn once they start practicing law. But I did all kinds of work. I still remember my first trial.

LABERGE: What was it?

REYNOSO: An old cowboy had had a shed built by a contractor, and he felt that the contractor had done a terrible job, so he didn't pay him, and I think the bill was a thousand dollars. It was a case that the law firm already had, but it was a small case, so I was asked to defend the case. No jury. So, we went before a judge, but it was my first case so I was determined to do it right. I went out to look at the shed myself, and I looked at it and ran my own judgment, then I hired an expert witness to testify. So we went into court, and with all the preparation I had done, it was hardly a contest. We won hands down. [laughter] The lawyer on the other side was very angry, and I think that he felt that it was unfair of me to hire an expert and do all that work on a lousy little case of a thousand dollars where he thought it was going to be a "he says, I say" sort of case, you know. But it didn't turn out that way. That lawyer later became a judge, and I always thought that he was not quite friendly. I think he always remembered what probably was a humiliating defeat for him. Here comes this young kid, and the case turned out to be an easy case for us to win because if you have an expert, they've got to have an expert on the other side to counter your expert. Well, those were the days before you had as much pre-trial discovery as you do now. So, we didn't tell

him who our witnesses were. He didn't know that we were going to come in with an expert.

LABERGE: You were telling me, the law school at Berkeley called you —

REYNOSO: Yes, the *Law Review* called to see if there was a book that I remembered reading that influenced my life. And I told them, "Sure, I remember one very clearly." It's a book that I read when I was a teenager, by Carey McWilliams, called *North from Mexico*. It was the first time that I had read a book like that, or even an article, recognizing who we were as Mexican Americans, so it made a great impact on me. He asked if I would review the book. I must have mentioned to you, that, as a youngster, one of the things that was disturbing was that we felt isolated because nobody that I knew that was Mexican American had an official position. The storeowners weren't Mexican Americans, the post office, the postmaster — postmistress, actually — was not Mexican American. I just didn't see that representation in the community as a whole, and I think there is an impulse among folk to be recognized.

In part of the book, Carey McWilliams mentions that there is a lot of evolving to be done in the Mexican-American community. For example, he says he wasn't able to find biographies and autobiographies of Mexican Americans. He thought that that would be a phase of evolution, of maturing of the Mexican-American community. So I asked my research assistant if he could find books that I will put in a footnote on biographies and autobiographies, and sure enough he found, what, eight or nine. And then, at that time, there were very few — no books on Latinos and Mexican Americans, and I asked him to just find several books on Mexican Americans — I know there are a lot around — and he found maybe a dozen. So, I will just put in some footnotes. I think Carey McWilliams would be pleased to see that evolution. I am not sure that I learned that much from the book, but it sort of fortified the things I was learning, sort of fortified the notions that I was developing about where I fit in society being both Mexican American and American. And he even has a discussion there of the 1930s, when so many Mexicans were deported to Mexico, and the experience of folk getting to Mexico and recognizing that, even though here they are referred to as Mexicans, when they got to Mexico they were as much Americans as Mexicans. And the Mexicans made fun of them because they either didn't speak Spanish very well or their customs were different, and so on. I'm often reminded of that when I remember,

when I went to Mexico — and I may have mentioned this to you — after college, many of the young students that I met around the university were very derisive of Mexican Americans. And they would tell me that I was one of the few Mexican Americans that they had met that knew about world history and about Mexican history and about literature and all that. Because they would say, "We've got cousins up there, and they are all so ignorant." They were very derisive. You sort of have to figure out where you fit in society, and I am sure that I was going through that process. I had evolved quite a bit by that time. I was living with the Randalls, so I knew a lot about, on an intimate basis, Anglo-American life, so I think I had sort of figured most of those things out by that time. But to have it black and white, and to have him confirm, not only what you knew about the unfairness of society, but also the hopes that he had for Mexican Americans. It was really to me greatly uplifting.

One of the more memorable experiences that I had was when I was there only about six months maybe, and there was a strike by farm workers. That's before Cesar Chavez started organizing. This was the AFL-CIO Agricultural Workers Organizing Committee as they called it, AWOC. They were trying to organize farm workers. They never succeeded, but they were trying. And they called a strike. We had this wonderful judge, I really liked him, but he obviously hadn't kept up with the constitutional law for a while because he ordered all of the picketers to stop picketing. Well, you can't do that — there is something called the First Amendment. He didn't say, "Don't be involved in violence." He didn't even say, "One picket every ten feet," or whatever. He said "NO picketing." Well, as you might guess, they continued picketing, and he ordered them all arrested. And they all ended up in the tank. At that time, the rules permitted the jailers and lawyers to go into the tank. So the lawyers representing the workers called me because they were all Spanish-speaking, many of them monolingual Spanish-speaking, called me to see if I would go see them on their personal needs. I wasn't representing them. So I agreed to do that. I viewed it as a mission of mercy. I went down and interviewed them, and got names of spouses they should contact and medical needs and that sort of thing, then I reported to the lawyers and went back to my office. My office was no more than about a block away from the jail. Nonetheless, when I got there, my two partners were there. They were very concerned that many of our clients who were growers were getting angry, and we were taking sides in an economic battle, and all that. And I remember thinking to

myself, "You know, I became a lawyer to help people." I didn't charge them or anything; this was a mission of mercy. Fortunately, the rules permitted us lawyers to go in. Nobody else could go in. And I remember thinking to myself, "Well, if my colleagues become that unhappy with me, fortunately I have a little card that says 'Attorney at Law' and I'm independent and I can set up my own shop." Well, it never got to that, but I remember having to think very quickly about what it means to be an independent professional. And, you know, I wasn't going to give up on the things that I had become a lawyer to do. I still remember that very vividly.

LABERGE: How did that affect your then going to do other things besides practice law, like work at the EEOC or at the CRLA?

REYNOSO: Well, that has a lot to do with the political environment, and so on. And as always, it was shifting. While I was there, I was very active politically because I had been with a senator. He was, unfortunately, defeated. He was a Democrat. But, interestingly, he was defeated by another Democrat in the primary. He always blamed the fact that he had voted against the death penalty as being the reason for it. I don't know whether that was true or not, but he was barely defeated, actually. In fact, there was a recount because it was so close, but he was defeated, so he left office. I stayed with the firm for another year, year and a half, and then opened my own office. We were very active politically during that time then. That was '59, and in '60, I guess, Kennedy was running for office. Another fellow and I were co-chairs of the Viva Kennedy club in Imperial County. And we succeeded in having, at that time, the biggest dinner rally that had ever taken place in Imperial County. So we were quite proud of ourselves. I still remember the one joke I have ever written and told, and you are about to hear my one joke. It was very well received. Kennedy was running against Nixon, and at that time, the highway patrol was beginning to ticket people who had stickers on their back window. That was very common in those days, but the highway patrol had decided that it impeded the view, so they started ticketing people. I told the crowd there that a highway patrolman had stopped this person with a Kennedy sticker and he was getting this ticket. And while he is being ticketed, a car passed by with a Nixon sticker, and he wasn't being ticketed. And he said, "How come you are ticketing me, but you aren't ticketing that fellow with the Nixon sticker?" And the

highway patrolman: "Well, anybody can see through Nixon." [laughter] That was the joke.

Based on my political activity, I think, I was asked if I wanted to run for the Assembly, four years after that. So, I ran for the Assembly. I had helped many candidates run for local office and all that. And in politics, it is a matter of, you help somebody and hopefully they will help you later. But it was interesting that when I declared, after I had been asked to run, several people whom I had helped were reluctant to help me. They were in favor of helping another person running in the Democratic primary. It turned out that that person hadn't registered when he had moved, and so he couldn't run. Those same folk then did help me. Now, it may have been just their assessment that I couldn't win. I had only been in the Valley five, six years, and no Latino had ever run for countywide office. That was before reapportionment. But then, we had another opponent in the primary. He was the mayor of Brawley, which was the second largest town. Everybody figured that the mayor would win the primary. And much to everybody's surprise, we won by about 60 percent of the vote. Suddenly it became an exciting race. We were running against an incumbent and eventually lost, but it was an exciting race.

I had met a gentleman, and I had really liked him, and he apparently liked me, when the senator was still a senator. And this fellow was a special assistant to the governor. After the campaign, I was appointed to be the assistant executive officer of the Fair Employment Practices Commission by Governor [Edmund G.] Brown [Sr.]. I was told that by this fellow who was in the governor's office, who then told me the following. He said, "Cruz, as different positions have come up in the governor's office that I thought you would be good for, I have recommended you to the governor. But he has always had his appointments secretary then check you out. His appointments secretary was his sister. His sister had a way of checking people out where she checked with former police chiefs and FBI agents, and you always came back as a very suspicious guy. So, I was never able to get you appointed." He said, "She retired." Actually Art Alarcón — now a very conservative judge, very conservative person, but who obviously had a very different view of what you look at — was appointed appointments secretary. And when, apparently, the first opportunity came up, he recommended me for this position.

LABERGE: Who was your friend in the governor's office? Because that must have helped too. The fact that you had a friend there?

REYNOSO: Yes, yes. Though I really didn't even know he was a friend. I mean, I had just met him. Bill Becker was his name. And I got to be very good friends with him later when I had more contact with him. So, that's how I ended up with the Fair Employment Practices Commission, and worked there for about a year and a half. And then I was asked to be a staff secretary for Governor Pat Brown in Sacramento, and I worked there for about three months. He was not successful in his reelection campaign against Ronald Reagan, so I returned to my law firm for about six months. And then I got a call from Washington D.C. from the new chair of the commission, the Equal Employment Opportunities Commission, who invited me to go back to be interviewed and meet him, and he offered me a job as associate general counsel [in 1967].

LABERGE: And who was the chair?

REYNOSO: Stephen N. Shulman was chair. [Sep. 14, 1966 – Aug. 3, 1967]

LABERGE: Before we go onto that, tell me what you did at the Fair Employment Practices Commission.

REYNOSO: The Fair Employment Practices Commission dealt only with employment. We handled complaints that came in pertaining to employment matters. We were involved in training state officials and others on equal employment laws. One of the big projects that I was involved in — and was placed in charge of it — was doing a study of testing for employment purposes, because that was one of the vehicles that had proved deleterious to the efforts to have equal employment. So we had a task force of very prominent people in the testing field from throughout the country. It was very interesting.

At first, all of the people we had appointed for the advisory committee were very professional and very correct in how we were handling our studies. But, as I got to know them better, they started relaxing a bit more, and near the end of many months of working and testing, this one gentleman — whose name I forget, but he was *the* most prominent person in the personnel testing area — said to me, "Well, Cruz," he says, "If you really push me on whether or not our tests actually test what employees will be doing, I'd have to take the Fifth Amendment." He says, "Our job really is not to test what people are going to be doing and whether they are the best people to have that job. Our job is really to come up with a test that appears to be fair, and thereby cutting down the number of folk that the employers need to interview or need to consider. For example," he says, "at that time, clerk/typists was a very popular

employment, and clerk/typists, we all know that a clerk/typist spends very little time typing. They file, they meet, they greet whomever they are dealing with. They do all kinds of things. Nonetheless, our recommendation was that we give them a typing test, and whoever types the greatest number of words per minute with certain accuracy factors is the most qualified." He says, "You and I know that doesn't really test what they are doing, but that appears to be fair, and that way they can take the top three people, interview them, and make the decision. It saves the employer money." So, I thought it was a — to me I have always remembered that because it was revealing in terms of what the real role of tests is. And very often, it has little, some, but little to do with actually testing what an employee is going to be doing.

The Fair Employment Practices Commission is a state commission, actually established by the state of California before the 1964 Civil Rights Act, which established the Equal Employment Opportunity Commission, and indeed, the federal commission was patterned after the California and New York experiences in setting up such commissions. So, it is very important in a historical context.

LABERGE: Who else served with you?

REYNOSO: The chair when I first joined was Ronald Dellums, the uncle, I believe of Congressman Dellums. He is the more prominent person that comes to mind.

LABERGE: For instance, just what that one person told you about having the test appear to be fair, how did you change it? If you did.

REYNOSO: What we eventually did, and actually I have some place that we actually published a report on testing that then was sent to all the employers, and so on, including cautionary provisos. My job was to a large extent administrative, to make sure that the cases were being processed. To be in touch with the office in San Francisco and the office in Los Angeles, and be sort of a troubleshooter and person who in some ways was the person who did most of — not all, but much of the public speaking and that sort of thing for the commission.

LABERGE: Okay. And then when you were briefly a staff secretary to the governor, tell me what you can about that. Any anecdotes, or what you did?

REYNOSO: Well, there were a lot of little things that I was asked to look at, but the major thing that I remember looking at was that, at that time, there was a rumor that the highway patrol in the state of California had some sort of a sweetheart deal with Ford Motor Company. They were buying cars from Ford Motor Company without following all of the proper state procedures. And that was during the time that the governor was running for reelection, so I don't know whether he was concerned that in fact there may be something wrong there and it would be used to attack him or whether he just heard these rumors and wanted them checked out. I was asked to investigate that. That was the single most interesting thing that I did, and what really impressed me was that, as a lawyer, you have to struggle to get information from parties. And it just amazed me how, when I would call people and I would say, "This is Cruz Reynoso, I am calling from the governor's office. The governor asked me to look into these matters." And all the files would open up for me. I would talk to people, I would read files and all that, and then I eventually gave the governor a report. I couldn't find any wrongdoing at all. But to me, it was just fascinating to see those doors open just because you were with the governor's office. I worked closely with, by that time, *the* staff secretary. I was *a* staff secretary working with Winslow Christian, who later was appointed to be a judge.

LABERGE: There is an oral history of him.

REYNOSO: Oh, good. I think probably it would be important to have as much oral history as possible around Governor Pat Brown, because I still consider him the last great governor that we have had in this state.

LABERGE: Yes, yes. There is a whole set called the Knight/Brown Era. And that's why Winslow Christian was interviewed. In the process, did you also get to know his son? I was wondering how that came about.

REYNOSO: You know, I met him only once, and he was then a very young person, and my recollection was that it was some informal gathering at the governor's mansion. Pat Brown was still in the old governor's mansion — which I loved; I really was unhappy when Reagan decided to leave it — and I think he was just sitting by the pool, and we said hello and that was it. I didn't really consider that I knew him.

LABERGE: But later on you got to know him?

REYNOSO: Well, strangely, when I was with California Rural Legal Assistance later, one of our staff attorneys had gone to work for him when he was secretary of state. And he said, "Cruz, you gotta meet the secretary of state, he is a very interesting guy." So, he invited us to come to Sacramento, and we came — another fellow and I came up, and we must have spent two or three hours with Jerry Brown on that occasion. That's the one and only time that I remember really sitting down and talking to him ever before I was appointed to the benchright. I think that my later appointment to the bench came not because I knew him, but because I knew other people around him.

LABERGE: Who suggested — ?

REYNOSO: Who no doubt suggested me for that position. And then I had met him. He obviously knew about me because he was an admirer of Legal Services [Corporation] and I was the director of Legal Services. He was an admirer of Cesar Chavez and I worked with Cesar Chavez for many years. I wasn't around when he ran for governor; I was in New Mexico.

LABERGE: Tell me your impression of Pat Brown and why you think he was our last great governor?

REYNOSO: Pat Brown was interested in governance, to a large extent, which I don't think any governor since that time has really had that interest: Looking at the whole state, seeing what needed to be done, taking the steps to do the things that needed to be done. We may or may not agree with the water policies and all that, but it was a studied approach to the needs of the state, and then an effort to implement them. To have a plan of where you want to be or where you think the state should be in five or ten or twenty years, and then working toward it. It seems to me that since that time, we have had every governor looking way ahead for say the next twenty-four hours maybe, maybe for the next election, but certainly not five or ten or twenty years. As a whole. Now, some may, in given issues.

That doesn't mean that I agreed with Pat Brown on everything. I was active, as I indicated, in trying to help the farm workers, and we tried to pressure Pat Brown to meet with Cesar Chavez. Finally, he agreed to meet with Cesar Chavez, and we celebrated! Not that he had agreed to do anything; just that he had agreed to meet with him. So, you know, in politics and public life you don't always get everything that you want, but he had that vision of California, and then tried very hard to implement it and to work with the

Legislature. He was a very gregarious person, remembered names and all that. The last time I saw him was at UCLA, where he had come to talk to students, and I ran into him at the faculty club. He was having lunch there with another professor. And he was just always a very friendly, very gregarious person, and at the same time a very serious person. So, I just think that he is the last governor that we had that really took seriously the notion of governance. And by contrast, look at our current governor [as of interview date, December, 22, 2003, Arnold Schwarzenegger].

LABERGE: Tell me about your involvement with Cesar Chavez, because this is the same period of time, and what you were doing in that area?

REYNOSO: Cesar Chavez was the staff director for a group that I joined when I started practicing law in 1959 in El Centro. A new chapter had just been formed, or was being formed, of a group called Community Service Organizations — CSO would be the initials. And at that time, Cesar was the staff director — in fact, the only, I think, full-time person. Dolores Huerta would also work for the CSO; I don't think she was full time.

I met him through the CSO at the various meetings that we attended quarterly, when he would come down to El Centro. We had various campaigns — for example, campaigns to register voters, campaigns to get out voters, campaigns to, at that time, get a statute passed that guaranteed a state pension for older people. These were all statewide campaigns where we tried to get hold of the legislators, and all that, and Cesar was very active at doing all of that. Then a time came, maybe a couple of years after I had met him, where he was in El Centro meeting with the chapter in one of those efforts, and he suggested that we go out and talk after the meeting, which we did. I remember we went to a Chinese restaurant in El Centro, and we talked until late that night, and he was telling me that he was thinking of leaving CSO because even though he loved CSO, CSO had chapters in cities as well as rural areas. His principal interest was in working rural areas and working with farm workers.

For example, he had been very involved in the Oxnard area in organizing local farm workers who would then show up en masse at the door of growers and say, "Here we are. We're ready to work." And they would do that because, at that time, the Bracero Program was in force. And braceros were supposed to be used only if there was not local help available. Well, clearly there was local help available. So it was one way of pressuring the government, the federal

government, to eventually do what it did, and that is to terminate the program because it was really an exploitive program when there were plenty of local workers who were willing to do it. Sometimes they would need to be paid a little bit more, but that's supposed to be the way the free enterprise system works. He was very interested in the plight of the farm worker and told me that he was thinking of leaving to organize farm workers. Not as a union, but like the CSO, as a self-help organization. The CSO would establish, when it could, credit unions. And all of the chapters had a mutual funeral aid society because the members were poor and so when somebody died, the poor people would pool their resources, and this was a way of pooling resources ahead of time to help with the burial of individuals. As I said, it was a self-help organization, and that's what he hoped to do with farm workers, and indeed that's what he did for several years as the farm workers movement got stronger.

I think I mentioned to you that I've read articles or biographies that say that he always wanted to be a labor leader. Well, if so, that's different than I remember it, because, from my many discussions with him, he was very suspicious of labor unions. He had very much in mind, for example, a labor union strike of farm workers that took place in Imperial County — as they did other places — organized, at that time, by what was called AWOC, the AFL-CIO Agriculture Workers Organizing Committee. And the strike failed. When it failed, of course, the organizers left the area but the farm workers were left, and they were blackballed, and so on. So he was very cautious of a traditional labor organization effort at organizing farm workers. Further, labor had tried on and off for years to organize farm workers and they had never succeeded. Because of the vagaries of the pool in California, the tradition had always been to have many more workers available than were required. That's the way we were set up politically and economically. So the growers could always draw from that pool, but that meant that off-times you had a 20, 30, 40 percent unemployment rate among farm workers because they needed a pool that would meet the highest demand of the growers. It put the farm workers in a very disadvantaged, disadvantageous position in terms of organizing.

There was quite a bit of soul searching, I have no doubt, when finally the farm workers, headed by Larry Itliong, called a strike and asked the farm workers headed by Cesar Chavez to join them. Finally, Cesar Chavez and the farm workers decided that, yes, they would turn the farm workers organization into a farm workers union. It was not a farm workers union until

that happened. And though I never had an in-depth discussion with Cesar about this, I am sure what happened was that, after several years of self-help, I think they recognized that self-help was not enough. That economic and political forces set against advancement by farm workers was just too great. They needed greater power, and that would come about perhaps through a union. But I think Cesar also recognized that the traditional approach of unions couldn't work, and so the genius really of what Cesar did, I think, was to combine the lessons learned from the civil rights movement with the labor movement. And that's what they did by calling on boycotts, by picketing, by propagandizing the plight of the farm workers. Really, there was a combination of Walter Reuther and Martin Luther King that I think really expressed the approach that the farm workers had.

LABERGE: And did you have any part of that in advising him or helping to organize or — ?

REYNOSO: No, not really. I would see him from time to time after he left the CSO, but I was never in the inner group of that organizing effort. Later, he and I both served on the first board of California Rural Legal Assistance, but even then it was not an intimate relationship. The last discussion I really had with him before he died was in 1986, I believe. We had a sit-down talk, and the main thing that I remember from that was — there were a couple of things. One, that they were increasing their more formal propaganda at that time. But the thing that I really remember is this: He mentioned that, that year or the previous year for the first time, they had gotten more monetary support from East L.A. than from West L.A. That was interesting because they always had a lot of support from white liberals and the Jewish community. Of course, the Latino community is poorer too, but that year he said they reached a new milestone where they got more economic support from East L.A. than from West L.A., which I think was interesting in terms of the evolution of the Latino community in California.

LABERGE: Let's go on then to the EEOC. When you got that call, how did you make the decision that you wanted to do that?

REYNOSO: I got the call — well, first of all, they agreed to pay my way and my family's to go to Washington to be interviewed. So, it was an easy call to go. Secondly, I should tell you that a dream that I had always had was to have my own law firm and to take time off from time to time for government

service. I think I read about lawyers taking time to serve in different capacities and that sounded to me pretty good. But I had also, I had spent some time in Washington in the Army, and I had also talked to long-time government employees who were very — who cautioned me that it was too easy to get a government job and then get so tied to it that you couldn't get away from it. I valued my independence, so I did not want to ever feel tied to a job where I could be intimidated, in terms of not saying or not doing what I thought was the right thing to do. I didn't want to work for the government permanently or professionally, but I wanted to be able to go in and serve in a certain capacity and then leave. I had met my wife in Washington D.C., and I would tell her from time to time that someday we would go back to Washington to spend a little bit of time working for the government. And she would always say, "Yes, yes." And seemed to be disbelieving. Suddenly here there was an opportunity. So we went back to Washington, and sure enough I met the new chair and he offered me a job. We couldn't leave right away because my wife at that time was pregnant, but he agreed to wait several months for us to report. And so I accepted. I was always interested in equal employment, obviously. This was a new statute, so it was exciting to be there at the ground floor.

LABERGE: And the new statute is the civil rights law.

REYNOSO: Yes, the 1964 Civil Rights Act. The commission didn't really get going until maybe late '65, and I was going there in '67. It had just been in operation for a couple of years and all the original commissioners were still there. It seemed to me like an exciting time to go back to Washington, so I accepted the position and went back there, again with the agreement that I would retain an interest in my law firm. But by that time it was easier because I had a partner who could continue doing all of the work and I didn't feel that I needed to be flying back every other week. I went back to Washington and I was there for about a year, and enjoyed the experience.

It was a quite different experience then than now. We had perhaps seven or eight lawyers in the whole agency. Now they probably have several thousand. At that time, the law did not permit us to file actions directly — we had to do it through the Justice Department — but we could file amicus briefs directly. And I was very impressed with the capacity of federal judges to change their minds and overrule themselves once they were educated as to what the law said. Because they would issue, very often, rulings that didn't comport to the new

law. Then we would file an amicus brief saying, "Hey Judge, this is what the law says," and sure enough they would reverse themselves and follow the law.

Other things were interesting at the commission at that time. It had relatively few Latinos working for the commission, and I was the most senior of the Latinos in terms of not time but position, and so a delegation of them — two or three — came to see me on behalf of the seven or eight Latinos who were working there. They felt that they were not being treated fairly, so they asked me to talk to the chair. In my position, I served at the pleasure of the chair. So I told them, "Yes, I will check into it, but I needed to talk to all the employees and get the proper story as to what their concerns were and so on before talking to the chair." Apparently, the rumor got back to the chair that this was happening. So, I got a call from his assistant saying "Mr. Reynoso, the chair would like to see you immediately." And I said, "I am sorry, would you tell the chair that I am not yet ready to talk to him." There was this silence on the other side. They couldn't believe that an underling would say no. And then I finished talking to the people, and I called back and I said, "I am ready to talk." But I still remember that silence and disbelief that somebody would say — would not jump up and say "Yes, sir!" But I remember being very happy that I had a law firm to go to. If they fired me, that was fine with me. When I met with the chair he was very gracious and listened to what I had to say and took some steps to correct the situation and so on.

Then, the other interesting thing — unrelated to the job, really — was that the Poor People's campaign took place at that time. I was there, and some of us were on the committee to help them — Latino government workers mostly. But some were not government workers, just folk who practiced law, or were residents of D.C. As matters evolved, the job of our subcommittee was to help the people from New Mexico find places to stay, and so on — headed up at that time by Reise Lopez Tijerina. I don't know if you remember a shoot-out that took place in Northern New Mexico, back in the early — mid-sixties over the issue of land grants. Well, land grants were given by Spain and Mexico to many families, and they were held in common. One of the techniques of the American occupation forces when they took over was to privatize as many of those land grants as possible because once they were privatized they could be taxed, and it was easier to change ownership, let's put it that way. And in fact, there were efforts along those lines during the Mexican territorial time, even after New Mexico became a state, and many families feel that their

land was basically stolen from them. That has been — it continues to be — a strong political issue, particularly in northern New Mexico. It was particularly strong in those days, and formed part of the civil rights complaint that Latinos in northern New Mexico particularly had — not just in northern New Mexico, but principally headquartered in northern New Mexico — much like the failure of the federal government to provide four acres and a mule to former slaves. Things that were supposed to happen never happened. Or the many treaties that were broken with the Indians. And so they formed part of a group of Latinos who came to protest during the Poor People's campaign. Another group was the [Rodolfo] Corky Gonzales group out of Denver, and then a large group came from Texas, and then a smattering from the other states. But those were the three large groups.

Somehow our subcommittee, though we met with representatives of all of them, ended up helping the New Mexico group. We were able to find a private school, actually, that agreed to have them be able to stay there, to stay there at night, and we would try to provide money and food and that sort of thing. But the campaign — the Poor People's campaign itself — was interesting. You may remember they set up tons of tents in front of the Lincoln Memorial, and there were programs and all that to emphasize the issue of poverty. Somehow — I may have mentioned this last time, that Martin Luther King has become a little cuddly bear these days. Everybody loves him, but they forget that he was moving into foreign policy, into unionization. He died in Tennessee there with trash workers who were on strike. He was concerned about poverty as such, and folk now want to forget all about that and just remember that he wanted to look inside poor people's souls. The Poor People's campaign was a manifestation, obviously, by [Reverend Ralph] Abernathy and others to carry on with that emphasis on the lack of economic justice in the country. So, as I say, I and many others participated in that as sort of a local core, and it was very interesting.

LABERGE: Yes. Well then, how did you decide to leave the commission?

REYNOSO: I started getting phone calls from members of the board of CRLA asking if I would join CRLA as a staff person. I had never considered doing that. Then, the director — the founder and director — Jim Lorenz came and stayed overnight with us and visited and also urged me to join. The idea was that I would join as deputy director, and then when he resigned, then I would

become director. Eventually I decided to do that. And they too had agreed that I could continue with an interest in my office because I had worked all those years to build it up, but I thought it would be a little bit awkward to do. So when I decided to join them, my partner and I then terminated the partnership, and then I was free to devote my time to CRLA. Meanwhile, the headquarters of CRLA had moved from Los Angeles to San Francisco.

LABERGE: And it's a state agency, or is it private?

REYNOSO: Oh no, it's a private non-profit, funded at that time by the War on Poverty that Johnson had set up. Later, the Legal Services Corporation was established and now most legal services programs get at least some of their funding from the Legal Services Corporation, but at that time, it was simply part of the War on Poverty. As it turned out, just two or three months after I joined CRLA, Jim decided to give up the directorship, so I became director very quickly and continued in that capacity for about four years. That was really how it happened. I was just convinced by the phone calls and so on that maybe I could do some good as the director. I didn't know at that time that it would turn out to be quite as high a visibility job as it turned out to be, but —

LABERGE: Yes. Tell me about that, and tell me about your dealings with Ronald Reagan.

REYNOSO: Well, I hadn't been at the CRLA very long when it was clear that the governor was not happy with CRLA. At that time, the law permitted the governor to veto a program, a poverty program, including legal services. And then the president had the capacity legally to override the veto. Every year that I was the director, we would get expressions of concern from the governor that we were doing things that he didn't like. We were suing the government and he didn't like that. We were suing welfare departments and he didn't like that. And we would get threats that he would veto the program, but he never did for two or three years. Then, eventually, about the third year that I was with CRLA — so it must have been in about '67 maybe — he did veto the program, and it turned out to be a very dramatic fight with him. So, before Nixon was elected, Reagan had been making noises about maybe running against him. And Nixon was very anxious to have him not run. So it became a very interesting balancing act. Reagan was very good at using the press. He issued his announcement that we would be vetoed, I think, on a late Friday night. It is said that that's not a good time to issue a press release

because fewer papers will carry it, but it is good from the point of view that the opposition doesn't get a chance to respond to you. But fortunately we had friends in the press and they called and said they had this announcement. And we got on the phone and called all the major newspapers so they got our response in the same story, and then the battle was on.

I should tell you that we had heard rumors that the War on Poverty office in Reagan's administration, headed by Lew[is K.] Uhler was investigating CRLA. They were going around asking all kinds of questions. The chair of the board and I went to see Ed Meese, a classmate of mine, and said, "Ed, we hear that there are investigators out there, and if that's true and if you find anything wrong please let us know. We would be anxious to work with you to correct it." And Ed says, "Gee, I really don't know anything about that. You'll have to talk to Lew Uhler." So we went to see Lew, another classmate of mine. We said, "Lew, we hear these rumors, and if you find anything, let us know and we would be happy to work with you," and he assured us that he would, and so on. Of course they never did, and then the next thing we knew we were vetoed.

The veto contained a large report, 170 pages or something of that sort. We broke it down, and it included dozens of accusations against us: we were fomenting riots in prisons and fomenting murders, we were attacking welfare departments for no reason at all, we were bringing lawsuits that were not proper against government entities, we were unethical in various things that we had done. We were really being accused of being felons. If what was true in this report — if the reports had been true, we should all have been in prison. The problem that Reagan had was that we had been reviewed just a few months before. There was an annual review of legal services programs, and that review team sent out from Washington was headed by Tom Clark, retired justice of the U.S. Supreme Court. They in turn had written a long detailed report that extolled the virtues of all our offices and the work we were doing, and how ethical and how marvelous our lawyers were and how they were doing everything exactly as required by OEO at that time. It was quite a quandary for Nixon because of the report and because we had had a lot of support at that time from Republicans as well as Democrats — the Republican Party has changed a lot from that time. There are no longer the Senator [Jacob] Javits of the world in the Republican Party. We had a lot of support, including Republicans from California, and so the administration was in a quandary. Rumor had it that [John] Ehrlichman and others in the White House were supportive of us. I don't know

whether it was true or not, but it sort of demonstrates the conflict that was going on. They were very anxious to make Reagan look good, but at the same time they couldn't quite rule against us, so they were issuing all these press releases, thanking the governor for bringing these things to their attention and all that and, to not be overly unkind, they were all untrue. And this was the federal government issuing these reports. So, we blew up the messages they were sending out in big print and all that, and I called a press conference in Washington, and all of these people came because we had very good press relations and whenever we called a press conference it was a good story for them. So they were all there.

I get up, and here I have blow-ups of what they have said and here was Clark or an unimpeachable source had said. It was just clear that they were lying through their teeth. I hadn't been into the press conference more than ten minutes when a reporter raised his hand and says, "Reynoso, did you call this press conference to tell us that high public officials lie." I said, "Absolutely." They all walked out on me. I mean, this is way back in the seventies. Apparently even then high public officials lying through their teeth was so common that it wasn't even a news story. I felt like a country bumpkin. I thought it was news when they were lying through their teeth the way the current administration does, for example. They are so used to it, they're inured to it in Washington. That's why it doesn't make the press, and the people don't even know that the current administration, for example, is just lying through its teeth. It is so common that it doesn't get reported and the people don't know it. So, anyway, I really felt like a sort of ignorant country bumpkin from way out in California calling this press conference.

The president was in this quandary I mentioned to you. The solution was to appoint a committee, right? But the committee was of three distinguished judges, all conservative and all Republican from state supreme courts — the chief justice from Maine, a justice from Colorado, a justice from the state of Washington, I believe. He had to drop out, and another justice was appointed. Anyway, three distinguished judges. They came out to California, and I remember the very first — well, first of all, the governor announced that he was not going to cooperate with them because he thought they had been appointed to investigate, not to hold hearings. And the judges said, "We are judges, that's the way we do things. We hold hearings. We want you to present us the evidence." The governor said, "We won't participate." They said, "Okay, but we are going to hold hearings."

I remember the first hearing they held was in San Francisco. I testified, and Sargent Shriver, who had established this office, testified at great length about the great work we were doing, and all that. One of the principal contentions to show how bad we were was a lawsuit we had brought against the school board of Madera because they had started school late so the children could go out and work in the fields because the growers needed more pickers. And we brought a lawsuit because it happened to violate the law. They said, "This is a clear example of CRLA and their clients interfering with the economic welfare of a community and doing terrible things. And besides, they are wrong. They are just harassing local government." What was so dramatic was that, on the very first day of the hearing, the California Supreme Court came down with an opinion in favor of our clients. The timing was just perfect.

Then hearings were held up and down the state. I remember the hearing where a local lawyer, who was quite respected and so on, testified that we were unethical, and the reason for that was that there had been a farm workers' strike and the farmers, the growers, were providing housing as part of the compensation. When the strike took place, they said, "Okay, get out of our housing." The farm workers came to see us and we said, "Wait, that's housing. If they want to get rid of you they have got to give you notice and follow all of what the law requires." The lawyer felt it was highly unethical of us to so advise them because it was compensation, and why should the employer be providing compensation when they were on strike. We argued, "Look, the law's the law, and it says that if you are in a house, before you can get rid of them, you have got to serve them a thirty-day notice and so on." Well, that case went to the Cal Supreme Court and again they agreed with our clients.

Then he also attacked us because we were bringing lawsuits — actually, they were administrative appeals — from denial of welfare. And he particularly pointed to Marysville, in Yuba County. What had happened there was that we had indeed filed something like nineteen appeals, and they were mostly based on the fact that the local welfare director was not taking applications in writing. The rules required they be in writing — I guess so later they could check to see whether it was properly administered or not. The easiest way for them to save money — I am sure because she was under pressure from the Board of Supervisors to save money — was to simply not take it in writing; therefore the application never existed. And so several people came to see us and said, "We applied; we didn't get the assistance." "Well,

show us your paperwork." "No paperwork." "Did you sign anything?" "No we didn't." "Was a report taken?" "No it wasn't." So, then we would file an appeal. At the time that the government complained about us, we had won eighteen of nineteen cases, and I think we won the nineteenth later. Not that we were great lawyers — it was just that the violations were so clear! But he attacked us for attacking, he said, the whole welfare system in California. So, it was that sort of thing that was in his complaint.

Well, jumping back then to this commission of three judges. They held hearings throughout the state. By about the third hearing, they started doing something that is rather injudicious. They started issuing little press notices saying; "We find no basis for these complaints, A, B, C, D." And then finally they filed a report to OEO. OEO then declined to show us a copy. So, we were negotiating then with OEO. One of the most dramatic things I remember is that [Director Frank] Carlucci said, "Look, you are the leading legal services program in the country. If we de-fund you, if we don't fund you again, that's going to be a terrible blow to legal services, so we've got to work things out." And they were proposing all kinds of restrictions that we found unacceptable. And I remember that we said when we met, we said "Look, if we — the best known and most important legal services program in the country — accept all of your restrictions, the next thing will be of course to enforce it against all the other programs. That we can't do. We would rather not be a legal services program than to have those restrictions." And the reality is that we had alternate plans. We didn't know whether we would get refunded or not, so we had plans to become a private legal service — a private law firm, to have the same regional offices. We knew that we wouldn't be able to do as much free legal work, but if we had, say, three attorneys per office, probably one attorney would be able to devote his or her full time and the other two attorneys would do work for pay to keep the office going. We were prepared to do that. So, again, we had the independence that didn't permit them to intimidate us. So we just said, "We just won't do it." I think that they were in a quandary in terms of what to do. Then they had this report that said, "These are great lawyers doing exactly . . . ." And they knew they had it. Then, [laughs] we filed a lawsuit against them.

LABERGE: Against OEO?

REYNOSO: Against OEO. *CRLA v. OEO*. I remember reporting to the board saying, "Gee, it felt so good to have a case entitled *CRLA v. OEO*" because

they were giving such a hard time. Freedom of information to get the report. We lost at the trial court level. We thought we would lose because of the judge, so we had already prepared the papers to file an appeal. On the day — I guess the judge ruled late morning. We were prepared to file the appeal that afternoon. Meanwhile, we got a call from OEO, and they said "We understand that the *New York Times* has gotten a hold of the report and they are going to print it tomorrow morning. Therefore, you can come and take a look at it." The Vietnam papers, what were they called?

LABERGE: The "Pentagon Papers."

REYNOSO: The "Pentagon Papers" had just been published by the *New York Times* a little while before, so it seemed very believable. We went to read the report and it was practically embarrassing to read it. It starts out by saying what great lawyers we are, et cetera, et cetera. No wonder they didn't want to make it public, because — I think they found one little technical thing that Reagan had put in his report to be correct. Everything else was untrue, so it was terribly embarrassing for the governor. Once they said that we could see it, I think they pretty well knew the jig was up. Shortly thereafter, they announced a compromise.

The compromise was a very clever one. One, they had funded us for a six-month period instead of a year while all this investigation and hearings were going on. Then, they decided to fund us for a year and a half, which was longer than usual, and happily took us beyond the election. Then they announced they were going to give the governor several hundreds of thousands of dollars, or maybe some millions of dollars, I forget now, to experiment with other ways of serving the poor because he was very much in favor of what was called "Judicare," I believe it was called. You hire private attorneys to represent local poor people to do divorces and things, certainly not class actions, and then you pay them. And I guess he experimented with it. I don't know. We never heard boo from the governor's office after that. So, that was their compromise, and they issued press releases saying what a great governor he was and what a great service to the nation he had done by bringing this to their attention, et cetera, et cetera. That was the end of the battle.

I met with the editorial board of the *Sacramento Bee*, as I had done from time to time. I remember their saying, "Reynoso, this is the longest front page story we have ever carried," because with presidential politics and all of

that, it had been in the front pages for about a year and a half. I always used to tell people that one gets known by one's enemies, and our enemy was a well-known guy nationally, called Ronald Reagan, and so I guess that's why we were in the newspaper so much. So that's the story.

LABERGE: Tell me about the other attorneys there.

REYNOSO: Well, we had a quite exceptional group of lawyers at that time. Bob Gnaizda, who now works with [The] Greenlining [Institute]. Several of these lawyers went on to form Public Counsel after that. And then Martin Glick, Marty Glick is a private attorney, who incidentally spends a lot of pro bono time now defending CRLA against the Legal Services Corporation. Many of those same issues. Can you believe it? A fellow by the name of Green, who is a private attorney in San Francisco now, and Jim Lorenz himself. That was the core of the folk that we worked as a team, but then Mickey Bennett, who was our administrator, not a lawyer, but was a very key person on this. He and I spent weeks and weeks in Washington later trying to establish — get the legislation to establish the Legal Services Corporation, which we hoped would protect legal services from politics, but it turns out that it couldn't do it.

LABERGE: Well, I found — I was looking for different things in our library with your name on it, and I found this report that you gave on the status of the elderly, the Mexican-American elderly.

REYNOSO: Yes, you know, I had been named — and I forgot about this for a while. I had been named by a Senate committee to be a member of an advisory group on the aging. I remember they sent me an ID card and all that — all of which I think I have lost — by that committee. And then they asked, I thought it was two of us —

LABERGE: Well, there is another name there. Let me see — I just looked at this morning so — Peter —

REYNOSO: Yes, Coppelman, Peter Coppelman. And I remember we gave this report. Also, you know, Mickey Bennett and I wrote an article on CRLA in the first *Chicano Law Review* out of UCLA, and that goes over a lot of the material of our battle with Ronald Reagan.

LABERGE: And in this, all the senators just give you high praise for this report, for what you found. Maybe you just want to say a couple of things about why or how the Mexican-American elder is in poorer shape than others.

REYNOSO: I don't know whether I have told you about this in terms of my early practice, but it sort of capsulizes, I think, the plight of so many Mexican-American elderly. This happens to be rural, but you will find the same thing in urban areas. I had a client, a couple that came to see me shortly after I started practicing law, I think the first year, maybe '59 or '60, and they were by that time retired farm workers, by which I meant that they were too old and physically unable to do farm work. They had no income. They came to see me to see whether I could help them in any way. They had heard that there might be some programs to help them. At that time, farm workers were not covered by Social Security. So I called the welfare department in El Centro, and the rules and regulations weren't very well kept in those days, and this lady — a very fine lady — and I spent hours going over the state programs that did exist. As I mentioned to you, CSO succeeded in getting a statute that had a very small pension for older people. So it turned out that they were entitled to that older pension, just a few dollars a month, but for them it meant a lot. It turned out, after he was examined physically, that he was legally blind — that is, less than 20/200 vision — so at that time, he was entitled to another small pension for the blind, a state of California pension. California has really been progressive in many of those areas when the federal government wasn't doing anything. And then she had a — when the lady came to see me she had physically open sores on her lower leg, and had a goiter condition including a large growth underneath her chin. She was able to be operated on and cured at the local county hospital, public hospital. So my wife and I would go visit them from time to time. They lived in a small house that had no floor — that is, it had dirt. No running water, they had to walk about one hundred yards to a faucet to get their running water, but at least after I had been able to help them, they had a few dollars a month coming in and they were able to make ends meet. Not easy, not easy. And I am sure I had that sort of thing in mind when Peter and I were doing these studies. And if you find folk like that in the city, which I am sure you do, their circumstances are probably even worse. What do you do when you get too old to work and you don't have Social Security, you don't have public assistance, and so on?

LABERGE: And how about the language barrier?

REYNOSO: Well, these folk spoke principally — I always spoke Spanish with them. I think they spoke only a few words in English, as did my own

parents, so they never would have been able to defend themselves or to apply or to go through regulations, and so on. They were just basically distrustful of government, if they were immigrants, based on their experiences in Mexico. And if they were not, based on language and other considerations, it was just very difficult, even though there were programs for them to take advantage of it. I think in that regard, actually society has gotten quite a bit better. Not better, incidentally, in terms of the life of farm workers. In my view, they may be even worse off now than they were when I was a kid, but for the elderly, things have gotten considerably better.

LABERGE: Back to CRLA. One — just a little capsule I found here. While you were there, you did something about banning pesticides, banning DDT. Do you remember anything about that?

REYNOSO: Yes. Well, there were a series of pieces of legislation that were meant to protect farm workers. We had like a two-year program of trying to enforce — we ran a survey and found that some huge percentage, like 97 percent of the growers were violating one or more of those laws. These were very simple laws; I am not yet to pesticides. These were very simple laws having to do with clean water and chemical toilets, and all that. So we ran this long campaign, which we knew we would have to do intensively, working principally with our community workers, which are like paralegals, filing complaints with the local health department, talking to local DA's. It was like pulling teeth. Elected officials are very responsive to those who have power and money, so it was very difficult to get health officials or DA's to bring charges against those who were violating the law. Nonetheless, we kept after them. Then we ran a survey. I guess we ran a couple of surveys. At any rate, the last survey we ran, I think it was something only in the thirties who were violating one or more of those basic laws. So, we felt good about that.

These little vignettes stick in your mind — there was a somewhat moderate assemblyman — I forget his name now — from the Central Valley, who would complain about us and write letters to us and to everybody in the world about how we were harassing his constituents. Then he left the Legislature and was doing some work, I think in Sacramento. At any rate, I ran into him and he came up to me and said, "You know, Cruz," he says — because I had got to know him pretty well — "I just want to let you know that I have reflected a lot about those battles we had some years back, and you folks were absolutely

right. Thinking back now, I don't really quite understand how I could have complained or fought you on something as simple as having chemical toilets for farm workers. In light of, one, sanitation, and plain human decency." I heard the mayor of Fresno a year or two ago speak at a dinner. He's Anglo, and his parents apparently were farm workers, and he says he remembers the lack of chemical toilets and how particularly folk who were working in tomato fields, who didn't have a lot of trees and all that, sometimes word would go out that folk needed to go to the bathroom, say the womenfolk, and then all the menfolk would stand up and look the other way. Just not very nice, frankly, and he was recalling that. We were very involved with that.

Then, the reality was that chemicals were used — as they are now — a lot in the fields, including pesticides. One of our lawyers — a great lawyer, in fact — Ralph Abascal, was very involved. People didn't call it at that time "environmental law," but we were basically involved in what is now called environmental law. So, we started investigating and bringing charges against growers for using pesticides without proper instructions. I may have mentioned to you that I did a lot of workers' comp work when I was in private practice, and I remember how the workers then would get all this white powder — they didn't realize it was pesticides — with their bare hands, and spread it around and all that, and then they would get sick. I couldn't find any doctors who would confirm that they were sick from those pesticides. But Ralph, particularly, was our lead attorney in bringing actions challenging the use of pesticides — DDT, and all kinds of pesticides. So, we were really very much in the forefront in those battles. Again, to a great deal of political opposition, as you might guess: You are interfering with the economic basis of California!

But very often, as happens even nowadays, you have to fight environmental issues through other laws. There was a famous case where he was involved, where there was going to be a huge expansion of a plant in the Central Valley. The laws only required that those notices be published in the local newspaper — which, there, happened to be miles away from where the plant was and where Latinos lived — or on the property. The property was private property up in the hills, so the local community never found out about it. When they did find out about it, they went to protest to the Board of Supervisors, but the Board of Supervisors weren't that interested. Their votes weren't that important, and this plant, if it got expanded, would greatly increase the taxes that were going to be paid to the local county. They didn't get

anywhere with that, so finally Ralph filed a lawsuit on their behalf, and eventually they decided to abandon the plans. But the lawsuit was not filed based on the fact that it was going to be bad for the neighborhood. It was based on the fact that they hadn't given proper notice. It was the first case that a court decided that notice had to be bilingually if they knew that those who were going to be affected were bilingual. So, it was all these actions divorced from the environmental issue, but that's the way you had to do it in those days, and he was very successful at it. We were often charged with dreaming up these cases. The notion being that there really weren't any health problems, and so we were just dreaming them up. Of course, now it is recognized that in fact those problems are very real, but it wasn't true in the seventies when we were fighting these battles.

LABERGE: Today, is CRLA still funded by the federal government?

REYNOSO: CRLA is still funded by the federal government — in part. I attended one of the training sessions recently.

LABERGE: To give the historical overview, or — ?

REYNOSO: More of an inspirational-type talk. I mentioned to them the plans that we had to have an alternate law firm if we had been defunded. I mentioned to them that they were in a perfect situation now to keep CRLA going, but nonetheless training their lawyers so the lawyers could go out after they decided to go into private practice, and establishing law firms like the ones we had in mind in those days. That's one of two things that I mentioned to them. What's interesting is two things. One, many of the restrictions that we did not accept from OEO have now been imposed by Congress. Thus, for example, legal services programs can't file class action suits. I consider it completely unethical to tell a law firm that they can't file the best remedy for their client but that's the reality. So CRLA now has what they call CRLA Basic. And that's CRLA as funded by the federal government. I think that's only about half of CRLA now. Then they have a portion of CRLA that's strictly devoted to migratory farm workers. Then they have yet another portion, I believe, that is funded by the state and private funds and so on that doesn't have the restrictions that Congress has imposed. Just from hearing them report, they would get up and say, "I'm with CRLA Basic," I think is the way they would say it. And they would say, "I am with CRLA Farm Workers." So I think there are like three different units, and only about half of it I think now comes under the federal government.

The federal government hasn't improved funding for legal services in ages. It is estimated that there is one legal services lawyer for every 10,000 poor people. There is one lawyer for something like every 322 Americans. That just gives you a sense of how poorly represented the poor are, and yet you often hear it said that the rich have all the lawyers they need, the poor have all the lawyers they need, it's only the middle class that needs help. The middle class does need help, but the notion that poor people have all the lawyers they need is simply not true.

LABERGE: Any more anecdotes from that time that come to mind?

REYNOSO: Oh, heavens! There are many anecdotes. The very first case that I had, and I was reminded of this the other day too because I swore in a new lawyer who grew up in Livingston. The very first case I had when I was in CRLA, we got a phone call from some folk in Livingston, CA, and what was going on then — this must have been 1968 — was that there was a student strike. Mostly Chicano, but some black and Anglo students were also striking, complaining that their history books didn't really represent true history of who they were, and that they weren't being treated properly by the school officials, and so on. So they were on strike, and they were out there picketing, had signs and all that. We were called. We went down there and there was a community meeting, so we met with the community to hear their complaints and all that. Meanwhile, the county counsel or DA, I forget, was threatening to arrest them and their parents because they were truants and violating the law and they were criminals.

To me, it was a traumatic experience for me because, as a lawyer, I had always refused to talk to the press. I figured that cases should be decided in court. That's the first time that I started talking to the press because the enunciations by these officials were scaring the parents and making them appear to be criminals in the light of their fellow residents. So, I started speaking publicly about things like the First Amendment and the right to picket and so on. Then, the school board said that these children should go back to school, but as soon as they went back to school they were going to be suspended for being truants. After the students had picketed for a week or two, they had made their point and they were ready to go back to school, but they didn't go back to school with that threat. So we went to federal court, filed an action against the school board and got a TRO [temporary restraining

order]. Everybody was shocked that we were able to get a TRO. It was a very conservative judge and they said that he never gave out TROs. But he was convinced that the kids were entitled to go back to school and they couldn't be suspended without a hearing and so on. So he gave us our TRO. We were there when the kids walked back into the school with all their flags and their posters and so on, and they couldn't be suspended. It was my first experience with CRLA. It was such a great experience. And, you know, I can't say that I remember what happened with the children after that. I think they were never suspended. I think that the community really got behind them, and the board was forced to deal with the issues that were being raised. But there are many stories with CRLA. It really was an exhilarating experience.

LABERGE: And you contributed so much.

REYNOSO: Well, we felt we were doing some good. The interesting was that, you know, it used to be said that we won 97 percent of all our cases, but I would tell people, we are not one of those places with great lawyers. We think we are great lawyers, but we're not winning them because we're great lawyers. We are winning them because the violations of law — by government, particularly — are so obvious, and they are just used to having poor people not do anything and not know about doing anything, not being able to protect their rights. Now they have lawyers who are protecting their rights. Also true of large private organizations, like growers' associations and so on, and now they weren't able to run roughshod over these folk.

At the same time, I always understood that winning a case meant nothing. Winning a case to me was like having a statute passed. You can have a great statute passed, but if it doesn't get enforced then it doesn't mean anything. So, winning a class action didn't mean anything, except that it gave us the power to try to enforce it. For example, we had a case called the Diana case, and what had happened there was that a mother came to see our Salinas office because she had moved to California from Texas. Her little girl had been doing very well in school in Texas, but when she went to school here in California, she started doing very poorly. She used to get straight A's. She started getting B's, then C's, then D's, and had no interest in school. We checked into it, and found that she had been placed in an educationally mentally retarded class. Then, when we looked into it, we found that all children in the educationally mentally retarded class were Spanish speaking. Actually, like this young lady,

might have spoken English also, but they were all Latinos and Latinas. So, we went to the Salinas office, went to see the administration. And we said, "Look, we think there is something wrong here." The superintendent said, "Look, if you have these youngsters tested," because they claimed that all these youngsters had low IQs, therefore they should be in that class. They said, "If you have them tested by a California certified school psychologist bilingually, we will accept those reports." We had them tested.

This young lady who was doing so poorly had an IQ of 134, or maybe 154. Anyway, she was in the genius category. There was only one that potentially should have been in the EMR class. All the others should not have been. We presented that to the superintendent. He said that he would take care of it and they would all be removed. Months went by and nothing happened. In fact, I usually didn't get involved, and by that time I was the director. Time went by and it didn't happen. So we filed a lawsuit in federal court. Against him and against the state Department of Education, which was allowing these things to happen. Then as soon as we filed, we settled. We had a stipulated judgment that all the youngsters would be removed. They would be tested bilingually, and not only with that school district, but over the state of California. The same things were happening in Orange County, for example, and other places.

We inquired as to what had happened. He had promised us, and then nothing had happened. It turned out that his own psychiatrists would say, "Hey, it's impossible. We tested these kids, we know what we are doing." Internally, politically, he wasn't able to swing what he thought he was going to be able to swing, but once the lawsuit was filed and they knew they would lose, I guess, at that point he had enough political power to say, "Hey, boys and girls, we have got to do this." And so it was done, but it is just interesting to me that this little girl had had that type of experience. Doing so well, and then — we've heard this so often before..

Then other things happened that are not quite so nice. I was refusing, I think, to name a staff attorney as directing attorney of one office. And the community workers — we had advisory committees in each office, and they invited me to go up there to meet with them to talk about this issue. I was willing to meet with anybody so I went up there and we met in a park. And they all said what a terrible person I was. Didn't I know that this was the best person for the job, and all that sort of thing. And I listened to all of them, but I still didn't change my mind because I didn't think he was ready for that

job, and we had another attorney that we were going to transfer to that office who was more mature and ready to be the director of an office. And then they said, "Well, if you don't name this director, we are going to show up at the board meeting and ask them to fire you." I said, "Fine. You are free to do whatever you want." I had those sort of things all the time. Running poverty law firms is not easy. [laughs]

So, I said, "Of course, come up and we will make room for you to express your ideas to the board." So they came, but what really sank them is that — people have always kidded me because I am just not given to harsh language, particularly bad words. I just don't use them; it's just not part of my vocabulary. And telling the board what I had said, they used all kinds of expletives and so on, so the board knew right away that it wasn't quite the representation, quite accurate in detail. So they didn't get very far. And other times, folk would come up and say, "You've got to do this, or we are going to go to the board." And I would say, "By all means," and usually they wouldn't. You can't allow yourself to be intimidated. You have to listen and all that, but you still have to use your best judgment about what to do.

LABERGE: Professor Reynoso was just telling me about experts testifying in Florida, I assume during the Gore–Bush election.

REYNOSO: Yes, but this little conversation will show that I am a Neanderthal insofar as progress and technology. Because the testimony we had was that the most correct voting — in terms of making no errors — was the old fashioned way of having people have a ballot on a piece of paper and they are marking it with a pen or a pencil. Or, the very modern way with computers. That the worst possible way was the middle way that California and Florida and many others have been using with the hanging chads and all that. You made the most mistakes that way. The reasons, of course, why they went to machines was because of the newspaper demands that they know right away what the election results are, and all that sort of thing. You know, I still prefer the old-fashioned paper and pen way. One, because it is more accurate and, two, because it gives a person more of a sense of participation, it seems to me. And I know it would take a long time to get the reports in. It might even cost more money because you would have to count them by hand instead of by machine, but it just seems to me that it is far more communal to do it that way, and far more accurate. And I would rather go with accuracy than speed on something

as important as elections. So, I was just going to tell you about those pieces of expert testimony we had in Florida, all of which made sense to me.

LABERGE: I want to say for the tape that you are on the U.S. Commission on Civil Rights, and that you were — well, tell me what you did during the Gore–Bush election.

REYNOSO: First I should just tell you parenthetically that I have been on the commission now about eleven years. The commission has eight members, four of whom are appointed by Congress — two by the Senate and two by the House — and I was originally appointed by the Senate. The term is for six years. Then, I was reappointed by the president because there was an informal agreement that each party would name one person to the commission, but the president's people weren't sure that the then newly Republicanized Senate would abide by that agreement. Since they wanted the chair and me as vice chair to continue, the president reappointed us. So I am now a presidential appointee.

LABERGE: This is President Clinton reappointing you?

REYNOSO: Yes, this is President Clinton.

LABERGE: And the majority leader appointed you first? Is that right?

REYNOSO: Well, the Senate appoints, but actually, the real appointment was Senator Paul Simon, who was the head of a subcommittee — within Judiciary, I believe — that had oversight of the commission. And I think the Senate depended on him to make a recommendation to the Democratic leadership and they made the recommendation to the Senate and it would be approved automatically. So, I went back and met with Senator Simon. That in some ways relates actually to my judicial activities, which we will discuss in a few minutes, because I got a phone call from a former extern of mine. An extern is a law student who works with us, usually for a semester or summer. This young man was from Stanford and came and was an extern in my chambers in the Supreme Court for a semester and he at that time was working with Senator Simon. He called one day and said, "Justice Reynoso, we are looking for a member of the U.S. Commission on Civil Rights, would you have any interest?" I actually had many relations with the commission, having done some informal work with them and having been at one time a consultant for the commission. So I said, "Yes, I would be very interested." And he arranged to have me go back to Washington and meet with Senator

Simon. We had a long discussion. Apparently things went well from his point of view, and certainly from my point of view. I think he was a great senator. He recommended me and so after a while I was appointed.

LABERGE: Who was your extern?

REYNOSO: John Trasviña, who is now dean of USF Law School. It is interesting how one activity that one has had in one's lifetime then can come up at another time. And then, former externs and former clerks are now legislators and judges, and so on. So it can happen. And former clerks of course. That's the way I got on, but it was sort of interesting too that I didn't hear anything for weeks. So, I called them and said, "What's happening?" He says, "Oh no, you are going to be appointed." Then eventually I got a very badly Xeroxed copy of the *Congressional Record* where a Senator got up — not even Senator Simon — got up and said, "Mr. President," — you know, the Senate has a president also — "Mr. President, I move the appointment of Cruz Reynoso to the U.S. Commission on Civil Rights." The president says, "Without objection, so ordered." That was it. I got this Xeroxed copy without a cover letter or anything, and that came only after I had — on one occasion I was driving from Los Angeles to San Francisco, and I like to take back roads, so I was taking some back road through the hill country between Los Angeles and San Francisco, and I had the Fresno bilingual radio station on and the noon news came on and they said, "Today we have a press release that Justice Cruz Reynoso has been appointed to the U.S. Commission on Civil Rights." That's the first notice that I had. Then they had a five-minute news program and they took the whole five minutes to talk about me, who I was, what my background was. Then, sometime later, I get this Xerox. Now, when I was reappointed by the president, I got a big certificate of appointment signed by the president and all that — appropriate, I am sure, for framing.

LABERGE: Who was the chair when you were the vice chair?

REYNOSO: The chair and I were appointed by the president at the same time, so she has been — Mary Berry's her name — and she has been the chair all the time that I have been vice chair. However, when I was first appointed, Mary was not the chair and I was not the vice chair. Initially, I was simply a commissioner. Then, when the president got elected, he named Mary as the chair and me as vice chair. That was interesting also because we have a very convoluted statute.

What happened was that the commission was established in 1957. President Eisenhower and Attorney General Brownell recommended it because there were so many debates on civil rights. You know, the African Americans and many civil rights people would say, "All these schemes in the House are keeping Blacks from voting," and the Southern politicians and others would say, "Who, us? Why, it's not our fault that they don't have the money to pay poll tax. This is strictly neutral. We are very democratic. Blacks just don't like voting." So the president basically said, "Look, we have got to find out what the facts are, so let's have a commission with power to subpoena. Let's find out what the facts are and let the people of this country decide." It was named then, and was very effective. It had six members, all appointed by the president, confirmed by the Senate. Then a problem came up. We had a president, you may recall by the name of Ronald Reagan, once. And he kept appointing commissioners whom the Senate felt had no interest — and in fact were antagonistic to — civil rights, so they refused to confirm them. Then they had sort of a stalemate and a conflict because they didn't have enough commissioners to run the commission. So a political compromise was entered into whereby the president could now appoint four members without Senate confirmation, and at that point, Congress was to appoint four members. That was the compromise. I came in after that compromise. The further compromise was that the president could appoint the principal staff director of the commission and the chair and the vice chair, but they couldn't take office unless they were confirmed by a majority of the sitting commissioners. When we were named, there were not a majority of sitting commissioners appointed by Democrats. It was a four-four split. I was confirmed by my colleagues, but several of the Republican appointees didn't like Mary Berry, and so they refused to confirm her for, I don't know, two or three months. Eventually the chair, who was a Republican appointee but actually a civil rights person, then voted to confirm Mary. So then she took over as chair and I as vice chair, and we have been in that position now for many years.

LABERGE: Well, how often do you meet?

REYNOSO: We meet once a month, except one month during the summer. We meet quite often in Washington D.C., where our headquarters are, but we also have hearings and meetings throughout the country. Particularly the last few years, we have invigorated the notion of having meetings outside of

Washington D.C. Folk are invariably so pleased to see us, and to hear their issues heard, because very often folk involved in civil rights battles feel very frustrated because the local politicians and powers that be dismiss their complaints.

For example, we had hearings in South Dakota pertaining to the problems that Indians have in South Dakota, and the interest in our hearings was just tremendous. It focused on administration of justice, but we heard about health and many other issues. The governor was completely dismissive of our commission, saying, "What are these outsiders doing coming to have these hearings here?" And was quite antagonistic. Meanwhile, however, several of the DA's testified to some of the issues that came up, and for example found the simple issue that the Indians ended up in prison far more frequently compared to their population than the non-Indians. But, interestingly, after we had the hearings and after we issued the report, the state government then authorized a local researcher under contract to study these issues. Though he is hired by the state, he reported to us actually a few months ago, and his very detailed analysis — with greater insights as to how the government actually works, because he is under contract with the state government — has been actually able to confirm our initial findings. Then, it was a preliminary report. He still has to check out a little bit further, but it was interesting to us that even though the governor was so dismissive, the politics of it were such, obviously, that he felt compelled to then name a third party, who then basically has confirmed what the Indians and many others were saying in South Dakota. That, in turn, has an impact on the internal politics of the state and what the Legislature will do or not do in terms of making life a little bit more fair for the Indians in that state. It is just interesting how these things go. Next month, this month [December 2003], we are meeting in Seattle to talk about some of the civil rights issues, including contracting, government contracting, education and so on that they have in that area. We have had hearings in Detroit, pertaining to the issues of Arab Americans. They are very interesting because that's sort of a concentration of Arab Americans. And it was interesting how they indicated — the consensus was that they were initially very concerned about private actions against Arab Americans, physical attacks, verbal abuses and so on. But even by the time we had that hearing, their concern had shifted from concerns about individuals to concern about what the government was doing. They brought to our attention all the things that the government was doing that they felt

was very detrimental to the Arab-American community. For example, at that time, the FBI was interviewing thousands of Arab Americans, and it scared the community. You know, "Are we under attack? Are we accused of crimes?" Et cetera, et cetera. And then they had recommendations about how to approach those issues. Actually, very good recommendations. There are enough Arab Americans in that area that they got together with the U.S. Attorney and entered into an agreement where they said, "Look, folk don't mind talking to the government, folk are happy to share any information, but before you go knocking on the door at midnight, why don't you send them a letter — anybody you want to interview — and say, 'Look, we would like to talk to you, this is what we are interested in. We will give you a call and set up an appointment.'" And he says that's the way they did it in that area and they had none of the backlash from the Arab-American community there that you found throughout the rest of the country. So, it's not that they were being non-cooperative; it's just that the Arab-American community really felt that it was under attack. Unfortunately, many incidents since then have really reinforced that perception that nationally Arab Americans have. But we have had hearings in San Diego pertaining to the issues of undocumented coming across the border and the vigilantes in Arizona. We have had hearings in Albuquerque pertaining to health issues of Indians and how the government is doing in that regard. So, anyway, we have hearings both in Washington and outside of Washington — to answer your question.

LABERGE: Tell me a little bit about the *Bush v. Gore* hearings and your recommendations.

REYNOSO: Well, I want to emphasize first of all, that we started hearing complaints about the election and people not being able to vote before the end of the day, before we knew who would win and who would lose, before we knew that Florida would even be important. For example, if Gore had carried Tennessee, his own state, he would have won, so Florida wouldn't have mattered. So I'm just emphasizing that this was a completely non-political decision on our part. Voted unanimously at that point. At that point, however, we only had, I think, six members of the commission. There were a couple of openings. Five of us were Democratic appointees at that point and one was a Republican appointee. Nonetheless, it was a unanimous vote based on the reports that — as soon as we heard that, we sent some lawyers, staff lawyers, to check things

out. They came back and reported, "Yes, it is our opinion there are real problems down there." So we voted to have these hearings.

The other observation that I wanted to share with you is that even though if there are problems pertaining to elections, generally the Justice Department is supposed to investigate that. The Justice Department never did. Secondly, the attorney general of Florida should investigate and he's a Democrat. He did not. Thirdly, the governor of Florida has express statutory authority to investigate any problems pertaining to elections and he did not. The only official body that ended up investigating the Florida election ended up being the U.S. Commission on Civil Rights and we have no enforcement power. So, that was just interesting how it broke down.

We voted to have the hearing, and the first hearings we had were in the capital, Tallahassee. We had two days of hearings and then later we had another hearing in Miami. I think the very first witness we had gives you sense of the types of problems folk were having. The very first hearing we had was a Protestant African-American minister who testified that he went to vote. He had been voting the same precinct for about twenty-five years. He went with his wife and two adult children. When he got there, the personnel there, who apparently knew him, said "Gee, Reverend so and so, we are so sorry, but you are not on our voting list. Your wife and children are, but you are not so you can't vote." He said, "Well, wait a minute, I have been voting here for twenty-five years, what can we do?" They said, "Well, let's call the central office." And fortunately they were able to get through on the phone. We had tons of testimony from officials who said that they kept calling all day long and either never could get to the central office. One testified that she got to the central office one time, and had to turn back 300 to 400 voters who had some problems and she couldn't get to the central office to see whether there was a mistake or not. At any rate, on this occasion, they did get through on the telephone. The minister gets on the phone and says — oh, he is given the phone and then the first question that the person on the other side asks him at the central office is, "Sir, have you been to a courtroom or a courthouse lately?" And the minister says, "Why yes I have." And the gentleman said, "Well, in what capacity?" He said, "Well, I was a federal grand juror." The gentleman on the other side says, "That's impossible. You are not on the voting list because we have you listed as an ex-felon." He said, "I am an ex-*what*?" he said. "You are an ex-felon." And then they talked about if for a while, and finally the minister says, "Look,

what do I need to do to vote? Do I need to hire an attorney?" And he says, "One moment, sir." He went off for about two minutes and he said, "Give me the local officials. We will put you back on the voting rolls."

What happened was that — it didn't start in an evil way, and one could even say that it might be justified. I don't want to be unfair with this, but what happened was that there had been an election in Miami where it was shown a few too many dead people voted. So the Legislature was concerned about that. Another body that can't vote in Florida besides dead people are people who have been convicted of felonies. Anybody who has ever been convicted of a felony in Florida can't vote in Florida. There are seven such states that have that type of law. I think it goes back to the time where they would come up with all kinds of techniques to prevent Blacks from voting, one of many techniques they used. In fact, that's part of the problem in Florida. They still have sort of a system of statutes and procedures and practices in Florida that go back I think to the Jim Crow days. At any rate, the Legislature then passed a statute that told the secretary of state to enter into a contract with a private company. I think they even gave her the amount of money to do that contract with, to have that company put a list of ex-felons. That seems okay. The problem came up in this way. The company — and we had testimony from the high officials in the company — got together with the state and they said to the state, "Do you want us to have a list of people we *know* are ex-felons, or do you want us to have a list of people who *might* be ex-felons?" The state said, "We want the might-be list." So they included in their list tons of people who were not. If you had a John Smith, they would include twenty John Smiths. Maybe only one was an ex-felon. That's what happened to this gentleman. In fact, with this gentleman, if I remember the testimony correctly, his middle initial was actually different than the ex-felon, but I guess because the first name and last name were the same they said, "This might be an ex-felon."

Then the secretary of state sent these lists to the local registrars. Now, I understand that the instruction did say, "You should check this out yourself," but most of them didn't have the resources and so on, so they simply took the list, and then as happened in this case, knocked off the name of this gentleman. We have testimony that that happened over and over again, probably several thousands of people. Now, in this case, they got through to the registrar, this gentleman was insistent, so he was apparently ready to go out and get a lawyer and maybe get a TRO [temporary restraining order] or something. So they gave in.

We had testimony from one local official who said that the only way to get to vote if you have been improperly dropped is to make yourself obnoxious. He called it "the obnoxious rule," if I remember correctly. But we had testimony about all these local officials who weren't able to get through on the phone, so one can guess how many did not get to vote. And that's by way of emphasizing what our later report said that the biggest sin was not all the people who voted whose votes weren't counted, et cetera, it's all those who didn't get to vote, who — our estimate was in the thousands.

Now, with that testimony — incidentally our second one was a registrar in another county who testified that when she got the list, her name was on the list as an ex-felon, and she knew she wasn't an ex-felon, so she decided not to use the list at all. She didn't pay any attention to it. She left everybody on, even if they were on that list because there's — and this goes back to perhaps the Jim Crow days. In Florida, the election officials are locally elected, and they have quite a bit of autonomy. For example, they are the ones who draw up the ballots. That's why you ended up with the butterfly ballots in only one county but not in others. Interestingly, however, that's more of a tradition than anything else, because the law is very specific. There is a specific law that says how you are supposed to have the ballot, and the duty to enforce that law is on the secretary of state and the governor and they haven't done it, I think for political reasons because the local officials are quite jealous of what has been their prerogative. There's a lot of blame to go around in Florida.

Then, let me just mention one other interesting aspect of Florida law. I have always found that the sample ballots we get are very instructive and very important in my decision making, and it makes voting easier. In Florida, whether or not a voter gets a sample ballot is a local option. If the county can afford to send out sample ballots they do. If they can't afford it, they don't do it, and they are authorized to simply publish a sample ballot one day in a local authorized newspaper, which very often is a weekly newspaper that charges not very much. As you might guess, the poorer counties don't send sample ballots, and as you might guess, people who live in poorer counties are poor whites and minorities. So, you have these built-in structures in Florida that practically make for trouble. There is one other interesting law in Florida and it's this: If you are registered, you can vote if you are registered, but you must vote in the precinct where you are living. So if you've registered where you *were* living, you can go there and they will have your

name, but they will ask you for your address. If your address meanwhile has changed, under the law, you must then go to a new precinct. That new precinct will know you are coming because your old precinct will call them and say, "We have properly authorized here José Jiménez to vote, and he is coming to your precinct." We have tons of testimony, one, that phone calls couldn't go through; two, from voters who said, "I was given this address, I went there I couldn't find it," or "I got to that address, I could find it, but they didn't have my name and they couldn't get through on the phone to get my name." And so many such folk didn't get to vote. Finally — and I just heard somebody from California tell me that she had this same problem — but we had testimony that Florida, like California has the motor voter registration concept. In one area, many college students registered in their equivalent of the DMV [Department of Motor Vehicles]. None of those registrations got to the county registrar, so none of those folk got to vote. Now, I should tell you I was talking to a law student here in California, here in this law school who told me that's what happened here to her. She registered in the DMV; when she went to vote they didn't have her name there.

So, things can go awry anyplace. I have told people that any close election in any state can bring up Florida-like issues about who really won, but Florida, we have got to name it as sort of the champion of these problems. I mean, they have got so many things wrong in their electoral process that it is far easier for things to go awry in Florida, as in fact they did. Then there were other problems. There was a large registration effort to register African Americans, and it was successful. There is a statute that calls upon the local registrar to let the state officials know, month by month or week by week, what their registration numbers are. And everybody could tell that there was going to be a huge number of new voters. There is a specific statute that mandates that the secretary of state must do everything that she or he can — in that case, she can — to educate the new voters. To educate voters — period. They spent several millions of dollars on radio ads, warning people that if they voted improperly they were committing a felony. That's all the education they did. She had requested — we have testimony that she had requested $100,000 in the next year's budget for education and the governor cut that out of the proposed budget.

Basically, the state failed completely to meet any of its own obligations of oversight. That turned out to be very important later on, when in a recount, the Supreme Court said, "There are no rules for how a recount will

take place." Well, that obligation squarely lies with the secretary of state, and we had testimony from local registrars, who said, "When we had the recount, we kept calling the registrar's office to say what are the rules?" And they kept saying, "We don't know, we don't have any rules for you." And they have that specific responsibility. So, as I say, there was the element of negligence. Now, one of our commissioners did write a concurring opinion saying, "Well, you know, the conclusion is that there was no intent to discriminate and maybe that was true. On the other hand," she says, "you had a Republican administration. You had the governor and the secretary of state being leaders in the Bush campaign. You had all these new registrants coming in — most of them Democratic and most of them African American. Clearly what interest did the state officials have in educating those voters about how to vote properly? I wonder," she said "if there really wasn't, before the election, an affirmative negative, an affirmative effort not to do anything." And I guess one can wonder about that, though I must say that I think probably if the Democrats had all those same offices, they may have responded the same way also.

My own conclusion was that there was not an intent to discriminate. However, the law on voting is very specific. It does not require an intent. It is an effect law. In fact, a voting rights case went up to the U.S. Supreme Court on one occasion. The U.S. Supreme Court held that there was no violation because there was no intent to vote. The Congress then immediately passed a law saying, "Supreme Court, you are wrong. We said that intention wasn't required and we meant that intention wasn't required. It is simply an effect. The person who gets discriminated against, it really doesn't matter whether somebody intended to keep his vote from him or whether he negligently kept his vote from him or affirmatively kept his vote from him. He or she still needs to vote." So that's the test. Now, the interesting thing about that is that by the time we had the hearings, President Bush had appointed a member to the commission. And in the hearings, she kept asking every witness, "Governor, did you intend to discriminate against black people?" "Heavens forbid!" "Madam Secretary, did you intend to discriminate against black people or Latinos or disabled?" — because we had a lot of testimony on disabled and language minorities also, and so on — and of course they all said no. That is not — that's an important matter but it's *not* the test. I was interested that much later, senators raised the same point with a justice official from the Bush administration. He said that he wasn't prepared to answer. He would answer in writing. He sent a letter, and

much of his letter emphasized the issue of whether or not there was intent or a lack of intent. That's really — that's not the test.

Our conclusion was that — well, again this will illustrate the problem. There was one county that was poor and predominantly black or at least a large percentage were black. Of those who voted, 12 percent I believe were discounted for a variety of reasons. They may have voted for too many — for more president than one because the ballot was quite confusing. For many reasons it was discounted. A neighboring county that had — I guess he is the leading local official, who was very aggressive, got foundations and businesses and individuals to contribute money to his office so they could, one, buy good equipment and, two, educate the public on how to vote. In that county, the number of votes that were discounted — these are cast votes now — was a little bit under one percent. So, you had that great variation there with a predominantly black county, 12 percent get discounted; predominantly white county, 1 percent get discounted. Our studies — and we hired a professor who does this type of work — came down with, I think his figure was that something like ten African-American voters were discounted for every one non-African-American voter that was discounted. Now, I should tell you there was a separate opinion by the same Bush appointee.

LABERGE: And who was that?

REYNOSO: Abigail Thurnstrom, saying, "Hey, this whole science is wrong. You can't tell what the relationship is of African Americans to voters, and so on," but frankly, the expert was brought in when our staff that's not an expert in those types of studies, noted just with a map that the percentages of those who were discounted seemed to be in African-American areas. So then they entered into a contract with this gentleman who did this study by county and sometimes by precinct. How many African-American voters are in that precinct and how many were discounted? Then they do an analysis and come up with an estimate. And as I say, Abigail disagreed with all of that, but I am persuaded that he was right. We had testimony from disabled. I still remember one gentleman in a wheelchair said he went to vote, and the voting booth table was so high that he had to push himself up, had to put an elbow down, and had to sustain himself with one elbow while he tried to vote, and getting more and more tired all the time. Another one testified that she was in a wheelchair, she got to the voting site and there was actually

a construction job going on and there was a big hole between her and the construction site. Fortunately, some people saw her dilemma, went out and got some boards and put the board over the hole and she was able to vote, but we got testimony of all kinds of that sort of thing going on.

There was one precinct that was, I think, either in a commercial building or in a firehouse, I forget, but there was a door in front, a big door that normally closed automatically at 5 p.m. They thought they had undone that instruction to the door so it would not close at 5:00, but apparently it wasn't done properly so it closed at 5:00. And we had testimony from several people who went and tried to vote at 5:00. The door was locked; the building was a little bit far away. They called to people. Nobody heard them, nobody came out. They discovered half an hour or so later that the door was locked. So, they called the engineers and all that who were at home. Finally, they came and opened the door, but how many people didn't get to vote, you know? We still don't know. So, as I say, Florida is just the champion.

Now, we have, I notice, revisionist historians. One is a member of the U.S. commission appointed by Bush, who says "Hey, what are all these numbers? This doesn't mean anything. We have heard so often that there were problems in Florida, but it is all the imagination — somebody's imagination. There were no problems in Florida. It's hunky-dory." And these get blown up quickly into political issues, as you know. That's why I emphasized that when we first went there, one, the vote was unanimous, and, two, we heard about the problems before we even knew it was going to be a political issue. And we would have investigated whether it was a political issue or not. And we recommended that the U.S. Attorney General investigate these matters, which of course he hasn't. And we made a series of recommendations to the Legislature, some of which they — now, the governor, and he has to get credit for this, did appoint a commission to investigate. Unfortunately, they focused a little bit too much on the mechanical voting problems, but based on that, they did, one, recommend different machinery for voting — which was good — and, two, they recommended that the provisional ballot be made a part of the voting mechanism. I tell you the latter part with some trepidation because we had looked at the statutes and the way we read it, the statutes permitted a provisional ballot, but nobody knew about it. So, it was not enforced at all. But they did make that recommendation. Apparently that statute has been enforced. That would be very important because if somebody shows up, and they say, "Sorry, your name is

not on the list," and they say, "Look, I have a right to vote," they can vote, and then later they can check to see whether or not that person was right. So those were very important changes. But they haven't changed the felony rule, I don't think they have changed the rule pertaining to the ballots, et cetera, et cetera. I am afraid that they may still be the champions — not quite as clearly, but probably still the champions — in terms of problems with voting.

LABERGE: Well, I hope you don't have to have another investigation next November.

REYNOSO: I hope not. Because the election was so flawed that President Carter, who has been involved in monitoring many elections in many countries, was asked whether or not he would have agreed to monitor the Florida election. The president said that he would not have because he and his team always insisted that the rules be clear before they monitor an election so they can then issue an opinion later, and that the rules were so unclear in Florida that he would not have agreed to have been a monitor in Florida — i.e., the Florida election is worse than third-world country elections. That would seem to be the implication of the president's remarks. It is sort of sad that here we are this late in our process. But you know, voting hasn't been that easy.

Nowadays, we assume — and you talk to young people and they can't conceive of a ballot that's not secret. We didn't get secret ballot until late in the last century and early this century — late in the eighteen hundreds and early in the nineteen hundreds, and as you know it's referred to as the Australian ballot. During the Civil War, you know, an officer would go and line up his two hundred troopers and say, "Who are you going to vote for? Are you going to vote for Abraham Lincoln or that dirty traitor running against him?" Well, you know, everybody would vote for Abraham Lincoln and he got reelected and that was the way we voted. Non-citizens voted until the late eighteen hundreds, and it was only because many voters were concerned about all those Catholics, particularly all those Italians and Irishmen that were coming over, and they were afraid that they would end up with some power, especially since one of them got elected mayor of Cleveland in the 1880s, and they said, "Hey, from now on only citizens can vote." And interestingly, I was just rereading a history of Hawaii, and when Europeans and Americans overthrew basically the Hawaiian government, they passed a rule that said that everybody who lived in Hawaii, citizen or not, could vote. Why? Because they wanted their own people to vote.

So, all these things that appear to be so natural are not God-given rules. They are rules put in place, very often by folk who really say they like democracy, but not that much. They want to be in charge. And it seems to me that a democracy has to be as universal as possible. But, as you know, we started out with white-only could vote, property owners could vote, et cetera. Men-only could vote, and slowly we have been expanding the concept of democracy to where we are now, but clearly Florida reminds us that we have a ways to go to have the type of democracy that we as Americans believe that we are entitled to.

LABERGE: Well, shall we move to this other part of democracy, namely the court system?

REYNOSO: By all means, by all means. Except that their role is not democratic and that's the problem that we have. Many judges — there was a suspicion, historic suspicion against judges in the colonial days because they were appointed by the king. Then, later the U.S. government appointed federal judges. It's true that they had to be approved by the Senate, but nonetheless, there was still a great deal of suspicion of judges. And during the Jacksonian era, a movement was founded, particularly in the South and in the West, to have judges elected. That seemed to be more democratic. The problem, of course, was that judges have a non-democratic role. It's their job to enforce the Constitution of the United States and the constitution of that state. And very often the Constitution tries to protect political and other minorities — but particularly political minorities — and if a court protects that political minority, it often is making a political majority very unhappy. One of the most important roles that judges have is a non-majoritarian role, and how do you square that with a majoritarian way of selecting judges? And that's been the quandary that many jurisdictions have been struggling with for many decades now.

LABERGE: Let's go to how you were selected and appointed, and then tell me too what — how you would change the appointment process. You were, in 1976 in New Mexico. And so, what happened?

REYNOSO: I was teaching in New Mexico, minding my own business, when I received a phone call, shortly after Jerry Brown had been elected, from a gentleman whom I knew very well who was on his transition team, Mario Obledo. And he said, "Cruz, if the governor wanted to appoint you to a high political office in the state, would you consider that?" I said, "Why

sure. It depends on the timing. It depends on the job and all that." And then nothing happened for a year and a half. I didn't hear anything.

LABERGE: By this time are you a citizen of New Mexico?

REYNOSO: I am a citizen of New Mexico. I am voting in New Mexico. Sargent Shriver had announced his candidacy for the presidency of the United States and had asked me to be his statewide chair and I had agreed to do that. No, no, I was very much a citizen of New Mexico. Then, a year and a half later or so, I get a call from another person, by now a member of the administration, Anthony Kline, Tony Kline, who was the appointment secretary. And he said, "Cruz," he says, "the governor wants to appoint you to a high administrative office. I can't tell you what office it is, but the question is will you accept? And it's a very important office and the governor is very anxious to have you be in that office." And I said, "Tony, I am in the middle of a semester, I can't" — oh, I said, "When will I have to report?" And he says "Yesterday." And I said, "I am in the middle of a semester; I just can't do it." And he nonetheless called several times and I kept saying, "Tony, I just can't leave in the middle of the semester." After a while he gave up and I thought, "Well, that's it," because my impression had been that governors are pretty self-important, and if they ask you to do something and you say no, that's pretty well it. Much to my surprise, a while later, a month or two later, Tony calls back. "Cruz," he says, "the governor wants me to ask you, if you can't accept an administrative position, would you be able to accept a judicial position?" I said, "When would I have to report?" He says, "It doesn't matter." I said, "Could I wait until next summer?" He says, "Oh, sure." I said, "Well, what position did you have in mind?" And he said, "Court of appeal." Then he said — I forget all the discussions. We had several discussions, but basically he asked, "Where would you like to go?" At that time, you will remember, Jerry Brown was in trouble with a judiciary in the electorate because he had said that judges shouldn't worry about their pay. They should be happy with the psychic rewards of being a judge. And so I think he was trying to prove that you could run the judiciary without that many judges because he had not appointed one appellate judge at that point, a year and a half into his governorship. He had openings throughout the state. I think Tony thought that I would say San Francisco because he had been with a public interest law firm, I had been with a legal services law firm and we often cooperated on cases. But, in fact, I said, "You know, I'd like to go to the

most rural area that you have." And the only place that they had an opening I think at that time in a smaller area was Sacramento. He said, "Well, let me explore that. That's more difficult. One, because we have only one opening there and, two, we have some really good candidates. So I don't know whether it will work, but let me check it out." Later he called back and said, "Yes, that will work." And so I accepted. I must tell you that my wife, who didn't want to move to New Mexico, once we were there loved New Mexico, didn't want to move back to California. So it wasn't easy.

LABERGE: And how old were your children now?

REYNOSO: And my children, three of them were school age and one was preschool, so they didn't want to move either. The law school interestingly just before that had named me to be the associate dean, the academic associate dean. Something funny happened. My neighbor at that time, professional neighbor, was a fellow by the name of Joseph Goldberg, Joe Goldberg. And in the morning he would always say, "Good morning, Professor Reynoso," and I would say, "Good morning Professor Goldberg." And then the next day he came in and said, "Good morning Dean Reynoso." I said, "Good morning Professor Goldberg." And then the next day he came in and said, "Good morning Justice Reynoso" — it happened so quickly. They were hoping too that I would stay with the law school. So it wasn't an easy decision.

On the other hand, I just couldn't say no to an opportunity to be on the appellate court. As a litigator, I used to analogize going before the appellate courts to a doctor operating. A doctor can do many things, but if you are going to operate on a person, you have got to set everything else aside. When I had a case before the appellate court, I would really set everything aside and concentrate on that because that was the one time where you were not only representing your client, but you could make law that would then affect many other people. So, I always had really an element of awe with respect to the appellate courts. I also wondered whether I really had — you know, whether I would be a good judge at the appellate level. It is true that by that time I had been a litigator, obviously, I had been a law professor, and I had sort of all the background that one would think one needs to go to that position, but I really didn't know. It was obviously going to be an adventure for me.

Basically, that's what happened. Until later I was given a just one or two-page opinion by the attorney general. They had been carefully — I didn't realize,

they knew more about me than I knew about myself by the time they appointed me to the "vetting process" that the governor goes through. It is really quite an extensive one. When I got to California, Tony gave me this attorney general's opinion that said the following: "To be appointed to the appellate bench, the Constitution requires ten years of membership in the California Bar. It does not require residency." And that was clear. That's been the constitutional provision all the time. Nonetheless, it is rare that a non-citizen gets appointed.

LABERGE: But you certainly fit that.

REYNOSO: Yes, and obviously I fit that, so that's why they felt free to appoint me. And then — life is very strange. When I first started practicing law, I, among other things in Imperial County, represented farm workers, filed civil rights cases and all kinds of things that were viewed as controversial — as you might guess — in a conservative community like that, but that's why I had become a lawyer. I had several people come to me and say, "Gee, Cruz, that's no way for a young lawyer to get ahead." In fact, I still remember a conversation I had with this great gentleman in the Latino community who came to see me. I still remember his name. He used to go by three initials, MCL and his last name was Ruiz. And Mr. Ruiz came to see me, and he had read in the paper that I was representing a person accused of selling or dealing with drugs or something, and he came to see me. We exchanged pleasantries, and finally he said, "Señor Reynoso," — this was a discussion in Spanish — "we've so appreciated your practicing law in Imperial County, the leadership you've provided in the community," et cetera, et cetera. He says, "But you know, I just read about this case, and I am just concerned that it might sully your reputation if you represent people of this sort. I wonder if you could just do civil cases instead of criminal cases." We had this whole discussion and I don't know if I ever succeeded in persuading him, but I tried to persuade him what the role of a lawyer was. In a criminal matter it is to say, "Look, constitutional mandates need to be afforded and provided in court. If the state says you're guilty, now you have got to prove that this person is guilty, et cetera, et cetera." So these sort of pressures came not just from folk that didn't like what I was doing or didn't like most of what I was doing, but from other folk too. Nonetheless, that is why I had become a lawyer.

Then, by circumstances of history, we end up with a governor who admired Cesar Chavez and people who worked with farm workers and who

admired legal services lawyers. Many people in his administration fitted in that category, or public interest lawyers. Mario had been a public interest lawyer; Tony Kline had been a public interest lawyer. So, I think when he looked around for people to appoint, a person like me came up high on his list. I imagine that's what happened. Aside from that, he was interested in bringing some ethnic and gender diversity to the bench, and I think that had some impact also. I told my story about how I got appointed to a federal appellate judge, and he said to me — he then recounted how he got appointed. He had been a law professor and he wanted to be an appellate judge very badly. He wrote about all these important issues, and then he figured out that law professors seldom got appointed to the bench. So he became a dean and that had more visibility. Then, after a while, he figured out that even they didn't have a chance to be appointed to the bench, so he quit being a dean and joined a big law firm. A litigator, those are the type of people that get appointed to the bench, and he got active in politics and he contributed money and all that sort of thing. And he says he really worked hard at it, and after about ten years he actually was appointed. And when I told him my story he said, "My goodness, that's the first story I have ever heard of a person being appointed on their own merits, because I really had to work hard." He said, "I thought I was meritorious" — you know, he had all the background — "I had to really work hard at it."

But for me, that's actually the way it happened. In fact, I had thought as a young lawyer that it might be nice to be appointed to the bench when you got to be fifty or sixty or something of that sort, and I quickly gave up on that idea because, at that time, when I became a lawyer, so many of the judges were ex-DA's and people who had not at all been troublesome in their communities, let's put it that way. I didn't fit that category at all, so I gave up completely on that idea. And I was happy in what I was doing, you know? I enjoyed the work that I was doing, and I figured you can't ask more from your profession. So then this came as a complete surprise to me, but I ended up on the Court of Appeal.

LABERGE: Did you ever find out what administrative positions you might have been appointed to?

REYNOSO: They wanted me to be the chair of the then new Agricultural Farm Worker Board, which would have been exactly the wrong position for me to have. They needed more neutral people and I was so closely associated

with farm workers that I was glad I said no, not just because I couldn't do it but I think that would have been exactly the wrong position for me to have.

LABERGE: Tell me a little bit about what you knew about being an appellate judge and how you got orientation to it and —

REYNOSO: I had always assumed — and there is an element of truth; but I found out not necessarily — that it was the role of an appellate judge to decide a case and to — obviously to decide it in writing. The Constitution requires that it be in writing, but not just to decide the case, but to indicate the reasoning for your decision, which in a democracy may be one of the best things that we have going because then you know not just that the decision was made, but why. So I looked forward to that challenge. In terms of training, I had zero training. That is, I had a lot of training because I had been a litigator, I had studied appellate cases, I knew the process. In some ways, I'm not sure there was that much learning to do. That is, in how you put briefs together, how you research, how you do all those things, those are really many of the same skills that you use in being an appellate judge. In fact, I used to tell people that being an appellate judge, in contrast to a Supreme Court judge, is the best job that a lawyer can have because you do true lawyering work. You look at cases, you distinguish them, you do all of the things that we have been trained to do as law students and as lawyers and law professors. But the way I got trained was on the job. There was particularly, Justice Bertram Janes, was just a wonderful person. He was a Reagan appointee, former DA from Plumas County, but was a Republican of the sort that we find seldomly nowadays. You know, very socially moderate, liberal on civil rights, et cetera, et cetera, but a very, very distinguished and conscientious judge. Whenever I had problems or issues, I would discuss it with them and some of my fellow judges also, but I was particularly close to him. So, I learned from others around me. "I disagree with this; is this the sort of thing where I should write a dissent or not?" "Is the notion that it's important to have unanimity sufficient that you ought not to write a dissent unless you have really strong feelings?" "Should I write a concurring opinion on this?" "What do you think about this argument; does it make sense or not?" All of those sort of things I would discuss with him and some of the other folk on the bench, especially later when some folk were appointed to the bench who were more attuned to my way of thinking. Because, when I first got there, most of them — a majority of them had been appointed

by Reagan, and most of them were not on the same social persuasion as Judge Janes. A couple had been appointed by Pat Brown, and I felt close particularly to one of them, Justice Leonard M. Friedman.

LABERGE: What was one of your most memorable cases?

REYNOSO: Before that, let me just tell you that when I was then sworn in late that summer, it was — folk got together and it was a very exciting time. Somebody was there from the Bar and said what a great person I was, born in poverty and now a judge, and other folk were there and I could hardly believe they were talking about — and then there was a big celebration.

LABERGE: Where was it? In Sacramento?

REYNOSO: It was in the courtroom in Sacramento, and the Sacramento courtroom is, in my view, *the* most beautiful courtroom in the state. And then there was a big get-together and my dad was there and brothers and sisters and all that, so it was just a wonderful occasion. Then we got to work. There was an element of pride there. Or even my mother. I may have told you when I went to visit her one time when I was in law school, a neighbor came over and she said, "You know, my son is in law school and he is going to be a lawyer." I think that's the first time I noticed sort of a tone of pride in her voice. So, no that was really quite special.

And then we got to work. Being an appellate judge is an amazingly interesting job. By the time I got to the court, we were expected to work on ten cases a month. Judge Janes told me that just a few years before they were working on five cases a month, so it gives you a feeling of the increase, and now they are working on even more than that. That may sound like more than what it is because many of the cases, they were criminal cases where there was an appeal and the result was quite clear. We would actually have the staff study the case, write an opinion, and then it would be assigned to judges. We would review the opinion, make any changes we wanted, review the record, but generally it was very clear. So, on half of the cases, we didn't spend that much time. On an important case you might spend the whole month or a couple of weeks on it, so it varied a great deal but, remember, each judge had ten cases to work on the average. The judge sits with three other judges. That meant we had thirty cases a month to work on. If you figure that out, it's less than a day a case on the average. But, as I say, those simple cases you might be able to do in two or three hours. So, the work was really

daunting. We had meetings once a week to decide writs. And the presiding judge would usually sit there with two other judges on a rotating basis. And because of the composition of the judges there, I ended up dissenting quite a bit. I used to refer to myself as the "not-too-great dissenter," but I dissented quite a bit. Most cases that went up to the Supreme Court, not all, agreed with my dissent because philosophically, the Court of Appeal had a majority of Reagan appointees, and that was not true on the Supreme Court.

When we first got there, we had no externs in the court. I asked why we didn't have any, and they said, "Well, we used to have them some years ago, but the practice fell into disuse; I guess we didn't really need them. So," they said, "we ought to have a meeting about that." All the judges got together, and we agreed that judges could have externs, but that it would be an option on each judge. Well, I immediately had a whole bunch of externs, and the judges kiddingly would refer to my chamber as the "Reynoso Law School." But, at that time, we had only one — and I should say really only one *partial* clerk because the main role of that clerk was to study cases that we were going to hear, and to write a memo on the cases, a "bench memo" as we called it. The reality is that, even though he was your clerk allegedly, he really had a responsibility — or she had a responsibility — for all three judges. So, you were sort of the supervisor for that case. You would discuss the case with him or her — I had a male as a clerk — and then you would have that bench memo.

LABERGE: And did you pick your clerk, or did you inherit?

REYNOSO: I picked my clerk. I forget who I was replacing. But, anyway, I picked my own clerk, though I think he was interviewed by the other judges also. Basically I could veto. And I picked my own secretary. I selected one who was there already, so that was my team. Well, when you are writing dissenting and concurring opinions — I also felt that it was the role of a judge to sit back and look at the structure of the common law and the law and try to make sense. I would write concurring opinions from time to time saying, "I've got to decide it this way because that's what the Supreme Court said, but the opinion of the Supreme Court, in light of recent developments, doesn't make sense for this and these reasons, and I would suggest that it's time for the Supreme Court to take another look at this case." I just viewed my role as a global role.

What I have got to tell you, though, is that when I became an appellate judge — now, the only constitutional requirements were that you decide the

case and you do it in writing. I think all of the judges met that constitutional requirement, so I am not being particularly critical. But I could count, I thought, on the fingers of one hand, the number of judges who had the same interest that I had in the structure of the law, the history of the law, and I thought it odd that here I had been so concerned and yet — you know, I may be unfair to my fellow judges. We had at that time fifty-six appellate judges, but really from talking to them and reading their opinions, I felt that only about half a dozen had the sort of interest that I had.

LABERGE: And this is fifty-six throughout the state.

REYNOSO: Throughout the state. Yes, throughout the state. I had to work very hard. Cases, sometimes, were difficult to decide, and sometimes the presiding judge would get unhappy with me because I would take a little bit too long to decide. There was a case, for example, in which there was a Spanish-speaking defendant, and there was a tape. And we didn't have his tape where he allegedly confessed, and the record seemed unclear whether he had confessed or not, so I asked for the tape. The superior court then had to send it to me so I could listen to it, and that delayed deciding that case awhile. And, obviously, in terms of justice to the litigants, we wanted to decide them as quickly as possible. What's interesting is we dealt with criminal cases, civil cases, all kinds of cases. So, it was a great job and I very much enjoyed it, and I was there for five-and-a-half years. What other questions do you have about the Court of Appeal? The Supreme Court is quite a different story.

LABERGE: How did you get appointed to the Supreme Court and what was that story?

REYNOSO: There were speculations that if Jerry Brown had an opening to the Supreme Court, I would be the first person appointed because very often that's what governors do. And, in fact, my former partner from El Centro, was so excited he sent me an article that appeared in a magazine, saying what chance people had of getting to the Supreme Court. And I had at least a 50–50 chance. I was on the way to the Supreme Court, and by golly, then an opening came up, very early on, and that was the opening for Rose Bird. And there were predictions that I would be appointed as chief justice also. In fact, one time, I was at the Supreme Court for some type of meeting and I was in a line, I think to get into the chambers or something. I heard these two people in front of me talking about who would be the next Supreme Court justice, and they were all

convinced that I would be it. So, it is sort of interesting. Then, a second opening comes up, and people say, "Obviously Reynoso is going to be one of those two appointments." Well, he appointed two people, not Reynoso, to the chief justice and the associate justiceship. Most governors don't get to appoint many people. By coincidence, a third appointment came up, and they said, "Ah ha, now must be that Reynoso is going to be appointed." A non-Reynoso got appointed. A fourth appointment opportunity came up. They said, "Surely now!" Nothing. Finally, his fifth appointment I think, and finally he appointed me.

LABERGE: And who were you replacing?

REYNOSO: I was replacing [Mathew] Tobriner. And it was such a wonderful thing for me to replace Tobriner, the judge on the bench that I most admired. I got a letter from Ralph Abascal, I think I showed it to you.

LABERGE: You did show it to me.

REYNOSO: And I have framed it since you were here. And I am going to put it up on this wall, because it was just wonderful for me to replace him. At that time — no longer, since the Court has been redone — there was a plate on the chambers, outside the chamber door saying who had been at those chambers and Tobriner had been the judge preceding me, so it was a wonderful — that element of it was quite wonderful.

LABERGE: I must say for the tape, this is a letter that Ralph Abascal wrote to Mrs. Tobriner.

REYNOSO: Yes, and sent a copy to me. On the occasion of my going to a reception as a new justice, and he is talking about the coincidence of his coming to Sacramento to argue a case that Tobriner later wrote. His suggestion that this was like one justice passing the torch to another. So it is a beautiful letter. When I was appointed, I got a call from the appointment secretary saying, "The governor would like to see you." And I went over to the governor's office, and then somebody took me to a very small office, and there were about six people, including later Governor [then, Secretary of State Gray] Davis and others. And the governor said, "Cruz," he said, "I am going to appoint you to the Supreme Court." And he says, "We need to have a press conference tomorrow. And don't tell —

Actually, by that time, I had sat with the Supreme Court two or three times on assignment, so I understood their role and how they did their work

and all that. It was not going to be that new to me. I was prepared to accept if it were offered, so that was not a question for me. So that's the way it happened, just very quickly. And the coincidence, again, of a governor having that many appointments. Why he hadn't appointed me earlier, I don't know, though a discussion that I had with him, which I dismissed at that time, but it turned out to be prophetic, may have been a reason. He said, "Cruz," he says, "I am going to appoint you to the Court; it's up to you to keep that job." I dismissed it because at that time, those weren't issues. Later they turned out to be an issue. Maybe he already saw darkened clouds on the horizon, I don't know, but that was — mostly it was a very nice affirmative talk. But I remember that he did mention that.

The big political issue already was the death penalty. They said, "Justice Reynoso, are you opposed to the death penalty?" And I told them, no, I was not morally opposed to it. I see a lot of problems with the death penalty, procedural and others, but I have never been morally opposed to it. So that's what I said. They asked about some other issues, but that was the main thing that they were concerned about because already the death penalty was a big issue with many people having been attacking the chief justice for several years on that and some other issues.

I felt that practically all of the attacks on the chief justice were unfounded. I still remember two, then state senators, one now present congressman, [John T.] Doolittle held a press conference at the time, on the site where a murder had taken place, and the Court had just overturned, I guess the death penalty on that case. And they always spoke about the Supreme Court putting murderers out on the street. In fact, they knew that in death penalty, the only portion that normally the Court was overturning was the imposition of death because the Briggs initiative, which became the law in California, violated the U.S. Supreme Court rulings. When you reverse, the person was still convicted of the murder and still had to serve at least the sentence, which was life without possibility of parole. So they knew that they were being untruthful — to put it mildly.

But then, what I want to tell you is that either on that or another occasion, Doolittle produced a list of cases that they said showed why the chief justice was exactly the wrong person to be in that position. The list included cases decided before the chief justice had been appointed. The reporter said, "Why are you including those cases?" And he said, "Because she is a symbol of what's

wrong with the Supreme Court. So it is perfectly proper for us to point to those cases even before she got to the bench." That was the quality of the attack on the chief justice. It was just very unfortunate. Then, though even Doolittle and others had not really been able to muster the political support for their attacks on the chief justice until the then attorney general, later Governor Deukmejian took up the call. And then, when the chief enforcement officer of the state — the governor — starts attacking the chief justice, the people, I think, naturally will listen. And when the Democratic leadership, out of the normal political aversion to anything that might cause problems to them, didn't come to her defense, the people of the state simply heard time and time again, repeated over and over again that the chief justice was not following the law of the state. What was the public to believe when all they heard — and they didn't hear an answer from those who were in a position to know. In some ways I have never found it in my heart to blame the people of the state of California for voting not to return her — and then I was included and Justice [Joseph] Grodin was included and they didn't return us. But in some ways I really couldn't blame the people. I used to tell people, "If I believed what these folk are saying that I am not obeying the law, I would vote against me." It happened not to be true, but the people, I think, in our political process couldn't know that.

But then I was appointed and the press conference went well. Then a committee was formed to celebrate my appointment, and apparently they gathered a lot of money and so on. They gave me a new robe and they had this great big celebration in San Francisco. I was sworn in in this huge auditorium and it was completely filled, and the judges and the chief justice and I were in the front, and there were tons of people there. Folks spoke, and when the chief justice was about to swear me in, this gentleman whom I knew from Stockton, and I forget his name, but he was very well known in the Latino community. He always wore a little hat that was the type of hat that the park rangers wear. You know, like the old World War I hat, and he had embossed it in some sort of gold substance so it was stiff and he always wore that. People used to refer to him as *el hombre del gorito*, "the man of the little hat." And all of a sudden, he either stood up — I don't know what he did, but everything was very quiet as the chief justice, I think, was about to swear me in, and this booming voice came out saying, "Viva Cruz Reynoso." [laughter] And the audience responded by saying, "¡Qué Viva!" The chief justice said, "My goodness, this is the most celebratory swearing in that I

have ever attended." But I still remember that. And again my dad was there and brothers and sisters, and it was just really an emotional occasion.

LABERGE: Oh, I bet. And your kids too?

REYNOSO: Yes. Oh, the kids were all there. We still have pictures of them with the chief justice, and that sort of thing. And then they had rented a place for us to stay in San Francisco. We did have a little bit of a problem. My family and I don't drink alcoholic beverages, so we told the committee, we really don't want alcoholic beverages served at this big ceremony. They said, "What, no alcoholic beverages?" but I think finally they were convinced, particularly I think when they checked it out and found out how much money they would be saving. [laughs] They even put on the invitation, "No alcoholic beverages at the request of Justice Reynoso." They didn't want to take the blame for it. [laughter] But, it was really a grand occasion.

LABERGE: Did you have to move down to San Francisco?

REYNOSO: No, by the time I was sworn in — that was really a ceremonial swearing in. I had actually been sworn in privately by the chief justice, the day after I was appointed. It was just a couple of days after. In fact, I believe it was February 13. I think it was the day after my wife's birthday, which is the twelfth, Lincoln's birthday. So I was already at work. I knew the work, and there were a couple of clerks there, who were already with the Court, that I hired, and then I hired another clerk who was not with the Court, a graduate of this law school, Davis. We had three clerks at that time; later it went to four. And I immediately started working on the cases.

But I mentioned to you that the work there was very different than the work in the Court of Appeal. In the Court of Appeal, constitutionally, we have to hear and decide — we have to decide all the cases. We had a technique of writing to the lawyers, the presiding justice would write saying, "Hey, we don't think we need an oral argument on this case," and most of them would waive argument. Maybe about half of them. We had to decide constitutionally all of those cases. At the Supreme Court, as you know, we decided which cases to decide, and I was — though I knew this, I was still taken aback by the reality that at least half my time and the time of all other judges was taken in reading and deciding what cases to take. We would meet on Wednesday morning and we are very imaginative, we used to call it the Wednesday morning conference, and we would go in with a stack of cases literally a couple of

feet high, sometimes three feet high, and we would have to go and make a decision on each one of those cases. They do it differently now, but at that time, I would distribute them among my clerks and externs. Then we would get together on Tuesday afternoon and go through all of them — not only mine, but the others — discuss what we wanted to do, hear arguments back and forth on issues that were close and so on. And, of course, you never have any commentary about that. Analysts of the Supreme Court are always analyzing how many cases they issued, and if they issue a lot of cases they are working hard, and if they don't issue quite as many they are not working hard. False! Judges work very hard. I remember one time after I had left the Court, I ran into a Supreme Court judge sitting in the airport, and this was late at night, he was obviously catching a late flight from Los Angeles to San Francisco. He was waiting for the plane and guess what he was doing.

LABERGE: Reading briefs.

REYNOSO: Going over all those briefs. I went up to say hello and I said, "I see you are busy. I know what you are doing." He says, "Yes," he says. It is like a constant stream every week, but the cases you decide determine the jurisprudential public policy of the state, and that's really the job of the Supreme Court. Very different, in a way, than the job of an appellate court or a trial court. Then, when we would decide the cases, the chief justice would assign a case to a judge, normally to a judge who had voted to take the case, but there had to be at least four votes out of seven votes to take a case. So, again, the Supreme Court in California is very different than the Supreme Court in Washington. In Washington it takes four votes to take a case, but five votes to decide it.

LABERGE: Before we started, you were going to tell me a story that you and your wife do disagree on several things, including Cesar Chavez.

REYNOSO: Well, including some of the current heroes, most current heroes like Martin Luther King and Cesar Chavez. I didn't know Martin Luther King, but I knew Cesar quite well and Dolores Huerta who worked with him. My wife is a very good person, but who looks at things on a very personal basis, and I take a broader view. I think Martin Luther King was a great person for the things he stood for. On the other hand, she concentrates on the apparent reality that he was not faithful to his wife, and she says, "How could a person like that think to be a minister? How could he claim to be speaking for all these good people when he was a disloyal person?" So, I've

had a hard time convincing my wife that everybody has strengths and weaknesses and we have to look at the broader issues of whether or not they have done good for society. And for many individual people. I think that Martin Luther King in fact captured the spirit of America in challenging us to do better for ourselves as Americans, for all Americans, and I consider him a great hero in the American scene. My wife still looks at the peccadillos and says, "How could a person be great when he has done these terrible things?"

In like manner with Cesar and Dolores, one time we were talking with Dolores, she and I, my wife and I about some publications that had been issued during a strike where the publications published by the UFW [United Farm Workers] were saying some pretty unkind things about growers. My wife or I said something like, "Gee, are you sure about these things?" And Dolores said, "Oh, you know how these things are. We are in the middle of a battle and sometimes we exaggerate things." My wife says, "She's saying that's not true, and they are putting out information that is not true. How could a person do that?" And she has always remembered that the UFW in some circumstances were untruthful and that's not a nice thing. On another occasion, the UFW and we had a disagreement. We and CRLA [California Rural Legal Assistance] had a disagreement. And the newspapers had a wonderful time with it because the UFW picketed the CRLA offices in San Francisco.

LABERGE: Were you working there then?

REYNOSO: Oh yes, I was the director. In fact, I served coffee and doughnuts to the picketers. [laughter] And we talked about it — they were very unhappy because they had heard that one of our lawyers in the Santa Maria office had agreed to help another farm worker group organize as a union. It turned out not to be true, but they were very excited about that because it would mean a competing group speaking for farm workers and all that. All of which I can understand, but my wife still thinks of that unfairness of picketing CRLA. "Here you are working twelve hours a day, twenty hours away, working for the farm workers and the UFW shows up and pickets you. How unfair that is." So, she remembers those individual things, and I confess that I, on the other hand, think of the more global effect that Cesar had on this country and on Latinos.

Because the success, I thought, of his effort was that he combined traditional labor tactics with traditional civil rights tactics to try to brings some changes about. And he was working for those who had never had and still

don't have the sort of power and respect that they ought to have from society as a whole. Those were the folk who picked the fruit that feeds all of us. And yet, economically, we still treat them like dirt, frankly, and socially they are still looked down upon, and so on. Yet, these are very important folk, and Cesar Chavez was to elevate their standing in the community — their economic standing, their educational standing and so on. And again, calling on our country, I think to remember that a society is judged by how it treats its lesser citizens — and by lesser, I mean those who have less power and less money — and not its greatest citizens. I mean, when a mayor or a president always comes about everybody kowtows and is nice to them and tells them how great their speeches were and all that sort of thing. That's true whether you have a dictatorship or a communist country or a democracy or whatever. The real test is how do you treat those that don't have that much power because they are simply fellow human beings and they are children of God. And I thought Cesar did great work along those lines.

Incidentally, he did change many of his views that many folk don't write about. I had discussions with him before he started organizing farm workers and his idea about organizing farm workers was to do with them what he had done with the Community Service Organization — because he was a full-time employee of the CSO before he started organizing farm workers. And actually had worked organizing farm workers, and became convinced that he wanted to spend all of his time working with farm workers and not, as the CSO did, working both with the urban poor and the rural poor. That's why he went out, and his idea was that he was in fact going to go back, and he had little faith in folk being able to organize who weren't part of the community. So he told me — and he did it — that he was going to go back and work as a farm worker and so was his wife because all of them would have to work, as happens so often, to be able to feed the family.

LABERGE: Had he not been a farm worker before this?

REYNOSO: He had been a farm worker as a young person, I believe. His family was farm workers out of Arizona and then California. So, he knew the work.

LABERGE: As you did.

REYNOSO: Sure, sure. And he did that. But his idea was that he would be an organizer as he had been with the CSO. He never conceived of himself as being a leader. And he was always soft-spoken and so on. It's more because

his efforts and Dolores' efforts along those lines ended up not working that he became the leader. That is, I chatted with him a few years later about how come he ended up as president of the UFW, and he said, "Well, you know, what happened was that we would have meetings very democratically, and a person would be elected president, but they really didn't provide the sort of leadership that we were hoping, and then further, they would resign after a year or two. And we didn't have the consistency that I knew we needed." So, after two — I forget how long — two or three years of that experimentation, he and Dolores and Gil Padilla and the other people, many of whom had worked or been associated with the CSO, that went to help Cesar, said, "You know, this is really not working. We are the ones who have the ideas about how to put — ." But their hopes for the type of leadership that would evolve somehow didn't. So, finally they placed themselves as candidates for those leadership positions, and of course the folk who were with them already knew that they had the leadership capacities, so they were voted in and they became the leaders. In some ways they became leaders by default.

I never had this discussion with Cesar, but I think what happened was that after several years of self-help, they saw that even then they still didn't have the power that it would take to truly protect the farm workers as well as they needed to be protected vis-à-vis their employers, principally. Because they also were involved in registration drives. They encouraged their members to vote and do all of those things that have to do with self-help. Then, when the AFL-CIO organizing committee — headed at that time by Larry Itliong and it was predominantly a Filipino-American group of farm workers — decided to strike, they asked the UFW to join them. My sense is that the UFW had some deep thinking about "Do we shift from self-help to a union?" And they must have concluded that the self-help that they had been involved in was all very good, but they needed to go beyond that to really help the farm workers get to where they needed to be, and decided that maybe it was time to unionize and to go with Larry Itliong. Ironically, the farm workers were far better organized and had greater numbers than the union, than the formal union. So when they got together, they all agreed that Cesar would be the president and Larry would be the vice president, and then it became a labor effort. But that was all evolutionary, and some of the articles I have read seem not to recognize that.

LABERGE: This is wonderful to have this recorded because even before when we talked about him, we didn't talk about this part. What we were going to talk about today is more on the Supreme Court. I thought today if you could talk about what you think your most significant cases were.

REYNOSO: Well, it's always hard to tell, but one in which — I will just mention one case because in some ways it was special. I trust that I am not breaching confidences, because I won't speak of individuals, but what happened was that a case had come in, *People v. Aguliar*, having to do with the use of interpreters. There had been one interpreter in this criminal case, and the interpreter was then borrowed by the judge to help interpret for the jury and to be a general interpreter for everybody. There was an appeal, arguing that their basic due process had been violated, and it was assigned to a judge and the judge wrote a very fine memo saying, "I don't think there is anything new about this case and I don't think we should grant it."

But I had had a lot of experience with interpreters, and I knew how difficult it was and how unfair it was to have a defendant sitting next to you, to have a witness be speaking in English and say — most of my clients that spoke another language were Spanish-speaking — have that client be there, not understand what the witness is saying and turning to me and asking over and over again in Spanish, "What's he saying? What's he saying?" The difficulty that I had in continuing to listen to the witness so I could better cross-examine him, but not be able to talk to my client about what had been said to see whether or not the client had a different version that would then help me in a more effective cross examination. And the frustration of the client sitting there, not knowing what the judge is saying, not knowing what the witnesses were saying, et cetera, et cetera. I had read articles and so on, on that issue, and in fact, that issue had been faced, even by some other courts. Certainly, writers had written about the due process violation involved in that type of situation. So I asked for a continuance of our deliberations on that and wrote another memo where I argued that in fact it was a very serious issue and we should take the case. Indeed, the Court voted to take the case. We had a hearing, and a majority of the judges agreed with me that in fact there was a serious due process consideration, and I wrote an opinion about the use of interpreters — frankly, going way beyond what the briefs said about it. I had my research assistants go and look up articles and so on in the public library as well as the library, and so on, because I consider this an important issue.

And then I wrote an opinion, which I understand is still the leading opinion in the use of interpreters (People v. Aguilar (1984) 35 Cal.3d 785). How one has to be conscious of the administration of justice and how it affects — you need at least two interpreters, maybe sometimes even three because you have got the interpreter for the court and for the jury. That interpreter is interpreting what happens off the witness stand. That's completely different than the due process right that the defendant — if the defendant doesn't understand what's going on, understand what's going on. That person should be right next to the defendant to be interpreting what's happening, so then the witness or the defendant, the client, can help the lawyer be more effective. And then it may be that there is more than one defendant. It may be that for other reasons, you want to have everybody in the trial know what's going on. That was the basis for the opinion, and fortunately a majority of judges agreed with me. And I think that was an addition to the administration of justice in this state. I think that's an example of the strength of having a Supreme Court with individuals with many different backgrounds. We had in our Court, a former attorney general. We had in our Court at one time, a person who had been a rancher. We had in our Court, a person who, like me, had been a small-town lawyer and then a bigger-town lawyer. We had, with me, a person who had been a legal services lawyer. We had a judge who had done, as a private attorney, mostly work with large law firms in corporate and insurance matters. Just a combination of folk that — I think there is wisdom in having folk with different backgrounds be on the Court.

LABERGE: I know just from interviewing Peter Belton, that his experience with a disability influenced Justice [Stanley] Mosk, and there was a case about — now I can't remember exactly what — but the defendant was disabled. And that really informed how they looked at that case in a different way.

REYNOSO: You know, in the Wednesday conferences that I mentioned, when we were talking about which cases to take, judges would often refer to their personal experiences and say — or something they had read, not in a legal periodical, and say, "Yeah, you know, I have read that this is a real issue and I hear it has become even more important, so don't our courts need some guidance in that area of the law?" Personal experiences in terms of disability and so on become very important. In a democracy, I think one of the most important roles of a court is to make sure that everybody is treated

fairly with equality and procedurally with due process. Everybody gets a fair shake. The problem — one of the problems we have in a democracy, at least a democracy like ours, is that a majority rules. It means that minorities can very often be ignored. I am not just talking about racial or ethnic minorities. It means anybody who has experiences that are not shared by the vast majority. Let me give you several examples.

Few people have relatives, relatively few have relatives who have immigrated to this country, so they don't run into the problems that folk who have immigrated to this country and aren't yet citizens will have very often. I often cite the experience of my dad who thought — it turned out that he hadn't — he'd lost his identification card as an immigrant. He went to get a replacement, and here he is in his late seventies and had to stand in line all day long. Got there like at seven in the morning. Like at four in the afternoon, the officials came out and said, "Sorry that's as many people as we can serve." Then he goes there the second day, gets there at like four in the morning, stays in line all day long. Hot sun in Los Angeles. About three in the afternoon somebody comes and says, "Sorry that's as many people as we are taking." If that were happening to citizens, to a lot of citizens, on a different issue, say getting your driver's license, would we ever put up with that? Absolutely not.

And my dad said, "You know, if they want to — I am an old man; they can deport me if they want to. I am not going to go back there." Then my brother called me and said, "Hey, we have got a problem. Look what happened to dad." He said, "You've got to help him." I said, "Okay." So I called a lawyer I know in Los Angeles who did nothing but immigration work, and I said "Lawyer," this is a person I knew very well, "my dad has this problem. Is it solvable?" She says, "No problem." She says, "The office" — and this is how clever folk in power can be — "the local office has one day out of the week they call 'lawyers day.' And on that day, we lawyers walk in with our clients and they take care of the issues immediately." What a clever way of a governmental agency to get rid of anybody who has got any power, any money, any influence, right? So she says, "Have your dad come by and I will take him with me next Wednesday." Sure enough, my dad went by, they went in — you know it takes two minutes to fill out a form. They fill out the form and it was done. And I thought, one, a democracy that understood, if we all understood those issues, we would never put up with it. The reason we put up with it and the reason the INS [Immigration and Naturalization Service] in those days didn't get any money and

all that is that most of us just didn't know that. That's the type of person who ought to be able to go to court and challenge that type of activity that affects only them and not a whole lot of other people.

Let me give you another example. At the U.S. Commission on Civil Rights, I can't tell you how many hearings we have had that in one way or another deal with the administration of justice. Okay, we had hearings in Santa Rosa one day — actually, by the state advisory committee, and a couple of us commissioners were there. The chief of police told us with great pride they run surveys in the community, and their last survey showed that 85 percent of the people in Santa Rosa approved of the police department and how they did. In fact, they got a lot of very positive feedback and so on. I think that's wonderful that they — I mean, you don't often — police, 85 percent. There is only one problem: it's the role of the police to represent 100 percent of the people well, not just 85 percent. Yet, we had so many people and organizational representatives at that hearing that the hearing room couldn't hold them and they had to set up loudspeakers in the foyer of that big building for the overflow crowd of people who came to complain about police malpractices.

What went awry? What went awry was that there was a substantial minority that felt they were not being well treated by the police, but meanwhile we had tons, seemingly, of city council women and men coming forward saying, "I support the police department in our community." This was a hearing not just about Santa Rosa, but about the whole county. "In our community, this community, or that, the police are great. They put their lives on the line, et cetera, et cetera." They get elected by a majority of people. It was to their best political interest to say, "What a great institution we have," and so on. Who was there to look out for the 15 percent? Nobody but a group of civil rights organizations that worry about those things, or courts when those issues are brought up. Democracy seems to be incapable of responding to that. I will just editorialize: one of the greatest sins of the U.S. Supreme Court is that for the last twenty or thirty years it's forgotten or never learned that role, as I see, a role of a court in our type of democracy. We just see that over and over again. When you talk about the disabled, only a certain number of them either are disabled or have relatives and others who understand the problems of disabled. My wife, for a while, had a hurt leg and couldn't get around, so we bought her a three-wheel scooter, and she got around very well in that. She told me that most of the restrooms that are now retrofitted for disabled,

for wheelchairs, didn't work. She had a very small little scooter, and she said even that scooter wouldn't easily maneuver into some of those restrooms and so on. I confess that I always feel good when I see that a sidewalk or something else has been made, has been retrofitted so the disabled can use it, because I tell myself, on this occasion, a majority of Americans recognized the problems of a minority of Americans and have said to themselves, "We want them to have as good a life as possible. Approximating the life that we have." And I think that's a great thing to say for our country.

Well, that individual case can come to a court, and the court may be — you know, judges — a lawyer — we always talk about how, as a lawyer, you have got to become an expert on the issues in that case, and that case might deal with the manufacturing of sulfur and you become an expert on the manufacturing of sulfur. It may deal with deep sea diving and you become an expert. Well, judges are the same thing, and they will then get to see how the disabled may suffer in a certain way and ask the question: is due process being met here? Do we really have equal protection, and so on? When politically, more often than not, we can't do that or don't do it. Now, from time to time we do. We did it with the Civil Rights Act, we did it with the Voting Rights Act, we did it with the Americans for Disability Act, and very often, when democracy is working at its best, we do it. But very often, we don't.

LABERGE: What would make the Supreme Court step up to that? You mentioned that the Supreme Court has been not paying attention. Would it be different people, having it more diverse or — ?

REYNOSO: I think it would be different people with different ideas. That is, people like [William] Brennan and [Earl] Warren that in some way accepted the notion of that role of the Court. I don't mean to be disparaging of the California Supreme Court, but I think it's fair to say that traditionally the California Supreme Court, up until the time of Rose Bird, had been very conscious of that responsibility on the part of a supreme court. So, I think it takes judges who think differently and those who appoint them who think differently. For example, the U.S. Supreme Court now is so respectful of — well, not in the Florida case, but more often than not — so respectful of the power of government and the power of a majority, speaking of that as being "democratic." For example, even on the argument of the Pledge of Allegiance, I understand from reading, that [Chief Justice William] Rehnquist asked the gentleman —

the lawyer–doctor who was arguing the case — in this fashion: "Well, when there was a change in the flag, how many Congress people voted against that change?" The lawyer-doctor answered correctly, "None." Then Rehnquist said, "Well see, that doesn't sound to me like much of a difference in opinion in this country." Then he responded, "That's because people who are atheist can't be elected to Congress." That's clearly true. We have very few atheists percentage-wise. Does that mean that atheists aren't entitled to equal protection in this country? Of course not. Query whether that's involved in this case, but all I am saying is that it is so easy with a certain mentality to think that Congress actually represents most of the people. Well, they don't. They represent people who, in a majority in their district, voted for them.

In fact, I remember one time, a friend of mine who was the head of an organization was very unhappy with what the governor of California had done. He wrote a letter to the governor and pointed out how, in light of the total number of eligible voters, only a certain number are citizens. And of those, only a certain number have registered to vote. And of those, only a certain number voted. And of those, only a certain number voted for him. If I remember correctly, 12 percent of all of the adults voted for that governor. He was pointing out that he wasn't really representing all of the people, and yet once being a governor, he had the duty to represent the interests of all of the people. Well, it's tough for a politician to represent more than the folk who just voted for them. I remember one time, Governor Deukmejian was asked whether he was going to look out after the interests of the farm workers. And his answer was, "Did the UFW endorse me for governor?" The answer was no. Sort of a realistic response saying, "I have a duty as a politician to respond to those who have elected me." But of course as governor, not as politician, you have the duty to represent everybody. But it is very difficult in our type of democracy, and the Court — which is basically a non-majoritarian institution — has the duty to then represent, if you will, constitutionally the interest of all those folk who didn't vote for the governor, who didn't vote for our president, who didn't vote for those Congress people. How each case will come out is a different matter. All I am saying is that there is that responsibility. I am not sure that the current U.S. Supreme Court understands that, frankly. I am not sure they agree with me. They may have a completely different view. That's my view of one of the important roles of a supreme court in a democracy.

LABERGE: As far as when you were on the Court, and you mentioned that until the time of Rose Bird, that was the way the California Supreme Court —

REYNOSO: In my view — and I don't want to say it's not that way now; I don't want to speak to that — I am just saying that I know that up to that time it was. The Court, at that time, had not changed for about fifty years. And during that time it had gotten a national reputation for being protective of consumer rights, of the environment, of little people, in a way. And that comported very much with my own way of thinking. When I was on the Court of Appeal, I think that I may have mentioned to you that I referred to myself sometimes as the "not-so-great dissenter." But probably thirteen or fourteen of my cases that were appealed to the California Supreme Court were affirmed by the Supreme Court. That is, I was in tune with the way of thinking of the Supreme Court. So when I got to the Supreme Court, I happily ended up agreeing most of the time with the judgments of the Supreme Court.

I should perhaps tell you about one case where I disagreed with the Supreme Court. Here's what happened. There was a property owner in a commercial area. There were two empty lots and one property owner then built a building for the storage of materiel and so on, some sort of warehouse. And trucks would come and take things. They had built in such a way that the trucks couldn't go in and out too well, so they would trespass upon the neighbor's land. They did that for several years. The neighbor complained about it. They even built a little mound to keep the trucks from going onto that land; the trucks went over the mound. Eventually, the second owner built their own building. Then the first owner said, "Hey, we've got a prescriptive right over that land." To me it's an interesting case. And based on the opinions on prescriptive rights, they were right. They had used it for over the prescribed number of years and if you have a prescriptive right, you are basically the owner. The case had gone to court and the trial court said, "Hey, they are right, they have a prescriptive right." And, if I remember correctly, ordered the owner of the second building to tear down the building. I mean, quite drastic. Presumably, they also had the option of selling it by settlement. But said, "Hey, you've encroached on land that these people now own by a prescriptive right." It went to the Court of Appeal and it ended up before a very conservative panel. And the conservative panel overturned the opinion and said, "Look, we agree there was a prescriptive right, but here what you really have is a private taking of property. And under those circumstances, in equity" — because there is a

concept of equitable laws which basically give the judges a lot of authority to make sure that the case is decided fairly, and the appellate judges said, "At least the fair thing to do here is to have the owner that took the prescriptive ownership at least pay the other owner for it." Because the irony of common law was that one minute you are a trespasser and a criminal; the next minute you are the owner. I have always thought that to be very strange.

It made sense in rural England several hundreds of years ago when they were trying to encourage people to use the land well and to use all of the land. Nowadays, in crowded California, we do well to discourage people from doing that. The case came to us and we accepted the case because the Court of Appeal had changed 100 years of law. We had to either agree with them or not agree with them. So, I agreed that we should have taken the case. We took the case and we heard the case, and a great majority of the judges said, "The Court of Appeal is clearly wrong, and if we don't change it, that's going to be the law of the land" — because the trial court judges are supposed to follow appellate precedent — "so we have got to write an opinion saying they're wrong." And a judge wrote a very fine opinion saying, "Well, it's true it's an equitable case, but the state of California took all of the then existing law and adopted it to California and then codified it. And they codified the rules of equity. Therefore, if there is going to be a change in the law, it ought to be done by the Legislature." Okay? Perfectly proper thinking, but it didn't agree with my way of thinking. The thing was so patently wrong. It was just unfair. So I did a lot of reading. I had sort of fun. I remember, at that time I was commuting to San Francisco, catching a van that left Sacramento at five in the morning. It was a very good van because it had good reading light like airplanes. So I was going through all these books written hundreds of years ago. How does a judge decide what fairness is? And the teachings of those writings and those cases went something like this: "You don't just depend on your own notion of fairness. What you do is try to perceive of what the community notion of fairness is." I had absolutely — now, a judge is not supposed to talk to nonlawyers and people outside of your own circle to answer a question.

I argued in a dissent that it is true that California had codified the rules of equity, but the rules of equity going back hundreds of years said that the judges had to look at fairness. And when California codified that rule, it also codified the basic notions of equity that you look at fairness. And I thought that the appellate court judges had put down the very basic notion of fairness.

At least pay for it. Not to talk about the fact that these guys were bad guys. They knew they weren't supposed to be trespassing. There was even a mound built and all that. They shouldn't have even been trespassing, from my point of view. But the least — if we are going to have a prescriptive right, the least they ought to do is pay for that property. So that was my dissent.

But I just felt we really missed the boat there. Sure the Legislature can pass it, but tradition and the law of equity said we as judges had that duty. And how we could look at something so unfair — now I should tell you, after the case was decided and published I asked tons of people. I gave them this scenario and I said, "What do you think is fair?" And they said, "You should have put those trespassers in jail. What are they doing? Of course it's fair to have them at least pay for the property." I didn't talk to one citizen or resident that wasn't a lawyer who didn't agree with my dissent. To me, to this day it's absolutely clear. And incidentally, we — judges issue opinions saying very often — we didn't on this case, but very often we say — maybe I did in my dissent — "the Legislature ought to look at this issue again." More often than not the Legislature doesn't. They have very often bigger fish to fry, and this is just dealing with a small aspect of our community life. So there's a time when I dissented, even though I normally agreed with the majority, but I just thought they were dead wrong. And here I was agreeing with this very conservative panel who looked at property rights and all that, but I think they were right. So anyway, at least those are two cases that I remember well.

LABERGE: Now, since then, haven't you taught Equity?

REYNOSO: Oh yes. I am teaching Equity right now.

LABERGE: That's one of your specialties.

REYNOSO: Absolutely, yes. I was asked to say a few words about Justice [Frank] Newman when he died, and one of the things I mentioned was that he was my Equity professor at Boalt Hall. And then I built that into my talk saying that in fact he always did worry about justice and fairness. But I learned all about equity from Frank Newman and now I am teaching equity as part of the Remedies class. We used to have a class just called "Equity." Now, it is part of a class called "Remedies." But equity is one of the important remedies, and that case dealt with the issue of *what's the remedy* in this situation. I am getting excited. I kept my class an extra five minutes. I didn't pay attention to the time this morning because I had gotten excited about an issue we were talking about.

LABERGE: Let's talk more about the Court and the others on the Court. We invited Rose Bird to do an oral history, but she never wanted to. So we don't have her philosophy or her words on how she decided things. Before you even were on the Court, what was your take on the fact that Jerry Brown appointed her, and then, what kind of a job she was doing?

REYNOSO: There had been the position by many that I would be the first appointee, and of course I wasn't. Rose Bird and Wiley Manuel were. I didn't know Rose Bird. I didn't know anything about her. I was impressed with the work she had done with the governor. I was impressed that she had been the first female cabinet member. I had been impressed by her background as a lawyer, and she clearly was a very bright person. When she got to be Supreme Court justice then, I agreed with practically everything she did. But she was breaking traditions and that's always a little bit dangerous. For example, in California, unlike the U.S. Supreme Court, if a judge recuses himself, the chief justice has the authority to name other judges to the Supreme Court — to sit with the Supreme Court. There had been a tradition, ever since I could remember and knew about, that invariably an appellate judge, very often a presiding judge — sort of going by pecking order — would be named to the Cal Supreme Court to sit with the judges. She started naming trial court judges from time to time also, and I think there was sort of a sense on appellate judges of, "Gee, who does she think she is? There is the tradition that we get named to the Supreme Court. Now she is naming all these other judges." So she started breaking traditions.

Secondly, Jerry Brown had already broken two traditions by appointing her, maybe three. One, he had appointed a very young person. Two, he had appointed a person without judicial experience. Three, he had appointed a woman. And there had been many predictions that Stanley Mosk would be named chief justice because he had been named by a Democrat — his father — because he had been there a long time and so on. And he was not named. So there was sort of a sense by many of the senior judges, and not just on the Supreme Court but on the appellate court also, of — "betrayal" is too strong a term, but of not being respectful of their important status in society. I shouldn't say that. There you started to see some of the things — I thought it was a good idea, incidentally, but I could understand sort of this nervousness on the part of some of the judges. Then she had a philosophy of judging that is not uncommon, and to be respected, and some present judges have the

same philosophy. Mine was a little bit different. I viewed the Supreme Court as having the duty to set the jurisprudence of the state. Therefore, I believed that having a fair ruling by the Supreme Court was important. I lamented, for example, many of the rulings that had been coming down from the U.S. Supreme Court where there were like four of five opinions and one opinion would say, "I agree with section one and three of the opinion, but disagree with sections two and four," et cetera, et cetera. It was an unclear ruling.

The chief justice, apparently — I never had this discussion with her but I have to assume, and from some of her speeches and so on, I think it is pretty fair to say that she felt very strongly that a judge has an independent, individual responsibility to express his or her views on constitutionality, on the various issues that came before the court, because the issues are important and you have been appointed there as an individual. My filing a one-person dissent, for example, for me was quite rare. And I thought that if you were going to sign a dissent, you had to have pretty strong feelings about it. She often wrote separately — would write dissents, or write concurring opinions, and so on. Now, interestingly, at the Court of Appeal level, I felt it was my duty to file dissents and concurring opinions if I didn't agree. I would sign dissents because I didn't agree, or I would sign concurring opinions because sometimes a concurring opinion in summary would say, "I agree that the majority has done what the Supreme Court said needed to be done; I disagree with the Supreme Court for these reasons, and I think the Supreme Court ought to take a second look at it." I felt that was my duty in the appellate court. At the Supreme Court level, I didn't feel any compunction to write concurring opinions because I was more interested in having there be clarity of ruling. So, I would sometimes suppress my own feelings about a matter to make sure — to fit within that philosophy. I think the chief justice had a different view, and therefore, she started to be viewed by some as being in some ways too individualistic. So, that all had a sad and cumulative effect, where she was unable to garner — even from the judiciary and sometimes from the Bar — the sort of support that a chief justice had traditionally had in California.

But in terms of the things that she did, they were admirable practically in an extreme. I will just give you an example. A judge cannot use public materials for personal use. On the other hand, a judge is in a difficult situation. A judge is a full-time judge, they have a secretary, and at that time a typewriter and then later a word processor, but normally you don't have all that at home

and so on, so if you are going to write a personal letter, how do you do it? By tradition, though in a technical sense you are not supposed to use it, everybody understood that so long as you don't abuse it, it's fine. One item came up that I think really ticked off judges. Public funds, again, are not supposed to be used for private purposes. It had always been assumed that paying dues to the Judges Association — then it had a different name — was proper use of public funds. So the Court would always pay the dues to the association, and the association would have programs on what judges should do, and all of that. It was an educational effort also. Rose Bird decided that that was a private organization, and it was because it also lobbied Sacramento for higher wages and all that. She decided that it was really a private organization — and one can certainly see that — and decided, if I remember correctly, that it was not proper for the courts to pay that. Well, that hurt the judges in two ways; monetarily, but I think they also thought that it somewhat demeaned the importance of their organization. There were a lot of little things that accumulated in that way. Another judge and I used to kid about the fact that there was a copy machine.

He and I would kid sometimes if we were copying a newspaper article or a private letter. We would say, "Gee, I wonder if we should figure that this is 1/1000th of the cost of this and we should reimburse the Court." Of course, we never did because we followed that tradition, but Rose Bird was so conscious of her responsibilities that in some ways she was practically overly conscious and she worried about those things. "Are we really properly using public resources for private purposes?" And she was, of course, very fruitful in protecting the public. But that in turn, I think, turned off some people who thought that she was too — well, in fact one of the much mentioned matters was that the Supreme Court used to have a limo that would carry the judges around, and one of the first things she did was to sell the limo. And judges now simply had cars in the pool. Indeed, near the end — she started ameliorating that idea, I think, because the last couple of years, she actually authorized the judges to have cars issued by the state for their use. And she understood that some of it would invariably be used, at least a little bit, for private purposes. We actually had cars assigned to us the last year or two that I was on the Court. Maybe she started changing her mind about some of those things. Obviously, it was a convenience to have a car and it saved time and then saved the taxpayers and all that. But I think some of those little things went against the grain of how judges had done work before.

One lawyer told me this story. He had called the chief justice to see if she would perform a wedding. And, in fact, she did perform weddings; I attended some of them. But on that occasion, her assistant told them that she was too busy. And after all, she is chief justice, she has these big things to worry about. Anyway, he was completely turned off by that phone call, and I don't know whether the assistant was doing that on his or her own or whether they were under instructions, but I remember that he was turned off because he had been a long-time admirer and friend, apparently, of the chief justice. Little things like that went awry, and that all ended up with her not being able to have the type of support that she really should have had. On the other hand, I admired all of the things she was doing, and in terms of her decisions, I not infrequently disagreed with her. I would be with the majority and she would bring a concurring or dissenting opinion, but I thought they were always very well researched, very well structured, and sometimes looking toward the future. In fact, sometimes, I rather agreed with her, particularly when she wanted to change the law. Appellate judges have to worry about whether there is more merit in changing the jurisprudence because there is so much merit in stability of the law. And sometimes I thought there was more merit with stability of the law, even if I disagreed with it, than changing it. But her feelings were so strong and so individualized that she would still write a concurring opinion or dissenting opinion. Not infrequently I disagreed with her, but they were always well-written, well-reasoned opinions.

Now, some people said that she was hard to get along with. Maybe that was true; maybe it wasn't. All I can tell you is that the Wednesday conferences and the way I saw her deal with the judges was always upbeat and marvelous. I don't know what the tradition was before we got there, but she would always, during our Wednesday conferences would have trail mix or something else for us. She was always jovial. She was very fair in the discussion. Never cut anybody off. Frank Newman used to describe the Wednesday conferences as the greatest seminars he ever attended. And that's the way it was. I mean, everybody was free to talk; she was very respectful. In my view, she was a great chief justice. Now, the sad thing is that because she had been a public defender, I think, and because politically some folk didn't agree with her, folk — mostly Republican legislators — started attacking her from the day she was appointed. So the attacks had gone on for like ten years before the confirmation election came up. Also, by the time the second confirmation came up — she was confirmed the first time — by that time we had quite a few death penalty cases.

In fact, we were reversing a lot of those cases. One of the reasons we were reversing them — and I have another reason why I thought those cases were difficult, but one of the main reasons we were reversing them — is that we had had an initiative in California called the Briggs initiative, where the author, Senator Briggs, had bragged that his initiative was tougher than the U.S. Supreme Court rulings on the death penalty. Because the Supreme Court had first declared the death penalty unconstitutional, then changed its mind and said, "Well, it can be constitutional if you follow all these rules." His initiative didn't follow those rules, and the Legislature interestingly had passed a statute that did follow the rules — a statute, ironically, sponsored by Senator Deukmejian, who later became attorney general and governor. However, the initiative passed. An initiative takes precedence over a statute. So now the law of the land was the initiative. Sad to say, the initiative didn't comport with the U.S. Supreme Court rulings. But it takes time for a case to be tried. Well, first for the charges to be made and then the case would come to trial and then be tried, then appealed. So it was several years, very often. By the time it came to us, if it did not comport with the U.S. Supreme Court, we had to overturn it. And we were overturning many of those cases.

Now, when we overturned a case, we generally were overturning only the — death penalty cases are tried in two different trials. One trial asks the question, did the defendant do it? The next trial asks the question, what should happen to this person? Either sentenced to life without the possibility of parole, or death. So when we reversed the second trial, which is normally what happened, we were saying, "You got it wrong in terms of how you held that trial. You have got to do it in conformity with U.S. Supreme Court rulings." None of those defendants were set free. They were in jail for life at least. The court became the political enemy of folk who disagreed with its ruling of protecting consumers, protecting workers, setting higher standards for insurance companies, et cetera, et cetera. Most of the Democrats were afraid of the death penalty issue, so except for one senator out of Oakland, who campaigned vigorously for the Court, most of the Democrats were silent.

LABERGE: Who was that? [Nicholas] Petris?

REYNOSO: Petris, yes. He was the only one. Most of the others were silent. So the public, one, didn't understand that it was a partisan attack and, two, never heard publicly, I think, with the vigor that they should have, the

arguments in favor of an independent court system, the reality that we were simply enforcing the law, et cetera, et cetera. So it is not surprising to me that the vote went very poorly, particularly against the chief justice, but also against the two of us who late in the game were added to the attack. That was all to me a sad episode. Very unfair to the chief justice. I think that she was very conscious of her obligation. You know, the title of the chief justice is not Chief Justice of the Supreme Court; it is Chief Justice of the State of California because the chief justice has administrative responsibilities as well as judicial responsibilities. And I thought that as to everything, she took it very, very seriously, and I think I agreed with most of her positions, certainly administratively. In general, I just thought she was a great chief justice, and it was sad for the State of California that we lost her.

LABERGE: Now, what about you? I have got several questions, but let's just go with the election. What did you do, if anything, before the election to — not to campaign, but to deflect any of what was being said about you?

REYNOSO: Well, I always accepted a lot of speaking engagements, so I spoke all over the state talking about the concepts of judicial independence and that sort of thing. But, you know, when you speak, you speak to a hundred, two hundred people; television you speak to 35,000,000 people — well, at that time, only 33,000,000 people in the state. And certainly our talks didn't get on television and all that. So, the answer is that I didn't do anything for a long time. Eventually I was convinced that I needed to set up a committee, so I set up a committee and that committee tried to raise some money. I would go around and talk to those folk who gathered in different parts of the state. Eventually, incidentally, we grossed nearly a million dollars, which I thought was rather amazing for starting so late and doing everything on a small scale. But it showed that a lot people were really quite interested. But a million dollars goes nowhere in the state of California. Then, very late in the campaign, I hired — just the last two or three months, I hired a political consultant. I don't think he did any good for us, actually, except one thing. At the end of the campaign, he ran those polls that those folk run sometimes about how well you are doing — and near the end, they run it every day or every other day — and he told me that we were going to lose. And that's really the only real true value that I got out of that campaign. So I forewarned my family, and I got all kinds of calls from people who wanted to have a

party and have a celebration and all that. And I told all of them, "No, no. Thank you very much. I really appreciate it, but I am going to just stay at home and listen to the returns." So, in a way, nothing unexpected happened. In fact, I got more votes than what I thought I was going to get. I forgot what the percentage was, but Joe Grodin, Judge Grodin and I didn't lose by very much. The chief justice, unfortunately, lost very badly.

So I had forewarned the family, and I had decided that I had been out in the public enough talking to reporters, that, after all that, I was going to take the day off after the election. My wife and I went up to the foothills, went to Jackson. This was during the week. The election is on a Tuesday, so it was on a Wednesday. We visited a local museum that I think is open on Wednesdays for two hours and we had a nice lunch. It was one of the nicest days that we've spent. I always understood the campaign to be a political campaign, not a campaign really judging me because I knew that folk didn't know anything really — the voters knew very little about why we were voting the way we were voting, and so on. I always remember a headline in the *Woodland Democrat* when I was on the Court of Appeal. Court of Appeal judges also have to run for confirmation, and by tradition, we didn't do anything. We didn't do anything on the time that I came up for confirmation, and the *Woodland Democrat* ran a headline that said, "The Candidates Nobody Knows." They had pictures of the three of us judges who were on the ballot and then it said something about us and all that, but they are right! The electorate doesn't really know who we are. So I always thought about that. I never considered it a vote on me personally. It was a campaign and how effective the campaign had been. We had enough money to, I think, put a few ads on television, but very few. We knew that it wasn't going to compare with what some estimate to be ten to twelve million dollars that the people attacking the Court had raised.

Those who were attacking the court had one particular television ad that ran a lot, that later got an award for being one of the most effective political television ads. And it showed a rectangular box, if I remember correctly — I will paraphrase — and it said, "The people of the state of California voted for the death penalty. Rose Bird's vote." Then it showed cases that came up, say forty, thirty — whatever it was at that time. "Rose Bird voted to uphold the death penalty: zero." Then it said, "Is she following the law?" Then it said, "If you don't like Rose Bird you can't like Grodin. Voted against the death penalty twenty times; for the death penalty four times. And you can't

like Reynoso. Voted against the death penalty so many times, for the death penalty so many times." Both Judge Grodin and I had voted in several cases to uphold the death penalty sentence, but more often than not we had voted not to for the reasons I indicated. So they started with Rose Bird then went to the two of us, and it was very effective.

LABERGE: They didn't say anything about Stanley Mosk?

REYNOSO: No, they had decided by that point that, one, all they needed was three votes to take over the court because Deukmejian had already appointed one justice, so they didn't need Mosk. And, two, Mosk had been attorney general, and he had a lot of friends. He could have raised a lot more money than the rest of us, I think. So I think they were afraid that it might look partisan, and they could see then that practically all the Democrats were cowardly and they weren't going to speak up. I remember calling a friend of mine whom I had known for years and years who was in the Legislature, and I said, "Gee, so and so, why aren't you folks speaking out on this? This really is an important issue." And I remember he said, "Oh, Cruz," he says, "about the last thing the people want is to hear another politician talk about the death penalty." Then, to show what a good guy he was he sent $1,000 contribution or something to my committee. But even he, who came from a safe district and all that, somehow didn't want to take on an issue that he viewed as gratuitous I guess. So the people got very much a one-sided view.

I remember, I had an interview one time by a person, I forget what his issue was, but he was interested in the independence of the judiciary, and he asked me whether I thought the California Supreme Court would be too tied to politics, and I told him that I didn't think so. I mentioned to him that when all is said and done, the people on the Court are still conscientious and if anything appeared to be too partisan, it would hurt the Court. It takes a confluence — a historic confluence of matters to have happened what happened with Rose Bird, and that I didn't think that was going to happen. I still had faith, I told him, in the electorate. He says, "Boy, that's a funny thing for you to say in light of what happened in that election." But, in fact, I still do. It's just that the voters unfortunately just didn't get a true picture of what the law was, what the death penalty rulings were, and mostly I blame the Democrats for it. The Republicans though — frankly, Deukmejian was unethical in my view. He sent me a series of questions when I was named to the Supreme Court that certainly

there is a little bit of a question as to whether they would now be considered unethical — but at that time, they were clearly considered unethical. And he was a lawyer. He knew better. And the people who were attacking Rose Bird and the Supreme Court, they knew that what they were saying was not true. So it was not a very upstanding campaign against the Court and the chief justice. Frankly — I don't know whether I am now sounding cynical — that is sort of what I expected from that wing of that party, but that those who better understood, many Democrats, didn't then stand up and help educate the public about what was happening, I think, is a very sad commentary on how politicians think and their unwillingness very often to take on an issue that they don't consider vital for their reelection. Which I think is what happened.

LABERGE: George Deukmejian sent you questions because he was going to be on — voting whether you would be confirmed?

REYNOSO: That's right. The confirmation vote. When one is named to an appellate court, those judges have to be confirmed not by the electorate, but by a special constitutional commission composed of the chief justice, the attorney general and the senior presiding justice of the Courts of Appeal. And just to give you a sense about how much the political environment had changed: When I was appointed to the Court of Appeal, I was in New Mexico, and I got a call from the chief justice who called and said, "Cruz, this is so-and-so calling from San Francisco," referring to himself by his first name. I thought, "Who do I know in San Francisco?"

LABERGE: Was that Donald Wright?

REYNOSO: Yes. He said, "This is Don calling." Which Don do I know, which Don do I know? Fortunately, I didn't say, "Don who?" And then from the conversation it was clear that it was Chief Justice Wright. And he says, "Congratulations, you have been appointed to the Court of Appeal. As you know, our commission has to confirm you, but don't worry about it," he says, "I have read your background that is sent to us by the governor. It is an exceptional background. I know you will be confirmed. It is a public hearing, so somebody might show up that has some private grievance against you that happened years ago, and we will hear them out, but you don't have to come," he says. "A person from the Bar will be there to talk about your background, and what a fine background you have for this position. And then, anybody else can come, but that's done by tradition. So, don't worry about it, I will call you after the

hearing." Sure enough, two or three weeks later he calls and says, "Hi Cruz, this is Don calling. We just had the hearing. Everything went well. Nobody showed up to talk against you. The testimony by the Bar was really great. You have such a great background. You are confirmed unanimously." That was it.

Now, when I got appointed to the Supreme Court, I get this several-page questionnaire from Deukmejian asking how I would have voted on cases and on issues and all this sort of thing. I refused to answer it. Then, I knew that it was going to be a tough hearing.

LABERGE: Did the chief justice call you this time or not? It would have been Rose Bird.

REYNOSO: I don't think she called. I think one of the clerks, one of her assistants called, to tell me that I would be receiving a notice of the hearing. I don't think she even talked to me. No. That comports with the way she would do things. And certainly didn't say, "Don't worry, Cruz." No, I don't think I got a call from her. So we went to the hearing. I told friends that my wife and I always took our children to any public hearings, many years before when I was involved in politics. I remember, our children — little three- or four-year-old kids would learn how to clap very early. [laughter] And we always took them to important meetings and so on, but on this occasion I told my friends that we had left all the children at home because we wanted to save them from bloodletting because we knew it would be a tough hearing. In fact, it was very tough and I was confirmed on a two to one vote.

LABERGE: It was Deukmejian, the chief justice, and —

REYNOSO: And the senior presiding justice of the Court of Appeal in Los Angeles who was Roth, Justice [Lester] Roth. Very respected guy.

LABERGE: So, who voted against you? Deukmejian?

REYNOSO: Yes. Right. How did you guess? [laughter]

LABERGE: Did someone come to speak against you?

REYNOSO: Oh yes. Well, the most serious and precedent-breaking activity was that two judges I had served with came to testify against me. One was actually still on the court and one had resigned from the court. One was Justice [George] Paras, who had resigned from the court. He issued a press release at that time, saying that he could no longer be an appellate judge serving under the junta led by Chief Justice Rose Bird. So you can tell what his

feelings were. When he resigned from the Court of Appeal, he had written a private letter to me saying, "Cruz, nobody knows about this letter except you and me, and I am now practicing law and I had my private secretary type it. I just want to let you know that I think you have the great potential for being a great judge, but you haven't shown it yet." Then he cited several cases I had decided, to show what a bad judge I was. Just recently I had decided a case that he approved of. And he said, "Ah, but this case that you decided shows the real potential that you have." He mentioned that he thought I was too often, too much in — I considered poor people and minorities my clients, and that was a bad thing. He had some not very nice things to say. I got a phone call one time from a person I knew very well, and he says, "Cruz, I am just calling to let you know that Paras is going to release the letter he had sent you to the press." He didn't say, but apparently that was just part of his urging the commission not to confirm me. And sure enough, I got phone calls. Oh, he had put in the letter that I got off to a very bad start because I had showed how prejudiced I was in favor of colored people because I had appointed as my secretary a woman who was African American. He forgot, actually, that I had interviewed everybody. Oh, he said, "And you had such a great opportunity to hire this great lady that came to see you from San Francisco. Her judge had just retired from the First District Court of Appeal, and you didn't hire her. Instead, you hired this young black woman." Actually, interestingly, the black woman was working for the court already and everybody spoke highly of her, so I thought, "Well, I will hire her."

Later, I learned incidentally, that [Frank] Richardson who was very concerned that there was so few minorities in the court — and he was a conservative Republican — when he was presiding justice of the Third District Court of Appeal had said, "You know, we have got to do better." And it was through his efforts, actually, the courts started hiring a little bit of diversity in the court. Interesting. I didn't know that when I hired her. I just hired her because people spoke well of her, and in fact she did very well for me. And she was hired by another judge after I left. But that was his proof — among other things — that I was prejudiced in favor of black people. I was very concerned when I heard that, and I took my secretary aside and I said, "I have never shown you this letter, but I hear that it has been made public, and so I have got to show it to you now." And I showed her what he said. It turned out that he had had the good the grace of cutting that paragraph out of the letter.

He didn't cut out other things about my prejudices from his point of view, but he did cut that out. I guess he issued it with a press release, and he said that for personal reasons, he was cutting out a paragraph, and if I wanted to I could make it public. I think that's the way he handled it. It turned out that he did make that part public. I remember feeling so badly when I felt I had to show that to my secretary. She got along very well with everybody, and to have her know that one judge thought that she was a nincompoop, that I had just hired her because she was black — I thought it was really demeaning. So, he showed up and testified against me. Thought that, you know, that I just — well, I would be part of the junta.

And then, Evans, a judge by the name of Evans. Anyway, he appeared, but he had written to the Commission which had to approve or disapprove my appointment, saying, "Reynoso is a terrible judge, and the proof of it is that he wrote this opinion." He attached the opinion. And it was an opinion, of which I was terribly proud, that went to the Supreme Court and they reversed my opinion. I never took it personally. They have got their views; I have got my view. It was a case having to do with the standard of proof before you can separate a parent from a child. Not separate; when you are breaching that relationship and you are saying, "You are no longer a parent." I thought that was a very important decision for a state to make, and I set down what I thought ought to be the proper rules, which made it tougher on the state to reach that conclusion. It went to the Supreme Court, and they didn't think that the rules ought to be that tough. I think any judge or anybody reading that letter would quickly conclude that he just disagreed with my opinion. I really didn't worry about that opinion, but to have two judges that sat with you show up and say, "This guy is not going to be a good Supreme Court justice" was very bothersome, and I think that's the only thing that bothered Judge Roth. He asked several questions that somewhat related to that, and of course I responded and apparently he was convinced that in fact I would be a good Supreme Court justice because he voted for me. But that would be troublesome to anyone. Then, of course, there were many judges there who had served with me who said, "Oh yeah, he is going to make a great judge," but that's common.

Then, incidentally, there is a judge, the presiding judge of the Court of Appeal, with whom I often disagreed, Robert Puglia. I always nonetheless considered him a very thoughtful and ethical judge. He tells of Deukmejian coming to see him, when he was the presiding judge of the court to solicit his

vote against confirming a new judge [to that court]. As the story goes, and I have heard it from several people, including Judge Puglia, Judge Puglia said, "You know, we have got a procedure, and if you really believe there are good reasons why this judge shouldn't be appointed, you really should write us a letter." Apparently, Deukmejian took umbrage of that because the new judge was a very politically liberal judge, would no doubt disagree with Puglia and Deukmejian, and apparently had had some run-ins with Deukmejian as a senator because this fellow lobbied for some folk. So, apparently, Deukmejian had some personal qualms about this person. That was his approach. The presiding judge knew the lawyer, and knew that while he disagreed with him, he was a really competent lawyer, really ethical and all that. So, when it came to a hearing, he voted in favor.

Everybody had predicted that if Deukmejian got elected governor, the presiding judge, Bob Puglia, Robert Puglia, would be the first person appointed to the Supreme Court because he was respected, because he had exactly the same philosophy as Deukmejian on the death penalty, on criminal law, et cetera, et cetera. He was a perfect candidate. Deukmejian got to be governor; never appointed Bob to the Supreme Court.

LABERGE: And you wonder whether it was because of that?

REYNOSO: I don't wonder.

LABERGE: You know.

REYNOSO: Of course. And that's sad to say because Bob is a very bright guy. I would have disagreed with him probably nine out of ten cases on the Supreme Court, but personally — I may be wrong, but I have little doubt that that's what happened. I should tell you another story. These are stories that I may talk about in my biography, but I never speak to them publicly. I was once going to be appointed dean of this law school.

LABERGE: Of this law school?

REYNOSO: This law school. I had been a reluctant candidate. I got a call from the chancellor here saying, "Cruz, we need a new dean, and the search committee is very interested in talking to you." I said, "I don't think I want to talk to them if, one, I am not a candidate. I am not sure I want to go through all of the processes — being interviewed by the students, by the faculty and all that." I said, "You know, I am not sure that I want to go through all that."

He said, "They are quite insistent that they want to talk to you." I said, "Well, I will talk to them, one, if it's not at the law school and, two, if I am not considered a candidate." He says, "Fine, I will set something up in my home." Which he did. I went to the house —

LABERGE: And who was the chancellor? [Theodore] Hullar?

REYNOSO: Yes. So I went and met with them. Apparently things must have gone well because he called back and said, "Oh, they are very excited about you, and so on. Won't you agree to meet with the faculty?" Or something. Anyway, somehow I slowly slipped into being a candidate. Hullar was very excited about it. He called me every other day saying, "Oh, I talked to this person. Oh, when you become dean you will be part of my cabinet and it will be so good to have your voice there," and oh he was so excited.

LABERGE: This is in the nineties? After you were on the Supreme Court?

REYNOSO: It must have been late eighties. Everything seemed to be going well, and by that time, I had decided that if in fact I was offered, I was going to accept. And then, suddenly, the phone calls stopped. My wife said, "Aha, something has gone awry." I had mentioned to Hullar, "You know, Deukmejian" — I had already heard some of these stories; it may be completely untrue — my description was, "I think he is a very vindictive guy and I don't think he will ever allow this to happen." And Hullar says, "Oh, this is not at all political. It is strictly academic. I make the recommendation to the president, and by tradition the president always accepts it." Anyway, I ended up being a candidate and the phone calls stopped. Then, later, actually a member of the regents who was very favorable to me said he got a phone call from Hullar saying, "Hey, how do you feel about Reynoso being the dean?" And he was all enthused and so on. But, no doubt, the same phone call went to all of the regents, and I think a majority had been named by Deukmejian by that time. A person whom I respect a lot — it may be untrue, I want to emphasize that — but what I heard happened by a person close to Hullar and close to some other people in the loop was that the president of the university —

LABERGE: David Gardner.

REYNOSO: Gardner got a call from the governor saying, "I hear this blankety-blank guy Reynoso is about to be appointed dean. How could you have such a terrible guy be dean of such a fine law school?" And that Gardner

called Hullar and said, "Hullar, you just can't put me in this position." Deukmejian had been very good to the university. Had been very good with the budget, had been very supportive of the university, and so on — so it all sounds right to me — and said, "You know, Hullar, you just can't do this." So then, after a long, long time, I got a call from Hullar saying "Gee, Cruz, I am really sorry. I have got to open the search again," he said, "because I haven't been able to get a unanimous vote from the faculty for your appointment." I have never known of a unanimous vote by any faculty. It may have been true that he couldn't get a unanimous vote, but frankly that wouldn't be surprising. So, the story sounds right to me. It may not be right, but in light of what happened with Puglia, and in light of the fact that I had mentioned during the campaign that the governor was a lawyer, that he should know better, that what he was asking me to do was unethical, and so on, I can't help but feel that maybe that's true. It may not be true, but I have a feeling it is true.

LABERGE: We haven't talked about the other justices, how you worked together, what the collegiality was like. Maybe just to start — because I just mentioned to you that we are going to be interviewing Professor Grodin — how you worked with him, or your impressions of his contribution.

REYNOSO: When I was going to the Supreme Court, I had read many articles about tensions within the Supreme Court, and I had told myself that I had a reputation for being able to work with people, and therefore I viewed myself as going to the Court and being sort of a peacemaker — having people work together in a collegial way. If I had those skills, they never came to use because I found that those reports were false. That is, when I got there, everyone seemed to get along very well. The chief justice was always jovial and very respectful of the other judges during the Wednesday conferences that we would have. Now, it was an element of some disappointment to me, however, that the judges didn't work as much together informally as I had assumed they did. In fact, I remember, one time, Justice Kaus, Otto Kaus, coming to me and saying something to the effect of, "Well, Cruz, I don't want to lobby you on this case, but I wonder if I can discuss this issue with you?" I said, "Otto, lobby me. That's what we are here for." I think it's more a pressure of time that didn't permit us to sit down and talk with our fellow judges about issues that concerned us. Very often, that communication was done through memos, and I had hoped that it would be more by discussion.

I found that coming to a conclusion on a case at the Supreme Court level with seven justices was a completely different dynamic than coming to a conclusion at the Court of Appeal with three judges. The system at the Supreme Court was that after we had a hearing, the chief justice would assign a case to a judge to write. Meanwhile, no doubt we were working on several cases at the same time. So, another judge would finish his draft or her draft and come to us while we were working on our own draft. And so you were just busy all the time, and I think that made for our not getting together informally with one another as often as I had hoped that we would. In some ways it made the Wednesday conference even more important because that's a time when we were all together where we really could talk about the issues that were coming before the court. Was it important enough to grant the case? Was it not? Et cetera.

When I first joined the Court, we had a Court that was, I would say at that time a traditional court in terms of its reputation of the last fifty years before I joined the Court. That is, it had a reputation for being very sensitive to consumers, to working people, and to the citizens of this state and residents of this state who didn't have great partisan political power. So the Court, in my view, was very responsive to its responsibility to enforce constitutional mandates that do deal with notions of equality and due process and so on. We had only one judge at that time who had been appointed by a Republican. That was Justice [Frank] Richardson, and he was really a truly fine gentleman. Would often file dissents, but they were generally respectful. Though, on one occasion, he wrote that the majority was legislating, and I had always felt that it was unfortunate that dissenters so often say, "I think the majority is legislating," because the majority generally is doing what courts do. There is a vagueness in a statute or a vagueness in the Constitution and the judges have to fill in the blanks. And you might say that there is an element of legislating or "constitutionalizing," if there is such a term, but that's the traditional role of justices. So I went to see him, and I could tell that he felt that he had a right to express himself in any way he felt appropriate. I just sensed that very quickly in the discussion, so I didn't push it. So sometimes, even though you have your own views about how things should be done, you have to recognize that others have their own quite legitimate views.

A lot of what courts do is more by tradition than from mandate of the constitution. For example, the constitution only requires that the decision be in writing. The decision could be a one-sentence decision. Why do the courts

take the time to explain why they have done what they have done and so on? That's really more by tradition. It's a great tradition. I have told people that even though the deliberations are not public, since everything the Court does is public, it may be the most public of all institutions because there you have it in black and white and people can agree or disagree. But again, that's really more based on the tradition of how judges in the common law jurisdiction function more than the requirement of the Constitution. I remember being taken aback sometimes when I would see some older opinions of the California Supreme Court, and the dissenter would have a two-word, one-sentence, one-paragraph dissent. It would say, "I dissent." But that was fitting that judge's constitutional duty. It was putting down in black and white what his decision was.

I found that the work at the Supreme Court, in terms of a judge's work, was quite different than on the Court of Appeal. And I just provide those comparisons because I served on both courts. In the Court of Appeal, I would do *most* of the work on the opinions. I would get a draft from a clerk, but then I would work on it quite extensively on those opinions that had been assigned to me. I wrote many dissenting opinions and concurring opinions where I, or maybe with the help of externs, then did everything. At the Supreme Court level, aside from some dissents and concurring opinions, I don't think I ever wrote an opinion from beginning to end. We would always get a draft from the staff, and then one would change it considerably. But there is a difference, I think, in thinking through yourself how to structure your opinion and have it be truly your own than taking a draft and then working on that. So, that was different. And I guess that was different because so much of our time — I have mentioned, about 50 percent of our time — was taken in deciding what cases to take, so there was an element of pressure to move cases, if you will. In essence, the work on the Supreme Court is really quite, quite different than the work of a judge on the Court of Appeal. I confess that I felt comfortable with both roles, though I understood that they were quite different.

My immediate neighbor when I joined the Court, because I replaced Justice Tobriner, was Frank Newman. I guess I had probably more discussions with him just because of the proximity than with others, and probably the person who I had most discussions with aside from Frank Newman was Joe Grodin. You asked about Joe.

LABERGE: Did you come in on the same day? You and Justice Grodin?

REYNOSO: No, he came after I did. He and I had actually served on the Court by assignment a time before, and I remember somebody saying, "Maybe this is reflective of the Court to come." Whoever said that obviously had a premonition because both of us ended up on the Court. I have at least one story to tell you about Joe. There was a case that came up, that I don't know if I mentioned this case to you, having to do with equity.

LABERGE: No. Unless it's the real property, the trucker?

REYNOSO: Yes. Yes. What happened was that I disagreed with the majority. They felt that if there was going to be any change, the Legislature should change it and I felt that because there was an equitable issue, that by tradition, the courts could update equitable concepts. And I think Joe must have felt sorry for me because, at the Court of Appeal level if you file a dissent it's one third of the votes; it's quite respectable. At the Supreme Court level, if you file a dissent it's sort of six-to-one and a reader might wonder who this oddball is. So Joe wrote a concurring opinion of that case, and he said, "I agree with everything that Reynoso said, but when all is said and done I think the majority is right — the Legislature should do it." The vote came out five-to-two, so it sounded better. [Laughter] I still remember that case. Maybe it shows his sensitivity. Joe and I generally agreed on cases, or we never had much opportunity to be at odds intellectually or in terms of our analysis of history. I just found working with him — and we did quite a bit of travels. We had hearings in Sacramento and Los Angeles, and I very much enjoyed getting together with him and his wife, who traveled with him on those occasions. I stayed overnight at his home from time to time and that sort of thing. So, it was just a very, very nice relationship. On the other hand, he wrote a book —

LABERGE: *In Pursuit of Justice*?

REYNOSO: Yes. And he talks about me there, but he made a mistake. He said I grew up in Imperial County, and I didn't. I grew up in Orange County. [Laughter]

LABERGE: That was the only mistake, huh?

REYNOSO: That's the only one that comes to my mind. I started practicing law in Imperial County, so many people think that I grew up there.

LABERGE: You two were in the confirmation election together. Did you discuss how you were going to deal with that at all?

REYNOSO: Yes, we had discussions. And particularly, we had discussions with the chief justice. I remember a particular day when we had a discussion, where she was telling Joe and me that if we wanted to separate ourselves from her that she would not at all take it personally, because she understood that it was she who was under attack, and the polls indicated that, in fact, those who had been attacking her — in my view, illegitimately — were having some success. She was saying that if we wanted to separate ourselves from her and so on that she would understand that and perhaps even encourage it. Joe and I, I believe had talked about those issues before. At any rate, without consulting with one another, we both rejected her suggestion out of hand. We felt that it was an institutional attack on the Court, and that we all had the same obligation to come to the protection of the Court and the notion of an independent judiciary, and that her issues were basically our issues. We talked from time to time about whether we would hire a professional to help us with the campaign. Frankly, I am not quite sure whether Joe did. I think he did. We hired a professional person the last few months of our campaign, but there really wasn't that much that one could do as an incumbent judge to defend oneself. Really, anything that one would say, it seems to me, would be self-serving. The person we hired — who was a very low-key person, which is what I wanted — did produce a couple of television spots that were rather staid. My recollection was that he put me on, sort of a talking head in a way. No, I think he had two commercials. One was with me saying something nice about the independence of the judiciary, and then he had another one with a well-known actor, whose name I forget, talking about me and talking about the importance of an independent judiciary. We had a little bit of money to put it on for a few days, and that was really about it. Other than that, I accepted a lot of speaking engagements at that time, and traveled all over the state speaking to various groups, and met with folk who would do endorsing — bar associations and so on. And all of those groups endorsed us. But, in a political campaign of that sort where people don't know the issues very well, the folk who have money win, more often than not.

It was interesting, however, there were several organizations that were gathering money to fight against the chief justice, but many of those folk pay themselves very well. And they ended up near the end of the campaign with very little money even though they had raised several millions. So I have always thought that their success was due to a large extent to the governor taking

a strong stance against the chief justice. And the impression I have is that, in the last few months, he encouraged his supporters to then contribute to the organizations. I think by that time, it was reduced to a couple of organizations that were heading the campaign against the chief justice. And I assume — I don't know the ins and outs of it — that they started cooperating with one another, because they were able to put together some television ads that were very effective against the chief justice and Justice Grodin and me. I had told Joe just a few days before the election, our consultant had run a survey just not on me but on the others. And he mentioned that the chief justice was going to lose — according to his surveys — quite badly, that Joe and I would be quite close, but we were both going to lose. So I told Joe that to aid him in his — in deciding what he wanted to do. I remember now; he did have a consultant because he told me that his consultant hadn't done that last-minute survey. However, he couldn't believe it, I don't believe, because he did have in downtown San Francisco a hotel, one of those victory get-togethers that you have on election night, but it was a very sad occasion for them. I had thought that maybe if he were convinced, as he was not, that in fact the election would not come out well, then he would not have been in that type of gathering. I had decided not to, but it was very difficult, I think, for anybody who knew the history of the Supreme Court in California to accept the notion that justices would not be returned. And most of the people who were supporting the Court and the justices, this was their first experience in fighting that sort of really quite reckless attack on the Court, and folks I don't think quite know what to do about it.

LABERGE: Well, I was going to ask you, what — in your perfect world, if you could decide how justices are chosen and how long they stay, if they should have a lifetime appointment — what do you think the best for justice is?

REYNOSO: I think that despite all the weaknesses of the federal system, that probably lifetime appointment is best. Another system that would also be quite good I think is to have long-term appointments. Appoint a judge for say fifteen years, subject to reappointment by the governor. I do believe that it's perfectly proper to have politics be involved in the naming of judges, because judges need to keep up with changing times. And that can be done by the appointing power — more often than not, the governor — appointing folk that he or she believes are judges who represent those changing times. However, once a judge is appointed, I think they have a duty to forget about who appointed them

and be true to the constitution of their jurisdiction, the statutes and all that. I think it's Pennsylvania, I am not sure — there is a state that has a system of appointing judges for a long time, long-term, and then they're subject to reappointment by the governor. It seems to me, that way a judge would have time to develop his or her own style, would be there long enough to make a difference in the court, and presumably after fifteen years, the judge would have some sort of retirement when he or she left the court. It's a long-enough term to be enticing to good lawyers and folk who would do well on the bench. So, I think that might be also a good system. The literature indicates that the people of the state thought that they were depoliticizing the Court when they went to the confirmation process. The literature seems to indicate that the confirmation process was a substitute for the federal system of having to go through a trial to remove a judge. So the idea was, only if a judge had really acted improperly would it call for a no vote. I don't think those who suggested the confirmation process had in mind that the issue would be as politicized as it got.

LABERGE: You mentioned a couple times the role of the media — for instance, in that election. You also mentioned it, I think, in relation to the farm workers. I wonder if you would comment on the strength of the media, its importance, how it handles —

REYNOSO: The evolution of the media in covering this issue was very interesting. At first, the folk who talked about any criticism of the Court were those who wrote about the Court. As the issue continued, however — say, for the last year — most of the newspapers then turned those assignments to political reporters. So most of the reports were very much the type of reports that you read about the presidential election or the gubernatorial election. The Court has now come down with this opinion; that's going to hurt them politically. Right or wrong? A judge said this or the governor criticized the Court for this decision or that. That is not looking at the merits at all, and not investigating — taking at face value that the issue was the death penalty, for example. Never investigating where the money was coming from, whether there were folk who had qualms about the Court's long-time rulings on insurance companies, for example, on employer–employee relationships, on workers' compensation — any of those issues that in fact were very important, I think, in terms of who provided money against the Court. So far as I can recall, there may have been one or two articles that dealt with some of those

issues, but mostly they dealt with the death penalty because that's what those who were attacking the Court wanted people to believe. Little effort, it seems to me, by the press to explain that in a death penalty case, an overturned opinion did not mean that the person was out free; it just meant that there had to be a retrial. Very little effort to explain that, oftentimes, decisions were overturned based on the United States Supreme Court rulings. Very little in depth; very superficial. I think a good grade for the press might be an F–.

LABERGE: Now we are hearing — all this week [week of May 16, 2004], particularly — about *Brown v. Board of Education*. How that was, in a way, long in coming, but a reaction to changes in society. Or now with gay rights. How do you approach that? I mean, how much did you take into your consciousness, "Well, times have changed," or what the society was saying?

REYNOSO: What you do is you take a second look, I think, at the basic documents that mandate how you as a judge should look at the law. So, what *Brown* did, for example, was simply take a second look at what equal protection meant. And by the time they ruled, it was not in the abstract that they were ruling, but they were ruling on the basis of what they all knew had happened since *Plessy* [*v. Ferguson*]. So, they knew the real effect of "separate but equal" meant "separate but not equal." Secondly, *Plessy* was decided sort of in the shadow of the Civil War. *Brown* was decided in the shadow of the Second World War.

I have always felt that the modern civil rights movement began with the Second World War when veterans came back and they said, "I lost my buddy, I lost a leg fighting for democracy. I am not going to stand it, to not have our own country not live up to democracy." So you had the formation of groups like the GI Forum, where a city in South Texas declined to allow a returning veteran who died at war be buried in the municipal cemetery and folks said, "Hey, wait a minute! This is not right." Then you had in California the *Mendez* case, where the court had said that segregation in and of itself is unconstitutional. It had to do with ethnicity, not with race. In fact, it couldn't have said that about race as *Plessy* was still the law, but they had clearly said that segregation, in and of itself — segregating people based on ethnicity — and it's not a big jump to say also based on race or whatever. And the lawyers in *Brown* had filed amicus briefs in the *Mendez* case. Thurgood Marshall's biography indicates that Carter particularly, who was on the briefs with him, argued strongly that they should go for the same approach at the Supreme Court. It

says that Marshall was initially sort of reluctant to do that, but then decided, "Yeah, we're ready to take that step to fight." They had been fighting most of the issues, based on the fact that the reality was inequality — that the law was separate but equal. And now they were prepared to say, "separateness alone is not equal." There had been testimony, interestingly, by a sociologist in the *Mendez* case about the intensifying of any sense of inferiority on the part of a class of people in the community that's already separated from the majority. And of course, that's what was done in *Brown*. So then the court looked at the issue of equal protection with new eyes. The basic policy of the Constitution is there, but based on experience and so on, you can now reinterpret what true equality means, not just formal equality. So, that's what the Court did in *Brown*, and I think that's the role of courts. Now, I confess that I think the Supreme Court has lost its way and hasn't done that for the last twenty years maybe, but I think that's a very important part of the role that courts have.

LABERGE: Well, since we are on this subject of civil rights and equal protection, let's talk about affirmative action and what your views — both in general, but in education and the University of California, Prop. 209. Whatever you would like to reflect on.

REYNOSO: I am very much in favor of affirmative action as it has been utilized by educational institutions, employers, and others. And what I mean by that is that affirmative action includes a great many things. When I served with the Fair Employment Practices Commission [FEPC] in the middle of the 1960s, I don't think we used the term "affirmative action" then, but we encouraged employers to reach out. To not be content simply, for example, with advertising a job in the principal English-language daily newspaper. To also advertise in minority press and so on. To reach out. To act affirmatively to make sure that they got the best employees and that everybody got a shot at it. For example, I remember talking to a gentleman who was in charge of the local bank in Brawley, California, when I was a lawyer. Brawley, at that time, was about 40 percent Latino. Had a lot of monolingual, Spanish-speaking people. Had a small, but not inconsequential, group of African Americans and Asian Americans. And, at that time, every single employee, including the janitors and everybody was Anglo American. So I asked the gentleman in charge how come it was that here they were in this very racially and ethnically mixed community and they served all of them, and yet, every single

one of their employees was Anglo. Why didn't he get word out? And he says, "We don't need to get word out. Word gets out in the community when somebody is leaving. We normally have several applications before the person even leaves. Then we hire the best person. We don't discriminate against anybody." But, of course, who would hear that somebody is leaving? Friends, relatives, and so on. And normally folk would be of the same race and ethnicity, then they would hire that person, and that was a continuum.

I wasn't with the FEPC at that time, I was just having this discussion with him, but the FEPC affirmatively encouraged a bank like that to let everybody in the community know. That way it would be good for the bank because everybody could compete for that job and they could find the best person that could do the job. And obviously it was good for the element of fairness to the community. That was affirmative action — anything that tries to bring about some fairness in the workplace or in the educational establishment. What it does *not* mean is that you hire anybody that's not competent. So often, those who attack it say, "Aha! You've hired somebody that's not competent." I have never heard anybody, certainly not us in the 1960s with the FEPC, not with the EEOC when I worked with them later in the late 1960s did anybody ever suggest that folk who were not competent should be hired. So, to that extent, I could be said to be against quotas if that implies that you would be hiring incompetent people. Incidentally, I don't believe that merely having quotas means that. That is, for example, when I was on the EEOC in the late sixties, the commissioners put together — I was on the legal staff. The commissioners put together what they called the one thousand list. That was a list of employers who had over 1,000 employees in areas that had a sizable minority population and not one of the employees for that employer was minority. I mean, it's extraordinary the level of segregation that we had developed in this country.

I remember seeing a movie put together about the construction of Hoover Dam and how these companies were hiring thousands of people — not one black person. Finally, the secretary of the interior insisted that they hire some black people. So they hired a few black employees who were all completely segregated, but at least they hired some black employees. But until the government insisted, they had hired thousands of workers; not one African American. You know, we were really — it's amazing how efficient we were in that segregation. Now you have laws saying, "Fair employment." You don't get over it by continuing the same practices; you have got to do something different.

Affirmative action has meant that you go out and let people know about it and that you do take their race and ethnicity into account, in part, in hiring. So that if you have 1,000 employees and you have not one African American, and you have an applicant that's African American, you take a careful look to see whether or not the person is qualified. You don't hire them simply because they are black, but you do take that into account. Not only that, but you tell the people that are there that it's their job to hire the best-qualified person irrespective of race and ethnicity. If you know there are a lot of folk in that community that are African Americans, they are bound to find some that are competent. And you ought to keep track. If the workplace is 25 percent African American, and you are looking at unskilled laborers, and you have got 500 unskilled laborers in your plant and not one is African American — you survey those who are in the workplace, and you know that there are just as many or more African Americans in that community or more that are unskilled, and yet you end up with none, there is something not quite right. So you keep track of it, too. And you keep track of it, not incidentally by asking them to identify themselves, but by yourself identifying. Because whether or not a person considers himself African American or not, if others consider him African American, he will be discriminated against, perhaps. You can have a self-regulatory system, only by keeping track of that and sensitizing your supervisors, and so on, to that responsibility, and it really works out best for your company also. You will end up with the best people. Can you keep track of whether or not your company is doing, from my point of view, the proper legal and moral — whether you have taken the proper legal and moral steps in that process? These things don't happen automatically. Then, if minorities hear that an employer is hiring or a college is admitting students of color or students of various ethnic groups and so on, then they themselves are encouraged to apply. So it helps in that process.

For some time I was on the board of directors of a group called CLEO, Council on Legal Education Opportunity. It was a group whose purpose it was to try to get more minorities and poor whites into law school. At one point I became chair of that group.

LABERGE: Is it national?

REYNOSO: It's national. Well, it used to be a subsidized group by the federal government. They actually would give a stipend to the students, they would

pay the professors, and all that. Apparently all that has disappeared. The group still exists, but students now have to pay their own way to go to it. It is a summer program meant particularly for those folk who don't have great LSATs, but who may have a potential for being good students. In part, it's to teach the students about law school, but also to sort of test whether they have a good shot at success at law school. Some students are sufficiently interested that they actually — as I understand it there are only one or two summer institutes now — they actually pay to go to them. When I was involved, there were government funds actually for all of that. I would meet with them, and my talk in summary would say, "Look, you are not here because we love you. It happens that we love you, but you are not here because we love you. You are here because we think the country needs you. We need, in the legal profession, folk to come from all walks of life that in times past haven't had the opportunity to go to law schools. Poor people who haven't had the money, minorities because of discrimination or linguistic or other issues haven't been there. We look at the statistics — even today we look at the statistics, and we don't have the type of representation that we need to have the people of this country have confidence in the legal and judicial system."

Today, I still get phone calls from prosecutors and defense attorneys saying, "Hey, recommend some minority lawyers. We have a disproportionately large number of folk accused of crime. They go into a courtroom, everybody there is Anglo or white, and we sense that it is not legitimate to have so many minorities coming through and having everybody in charge be of a different race. We think we ought to have more minority prosecutors, more minority judges, et cetera, et cetera." So I would tell them, "Society needs you. *That's* why you are here. And there is no free lunch for you. You are here because you are being tested — you are being taught, but you are also being tested to see whether or not we think you will do well in law school. You will have a far harder job than others who are being admitted to law schools. So don't think you're here because it's going to be easy for you." And I believe that. That is, many of those folk who have been admitted — well, Villaraigosa [later mayor of Los Angeles], the fellow who was an assemblyman and got to be the head of the Assembly and then ran for the mayorship and didn't get it, used to say of his own experience. He dropped out of high school and got into trouble and all that as a youngster. Finally, sort of shaped up and was admitted to UCLA. And he said, "You know, I was admitted under affirmative

action. Some say I got in through the back door." He says, "Maybe that's true, but let me tell you, I got out through the front door." That is, he had really turned his life around and he has gone on to do great things for the public.

Once a student is admitted to a job or to a school, that student has to produce. And the reality is that the tests that we have for employment or for school very often test only a tiny amount of what goes to making a good student or a good employee. Well, the same thing applies to education. We give an LSAT test, which even those who put the LSAT say has nothing to do with how well the students will do except during the first year of school. That, in turn, has some relationship — but not that much — with whether or not that person will pass the bar, and has *no* relationship with how good a lawyer that person will be. And yet, the LSAT is one of the two absolutely most important matters that we look at in admitting. We look at their GPA and their LSAT, and most law schools will then put them together and come up with a figure, their own formulation of what that combination does. Well, we know that doesn't tell you how good a lawyer they will be. Meanwhile, from the point of view of society, don't you need more lawyers who are willing to serve the poor, who are willing to go to public jobs, who are willing to do many other things? If we ask ourselves the question, "Is our role to train lawyers who will serve society well?" — as medical schools try to; not with great success, but with some. I mean, a medical school looks at what's needed in society, and what's not needed is more plastic surgeons. A disproportionate number of doctors will become plastic surgeons because they can make money. What you need is doctors dedicated to serving all those folk who are underserved. So the medical schools try, by interviews and so on, to identify those who have a greater chance of going to those communities, and actually the statistics indicate that they have had some success, particularly with Latino and African-American graduates of medical schools. Well, we as lawyers, shouldn't we be looking at that also? What do we need in society? Instead of just looking at LSATs and GPAs, which tell you something, but obviously don't tell you the whole story about whether or not that person is going to be a great lawyer. We need to go beyond that, and one of many things that you look at is the background of the youngster, including ethnicity and race.

And I have long felt that what has been done based on affirmative action, which has forced many institutions to look at a person more, if you will, "holistic" — as they say nowadays — has been a great boon not just

to minorities, but to everybody. Because everybody who is applying to law school, who is applying to a university as a freshman, who is applying for a job ought to be looked at as a whole human being, not just whether you can type, but whether you can relate to people, whether you can remember things, whether you can file papers properly, and so on. So, in general, I continue to be very much in favor of affirmative action. I reject completely the notion that anybody should be hired who can't do the job. I think it is bad for that person. They will end up being fired or end up being dismissed from law school. What a tragedy. It is our job as educators or as employers to use our best judgment to make sure that those folk in fact do do well. There is an element of risk-taking that takes place, but we ought to be judicious in that risk-taking also. I am not in favor of simply admitting folks into the law school, even if we think they are going to be great lawyers, if we don't think they are going to make it through law school because they are never going to get to be great lawyers. So, I think we have to take all of that into account, but principally we need to take a look at the person as a whole, and then ask ourselves, "What does society need at this time?"

Right now, we have in California about — I see various figures, but I would say about 3 percent of the lawyers are Latino. Meanwhile, about a third of the population is Latino. We have probably about 2 or 3 percent are Asian, but 8 or 9 percent of the population is Asian. About the same figure are African Americans, so we have about 6 or 7 percent of the population as African Americans. We have a long ways to go before we see any sort of proper representation in that great profession, and we need representation in any great profession it seems to me. Affirmative action has just been one of many steps that one could take to do better in society from the point of view of representation of folk in different professions. Even after nearly thirty years, we are still at the figures that I just mentioned to you. So, this notion that somehow affirmative action has done all these great things for minorities is simply not true. In the black community, you hear a lot of discussion about the reality that affirmative action simply helped the middle-class and upper-class blacks. It did very little for poor blacks. I think it is still very important, but we have to recognize that it's of limited utility. It is a very important utility, but it is limited utility, and even that has come under attack. I completely disagree with the folk who think of affirmative action as a preference. I think that it is really a program that's good for *society*. It is

not meant to just help those given individuals; it's meant to help society be a better society. I don't view it as a personal preference at all.

I disagree — even though there is an element of truth to it, nonetheless, in terms of policy — I disagree with the notion that we ought not to have affirmative action because it maker minorities feel inferior. People will think that they just went to law school because they were there under affirmative action. In fact, sad to say, I talked to many minorities who have run into that. Minorities who had excellent grades and excellent LSATs, who under no condition could be said to be affirmative action admittees. And they say that very often they sense that as soon as some folks see a minority, they say "Aha! Another affirmative action admittee." So there's that element. On the other hand, most minorities say, "Look, if that's the cost that we have to pay to get more of our numbers in the law schools, that's fine with us." I am reminded of a discussion I had with a female professor here who was involved in some discussion about the fact that Davis, like most other universities, didn't have a fair number of female professors, speaking generally. One argument was, "Well, we don't want to do that because we feel that we hired them only because they are female," and meanwhile the group of female professors had the figures indicating the lack of representation. And they said, "We don't mind. Go on and hire them. We would rather have them hired than not." And I think that's the way most minorities feel.

Not all. I have written an article of Latinos in L.A. County, and there are several folk who responded saying, "I don't like affirmative action. I want to do it on my own." In any large group you are bound to have those sort of disagreements. You now have in the black community some folk that call themselves the New Black Leadership, and they reject affirmative action. They reject anything that smells of civil rights. They think that everybody ought to be able to stand on his own two feet and pull himself up by his own bootstraps, whether he owns bootstraps or not, et cetera, et cetera. But, you know, you have to expect that. Incidentally, I also believe that affirmative action is not something temporary like Sandra Day O'Connor thinks it's all going to be done in twenty-five, thirty years. I think it ought to be a continual concept for our society. Thus, for example, for years and years we at the university have discriminated against the mountain counties in California. Many of those schools don't provide all of the courses that we require. Many of the kids there, mostly Anglo, are poor and we have never had good

representation in the UC system of the mountain counties. I think we ought to have affirmative action to get more of those kids, just in terms of fairness. They pay taxes; they ought to have their own children come to the UC system. That has also been true of youngsters in the Central Valley, irrespective of race or ethnicity. It seems to me that we have a duty in a democracy to look around and see whether or not any group is being excluded. Pragmatically. I don't mean that there is a policy that says "No mountain kids," but we look at the figures and we see that they are being excluded for one reason or another from participating in that educational institution, that employment institution, whatever. And it tells us we are not doing something right.

I will tell you a story because it turns things topsy-turvy. I may have told you about this. I was invited to go speak on a Saturday to a parent–student group in a school in the Los Angeles area. When I got there, I noticed that practically everybody involved was Spanish-speaking, and a great majority of the kids there were there, but the leadership of the PTA and practically everybody in charge was Latino. So I asked, "Is this an entirely Latino school? Do you have some other folk?" And they said, "Oh yes, about 20 percent of our students are Anglo." And I said, "Well, where are the Anglo parents?" And they said, "We don't know. We keep inviting them; they just don't come." I was bemused because I have heard that story told a hundred times about Latino parents by Anglo parents, "You know we keep sending these notices. They don't come. They must not be — " They don't say this, but the implication is "they must not be interested in education or must not be interested in their kids." Well, I just said, "Maybe you ought to do something more so they feel comfortable when they come to these meetings and so on." Something is not quite right when 20 percent of the parents don't come to a Saturday function that is supposed to be good for everybody. I don't know what they have done right or wrong, I really don't. I nonetheless have the absolute sense that they haven't done enough. Somehow those parents, when they have come to a meeting, have felt uncomfortable, as my parents did when they went to a PTA meeting. And we as human beings are smart enough to be able to figure things out on how to make those folk feel more comfortable and so on.

I think affirmative action is and ought to be a continuing concept in our country, and in fact, we have seen that evolution at Berkeley. There used to be an affirmative action plan at the university as a whole for all the underrepresented folk, which included at that time, Japanese Americans and Chinese

Americans. When the numbers of those two particular Asian groups then got to be even more than their representation in the population and the high school and graduating population, those two groups were dropped from the affirmative action plan. I thought that was perfectly proper. Then they could worry about the Asian groups, the Hmong and others, that weren't well represented — Latinos and African Americans and so on. It ought to be a matter of private and public sensitivity when public or private institutions are not serving the folk that you know ought to be served.

Folk who disagree with me are perfectly honest in their opinions, and I think sometimes based on folk being such good people that they really can't believe that discrimination takes place, or they can't believe that the opportunities aren't there. That is, they can't believe that an Anglo parent would feel uncomfortable going to a predominantly Latino school, or that a Latino parent would feel uncomfortable going to a predominantly Anglo school without there being some special effort to make sure that they feel comfortable. These folk — and I know many of them are really very, very fine people — they just can't believe that those things can happen. Just as so many people can't believe that our soldiers would actually torture people in prison. And they say, you know, "It can't be." Sad to say, those of us who have been around and have seen what's happened in our own prisons in California and elsewhere find that — I'm sorry to say — unsurprising. But most folks just don't. When the Rodney King beating took place in Los Angeles, the mayor and all, they immediately start talking about "the few bad apples." Well, my own experience has been that there are a few bad apples, but very often — more than that — it's an ambience that has been created from the top. It's lack of enforcement by middle management, and therefore a sense on the part of those folk at the bottom that it's not only a good thing to do, but it's a matter that will be rewarded. So I blame, in terms of what happened for example in Iraq, everybody who was involved — from the buck private to a person called the president of the United States of America. And certainly every general and colonel in between.

There are many people who would fight against it, but many folk who were there did not. And that's been my experience in any big institution. You also know that there are bad apples. You sometimes see folk who finally have a little bit of authority, and they really want to exercise it. Sometimes against the regulations of their own employer or their own institution. But then the important thing is, what happens to those people? And very often the answer is "nothing"

or they still get rewarded. That also sends a message. If those photographs had not been made public, I'll bet you dollars to doughnuts that there would have been very few punishments coming out of that torture and so on.

It's somehow practically a natural inclination of institutions on how to protect themselves. There was a report this morning [May 19, 2004] on the prison system in Iraq that the first reaction by the people who got a report from the Red Cross was, "How do we keep the Red Cross out?" Not, "What do we do about the abuses?" It's a perfectly natural thing. That's also perfectly natural in who you admit to your institutions, who you hire, and so on. We need external forces, very often a program, a law, a regulation that tries to get us out of that so we try to do the right thing. And affirmative action is just simply one of those methods, if you will. That's the way I see it. There is nothing magical about it. You have to use discretion on how to use it, and there are many pressures going the other way. In law schools, for example, you always worry about the passage rate on the bar. Then, you have got to worry very much about maybe not admitting people who eventually won't pass the bar. You worry about people getting jobs quickly because all that goes into the national system of pecking order, right? Then you worry about how many of your students are going to get clerkships. Well, more often than not, folk who get clerkships, folk who get hired and all that, are hired by people who have a certain affinity to them. Very often the affinity, though unstated and probably unconscious, has to do with race, ethnicity, particularly with cultural background. A middle class person would feel more comfortable with a middle class person. Et cetera, et cetera. These are just natural institutional pressures, if you will, or practices.

I have always admired the U.S. Constitution because it recognized that power corrupts, and that therefore we need different power sources, different departments, who are able to curtail that corruption. To a certain extent, what's going on now in our country is that one of our institutions, namely the executive, is now claiming great power and we see the obvious corruption that comes from it. You know, that's one of the great thinking of the Constitution. They recognized an element of selfishness. An element that folk truly convince themselves that what's best for themselves individually is somehow best for the country. If it was completely up to you, you would quickly declare yourself king because you know you are wiser and smarter than anybody else so you know exactly what's right. That you end up with Cadillacs and houses all over the country and all that is simply because you

ought to be rewarded because you are so wise and evenhanded with everybody else. I mean, those are just natural tendencies that some folk who are spiritual and so on are able to reject, but most folk are not.

I don't even accept that about myself. I have to remind myself about those things. It is so easy. Many people admire the things that I am doing. I will go and talk to some group and folk will come and say, "Oh, what a great talk," and all that, and I think to myself, "Oh boy, I must really have been right." Then I will hear a talk delivered by a person who absolutely disagrees with me on everything, in which he is talking to people who agree with him, and they all go up and say, "Oh, you are right. No, that war against Iraq was exactly the right thing. Oh, you are so wonderful." And those people are bound to say, "Oh, you know, I must be doing the right thing." So, I have to check myself too. [Laughter]

I just spoke before, actually a Latino group, Boalt Hall students and alumni. And I said, "Look, we are now a third of the population. Our responsibilities now go beyond the Latino community." And I have never viewed that the Latino community wanted anything extraordinary. They want the same thing for their children that other folk want. It may be that it looks a little bit different. Bilingualism might be viewed a little bit differently, but it is only because those parents want the same thing for their own children that others do, i.e. a good education. So we've got to be sensitive to the vehicles for bringing fairness to everybody. Latinos — and now that we have maybe a third of the Legislature in Latino hands — we have a responsibility to be sure that everybody in California is treated with respect and with equality. I believe that. Unfortunately, I have long said that those who are in political control need to be conscious of those who are not because in the future they may not be in political control and they have to establish the tradition of fairness. I am sorry to say that I haven't seen that yet come about. So it may be that, when Latinos are in political control, there will be sort of an element of say, "Look, you did us in, now we are going to do you in." I hope it doesn't happen, but there is a danger of that because there is still too much anti-Latino ambience. I listen from time to time to find out what people I don't agree with say. Some of these talk show hosts. I mean the racism, the anti-Latino rhetoric, all of that just really floors me, and I can see the possibility of that happening, though I hope it doesn't. Anybody in charge needs to be aware that their responsibility is for everybody, not just for their own constituency. And sad to say, you see folk not being conscious of that.

LABERGE: Well, let's go back to our own Court, and the separation of powers in our state and how you felt that played out as you were in the judiciary?

REYNOSO: When I was on the Court, I believe that — but for the political attack led by the then governor, which I thought was absolutely inappropriate — the relationship had been one of respect. That is, there are many traditions that have to do with that respect. For example, the Court will seldom rule against the Legislature and issue an order against the Legislature. They will issue an order against an executive that carries out something pertaining to the legislation. That's an effort to not be confrontational with the Legislature. Each branch of government has the duty of self-reflection and self-control, if you will. A respect for the other branch. And generally I saw that happen. Now, the Constitution doesn't tell you how that is to be done and one of my favorite examples of a debate that then was worked out amicably had to do with what I described as the window story. The Library and Courts Building in Sacramento is a grand building, and the Supreme Court chambers there are my favorite of any court. It's a wood-on-wood motif. The bench is rather low so you can have a good discussion with the lawyers. It's just wonderful, but it was built in the 1920s, and a time came when I was there when the executive, through the office that takes care of buildings, decided that they should close the windows, I guess for air-conditioning purposes. That was very common in those days. Now, architects have changed their minds — they think open windows are actually okay — but at that time they wanted to close all the windows. The windows in the individual chambers were these great big windows that you could open. And it was wonderful on a spring day to be able to open the windows, and the judges said, "We don't want the windows closed." Well, who's in charge? They were our chambers, but the building actually belongs to the executive. So we asked the presiding judge to deal with those executives and try to protect our interests. I don't know the ins and outs of the meetings. He had several meetings with them. The end result was that our windows could still be opened. But see, there is no rule to tell you that. They could have said, "Hey, wait a minute, we're in charge of the building. That's our job as executive." And he could have said, "Wait, I am in charge of the judiciary."

I think the Constitution — state and federal — assumes and requires cooperation and self-restraint by the branches of government. One of the worst things that's happening now on the national side, is to have the chief executive officer called the president of the United States say that he wants to exercise

the entire power of the presidency. He believes that the presidency has been weakened. Well, that's absolutely wrong, in terms of our constitutional form of government. The executive — which has so much power — has the duty to be reflective about how to exercise that power, and to be respectful of the judicial and legislative branches. Self-restraint is a very important part of our government, and when you forget about that — as Governor Deukmejian did in attacking Rose Bird, or as the president [George W. Bush] is doing now in saying that the judiciary ought not to be able to review many of his positions and so on — I think that is exactly the wrong thing. Fortunately, we have been able to get beyond that historically in our country, and I assume we will get beyond those incidents that are more recent in history too.

We have to be reminded that everybody, every public official swears to uphold the Constitution. So the notion that it's the courts that enforce the Constitution is absolutely wrong. And I have heard legislators say, "It's up to the court to decide whether it's constitutional." Not true. Every legislator has a duty to decide whether or not something is constitutional. If, nonetheless, they go on and pass a statute that is unconstitutional, then obviously it can be challenged by the courts. And I think the courts have the duty to protect — to declare it unconstitutional — because the courts and the Legislature have two different responsibilities in a way. The Legislature is a majoritarian group, and they, for political reasons, respond to a majority of the people. The courts have a non-majoritarian role. Their role is to protect anybody who is hurt who has a right not to be hurt constitutionally. It's their role to say, "Sorry, we know you passed that statute because it pleased 90 percent of the people, but it happens that it discriminated against 10 percent of the people, and it is our role to protect those 10 percent." So they are quite different roles, and each branch has to be respectful of each branch exercising its role.

Now, each court has to exercise some self-restraint. I think the U.S. Supreme Court, for example, disgraced itself in the Florida election decision, because to me it was so clearly partisan. From my own reading — and I have read a few opinions in my time — I find it completely unpersuasive, and I find judges taking positions contrary to positions they had always taken in other cases in that one case. There, the Supreme Court I think did not exercise self-restraint, and I think it weakened the standing of the Supreme Court before the country. There are — what should I say — breaches of that responsibility of self-restraint by each of the branches. But, hopefully, in time

— hopefully it will happen not very often, and in time we will get beyond that and the people can continue to have confidence in each branch exercising its own responsibilities. I confess that the notion that the president could declare an American citizen an enemy combatant, and argue that that can't be challenged in court is so beyond my experience as a lawyer, as a judge, and a human being, that I can't even begin to understand it. But that's obviously my own view. Some, like Scalia, have a completely different view. They say, "Look, that's up to the president. He can do anything he wants. It becomes a political issue, not a judicial issue, and if people don't like what he wants, they can vote him out of office." I absolutely reject that. It seems to me that everybody, including the president of the United States, as the Court said in the Nixon tapes case, is subject to the law. Even the president has to obey the law. I think that's what a democracy is about.

LABERGE: We talked about your teaching, but we didn't talk about your practice or, too, what you thought you were going to do.

REYNOSO: Well, I just mentioned that because I remember Jimmy Carter wrote a book about life after the White House. Whenever you end up having a position of higher visibility — so often nowadays I'm introduced as retired Supreme Court justice.

LABERGE: Because that's the highest —

REYNOSO: Right, even though that's been how many years now. And I must say that my own experience has been that one can and should live a full life after being in offices like that. I always admired one of our presidents — I forget; I think one of the Adamses — who then ran for Congress after being president and he served in Congress. I think that's great. I think the tradition now that ex-presidents sort of are great-grandfathers for the country is wrong. I think they ought to be involved. They ought to run for Senate, they ought to run for Congress. They ought to be public servants.

LABERGE: Like Jimmy Carter has.

REYNOSO: Exactly. They ought to be like Jimmy Carter. So in some ways, my model really was the Jimmy Carter model. I wanted to do a couple of things. One, I was then going to be free to do things I couldn't do as a judge. And, two, I wanted to have it be clear that I considered it a political defeat, not a personal defeat. So I wanted to end up on my feet when I left the Court.

Fortunately, I was able to get a job as a lawyer with a firm that paid me more money than I was earning as a judge. I helped form a group called Latino Issues Forum, and we started calling press conferences. I remember at that time attacking a high official of the INS who said that undocumented were such terrible people that they should be dunked in burning oil, or something. I forget. So we called a press conference and attacked him, and started doing all the things that a citizen can do and a judge can't do. Then I got a call after a couple of years from UCLA asking if I wanted to teach, and eventually we agreed on my joining UCLA and I enjoyed that. Then I got a call asking if I was interested in being a member of the U.S. Commission on Civil Rights, and fortunately things went well and I was appointed by the Senate at that time to be a member of the commission. Even before that, I was appointed by Willie Brown to be a member of the California Post-Secondary Education Commission [CPEC], and that was very interesting work for me.

LABERGE: Now, we have not talked about that.

REYNOSO: Yes, again, it was combining private work and public work. I've always appreciated being able to do that, so I appreciated having been appointed to the California Post-Secondary Education Commission. Later I became its chair. That dealt with all the issues of higher education, so that was very interesting to me. I quit when I started teaching because you couldn't be an employee of an institution of higher education and serve on that commission. But for two or three years I served on that commission and that was very interesting work.

LABERGE: Did you make any changes or recommendations?

REYNOSO: Well, we were very concerned at that time — as we are now, even more so — with doing everything we could to support the plan that had been put together in the 1960s for higher education where the —

LABERGE: The Master Plan.

REYNOSO: The Master Plan. The UC system, the CSU system, and the community colleges had their own roles. And particularly the promise — which we have broken for the first time this year — that anybody who wanted to go and was eligible to attend those institutions could do so. I am really very saddened that this great state of ours with all the wealth that we have, has broken that promise to the young people of this state. I think it is really unconscionable.

And then we were concerned about, as now, the drop-out rate in high schools. High schools have to report their dropout rates, but they have systems that are very peculiar to each high school, where they very often assume that if a person leaves the school, they somehow have gone to another school district. In fact, when you examine how many students are in their first year of high school and how many graduate, we have a terribly high drop-out rate in California. I think something like 30 percent. Well, meanwhile, high schools report drop-out rates of 2 or 3 percent and it looks hunky-dory, but we knew on the facts that that wasn't true. We were coming up with plans to maybe have an ID number for each student that signs up as a freshman, and then that ID number goes with them to see whether or not they eventually graduate from some place within five years or six years or whatever. We had the same issues with college because we were very concerned that at that time — we have made a little bit of progress — it was taking something a little bit over five years for a student to graduate from college, from a four-year program, because sometimes they couldn't get the right courses, et cetera, et cetera. That just meant more time and more money for them and for the institution. So we were dealing with those issues. The staff was very competent. The CPEC is supposed to be an advisory group both for the Legislature and the governor, but we seemed to end up dealing mostly with the legislative committees on education. But they were very responsive to our recommendations and our reports, and I just found my work with the commission really very satisfying.

LABERGE: And what other people were on it with you?

REYNOSO: A portion of them were appointed by the governor and by the legislative leaders of the Assembly and the Senate. And then others were there because of their institutions. There were representatives from the UC system, CSU, community college, private colleges. So some were there by the position that they held already. It was a nice mix. I served — at that time, we set up a special committee actually to worry about access to college, and particularly about diversity, and we had informal meetings all over the state. We issued a report on things that were going right and things that needed to be improved and so on. It was a very active group. To this day, I am still in touch with some of the people that I worked with during that time. And then, as I say, when I started teaching, that's in a way a public position, but I was appointed to the U.S. Commission on Civil Rights — and I am still on

that commission, and will be at least until the end of this year or through January, I think — and continued again to do some public work, if you will. I have found that, as with other experiences, the fact that I have been on the Supreme Court has helped me perhaps be even more effective in the public positions that I have had, or the private positions for that matter. And so to me, I continue to be thankful to the people of this state for the opportunity to have served in the court system, and I have continued to be active both private and publicly. I feel fortunate, I must say, in terms of how my own life has evolved. I'm speaking professionally, but privately also.

There are some things that don't quite work out the way you would hope. My wife, somewhere along the line became a little bit disenchanted I may have mentioned to you. I think she probably went to a few too many meetings where Latinos had unkind things to say about Anglos, and she is Anglo. So, somewhere along the line, she became less interested in Mexican culture and language and so on, so that of our four youngsters, the first two have a pretty good understanding and speak Spanish pretty well, and so on, and the second two do not. And that's been a matter of sadness to me. My wife doesn't fly, so it means we haven't been able to take vacations in Europe and other such places. And from her point of view, she is a very religious person, and I have been attending church with her since we have been married, but I have never joined the church, and I'm sure that's an element of sadness to her. So in life there are some things that don't quite work out.

On the other hand, we have been married forty-eight years and I am still deeply in love with her and she with me I must say. I think. [Laughter] She calls me every night when she is away — she is on a train right now — and I call her. I just feel fortunate that we've been able to make a life together. I tell people that my life has been really idyllic. I sometimes think of those books that I read in kindergarten about grandchildren going to this grandma and grandpa on the farm, and we have a thirty-acre little ranch and grandchildren come and stay overnight. One of our granddaughters, her mother, our daughter asked her what she wanted for her birthday. What did she really want? And what she really wanted was to go stay in her grandmother and grandfather's home and have her cousins stay overnight with her, and that's what they did.

So, you know, in some ways my life has been magical, I would say. And that doesn't mean, you know, people sometimes — obviously there have been rough times in life and people ask me about it and say, "Gee, how can

you be optimistic when you've gone through this or that?" I don't know, I guess I haven't taken those things personally. Somehow, whether my internal fortitude was God-given or given to me by my parents or just one of accidents that one out of every ten persons or one out of every two persons has that fortitude. I don't know what it was, but I think I have mentioned to you that even as a youngster I ran into all kinds of problems and people ask me, "How come you kept going?" I tell them, "You know, I was just too dumb to know there were obstacles so I kept going." So, for all those reasons I just really have been very fortunate.

And, at the same time, if you are fortunate because of what God has given you or what society has given you, I think you have an obligation to try to do what you can for other people. That's why, particularly, I've valued anything that I could do in terms of public service, but beyond that — perhaps even more importantly sometimes — is what you can do as a private individual. Through organizations that I belong to, and so on, I have tried to do what I think is right. And again, I have to be respectful of those people who don't agree with my notions of what's right for society and so on. But you have the duty to think through what you think is the right thing to do and then act upon it, it seems to me. So that's what I've tried to do.

LABERGE: This has been a real privilege for me to be able to spend this time with you. Thank you, for all the people who are going to read this and use it.

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HISTORICAL DOCUMENTS

AGRARIAN LIFEWAYS AND JUDICIAL TRANSITIONS FOR HISPANIC FAMILIES IN ANGLO CALIFORNIA:

Sources for Legal History in the Autry National Center of the American West

MICHAEL M. BRESCIA*

An immediate and unmistakable sense of urgency permeates the brief letter that José Sepúlveda sent his *compadre*, Juan Sepúlveda, on August 23, 1850. "Come at once because the lawyers are here and are just waiting for you so they can start business. I hope you hurry and, with tomorrow's train, Tuesday, leaving at 9:00, I assured them that you would be here . . . today the lawyers started [to address] the matter."[1] Unfortunately for us, José failed to identify "the matter" at hand, nor did he establish the broader context and delineate local circumstances for the contemporary reader. It is clear from his imperative tone, however, that the territorial cession of 1848 — and subsequent statehood for California in 1850 — promoted angst and uncertainty among many Hispanic families. José's letter

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[1] The original Spanish reads, "Benga U. inmediatamente por que aqui estan los abogados y solo se espera a U para comenzar el negocio. Espero pues no pierda momento y con el tren de mañana martes a las nuebe, este U aqui asi les asegure yo a ellos . . . [H]oy comensaron los Abogados el asunto." José L. Sepúlveda to Don Juan C. Sepúlveda, August 23, 1850, Autry National Center of the American West Archive and Manuscript Collections, Los Angeles, California, Miehle and Sepúlveda Family Papers [hereinafter ANCAMC, MSFP], MSA.31, document 8.

conjures images of American lawyers descending upon Juan Sepúlveda's home in Los Angeles, armed with judicial decisions and legal documents that perhaps challenged his rights to the land and water he and his family had enjoyed for years under the laws of the prior sovereign, Mexico.

Land dispossession was quite common throughout the North American West in the years following the Treaty of Guadalupe Hidalgo despite its explicit guarantees to protect the property rights of those Mexicans who were prejudiced by the territorial cession.[2] In California, the rapid move to statehood in light of events at Sutter's Mill and the Gold Rush that followed led to federal passage of the Land Act of 1851, which subjected Hispanic property rights to adjudication in U.S. courts. A potent combination of chicanery, intimidation, and indebtedness resulted in the transfer of nearly 40 percent of Hispanic land in California to American ownership.[3] Territorial cession, therefore, set up a clash of legal cultures as the more established Hispanic civil law, which had defined the nature and scope of property rights and agrarian lifeways in Spanish North America since the sixteenth century — and in Alta

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[2] For California, see the classic accounts by W.W. Robinson, *Land in California* (Berkeley & Los Angeles: University of California Press, 1948), and Leonard Pitt, *The Decline of the Californios: A Social History of the Spanish-Speaking Californians, 1846–1890* (Berkeley & Los Angeles: University of California Press, 1966). The literature on New Mexico is vast. Malcolm Ebright summarizes quite nicely the changing political, social, and legal landscapes there in his *Land Grants and Lawsuits in Northern New Mexico* (Albuquerque: University of New Mexico Press, 1994). For Arizona, see the interdisciplinary study by Thomas E. Sheridan, *Landscapes of Fraud: Mission Tumacácori, the Baca Float, and the Betrayal of the O'odham* (Tucson: University of Arizona Press, 2006). David Montejano evaluates how land dispossession unfolded in Texas in his well-researched study, *Anglos and Mexicans in the Making of Texas, 1836–1986* (Austin: University of Texas Press, 1987). Article VIII of the Treaty of Guadalupe Hidalgo protected "property of every kind." The best survey of the treaty remains Richard Griswold del Castillo, *The Treaty of Guadalupe Hidalgo: A Legacy of Conflict* (Norman: University of Oklahoma Press, 1992). Arizona south of the Gila River to present-day Nogales, as well as southwestern New Mexico, were not part of the 1848 territorial cession and remained in Mexico's hands until the Gadsden Purchase of 1854, which in Mexico is known as *La Venta de La Mesilla*. See William S. Kiser, *Turmoil on the Rio Grande: History of the Mesilla Valley, 1846–1865* (College Station: Texas A&M University Press, 2011).

[3] Shirley Ann Wilson Moore, "We Feel the Want of Protection: The Politics of Law and Race in California, 1848–1878," in John F. Burns and Richard J. Orsi, eds., *Taming the Elephant: Politics, Government, and Law in Pioneer California* (Berkeley & Los Angeles: University of California Press, 2003), 102.

California since 1769 with the establishment of San Diego, followed in earnest by the *rancho* movement in 1784 — was forced to make way for American common law understandings of property rights *and* the onslaught of attorneys representing Anglo land speculators and mining interests.

The property rights tradition that evolved in Spain, and later Mexico, classified natural resources as property in ways that were quite distinct from Anglo common law, thus ensuring confusion after 1848 when adjudication took place in the newly acquired territories. Since water was considered property under the laws of Spain and Mexico prior to the territorial cession, U.S. courts were being called upon by both international law and American case law to act as surrogates for the Hispanic civil law of property.[4]

Spanish (and later Mexican) jurisprudence recognized three kinds of property rights that are fundamental to understanding the intersection of law and rural economic activities in places like California, Arizona, New Mexico, southern Colorado, and Texas, which were once part of the Spanish dominion in North America. Surface water was *propiedad imperfecta*, or a property right that was subject to qualification and measured against the rights of others.[5] For example, unlike Anglo common law, the Spanish civil law did not recognize riparian rights to running rivers or streams. If a piece of property fronted on a creek or river the owner could only use the water for domestic purposes and *not* for irrigation. The Spanish crown (and later an independent Mexico) conveyed rights to surface water for agricultural and industrial purposes via several mechanisms: *merced de agua* (a specific grant of water); *repartimiento de aguas* (a judicial procedure that divided surface water according to certain criteria such as need, intent, and legal right); *composición* (the judicial process of authenticating

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[4] For a summary of these international and national contexts, see Michael C. Meyer and Michael M. Brescia, "The Treaty of Guadalupe Hidalgo as a Living Document: Water and Land Use Issues in Northern New Mexico," *New Mexico Historical Review* 73 (1998): 321–345. For the California context, see Peter L. Reich, "Dismantling the Pueblo: Hispanic Municipal Land Rights in California since 1850," *The American Journal of Legal History* 45 (2001): 353–370, and Peter L. Reich, "Mission Revival Jurisprudence: California Courts and Hispanic Water Law since 1850," *California Supreme Court Historical Society Yearbook* 2 (1995): 3–47.

[5] For an explanation of the distinctions between *propiedad imperfecta* and *propiedad perfecta*, see Mariano Galván Rivera, *Ordenanzas de tierras y aguas, o sea formulario geométrico-judicial* (Mexico City: no publisher, 1849), 3–4.

asserted water rights); or if the land grant itself contained language that conveyed water rights for irrigation (for example, if a parcel of land was identified in the granting instrument as *tierras de pan llevar* or *tierras de labor*, both of which meant irrigable land).

Groundwater was classified as *propiedad perfecta* in the Spanish civil law of property. Ownership of spring water, rainwater, snowmelt, or water percolating under the ground was nearly absolute, and landowners could not be easily deprived of these waters once conveyance was extended by competent authority, even if use of such water caused damage to neighbors. The paucity of disputes over groundwater during the Spanish colonial period suggests that the nascent science of hydrology had not yet informed jurisprudence in the Spanish world. Most disputes in the documentary record reflect concerns over access to surface water rather than groundwater.

Propiedad usufructuaria, or usufructuary property, rounds out the third property right in the Hispanic civil law.[6] Usufruct is the right to use and enjoy the property of another, and to draw profit from it provided that such acts neither alter nor eliminate the purpose or substance of the property being used. In the case of Spanish New Mexico, usufructuary property was manifest in the common lands attached to Spanish municipalities, Indian pueblos, and, in northern New Mexico, informal agrarian hamlets known as *acequias* or *plazas*. Individual Spanish citizens (*vecinos*) residing in a town (or Native peoples in their pueblos) enjoyed a property interest in the common lands, which were used for recreation, hunting, fishing, for pasture, the gathering of wild fruits and nuts, for the watering of livestock, and for cutting wood. Citizens of the community, rich and poor alike, enjoyed equal access to the commons. In fact, most settlers would have found it difficult to make a living and support their families without regular access to the commons. The activities cited above, therefore, were usufructuary property rights, and, although our understanding of these rights is not nearly as nuanced as our knowledge of water rights, it is clear from the statutory and case law that Spanish jurisprudence recognized them as such.

Fortunately for historians and legal scholars, the Autry National Center of the American West in Los Angeles is home to two impressive research libraries that contain plenty of primary source materials for the study of

6 Meyer and Brescia, "The Treaty of Guadalupe Hidalgo," 323.

law, legal custom, and agrarian lifeways during the critical transition period between Spanish colonialism and American rule. The Autry Library, located at Griffith Park, and the Braun Research Library, which until very recently was located at the Southwest Museum of the American Indian on the Mount Washington campus but is moving to its new state-of-the-art facility in Burbank, include papers from several prominent Hispanic families that reveal both glimpses and panoramic views of change and continuity in their social circles, material well-being, and rural practices. Moreover, these resources also show how quickly the Americans became part of the California landscape even before the transfer in sovereignty, as some married into Mexican families and experienced firsthand the traditions and practices of Hispanic ranching culture, while others employed to their economic advantage the new political and legal infrastructure established under U.S. sovereignty. Finally, the Autry National Center has a user-friendly online catalogue that allows researchers to search its multiple archival and manuscript collections. The historical vignettes that follow identify and evaluate select items found within certain family papers, emphasizing what the sources tell us about the legal and cultural values that fashioned agrarian life for Hispanic families in California.

The Autry National Center of the American West, Griffith Park Campus

THE AUTRY LIBRARY, GRIFFITH PARK CAMPUS — THE MIEHLE AND SEPÚLVEDA FAMILY PAPERS

José Sepúlveda's anxious note to his compadre, Juan, is part of the Miehle and Sepúlveda Family Papers.[7] Apparently, the collection of papers arrived at the Autry National Center in a painted steamer trunk. The Sepúlveda family was a major player in the settlement and development of Southern California. After the U.S.-Mexico War and subsequent peace treaty, Juan moved quickly to accommodate the emergence of an integrated politics. For example, he served as *alcalde* (district magistrate or mayor) alongside Abel Stearns in the early 1850s. The more prominent members of the Sepúlveda family, including Juan, had prospered when California was part of Mexico; they received a rather substantial land grant of nearly 32,000 acres known as the Rancho de los Palos Verdes. Spanning the years 1834–1952, the family papers include an eclectic mix of letters, notes, ranching ledgers and account books, newspaper clippings, photographs, tax receipts, blueprints, maps, and legal documents. One particular source — the *Diario del Ganado Vacuno*, or the Cattle Journal — handwritten on blue paper and part of an old, brittle ledger with tissue paper to separate individual items, demonstrates continuity in prescriptive ranching practices among Hispanic families in California in the years following the establishment of American rule.

Spaniards started to move cattle and other livestock from Baja to Alta California in 1769 when Gaspar de Portolá and the Franciscan priest, Junípero Serra, made their *entradas* and initiated the Spanish colonial enterprise there. A few years later in 1775–1776, Juan Bautista de Anza left the Arizona–Sonora frontier with California's first Spanish settlers and about 1000 livestock, including 355 cattle. The Franciscan missionaries, striving for self-sufficiency and protective of their Native charges, embraced ranching as an economic activity up and down their extensive mission line. After Mexican independence from Spain in 1821, however, and the secularization of the missions that followed, more than 800 ranchos were granted to former presidial soldiers, and soon Alta California had cattle

[7] The finding aid can be found at http://www.oac.cdlib.org/findaid/ark:/13030/c8zk5fc8/.

grazing on "a thousand hills."[8] Mexican ranchers engaged regional and global commercial networks via the sale of hides and tallow, while their families and neighbors consumed beef. By the time the first Anglos entered California, the Mexicans were quite experienced stockmen, with a ranching culture fashioned as much by rules of conduct and legal custom as by Mother Nature.[9]

As a member of the Los Angeles County stockmen's association, Juan Sepúlveda was appointed to its governing board and entrusted with enforcing the regulations that were enumerated in the *Diario*. Mirroring the functions and hierarchical organization of the Mesta established by Spaniards in sixteenth-century central Mexico, the cattlemen's group that emerged in Mexican Los Angeles accommodated Americans like Abel Stearns who had embraced the ranching culture through marital ties with leading Mexican families. In fact, when the *Diario* took effect on October 1, 1857, Stearns was listed as the president of the association. He, Sepúlveda, and other ranchers in the area — such as Andrés Pico, José Antonio Aguirre, Vicente Lugo, and Ricardo Vejar — pledged to work together and protect their rural property (livestock and land), "always relying on the support of the law."[10]

These regulations prescribed the manner in which neighboring ranchers were to gather for *rodeos*, or the round-ups on horseback that took place in the open pastures for identifying and branding all the livestock in the district. In an effort to halt rustling, neither ranchers nor their *vaqueros* were to remove cattle or horses from their own property without the presence of neighbors or the rural police force that the regulations had established. Moreover, as a way to reduce illicit sales of beef, ranch hands without any livestock of their own, were prohibited from using unknown branding irons. Cattle remitted to family members or sold to the local slaughterhouse were expected to carry a certificate showing the branding mark of ownership, the number of livestock being given or sold, and the name and location of the buyer. The association eliminated the practice of

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[8] Beverly Lane, "Here's the Beef: A History of Cattle Ranching in the San Ramon Valley," *The California Historian* 59, nos. 1-2 (2014): 43–44.

[9] Ibid., 44.

[10] *Diario del Ganado vacuno que se mata en la Ciudad de Los Angeles . . . 1° de Octubre de 1857*, ANCAMC, MSFP, MSA.31. The original Spanish reads "contando siempre con el apoyo de la ley . . . ."

putting down stray livestock from nearby ranches and, instead, agreed to return the animals to their rightful owners. On the other hand, if the rural police apprehended someone trying to rustle livestock, the local authorities were to be notified immediately, while the local rancher whose property was threatened would initiate legal proceedings against the accused.[11]

Cooperation was essential if the stockmen's association was to properly safeguard the pastoral lifeways of Los Angeles. Fines of five pesos were levied, therefore, against those ranchers who failed to attend the executive meetings of the association, which were scheduled every two months to discuss business. Ranch foremen, or *mayordomos*, hired to ensure a ranch's smooth operation and enforce the association's regulations, were expected to carry papers — signed by the ranch owner — certifying their employment. Finally, the *Diario* empowered the governing body to hire attorneys when it became necessary to defend their interests in courts of law.[12]

With ranching so firmly established in California by the time of the territorial cession, it is not surprising, then, that the *Diario del Ganado* of 1857 hued closely to the laws passed in 1850–1851 by the new state legislature, which, in turn, had recognized Hispanic ranching practices as one of Spain's most important legacies in North America.[13] The discovery of gold at Sutter's Mill, of course, had promoted a sizable influx of new settlers looking to strike it rich. These newcomers provided California with its first substantial market for beef, encouraging a ranching boom between 1849 and 1856. As geographer Terry Jordan has noted, the gold rush led to two distinct pastoral regions in California: Southern California, with its largely Hispanic population, was an isolated and poorer area that witnessed a depopulation of its pastures as many livestock ended up near mining camps.[14] It is no wonder that Sepúlveda, Stearns, and other Los Angeles ranchers sought to impose order and transparency on the ranching sector after it had been turned upside down as a result of the mining boom. Hispanic pastoral traditions had proved so durable and reliable prior to

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11 Ibid.

12 Ibid.

13 William H. Dusenberry, *The Mexican Mesta: The Administration of Ranching in Colonial Mexico* (Urbana: University of Illinois Press, 1963), 195–197.

14 Terry G. Jordan, *North American Cattle-Ranching Frontiers: Origins, Diffusion, and Differentiation* (Albuquerque: University of New Mexico Press, 1993), 246.

Sutter's Mill, however, that even most new Anglo landowners simply embraced the culture. Even so, as Jordan points out, of the 130 large-scale cattle ranchers residing in Southern California by 1860, nearly two-thirds were still Hispanics working their old land grants.[15]

The northern and interior reaches of California, on the other hand, including the fertile Central Valley, quickly reflected a more hybrid approach to ranching, including the use of Anglo cowboys and the move away from hides and tallow to beef production.[16] By the end of 1850s, 81 percent of all large cattle ranches in the region were in the hands of Anglo ranchers who had introduced mid-western cattle to the range in addition to hiring Anglo ranch hands, thus hastening the disappearance of Spanish cattle breeds and a decline in the vaquero workforce.[17] Soon this northern Pacific and interior ranching sector, with its new animal bloodlines and human workforce, eclipsed Southern California as the pastoral engine of California.[18]

Despite intermarriage and the adoption of Hispanic ranching traditions in Southern California, relations between Anglos and the Hispanic community frayed over time as political power, economic clout, and social prestige transferred to the newcomers at the expense of the Hispanic establishment. Thirty-five years after José Sepúlveda urged his compadre to return to Los Angeles as quickly as possible because the attorneys had arrived, Juan Sepúlveda left an ominous note that made its way to the Miehle and Sepúlveda family papers at the Autry Library. Just like with José's note, there are no circumstances given. Neither the preceding nor subsequent documents provides the historian with any contextual assistance. Several Anglo surnames appear in the brief note, but we are not privy to their backgrounds there. Dated January 15, 1885, and coming from San Pedro, California, Juan (or someone on his behalf) wrote the following awkward yet powerful lines in English: "On this date Mr. Johnson came to see me in San Pedro, La Barraca and asked me to let Mr. Banning go on with the work on the water tank. I answered it was my duty not to let any stranger work on my property. The hired men said that Mr. Bixby, then that Mr. Banning then Mr. McDonald. Mr. Johnson told me this and I would get

15 Ibid.
16 Ibid., 246–247.
17 Ibid.
18 Ibid., 247.

the water free. Juan Sepulveda."[19] The note continues: "They told me they would give me water and I answered, I had a wagon and horses to bring it. Because Mr. Banning does not come and make such proposition in person. Instead I was arrested. Juan Sepúlveda."[20]

It is unknown whether Juan wrote the note himself or had a relative, neighbor, attorney, or scribe do it for him. Other documents bearing his name and signature in the family papers are in Spanish. As previously noted, Juan was part of a prominent Hispanic family in Southern California prior to the territorial cession. What is so striking about the note is the heavy presence of Anglos and the intimidation that they brought to bear as they tried to persuade Juan to allow access to his water tank. After trespassing on his property, these men — hired muscle, it seems — offered Juan his own water for free if only he would allow them to work on his water tank. Under the Hispanic civil law of property, water originating within the confines of one's property — as rainfall, snowmelt, groundwater, or percolating springs — was private water, or *propiedad perfecta*. Property owners could impound such waters in tanks or reservoirs for their own personal use, and were not obliged to share the water with neighbors. If ecological conditions changed — say, for example, a drought had developed — local authorities under Hispanic law could oblige the owners of these private waters to share the precious resource with neighbors, but they were entitled to compensation.[21]

It would seem that Mr. Banning, presumably the one calling the shots here, chose not to confront Juan in person. When Juan refused their demands, he was arrested. Taking measured but creative license with this late nineteenth-century document, we might imagine Juan Sepúlveda feeling insulted, even outraged, that Banning had neither the honor nor

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[19] Note from Juan Sepúlveda, January 15, 1885, ANCAMC, MSFP, MSA.31. We cannot discount the possibility, of course, that another Juan Sepúlveda wrote the note; perhaps an immediate relative or a member of the extended family.

[20] Ibid.

[21] Galván Rivera, *Ordenanzas*, 3–4. Groundwater under the laws of Spain and Mexico has not received the same kind of treatment in the scholarly literature as surface water. Two essays that address the general parameters of groundwater in the Spanish civil law of property are Daniel Tyler, "Underground Water in New Mexico: A Brief Analysis of Laws, Customs, and Disputes," *New Mexico Historical Review* 66 (July 1991): 287–301; and Michael C. Meyer, "The Living Legacy of Hispanic Groundwater Law in the Contemporary Southwest," *Journal of the Southwest* 31 (Autumn 1989): 287–299.

SOUTHWEST MUSEUM OF THE AMERICAN INDIAN, MOUNT WASHINGTON CAMPUS OF THE AUTRY NATIONAL CENTER OF THE AMERICAN WEST

the decency to make his demands in person.[22] Instead, he sent a bunch of associates — probably hired guns — to take care of his business. Under what pretense Juan was arrested remains unknown, nor do we know for how long he sat in jail, but this short document makes its reader feel uneasy and evokes the maxim popular throughout the North American West: "whiskey is for drinking and water is for fighting over."

THE BRAUN RESEARCH LIBRARY, MOUNT WASHINGTON CAMPUS — THE YORBA–COTA FAMILY PAPERS

The Yorba and Cota families were prominent members of the Hispanic landowning elite. In return for their military service and participation in expeditions, Pablo Antonio Cota and José Antonio Yorba received substantial tracts

[22] A well written, nicely conceived study that examines the values and sentiments that permeated Hispanic California during this time is Jeanne Farr McDonnell, *Juana Briones of Nineteenth-Century California* (Tucson: University of Arizona Press, 2008).

of land in California. The family papers reflect their vast holdings. Consisting primarily of legal documents such as land grants, chains of title, deed transfers, bills of sale, land petitions, powers of attorney, and boundary descriptions, the Yorba-Cota papers offer the legal historian plenty of opportunities to ascertain the fundamentals of Hispanic natural resource law in the context of judicial transitions in frontier California between 1837 and 1897.[23]

Municipal governments in Spanish North America held in trust for their citizens the common lands attached to towns. Often called *ejidos* or *montes* in the documentary record, these rather extensive tracts were home to a plethora of activities, including the grazing and watering of livestock, the cutting of timber to heat homes and cook food, and the gathering of wild fruits and nuts; more importantly, these activities were usufructuary property rights under the Spanish and later Mexican civil law. In 1845, Leonardo Cota wrote a letter to the Los Angeles City Council that, while not explicitly enumerating woodcutting as a property right, articulated Hispanic understandings of communal ownership of natural resources and the shared responsibility that accompanied citizenship. Cota reminded council members that one of the primary functions of municipal government was to develop wooded areas so its citizens would have access to firewood. In reciprocity, according to Cota, citizens should be obliged to enclose or fence these wooded areas, as well as all lands under cultivation within the municipal boundaries as a way to ensure the beauty and health of the land.[24] Cota also recommended that all future land grants issued within city limits require recipients to fence off their properties; those who failed to do so would be subject to a fine.[25]

Inspired by Enlightenment ideas of democracy and progress, nineteenth-century liberals in central Mexico began to question the economic feasibility of the common lands and found in these tracts the ingredients

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[23] The finding aid can be found at http://oac.cdlib.org/findaid/ark:/13030/c8q7js4/.

[24] Leonardo Cota to the Ayuntamiento of Los Angeles, August 8, 1845, Braun Research Library, Autry National Center of the American West, Los Angeles, California, The Yorba-Cota Family Papers [hereinafter BRL, YCFP], MS.1061, 248-L-17. The original Spanish reads "Siendo una de las principales atribuciones de los ayuntamientos formar montes artificiales y procurar que los vecinos pongan cercos brotados, para que los pueblos se provean de madera y leña…comprometen a los ciudadanos a que pongan cercos brotados en todas las tierras labranticias de esta Ciudad . . . con eso se logrará el objeto propuesto y los terrenos gozarán de hermosura y salubridad . . . ."

[25] Ibid.

for the ideal citizen–property owner who, motivated by self-interest, would work and irrigate individual parcels in a manner that reflected the values of the nation-state instead of the *patria chica*, or little homeland.[26] After Mexican independence from Spain, liberals in California sought a break with the colonial past by targeting the missions (and their extensive holdings) for secularization and elevating liberal institutions at the expense of an older, colonial military ethos.[27] It would seem in Hispanic Los Angeles, however, at least according to one of its leading citizens, that social equilibrium was best maintained via hybrid patterns of land tenure: individual parcels carved out of municipal lands for private ownership, and common lands held in trust by the city council for the common good, albeit with obligations imposed on the citizenry. The reader also senses that Cota had embraced the nineteenth-century aesthetic ideal that sought order and harmony through fenced enclosures in an effort to clearly delineate private property while at the same time setting apart the municipal commons.[28]

A source in the Yorba–Cota family papers that sheds light on the more procedural elements of Hispanic civil law is Leonardo Cota's efforts in the summer of 1845 to explain to the local judge the delay in building a house on the land that he had been granted. Spanish and Mexican property titles stipulated conditions that had to be satisfied if the grant, as a legal instrument, was to maintain its validity under the law. For example, the abandonment of one's land grant without just cause or prior authorization by competent authority (due to Indian attacks, for example), or the failure to put the land to beneficial use through irrigation or grazing, could lead to forfeiture under Hispanic law.[29] In this brief document, Cota

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[26] See, for example, Michael T. Ducey, *A Nation of Villages: Riot and Rebellion in the Mexican Huasteca, 1750-1850* (Tucson: University of Arizona Press, 2004), and Margarita Menegus Bornemann, ed., *Problemas agrarios y propiedad en México, siglos XVIII y XIX* (Mexico City: El Colegio de México, 1995).

[27] Rose Marie Beebe and Robert M. Senkewicz, eds. *Lands of Promise and Despair: Chronicles of Early California, 1535-1846* (Norman: University of Oklahoma Press, 2015), 341–342, 345.

[28] For a conceptually sound and empirically driven study that examines the nineteenth-century Mexican preoccupation with landscapes and social order, see Raymond B. Craib, *Cartographic Mexico: A History of State Fixations and Fugitive Landscapes* (Durham, NC: Duke University Press, 2004).

[29] Ebright, *Land Grants and Lawsuits*, 93.

acknowledged that the year before (1844) he had received lands contiguous to the home of his late father, and that he was going to build a home on his newly acquired parcel. The lack of draft animals to haul the adobes, dirt, water, and wood, however, made it impossible for him to erect the building. As such, Cota petitioned the judge "to take into account these reasons" as sufficient enough to give him more time to build the house, which he stated that he would do in the current year (1845), "preserving the property that I have acquired with just title."[30] The judge's signature at the bottom of the document appears to indicate that Cota's petition was approved.

Another procedural element of the Hispanic civil law was its stipulation that legal transactions, including the issuance of land grants and property rights, have a prescribed number of witnesses, with a municipal clerk or court notary recording the transaction on officially approved, sealed paper. The lack of any one of these elements, in theory, could render the transaction illicit or even invalid. Scarcity of approved paper, the absence of trained scribes and notaries, and inadequate storage had posed certain challenges on Mexico's far northern frontier since the earliest days of colonial rule, however, making it difficult to comply fully with the finer details of Spanish property law.[31] In fact, the inability to follow the procedural steps in precise fashion was quite common in the more remote areas of the Spanish empire, although such lack of precision in no way invalidated property rights. Often frontier authorities reminded their counterparts in central Mexico and Spain of the absence of the procedural accouterments of property law by employing in the documentation such language as "for lack of a public or royal notary, there being none in this province."[32]

Leonardo Cota's petition to the judge contained such language: "I made use of common paper for the lack of [having any] sealed [paper here]."[33] In the document that follows Cota's petition — a conditional deed for a

[30] Leonardo Cota to Judge Francisco Marquez, July 5, 1845, BRL, YCFP, MS.1061, 248-L-20. The original Spanish reads "suplico tomar en consideracion las razones manifestadas . . . y se sirva darlas para suficientes . . . conservandose la propiedad de el que he adquirido con justo titulo."

[31] Charles R. Cutter, *The Legal Culture of Northern New Spain, 1700-1810* (Albuquerque: University of New Mexico Press, 1995), 36–37, 99–102.

[32] Ebright, *Land Grants and Lawsuits*, 132, 316n.23.

[33] Cota to Judge Marquez, BRL, YCFP, MSA.1061, 248-L-20. The original Spanish reads "me desprende el uso de papel comun por falta de sellado."

vineyard dated and issued in 1848 to Esteban Jourdain — similar language appears: ". . . on this common paper for lack of sealed [paper]."[34] The same document mentions the use of local witnesses rather than a notary public, since Los Angeles, like so many other frontier towns in the far north, often did not have the means to regularly support the office.[35] Another document in the series, describing the debt that Juan Peralta owed Bernardo Yorba in 1848, ends with the line, "thus . . . I signed the present document on this common paper for [the] lack of sealed [paper]."[36] Despite the paucity of approved paper, or the dearth of notaries and clerks with formal training, Hispanic law maintained its vigor and fashioned the rhythms of daily life in Hispanic California.

As seen earlier, Abel Stearns moved comfortably in Hispanic social circles. Part of a broader movement of Anglo merchants, speculators, and shipping agents that moved to California under Mexican rule, Stearns married Arcadia Bandini, the daughter of a prominent Hispanic family in San Diego with commercial holdings in Los Angeles.[37] He purchased his first rancho in 1842 — Rancho Los Alamitos — which was spread over 26,000 acres between the city of Los Angeles and the harbor. As his investments in ranching, mills, and transportation paid off, Stearns would acquire seven other Mexican ranchos and immerse himself in local politics and civic associations. In addition to being president of the Los Angeles Stockmen's Association — as noted above — he represented Los Angeles to the U.S. military government at the end of the U.S.-Mexico War, served as state assemblyman, L.A. County supervisor, and city councilman. The deed to Rancho Los Alamitos is part of the Yorba–Cota papers, and it, too, reveals the fundamentals of Hispanic property law in the waning years of Mexican sovereignty.

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[34] Conditional Deed to Esteban Jourdain, August 10, 1848, Los Angeles, California, BRL, YCFP, MSA.1061, 248-L-21. The original Spanish reads "en este papel comun por falta de sellado."

[35] Ibid. The original Spanish reads "ante mis testigos de asistencia, con quienes actuo por receptoria a falta de escribano publico."

[36] Recognition of Juan Peralta's Debt to Bernardo Yorba, April 5, 1848, BRL, YCFP, MSA.1061, 248-L-22. The original Spanish reads "asi . . . firme el precente documento en este papel comun por falta del sellado . . . ."

[37] Pitt, *Decline of the Californios*, 19.

Dated July 12, 1842, the deed established the late José Figueroa, former governor of California, as the previous owner of Los Alamitos; his executor, Franco Figueroa, acting on behalf of all the heirs-in-interest, authorized the sale of the rancho to "Señor Don Abel Stearns."[38] Quite tellingly, the ranch consisted of six *sitios de ganado mayor*, two more than what was traditionally granted under Hispanic law. Set aside for the larger livestock such as cattle and horses, a *sitio de ganado mayor* carried a maximum size of 25,000,000 square *varas*,[39] which was equal to one square league or 4338 acres. On Mexico's far northern frontier, however, particularly after independence from Spain, local authorities in California and Arizona, for example, granted much larger tracts of land in an effort to combat hostile Apache groups, which was the case in Arizona and Sonora, or, in the case of California, to encourage the rapid expansion of the ranching sector in light of secularization of the Franciscan missions. Exception to the 'four sitio rule' was made for prominent citizens who were proven ranchers and stockbreeders, and whose pockets were deep enough to pay for the extra sitios.[40] Despite his Anglo background, Abel Stearns, bearing the honorific Spanish title of 'Don' in the document, had little difficulty demonstrating social prestige and economic prosperity. If the grant's previous owner, José Figueroa, could afford to pay for the two extra sitios, Don Abel had more than enough income and savings to purchase Rancho Los Alamitos intact.

Under Hispanic property law, grazing grants did not typically include water rights for irrigation.[41] Cattle and horses pastured these allotments, and water sources originating within the confines of the grant were only for the animals. In the deed issued to Stearns for Los Alamitos, the following language was used to describe both the general contours of the grant and the natural resources attached to it: ". . . with all the ingresses (entrances), egresses (exits), stock waters, wooded mountains, meadows, stubble pasture, watering places, buildings, extensions, uses, customs, privileges,

[38] Deed of Rancho Los Alamitos to Abel Stearns, July 12, 1842, BRL, YCFP, MS.1061, 248-L-39.

[39] The vara was slightly less than a yard or approximately 33 inches.

[40] See the discussion of the Babocómari Ranch in James E. Officer, *Hispanic Arizona, 1536–1856* (Tucson: University of Arizona Press, 1987).

[41] Michael C. Meyer, *Water in the Hispanic Southwest: A Social and Legal History, 1550–1850* (Tucson: University of Arizona Press, 1984), 124–125.

easements, and other things adjunct that it [the grant] has had, haves, and [that] pertains to it according to the law, for the amount of 1500 pesos."[42] Had the grant authorized irrigation, it would have included "*aguas*" in the enumeration of natural resources or employed explicit language to denote irrigable land, such as *tierras de labor* or *tierras de pan llevar*. Moreover, the deed included a side purchase of the ranch's branding mark and numerous branding irons, as well as the extant livestock still pasturing the land, thus reinforcing its 'grazing' nature. Don Abel, no doubt, had other parcels set aside for irrigation and farming. Besides, large agricultural fields were rare in Hispanic California at this time; most Mexican rancheros cultivated grains, vegetables, and fruits for domestic consumption rather than for sale on the open market.[43]

The deed also makes reference to a Spanish law code that has eluded legal historians of the far northern frontier for some time. In 1805, the *Novísima recopilación de las leyes de España* was compiled and reflected all Spanish laws, as they existed at the beginning of the nineteenth century. Unfortunately, with scarce references in the case law, scholars have yet to establish with any documentary rigor the general application of the *Novísima* to Spanish North America. In colonial Mexico, the wars of independence broke out a mere five years after the compilation was issued, although formal separation from Spain neither abrogated the property rights acquired under the mother country nor extinguished the Spanish colonial regimen of laws, customs, and usages that had operated in Mexico since the early sixteenth century. Stearns's 1842 deed, therefore, provides a rare glimpse of the *Novísima* in California twenty-one years after Mexican independence from Spain.

Heirs of the Figueroa estate were satisfied with the sale price that had been agreed upon with Don Abel (1500 pesos); even the time frame allotted for making payments met their expectations (two installments in less than two years).[44] In an effort to 'lock in' the agreed upon price, the attorneys

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[42] Ibid. The original Spanish reads, "con todas las entradas salidas, pastos abrevaderos, montes vegas dehesas aguajes, sensos fabricas estencion usos costumbres, regalia servidumbres y demas cosas anecsas que ha tenido tiene y le pertenecen segun derecho, por la cantidad de mil quinientos pesos . . . ."

[43] Lane, "Here's the Beef," 45.

[44] Deed of Rancho Los Alamitos, BRL, YCFP, MS.1061.

for the Figueroa family cited laws in the *Novísima* related to sales and contracts. Although drafted to protect the buyer in a sales transaction, the attorneys stipulated that their client (the seller) had waived those laws in the *Novísima* that allowed Stearns (the buyer) to revisit the transaction later if conditions or circumstances changed.[45] Despite the apparently harmonious relations between the two families, the Figueroa heirs, or so it seems, wanted to protect themselves from the vagaries of the real estate market. If land prices dropped before buyers had finished making their payments, they might want to renegotiate the original asking price. Moreover, the deed also stipulated that the seller waived the law in the *Novísima* that allowed buyers to rescind transactions within a four-year period, thus bringing a degree of certainty, if not finality to the transaction.[46] For their part, the Figueroa heirs were not looking back. They relinquished their complete ownership of Rancho Los Alamitos to Don Abel without reservation or prejudice. As the buyer and new owner, Stearns could "change, alienate, use, and dispose of [the property] as he wished, like something of his acquired with legitimate and just title."[47]

This essay began with a document that heralded — with much trepidation — the arrival of lawyers at the home of a prominent Hispanic family, the Sepúlvedas. The Yorba–Cota family papers contain a handwritten copy of the law organizing the Supreme Court of Mexico (probably derived from the Constitution of 1824). Leonardo Cota's name appears at the bottom of the document. The section of the law that seems to have captured Cota's attention was chapter 5, "On Attorneys," since it is the only part of the law that he or his scribe copied down or acquired. No date is listed, so we are unsure of when Cota came into possession of it (or when and where

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45 Ibid. The original Spanish reads, "Que por tanto renuncia la escepcion que en este asunto pudiera oponer por no constar de presente la ley (9) titulo (1) parte cinco, formaliza a favor del comprador la mas firme y eficacia carta de pago que a su seguridad condusca, y asimismo declara que el justo precio y verdadero valor del repetido terreno es el puesto en esta escritura, que no vale mas ni allo quien tanto le halla por ello . . . ."

46 Ibid. The original Spanish reads ". . . renuncia la ley dos titulo uno novisima recopilacion que trata de los contratos de venta, trueque y de otros en hay lecion en mas o menos de la mitad del justo precio, y los cuatro anos que prefina para pedir su resicion o suplemento a su justo valor . . . ."

47 Ibid. The original Spanish reads, ". . . cambie enagene, use y disponga de ella a su eleccion, como de cosa suya adquirida con legitimo y justo titulo."

he had access to the law for copying). With the rancho movement in full bloom under Mexican rule, coupled with the arrival of Anglos, Cota and his Hispanic contemporaries looked to the legal profession to assert their rights and defend their interests in courts of law. At first these courts were organized under the laws of Mexico; after 1848, U.S. laws and California statutes took over. During the Mexican period, California might not have had a sufficient supply of sealed paper or an adequate number of trained notaries and clerks, but Cota knew what to expect in terms of attorneys' fees. Chapter 5 enumerated in numbing detail the fees that Mexican lawyers were authorized to collect. When drawing up a legal document for "easy and simple" cases, for example, the attorney charged six pesos per sheet; if the case proved difficult, he could charge up to ten pesos.[48] It is unclear whether both sides of a sheet counted as one, since it was common to write on both sides due to the scarcity of paper — common, sealed, or otherwise. After the transition to American rule, chains of title became bulky and cumbersome, as documents written in Spanish often were translated into English so American judges, clerks, and attorneys could read them. Whether under Spain, Mexico, or the United States, however, ranchers, merchants, and miners sought to protect and expand their property rights through various means — acquisition, endogamy, legislation, litigation — all of which required the services of an attorney in some fashion. In a very real sense, then, the lawyers had always been part of the California landscape. These family papers, which form part of the Autry's splendid archival and manuscript collections, allow the historian to evaluate the agrarian traditions of Hispanic California within a social context sensitive to judicial transitions in the wake of American rule.

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[48] Untitled, Capítulo V, De los Abogados, no date. BRL, YCFP, MSA.1061, 248-L-60. The original Spanish reads, "Por todos los escritos que hagan . . . cobraran a razon de seis pesos por pliego, si fuesen sobre puntos facilies y sensillos . . . y si fuesen dificiles podran hasta diez pesos."

STUDENT SYMPOSIUM

Introduction: Student Symposium on

THREE INTERSECTIONS OF FEDERAL AND CALIFORNIA LAW

JOHN B. OAKLEY*

In January of 2015, as I commenced my class in Constitutional Law II at King Hall, the law school of the University of California, Davis, I was asked to invite students to write papers on aspects of California's legal history for possible inclusion in a student symposium to be published in the journal, *California Legal History*. The subject of my course was individual rights and liberties under the Bill of Rights and the Fourteenth Amendment of the federal constitution. This offered the prospect for students to undertake original research comparing rights and liberties protected by federal law with those protected independently by California law. A number of students responded to my invitation. Their only reward was the substitution of their papers for a final examination. They received no extra credit for the very substantial additional work that is manifest in the three papers reprinted below. These papers were deemed by anonymous reviewers to be of exceptional merit, worthy of publication in the symposium that follows. I take great pride in presenting them to you.

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I.

Absent voluntary compliance by the judgment-loser, every judgment of a court of law becomes effective only through the coercive enforcement of that judgment. At common law, this entailed the issuance by the court of a "writ of execution," authorizing the sheriff or some other law-enforcement officer to exercise such force as was necessary to achieve compliance with the writ, and hence to "execute" the judgment. The most draconian judgment to be executed by a legal system is the imposition of capital punishment: the execution of a judgment that the defendant shall be put to death. And so the whole process of capital punishment has become uniquely identified with the legal term of art for enforcing that as well as any other legal judgment: condemned prisoners are said to be "executed," and legally unsanctioned murders that are accomplished by particularly purposeful and conclusive methods are accordingly called "execution-style" killings.

This most awesome and irrevocable use of the coercive power of government as licensed by law is rarely used in modern democracies dedicated to the socially inclusive values of liberty, equality, and autonomy. Even in warfare, the killing of disarmed prisoners is not tolerated. The total eradication of life — as opposed to the systematic curtailment of autonomy through life-long incarceration, always subject to prospective correction should judicial error be belatedly discovered — is a stark reminder of the totalitarian régimes which stained the middle decades of the twentieth century. Nonetheless, capital punishment remains politically popular in the United States, although by a declining majority as evidence of the actual execution of innocent defendants mounts. Given the prominence of judicial protection of individual rights against majoritarian action within our constitutional scheme of governance, it is not surprising that capital punishment has been a recurrent topic of litigation under both state and federal constitutions.

Kelsey Hollander's paper on *The Death Penalty Debate* gives an excellent overview of federal and state constitutional law as applied to this subject in California. The applicable federal constitutional norm is the Eighth Amendment's prohibition of "cruel and unusual punishments." This nominally limits only the power of the federal government, but it has been incorporated into the meaning of the "due process of law" that limits the power of state governments under the Fourteenth Amendment. As Ms. Hollander makes clear, the Eighth Amendment has never been interpreted

by a majority of the Court as imposing a *substantive* ban on capital punishment. In keeping with the exclusively adjectival wording of the ban not on punishment, but only such punishments as are "cruel and unusual," the Eighth Amendment has been given only *procedural* effect in limiting *how*, not *whether*, capital punishment may be imposed. Less obviously, but no less importantly, this emphasis on procedural review of the execution of judgments of death has never resulted in the invalidation of a particular method of execution prescribed by state or federal law.

Execution methods have, of course, drastically changed since the founding of the United States. While the beheadings of Tudor England and revolutionary France never gained a foothold in American law, hanging and firing squads were common into the twentieth century. The move to electrocution and gas chambers was driven by a strange coincidence of technological pizazz and putative humanitarianism at play in legislatures unmediated by courts. Execution technique has most recently converged on lethal injection, with the apparent supposition that life can thus be extinguished in both an antiseptic and anesthetic way: pulling the plug without pain, if not without the painful anxiety of a conscious person aware that death is just a needle away.

Lethal injection is rare among American execution methods in that it kills the prisoner endogenously rather an exogenously — by poison rather than by some lethal application of external force. The only similar method is the gas chamber, where the poison is inhaled rather than injected. The fact that lethal gas — from the trenches of World War I to Auschwitz to San Quentin Prison — operates mainly by suffocating its victims, was a major factor in its displacement by the seemingly more humane method of lethal injection, which is supposed to sedate the victim into unconsciousness before stopping the victim's heart and/or respiration.

Recently both the medical profession and the pharmaceutical industry have refused to facilitate executions of the condemned, or to supply products for use in execution by lethal injection. This has led to jury-rigged drug protocols that have apparently suffocated prisoners without prior sedation. Ms. Hollander considers, and accurately predicts, whether the Supreme Court of the United States will allow this procedural uncertainly about the manner in which death occurs to inhibit the substantive power of government to impose capital punishment. In its final opinion of the 2014 Term

— decided on June 30, 2015, the very day her paper was submitted — the Court held 5–4, in the alignment Ms. Hollander wrote was most likely, that petitioners facing execution by lethal injection using an untested protocol of drugs had failed to carry their burden of proving that the protocol entailed a constitutionally-unacceptable risk of pain. "Our decisions in this area have been animated in part by the recognition that because it is settled that capital punishment is constitutional, '[i]t necessarily follows that there must be a [constitutional] means of carrying it out.'. . . Holding that the Eighth Amendment demands the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether." *Glossip v. Gross*, 576 U.S. ___, 135 S.Ct. 2726, 2732-33 (2015).

Ms. Hollander also provides an overview of the California Supreme Court's formerly independent review of the constitutionality of the death penalty. In 1972, that court struck down California's death-penalty statutes because its arbitrary and inconsistent application violated California's disjunctive prohibition of *either* "cruel" *or* "unusual" punishments. The high court found that the substitution of the ban on "cruel or unusual punishments" instead of "cruel and unusual punishments" in the 1849 California Constitution, carried over to the still-effective 1879 Constitution, had not been inadvertent. This disjunctive rather than conjunctive phrasing was parallel to the majority of state constitutions in effect at the time of California's founding. In *People v. Anderson*, 6 Cal.3d 628 (1972), the California Supreme Court ruled that the actual carrying-out of executions in California had become so capriciously rare as to be "unusual" within a strictly domestic context, and no less unusual when compared to the worldwide practices of civilized legal systems. The court also held that the infliction of capital punishment had become "cruel" as a matter of state constitutional law, whether or not it was deemed unconstitutionally "cruel" by the United States Supreme Court in that Court's interpretation of the Eighth Amendment.

This independent construction of the state constitution was announced in an opinion written by the Chief Justice of California, Donald R. Wright, and joined by all but one of the court's seven justices. This decision surprised Governor Ronald Reagan. Chief Justice Wright was a municipal bond lawyer in Pasadena before becoming a state trial judge. He was a judge's judge, who had served as presiding judge of one of the nation's largest courts, the Los Angeles County Superior Court. When Governor Rea-

gan appointed him chief justice, he was thought to be both colorless and conservative. Governor Reagan, who remained in office until 1975, swiftly repudiated both his appointee and the *Anderson* opinion that Chief Justice Wright had authored.

The California Constitution is rather easily amended: an initiative amending the constitution requires only the signatures of registered voters equal to one-eighth of the votes cast for governor at the last gubernatorial election in order for an initiative to be placed on the ballot, and then only a simple majority of votes cast for the enactment of that initiative. *People v. Anderson* was decided on February 18, 1972. With the full support of the popular governor, Proposition 17 was adopted by a 2–1 margin at the general election of November 7, 1972. This initiative amended the California Constitution to declare that the death-penalty statutes in effect on February 17, 1972, were restored to full force and effect free of any state constitutional impediments. Thus the constitutionality of the death penalty in California remains subject only to the lenient federal standards of *Glossip v. Gross*.

It is difficult to resist the conclusion that Eighth-Amendment death-penalty standards — to which California law is tied — have taken an ironic turn. As Justice Thomas has made clear, in an opinion highlighted by Ms. Hollander, the framers of the Eighth Amendment surely meant at least to bar such exquisitely cruel means of ending life as the stake and the gibbet. Both involve the infliction of extreme pain not just as the means of death, but as its precursor. One might conclude from these exemplars that the most immediate and conclusive means of death would be the most constitutionally acceptable. And this would seem to recommend the means of execution favored in the People's Republic of China: the instantaneous and hence painless bullet to the back of the head.

This method of execution is not only painless, but self-evidently quick and simple, even painless. Why is it beyond the constitutional pale? I suspect the reason lies in its exogenous brutality. We want the condemned to die, not to be killed. Better to be burned from within than to be bruised or bloodied from without. The Chinese method would transform a metaphor into a fact: execution-style killing employed for executions. The Eighth Amendment, it seems, now protects the process, not the product. It has encapsulated death, indifferent to its potential agony. And Californians, having foregone their constitutional independence, have nothing more to say.

II.

Justice Louis Brandeis, dissenting in 1932 from a decision of the United States Supreme Court that condemned as unconstitutional an Oklahoma state scheme requiring a license for the manufacture, sale, or distribution of ice, famously praised the potential of states to serve as "laboratories of democracy" within our federal system. Allowing states leeway to experiment with innovative grants of rights or policy initiatives, when not in fundamental conflict with federal law, allows legislators nationwide to determine the value of such innovations based on actual practice. When California enacted Proposition 17 in 1972, it closed down its laboratory on administration of the death penalty by specifying that state law was to be identical to federal law, however that should develop. But Megha Bhatt's paper, *Gender Equity in the Workplace*, demonstrates that California continues to be a well of legal inspiration when it comes to the integration of pregnancy into the law of reasonable accommodation of disabled workers.

The United States Supreme Court's nine justices now include three women. That is hardly over-representation. As Justice Ruth Ginsberg has whimsically noted, there will be "enough" women on the Court when all nine of the justices are women. Statistically, the representative figure should be between four and five. Until the appointment of a transgender justice, utopia will have to wait. But we do have a good sense of the consequences of dystopia. Until President Reagan's appointment of Sandra Day O'Connor in 1981, no woman sat on the Supreme Court. Only this circumstance can explain what Ms. Bhatt describes: a pair of decisions, in 1974 and 1976, in which the Court ruled that the denial of disability-benefits to pregnant women was not gender-based discrimination under either the Equal Protection Clause of the Fourteenth Amendment, or Title VII of the 1964 Civil Rights Act. The relevant classification, the all-male Court held, was between pregnant and non-pregnant people, and since women were included along with men in the non-pregnant class, the classification was not gender-based. Although women did not then hold the highest judicial office, they had since 1919 possessed the constitutional right to vote. Congress swiftly passed the Pregnancy Discrimination Act (PDA), which in 1978 amended Title VII to forbid discrimination in employment based on pregnancy.

The persistent problem addressed in Ms. Bhatt's paper arose after the passage in 1990 of the Americans with Disability Act (ADA). The ADA requires

employers to provide reasonable accommodation of the disabilities of employees. The PDA does not include a reasonable-accommodation provision, and federal courts have read the two Acts as providing parallel but not congruent remedies. Thus women temporarily disabled by pregnancy — a disability which varies markedly from woman to woman, and pregnancy to pregnancy — have no federal protection against loss of employment when disabled by pregnancy from performing their normal workplace duties. In California, pregnant workers have been given statutory protection beyond that provided by the federal ADA and PDA. Ms. Bhatt traces the reverberations this California experiment has had on the body of federal law which it supplements.

III.

The final paper in this symposium, Elaine Won's *Protecting Our Children*, deals with the constitutional constraint on federalism's "laboratories of democracy." State-law innovations, however valuable as experiments in effective governance, cannot transgress federal constitutional limitations on state power. Requirements that school children be vaccinated for such common diseases as measles have been left entirely to state law. There are three common exemptions: the medical exemption of students who have some sort of immuno-deficiency; the exemption of students whose parents have a religious objection to vaccination; and the more-amorphous exemption of students whose parents object to vaccination on "personal-belief" grounds.

Recent outbreaks of vaccination-controllable diseases, most prominently a measles outbreak among visitors to Disneyland, have focused attention on "herd immunity." In any given population, vaccination of approximately 90 percent is sufficient to prevent epidemic disease by vaccination-preventable pathogens. This "herd immunity" allows immuno-deficient individuals to benefit from that shared immunity without the potentially fatal consequences of personal vaccination. But when additional individuals decline vaccination on religious or ideological grounds, depressing the overall vaccination rate below the 90-percent herd-immunity threshold, a serious threat to public health may be created.

Ms. Won's paper discusses the constitutionality of proposed legislation in California that would abrogate the religious and person-belief exemptions to California's mandatory school-vaccination law. The bill she discussed,

Senate Bill 277, was in fact signed into law by Governor Jerry Brown on the same day that Ms. Won's paper was submitted for review: June 30, 2015.

The requirement of vaccination as a condition of enrollment in public schools has a long history of judicial review. Ms. Won begins her account of the relevant state and federal cases in the nineteenth century. It seems that parents blindly opposed to vaccination inhabit the same forget-the-facts anti-intellectual space as climate-change deniers. Recently, a retracted report of a wholly unproven correlation between the principal childhood vaccines and autism has led to a four-fold spike in parental claims for a "religious" or "personal-belief" exemption of their children from vaccination. This threatens the herd immunity of school children, which is the only defense against epidemic disease for children who, because they have degraded immune systems (often incident to organ transplants or cancer treatment) would likely be killed by otherwise routine vaccinations.

The enactment of SB 277 has already spawned lawsuits and proposed ballot measures. Ms. Won's careful and sustained analysis in support of SB 277's constitutionality suggests that, in court at least, the opponents of comprehensive vaccination of public school students are unlikely to shut down this particular experiment in the laboratories of democratic federalism.

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EDITOR'S NOTE:

Among the goals of the California Supreme Court Historical Society and its journal are to encourage the study of California legal history and to give exposure to new research in the field. Publication of the following "Student Symposium" furthers both of these goals.

Professor John Oakley, who offers a course each year in Constitutional Law at the University of California, Davis School of Law, graciously agreed to propose to his Spring 2015 students that they consider writing on California aspects of the topic, with the possibility that the most promising papers might be accepted by the journal. From those provided by Professor Oakley, three appear on the following pages as a student symposium on intersections of federal and California law.

— SELMA MOIDEL SMITH

THE DEATH PENALTY DEBATE:

Comparing the United States Supreme Court's Interpretation of the Eighth Amendment to that of the California Supreme Court and a Prediction of the Supreme Court's Ruling in Glossip v. Gross

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INTRODUCTION

The United States has long grappled with the constitutionality of capital punishment. The flip-flopping history of the country's stance on the death penalty indicates that this issue not only has several underlying components, but also that it has never been and never will be a non-controversial societal problem.

As society progressed and technology advanced, the death penalty did not become obsolete but instead became even more complex. Methods of execution that the early Americans relied on, such as hanging and the firing squad, were displaced by drugs and other technological advancements. And with these new methods came increasing judicial and public scrutiny.

This paper traces the history of the United States Supreme Court's application of the Eighth Amendment to the death penalty and compares

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this to the California Supreme Court's application of the California Constitution to capital punishment. This paper will also discuss how the current shortage of lethal-injection drugs has prompted states to turn to other methods of execution, such as using a controversial drug in their lethal-injection protocol. One such case currently before the United States Supreme Court, *Glossip v. Gross,* addresses this issue. This paper will predict how the United States Supreme Court will apply the federal constitution's "cruel and unusual punishment" prohibition to this pending case.

I. THE UNITED STATES SUPREME COURT'S INTERPRETATION OF THE EIGHTH AMENDMENT

A. A BRIEF HISTORY: DOCUMENTING THE COURT'S VARIOUS OPINIONS REGARDING CAPITAL PUNISHMENT

American society instituted the death penalty as early as 1608, and American views regarding lethal punishment have greatly fluctuated ever since.[1] The mid-twentieth century saw a substantial fluctuation in the public's perception of the death penalty. While the death penalty gained traction and support from 1920 to 1940, this movement was quickly quelled by a counteracting decrease in public support for capital punishment in the 1950s.[2]

The 1960s featured new challenges to the death penalty's seemingly unbridled discretion. Until this time, the Fifth, Eighth, and Fourteenth Amendments had been interpreted as allowing the death penalty.[3] This wave of new analysis began by addressing the absolute discretion given to sentencing juries,[4] a trend that continued until *Furman v. Georgia* in

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[1] *History of the Death Penalty,* Death Penalty Information Center, *available at* http://www.deathpenaltyinfo.org/part-i-history-death-penalty#const (last accessed Feb. 27, 2015).

[2] *Id.*

[3] *Id.*

[4] *See* United States v. Jackson, 390 U.S. 570 (1968) (holding that the death penalty provision of the Federal Kidnapping Act, which states that the defendant shall be punished by death if the kidnapped person has not been liberated unharmed and if the verdict of the jury should so recommend, is unconstitutional because it tends to discourage of the defendant's assertion of his Fifth Amendment right to plead not

1972. However, amid the increasing scrutiny of the death penalty and the meager number of executions that actually took place in the mid-twentieth century, the federal government expanded the list of death-eligible federal offenses. A series of airplane bombings and hijackings in the late 1950s led Congress to establish such crimes as capital offenses, and killings by explosives became capital crimes in 1970.[5] Therefore, although the list of capital crimes was increasing, the era of the Civil Rights Movement spurred litigation that somewhat restricted jurors' discretion in death penalty cases.

Then in 1972, the United States Supreme Court released an unprecedented yet divided five-person majority judgment in *Furman v. Georgia*[6] that invalidated every existing capital statute and verdict.[7] The fact that each justice wrote a separate opinion, and that no justice signed more than one opinion,[8] highlighted American society's reluctance and ability to reach a resolution, a trend that is unlikely to change any time soon. In *Furman,* the justices agreed that the current death-penalty administration was unconstitutional but that this may not be the case for death sentences imposed under different procedures.[9]

Many states responded by ratifying new capital statutes, beginning just five months after the *Furman* decision was published.[10] When rewriting their statutes, states focused on reining in discretion from the jury and even the judge. The Supreme Court reviewed the constitutionality of

guilty and to deter exercise of the Sixth Amendment right to a jury trial); Witherspoon v. Illinois, 391 U.S. 510 (1968) (a juror cannot be prevented from serving on a jury for a death penalty case simply because he has indicated he had reservations about the death penalty).

5 Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role,* 26 Fordham Urb. L.J. 347, 371 (1999).

6 Furman v. Georgia, 408 U.S. 238 (1972).

7 James S. Liebman, *Slow Dancing With Death: The Supreme Court and Capital Punishment, 1963–2000,* 107 Colum. L. Rev. 1, 7–8 (2007).

8 *Id.*

9 *Id.* at 8 (however, while the justices did agree that the current system was unconstitutional, they could not agree on the basis for which it was unconstitutional. Justice Douglas believed the process was discriminatory while Justice White thought the death decisions were "arbitrarily infrequent.").

10 *Introduction to the Death Penalty,* Death Penalty Information Center (last accessed February 27, 2015), *available at* http://www.deathpenaltyinfo.org/part-i-history-death-penalty#const (Florida rewrote its death penalty statute just five months after *Furman*).

these new statutes in the 1976 decisions known as the *Gregg* decisions. The Court not only upheld the constitutionality of these new laws but also retreated from its finding in *Furman*. As applied under these new statutes, the Court held that the death penalty was constitutional under the Eighth Amendment.[11]

In *Gregg,* the United States Supreme Court held that although the Eighth Amendment does not prohibit the death penalty, criminal sanctions must "accord with the dignity of man, which is the basic concept underlying the Eighth Amendment."[12] Thus the punishment for any particular crime cannot be excessive. Whether a punishment is excessive depends on two factors: first, the punishment cannot involve the unnecessary and wanton infliction of pain, and second, the punishment cannot be grossly out of proportion to the crime's severity.[13]

Chief Justice Burger's *Gregg* Court took the opportunity to review the history of the "cruel and unusual punishment" clause in the Eighth Amendment. The earliest cases involving Eighth Amendment claims did not focus on whether or not the death penalty itself was constitutional, but instead determined whether certain methods of execution violated the Amendment.[14] The Court recognized that the Eighth Amendment has "been interpreted in a flexible and dynamic manner" and that it has not "been regarded as a static concept," principles that the Court still adheres to today.[15] Chief Justice Warren had famously stated that "the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[16]

This idea of interpreting the Eighth Amendment in relation to societal maturation is reflected in the flurry of cases that immediately followed *Gregg.* The fact that the Court wavered and overruled its own precedent several times indicates that societal opinion toward the death penalty also evolves over time. For example, the Court has overturned itself several

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11 *Id.* (*See also* Gregg v. Georgia, 428 U.S. 153 (1976)).

12 *Gregg, supra* note 11 at 173.

13 *Id.*

14 *Id.* at 170 (citing Wilkerson v. Utah, 99 U.S. 130, 136 (1879); *In re* Kemmier, 136 U.S. 436, 447 (1890); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947)).

15 *Id.* at 171, 173.

16 *Id.* at 173 (citing Trop v. Dulles, 336 U.S. 86, 101 (1958)).

times in regard to whether a mentally ill person can be executed in the United States, ultimately determining that executing a mentally ill prisoner violates the Eighth Amendment.[17] Although the United States Supreme Court has not issued as many death penalty-related opinions in the last few years, the concept of interpreting the Eighth Amendment in the context of ever-changing societal norms would undoubtedly still hold.

These cases following *Gregg* were not only varied in their outcomes but also in their scope. They addressed a wide span of issues regarding the application of the death penalty, including but not limited to the crimes to which the death penalty can be applied, whether the death of the victim was necessary in order to impose the death penalty, the age of the defendant, and the defendant's mental capacity.

1. The Court's Focus on Disproportionality and Whether the Nature of the Defendant's Crime Warrants Capital Punishment

In *Woodson v. North Carolina,* decided the same year as *Gregg,* the Court held that the mandatory imposition of the death penalty in first-degree murder cases violated the Eighth and Fourteenth Amendments.[18] The Court reasoned that such mandatory sentencing was unconstitutional because it prevented the jury from considering the personalized circumstances and characteristics of the defendant.[19] This 5–4 judgment, announced in a plurality opinion written by Justice Stewart, fractured the Court and resulted in numerous concurring and dissenting opinions. Only Justices Powell and Stevens voted with the majority without writing a separate opinion.[20] Justice Brennan concurred in the judgment as did Justice Marshall, who expressed his view that the death penalty should always be considered cruel and unusual punishment under the Eighth Amendment.[21]

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[17] *See* Ford v. Wainwright, 477 U.S. 399 (1986) at 410 (holding that it is unconstitutional to execute an insane person); Penry v. Lynaugh, 492 U.S. 302 (1989) (holding that the execution of people with mental retardation did not violate the Eighth Amendment); Atkins v. Virginia, 536 U.S. 304 (2002) (finding that executing mentally ill prisoners violates the Eighth Amendment's prohibition of cruel and unusual punishment).

[18] Woodson v. North Carolina, 428 U.S. 280 (1976).

[19] *Id.* at 304.

[20] *Id.* at 282.

[21] *Id.*

Justice White wrote a dissenting opinion, which was joined by Chief Justice Burger and Justice Rehnquist, in which he rejected the argument that the death penalty violated the Eighth Amendment in every circumstance and that the North Carolina statute at issue would not result in the death penalty being arbitrarily imposed so as to render the statute void.[22] Justice Blackmun also penned his own dissenting opinion, as did the more conservative Justice Rehnquist.[23] Justice Rehnquist's opinion contained several reasons for his dissent, including that there was no basis for the plurality's conclusion that a mandatory death sentence for a particular crime was unduly harsh and rigid and that there was no basis in the plurality's conclusion that there must be "particularized consideration of relevant aspects of the character and record of each convicted defendant."[24]

The Court released another death penalty opinion the following year that also limited the scope of capital punishment, this time focusing on the crime of rape. In *Coker v. Georgia,* in a 7–2 judgment without a majority opinion, the Court held that the Eighth Amendment prohibits the imposition of the death penalty in a case where an adult woman is raped but not killed.[25] Justice White wrote the plurality opinion that Justices Stewart, Blackmun, and Stevens joined; this opinion "expressed the view that the Eighth Amendment barred not only punishments that were barbaric but also those that were excessive in relation to the crime committed" and therefore, the death penalty was an excessive punishment for the crime of rape because it did not involve the death of another.[26]

Justice Brennan, one of the more liberal justices on the bench at the time, concurred in this judgment but argued that the death penalty was cruel and unusual punishment in all circumstances.[27] Justice Marshall joined Brennan's concurrence. Justice Powell wrote his own concurring opinion in which he concluded that the Court was correct in holding that the death penalty was excessive in this particular situation because there were no facts of brutality or lasting injury, but that the plurality opinion

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22 *Id.*

23 *Id.*

24 *Id.*

25 Coker v. Georgia, 433 U.S. 584 (1977).

26 *Id.* at 586.

27 *Id.*

went too far in holding that the death penalty was *always* necessarily a disproportionate penalty for rape.[28] Justice Powell's concurrence demonstrated his well-recognized role on the Court as the pivotal vote, although he did tend to vote conservatively on criminal law issues.[29]

Chief Justice Burger wrote the dissenting opinion, joined by Justice Rehnquist, where he argued that rape is not a minor crime and not too far removed from murder in terms of heinousness.[30] This dissent also pointed out that the plurality opinion questioned the constitutionality of statutes that imposed the death penalty for crimes that might not result in immediate death, such as treason, kidnapping, and airplane hijacking.[31]

After the Court held that the death penalty could not be imposed for a rape conviction, it continued its analysis of death-eligible crimes and concluded that a defendant convicted of ordinary murder is ineligible for capital punishment in *Godfrey v. Georgia*.[32] In yet another judgment without a majority opinion, the Court invalidated a provision of the Georgia Code that allowed a defendant to be sentenced to death after a finding that his offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," finding that this provision violated the cruel and unusual punishment prohibition of the Eighth Amendment because it was too vague.[33] Specifically, the Court held that "there is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' "[34]

Justice Stewart wrote the plurality opinion, just four years after penning the plurality opinion in *Woodson*.[35] Justices Blackmun, Powell, and

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28 *Id.*

29 *Retired Justice Lewis Powell Dies at 90,* The Washington Post, *available at* http://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/powell082698.htm (last accessed April 15, 2015).

30 *Coker, supra* note 25 at 586.

31 *Id.*

32 Godfrey v. Georgia, 446 U.S. 20 (1980).

33 *Id.* at 422.

34 *Id.* at 428–29.

35 *Id.* at 422 (citing *Woodson, supra* note 18).

Stevens joined Stewart's plurality opinion.[36] Justice Marshall, joined by Justice Brennan, wrote a concurring opinion in which he reiterated his view that the death penalty is always cruel and unusual punishment. Chief Justice Burger wrote a dissenting opinion arguing that because the defendant himself said his crime was "heinous," this is sufficient to warrant the imposition of the death sentence.[37] He also argued that the plurality's opinion has created the onerous task of forcing courts to decide on a "case by case" basis whether a defendant's conduct is egregious enough to deserve capital punishment.[38] Justice White wrote a rather passionate dissenting opinion that Justice Rehnquist joined.[39] It is interesting to note that Justice White strongly dissented here but wrote the plurality opinion in *Coker,* in which the Court held that the death penalty for rape was excessive.[40]

Finally, in 1986, Chief Justice Rehnquist's Court decided to expand the scope of capital punishment by ruling that it does not violate the Eighth Amendment to sentence to death a defendant who was a major participant in the commission of a felony that resulted in a death.[41] The Court held 5-4 in *Tison v. Arizona* that the imposition of the death penalty for a felony murder conviction is not cruel and unusual punishment if the defendant had "major participation in the felony and [showed] reckless indifference to human life."[42]

Expansion of the death penalty's scope under the Rehnquist Court is not surprising, given that Justice Rehnquist had been a consistent advocate for the death penalty throughout his time on the Court. Additionally, Justice Powell was still on the Court and Justice Scalia had since joined. Justices Powell, Rehnquist, Scalia, and White joined Justice O'Connor's majority opinion, which argued that the facts of this case (in which defendants brought "an arsenal of lethal weapons" into Arizona State Prison and

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36 *Id*.

37 *Id*. at 442.

38 *Id*. at 443.

39 *Id*. at 444.

40 *Coker, supra* note 25 at 586.

41 Tison v. Arizona, 481 U.S. 137 (1986) (thus qualifying the United State Supreme Court's ruling in *Enmund v. Florida,* 458 U.S. 782 (1982), in which the Court held it unconstitutional to impose the death penalty on a defendant who is a minor participant in a felony and did not kill or intend to kill).

42 *Id*. at 138.

gave them to two convicted murderers in furtherance of a prison-break scheme) support the conclusion that the death penalty was not disproportionate to the defendants' crimes because defendants committed acts that were likely to result in the taking of an innocent life and showed reckless indifference to the value of human life.[43] Justice Brennan wrote a dissent, joined by Justices Marshall, Blackmun, and Stevens.

In 2008, the Court circled back to the issue of imposing a death sentence for a rape conviction, this time focusing on child rape. Although there were dissenters in *Coker* who advocated that the death penalty should not necessarily be forbidden for a rape conviction,[44] the Court in *Kennedy v. Louisiana* held that it is unconstitutional under the Eighth Amendment to sentence to death a defendant for a child-rape conviction in which the victim did not die because this sentence is a disproportionate punishment.[45]

In a 5–4 decision, the Court reasoned that there is a distinction between intentional first-degree murder and non-homicidal crimes; although these non-homicidal crimes, including child rape, are devastating and harmful, "in terms of moral depravity and of the injury to the person and to the public, they cannot compare to murder in their severity and irrevocability."[46] The majority stated that this opinion is only limited to crimes against people and that this case is not intended to address crimes against the State such as treason, espionage, and terrorism.[47] Justice Kennedy authored the majority opinion and was joined by Justices Stevens, Souter, Ginsburg, and Breyer.

Justice Alito filed a dissenting opinion, joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas, where he argued that such policy arguments are not pertinent to whether the death penalty constitutes cruel and unusual punishment for this crime and that holding "that the Eighth Amendment does not categorically prohibit the death penalty for the rape of a young child would not 'extend' or 'expand' the death penalty."[48] The dissent in *Kennedy* made it very clear that the conservative justices on the

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43 *Id.* at 151, 152.

44 *Coker, supra* note 25.

45 Kennedy v. Louisiana, 554 U.S. 407 (2008).

46 *Id.* at 412.

47 *Id.* at 437.

48 *Id.* at 462, 465.

Court would embrace an expansion of the death penalty and did not construe the "cruel and unusual punishment" provision as a necessarily prohibitive check on capital punishment.

2. How Personal Factors Such as Mental Retardation and Defendant's Age Affect the Court's Application of the Eighth Amendment to the Death Penalty

The following cases represent areas of death-penalty law that have proven to be inconsistently applied by the Court and remain controversial today. The first major United States Supreme Court case addressing the execution of mentally ill prisoners was *Ford v. Wainwright* in 1986. In *Ford,* Chief Justice Burger's Court held that executing mentally ill defendants violated the cruel-and-unusual punishment prohibition of the Eighth Amendment.[49] This case, which largely focused on Florida's procedures for determining whether a defendant is insane, splintered the Court. Justice Marshall wrote the Court's opinion and was joined by Justices Brennan, Blackmun, and Stevens.[50] Justice Powell, concurring in part and concurring in the judgment, wrote his own opinion to which Justice O'Connor joined in part.[51] Justice O'Connor also wrote a dissent in part, which Justice White joined, in which she shared Justice Rehnquist's view that "the Eighth Amendment does not create a substantive right not to be executed while insane."[52] Justice O'Connor's concurrence in part and dissent in part reflected her position on the court as a moderate conservative.[53] Justice Rehnquist, joined by Chief Justice Burger, wrote his own dissent.[54]

This issue proved to be so controversial that just three years later, the United States Supreme Court granted certiorari to another case addressing the application of the death penalty to the mentally ill and overturned *Ford*. In *Penry v. Lynaugh,* Justice O'Connor writing for the Court held that the Eighth Amendment does not categorically prohibit capital punishment

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[49] *Ford,* supra note 17.

[50] *Id*. at 401.

[51] *Id*. at 418.

[52] *Id*. at 427.

[53] *Sandra Day O'Connor,* The Oyez Project at IIT Chicago-Kent College of Law (last accessed April 21, 2015), *available at* http://www.oyez.org/justices/sandra_day_oconnor.

[54] *Ford, supra* note 17 at 431.

for mentally ill criminals but that a mentally ill defendant is entitled to jury instructions that instruct as to the mitigating effects of mental retardation.[55] However, this expansion of the death penalty did not last long.

Atkins v. Virginia, decided in 2002, effectively overturned *Penry* and is the current law.[56] As Justice Scalia wrote in his dissent, this "decision is the pinnacle of [the Court's] Eighth Amendment death-is-different jurisprudence.[57] In *Atkins,* the Court categorically held that the Eighth Amendment prohibits imposing the death penalty on a mentally ill defendant and that the "Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender."[58] The Court reasoned that there is no deterrent effect for such offenders and that these defendants' reduced capacity heightens the risk of a wrongful execution.[59] Justice Stevens wrote the Court's opinion and was joined by Justices Kennedy, Souter, Ginsburg, and Breyer.[60] Justice O'Connor, the author of the Court's opinion in *Penry,* also joined Justice Stevens' opinion.[61]

The Court's conservative justices wrote two separate dissents: Chief Justice Rehnquist wrote a dissent that Justices Scalia and Thomas joined and Justice Scalia also wrote his own impassioned dissent that Chief Justice Rehnquist and Justice Thomas joined.[62] Scalia's dissent reiterated the standards for determining whether a punishment is cruel and unusual under the Eighth Amendment ("modes or acts of punishment that had been cruel and unusual at the time that the Bill of Rights was adopted, and modes of punishment that are inconsistent with modern standards of decency") and argued that executing the mildly mentally retarded did not fall under either of those categories.[63]

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55 Penry v. Lynaugh, 492 U.S. 302, 328, 339 (1989).

56 *Atkins, supra* note 17.

57 *Id.* at 337.

58 *Id.* at 321.

59 *Id.* at 319–20 (for example, mentally ill offenders are more likely to give false confessions, may be less able to give meaningful assistance to their attorney, are generally poor witnesses, and their demeanor may provide a false impression of their lack of remorse).

60 *Id.* at 306.

61 *Id.*

62 *Id.*

63 *Id.* at 339–40.

As with its analysis of cases pertaining to the defendant's mental capacity, the United States Supreme Court has wavered in its analyses of capital cases in which the defendant is a minor. The first case to address this particular issue is *Thompson v. Oklahoma,* decided in 1988. There, the Court held that the execution of an offender who committed his crime when he was fifteen years old or younger is unconstitutional under the Eighth Amendment.[64] The majority concluded that imposing the death penalty on minors under the age of sixteen has not made, or cannot be expected to make, "any measureable contribution to the goals that capital punishment is intended to achieve. It is, therefore, nothing more than purposeless and needless imposition of pain and suffering."[65]

Justice Stevens, the same justice who wrote the *Atkins* opinion that held it was unconstitutional to sentence a mentally ill defendant to death, wrote the plurality opinion and was joined by Justices Brennan, Marshall, and Blackmun.[66] Justice O'Connor, who had wavered in her stance on categorically prohibiting imposing the death penalty on the mentally ill, wrote an opinion concurring in the judgment in which she appeared not to rule out ever executing a minor but agreed that in this particular case, the death sentence was unconstitutional.[67]

Justice Scalia, joined by Chief Justice Rehnquist and Justice White, wrote a dissent in which he referred to the plurality opinion as a "loose cannon."[68] He also vehemently argued that there is no "plausible basis" for answering the question as to whether "there is a national consensus that no criminal so much as one day under 16, after individuated consideration of his circumstances, including the overcoming of a presumption that he should not be tried as an adult, can possibly be deemed mature and responsible enough to be punished with death for any crime."[69] Justice Kennedy did not participate in this decision.[70]

64 Thompson v. Okla., 487 U.S. 815, 838 (1988).
65 *Id.* (citing *Coker, supra* note 25 at 592).
66 *Id.* at 818.
67 *Id.* at 848–49.
68 *Id.* at 878.
69 *Id.* at 859.
70 *Id.* at 818.

Just one year later, Justice Scalia wrote the plurality opinion in *Stanford v. Kentucky* in which the Court reached a contrary conclusion with respect to juvenile offenders older than 15. In *Stanford,* the Court held that executing an offender who committed a crime at the age of 16 or 17 does not constitute cruel and unusual punishment under the Eighth Amendment.[71] Chief Justice Rehnquist and Justices White, O'Connor, and Kennedy joined Scalia's opinion.[72] Justice O'Connor wrote her own concurring opinion and Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, wrote the dissent.[73]

The Court revisited this issue in the 2005 case *Roper v. Simmons*. There, the Court not only overruled *Stanford* but also broadened the scope of the Eighth Amendment's prohibition on cruel and unusual punishment when it held that it is unconstitutional to sentence to death a defendant under the age of 18.[74] Justice Kennedy wrote the majority opinion, joined by Justices Stevens, Souter, Ginsburg, and Breyer.[75] Kennedy argued that "capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution" but that juvenile offenders cannot be classified among the worst offenders for three reasons: a juvenile's lack of maturity, the greater susceptibility of juveniles to negative influences and outside pressures, and the transitory nature of a juvenile's character when compared with that of an adult.[76] Justice Kennedy concluded that these reasons, along with evolving standards of decency and the fact that all other countries have forbidden the juvenile death penalty, compelled the Court to hold that executing a minor constitutes disproportionate punishment under the Eighth Amendment.[77]

Justice Stevens wrote a concurring opinion that Justice Ginsburg joined.[78] Justice O'Connor wrote a dissenting opinion where she expressed her view that the majority's decision was not justified by the objective

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71 Stanford v. Kentucky, 492 U.S. 361, 380 (1989).

72 *Id.* at 364.

73 *Id.*

74 Roper v. Simmons, 543 U.S. 551 (2005).

75 *Id.* at 555.

76 *Id.* at 568–70.

77 *Id.* at 575.

78 *Id.* at 555.

evidence of contemporary societal values.[79] Although Justice O'Connor had voted in the majority in *Thompson v. Oklahoma,* where the Court prohibited executing anyone under 16, her dissent in *Roper* is not surprising because she had always appeared hesitant to prohibit categorically the imposition of the death penalty on minors.[80] Justice Scalia adhered to his conservative values and wrote a dissenting opinion, joined by Chief Justice Rehnquist and Justice Thomas.[81]

Roper is still controlling today; pursuant to the Eighth Amendment, minors who commit crimes are immune from execution. It is unlikely that this will change any time soon. The Court's analysis in *Thompson, Stanford,* and *Roper* indicates that it relies very heavily on the national consensus regarding the application of the death penalty when reaching its conclusions. Today, it is highly improbable that a majority of the nation would condone executing a juvenile no matter how atrocious the crime.

B. HOW THE SUPREME COURT HAS INTERPRETED THE EIGHTH AMENDMENT AS IT PERTAINS TO CAPITAL PUNISHMENT METHODS

Despite the seemingly constant publicity and infamous nature of death penalty cases, "the Supreme Court has never invalidated a State's chosen method of execution."[82] The Court ruled on the legality of execution methods as early as 1879, when it held in *Wilkerson v. Utah* that an execution by firing squad does not violate the Eighth Amendment.[83]

As technology progressed, the Court began facing more challenges to the constitutionality of various execution methods. One of the more formative cases in which the United States Supreme Court addressed an execution method in relation to the Eighth Amendment was *Louisiana ex rel. Francis v. Resweber,* where Chief Justice Fred Vinson's Court held that attempting a second electrocution after the first failed does not violate the Eighth Amendment.[84] There, the defendant had been prepared

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79 *Id.*

80 *See Thompson, supra* note 64 at 848–49.

81 *Roper, supra* note 74 at 555.

82 Workman v. Bredesen, 486 F.3d 896, 899 (6th Cir. 2007) (refusing to invalidate the three-drug protocol used by Tennessee and twenty-nine other jurisdictions).

83 Wilkerson v. Utah, 99 U.S. 130 (1879).

84 Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947).

for execution in the electric chair, but when the executioner flipped the switch, there was a mechanical difficulty and the defendant did not die.[85] Defendant argued that he had already undergone the psychological strain of preparing for electrocution and having to suffer through it again would constitute cruel and unusual punishment.[86] The Court disagreed. It reasoned that the Eighth Amendment protects against "cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution."[87] The Court added that just because the defendant had already been subjected to a current of electricity does not make his successful execution more "cruel."[88] This broad, permissive holding in *Resweber* helps explain why no execution method has ever been deemed impermissible by the Court.

Then, in 1985, the Court refused to grant certiorari for a petitioner who claimed that execution by electrocution was unconstitutional.[89] This was true to form for Chief Justice Burger's Court, which was regarded as being dramatically conservative in the area of criminal law.[90] Justices Brennan and Marshall dissented, stating that the "Eighth Amendment forbids inhuman and barbarous methods of execution that go at all beyond the mere extinguishment of life and cause torture or a lingering death."[91] The two justices argue that empirical evidence and eyewitness testimony demonstrate that death by electrocution is extremely violent and "inflicts pain and indignities far beyond the mere extinguishment of life."[92]

Electrocution became a rather obsolete method soon after the *Glass* decision and states began turning to lethal drugs as their primary execution

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85 *Id.* at 460.

86 *Id.* at 464.

87 *Id.*

88 *Id.*

89 Glass v. Louisiana, 471 U.S. 1080 (1985).

90 *Biographies of the Robes: Warren Earl Burger,* Public Broadcasting Service, *available at* http://www.pbs.org/wnet/supremecourt/rights/robes_burger.html (last accessed April 22, 2015).

91 *Glass, supra* note 89 at 1084 (citing *In re* Kemmler, 136 U.S. 436, 447 (1890)).

92 *Id.* at 1086.

method.[93] The increase in popularity of this method resulted in an increase of prisoners' challenges to the method's constitutionality. The Court in *Baze v. Rees,* in a plurality opinion written by Chief Justice Roberts and joined by Justices Kennedy and Alito, denied petitioner's argument that Kentucky's lethal-injection protocol is unconstitutional under the Eighth Amendment because there is a risk that these protocols may not be properly followed and would thus result in significant pain.[94]

The Court explained that just "because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of objectively intolerable risk of harm that qualifies as cruel and unusual;" therefore, an "isolated mishap" does not violate the Eighth Amendment because it does not suggest cruelty or that the procedure produces a substantial risk of serious harm.[95] The plurality opinion also denied petitioner's proffered alternative lethal-injection procedure because a petitioner cannot challenge a state's already-approved execution method just by presenting a slightly safer alternative.[96] *Baze* made it even more difficult for prisoners on death row to succeed in bringing an Eighth Amendment claim.

III. HOW THE CALIFORNIA SUPREME COURT HAS APPLIED THE CALIFORNIA CONSTITUTION TO CAPITAL PUNISHMENT

The California Supreme Court established early in its existence high standards for proving that the death penalty is unconstitutional. In *People v. Oppenheimer* in 1909, the Court held that using execution methods "ordinarily adopted by civilized people, such as hanging, shooting, or electricity, is neither a cruel nor unusual punishment, unless perhaps it be so disproportionate to the offense for which it is inflicted as to meet the disapproval and condemnation of the conscience and reason of men generally,

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93 *Methods of Execution,* Death Penalty Information Center (last accessed April 21, 2015), *available* at http://www.deathpenaltyinfo.org/methods-execution; *see also* Baze v. Rees, 553 U.S. 35, 42 (2008).

94 *Baze, supra* note 93 at 41.

95 *Id*. at 50.

96 *Id*. at 51 (reasoning that this would lead to a slippery slope in which courts would have to determine the best execution practices).

as to shock the moral sense of the people."[97] When considering the culture and historical time period in which the Court decided *Oppenheimer,* the court's holding and the public support for the death penalty becomes clearer: California was a new state battling outlaws and overrun with new settlers and gold miners. Hanging outlaws was not abnormal for California citizens. In the years following, the California Supreme Court adhered to its conclusion in *Oppenheimer* and routinely denied petitioners' claims that the death penalty was unconstitutional under the California and United States Constitutions.[98]

One of the most distinctive California Supreme Court decisions that analyzes "cruel and unusual punishment" in relation to the death penalty was *People v. Anderson* in 1972, decided earlier in the same year that the United States Supreme Court released its *Furman* decision.[99] Until then, the California Supreme Court had focused on justifications for sustaining the death penalty and had relied heavily on the fact that much of the California population had witnessed executions and encouraged them as a form of "vigilante justice."[100] *Anderson* constituted an unprecedented liberal shift of the Court.

In *Anderson,* the California Supreme Court held that the death penalty constitutes cruel or unusual punishment under article I, section 6 of the California Constitution; therefore, the Court did not need to address the legality of the death penalty under the United States Constitution.[101] While it is likely that the California Supreme Court would have come to the same conclusion when analyzing capital punishment under the U.S. Constitution's Eighth Amendment, the Court's reliance on the California Constitution insulated its judgment from federal review.

It is instructive to note that article I, section 6, of the California Constitution, unlike the Eighth Amendment to the United States

97 People v. Oppenheimer, 156 Cal. 773, 737 (1909).

98 *See, e.g.,* People v. Quicke, 71 Cal.2d 502 (1969); People v. Thomas, 65 Cal.2d 698 (1967); People v. Bashor, 48 Cal.2d 763 (1957); *In re* Wells, 35 Cal.2d 889 (1950); People v. Lazarus, 207 Cal. 507 (1929).

99 *Furman, supra* note 6; People v. Anderson, 6 Cal. 3d 628 (1972).

100 *Id.* at 642.

101 *Id.* at 633–34.

Constitution, prohibits the infliction of cruel *or* unusual punishments.[102] However, the California Supreme Court stated that the "cruel *or* unusual punishment" provision in the California Constitution serves the same purpose as the Eighth Amendment in the United States Constitution.[103] The *Anderson* Court recognized that it had historically been interpreting constitutional claims to the death penalty on the basis of whether a punishment was cruel *and* unusual and determined that it must analyze the issue under the "cruel or unusual punishment" standard.[104]

The Court emphasized that in deciding that capital punishment is cruel in the constitutional sense, it did not concentrate only on the "mere extinguishment of life" or on a particular method of execution because the United States Supreme Court had already determined that these are not unconstitutional.[105] Instead, it focused on "the total impact of capital punishment, from the pronouncement of the judgment of death through the execution itself, both on the individual and on the society which sanctions its use."[106] The Court considered the "degrading and brutalizing" psychological effects of impending execution on a prisoner, the lengthy imprisonment before execution, the evolving standards of decency on which enforcement of the Constitution relies, and the steady decrease in executions in California over the last few decades.[107]

Justice McComb was the sole dissenter in *Anderson*.[108] He argued that the death penalty deters people from committing violent crimes that result in the deaths of innocent people.[109] It appears that the California population agreed with Justice McComb's views. Nine months after the California Supreme Court decided *Anderson,* California voters passed Proposition 17 in November 1972, which amended the California Constitution to declare that the death penalty is neither cruel nor unusual

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[102] *Id.* at 634 (opposed to cruel *and* unusual punishment under the Eighth Amendment of the U.S. Constitution).

[103] *Id.* at 640.

[104] *Id.* at 645.

[105] *Id.* at 645–46.

[106] *Id.* at 646.

[107] *Id.* at 648–50.

[108] *Id.* at 657.

[109] *Id.* at 658.

punishment.[110] Capital punishment was constitutional again in California — but only on terms passing muster under the federal constitution.

This changed just four years later in December of 1976, an important year for death-penalty litigation and a year in which the California Supreme Court's and United States Supreme Court's rulings intersected. As discussed earlier, the United States Supreme Court released its series of *Gregg* decisions in July 1976, where it held that while capital punishment does not violate the Eighth Amendment of the U.S. Constitution in all circumstances, some states' death-penalty laws were unconstitutional.[111] In December of 1976, the California Supreme Court piggybacked off *Gregg* and unanimously held in *Rockwell v. Superior Court* that California's capital punishment law violated the United States Constitution.[112]

In *Rockwell,* the Court quoted *Gregg* when it recognized that death-penalty laws are unconstitutional under the Eighth Amendment of the federal constitution if they make the death penalty mandatory and do not give the judge or jury absolute discretion in choosing life or death.[113] The laws must also provide standards for the sentencing authority so it can consider the particularized circumstances of the crime and defendant.[114] The California Supreme Court, after engaging in analysis of several United States Supreme Court decisions, ultimately found that California's death-penalty laws violated the Eighth Amendment because they required that death be a mandatory punishment for first-degree murder and did not allow for evidence of mitigating circumstances, therefore resulting in the arbitrary imposition of the death penalty.[115]

Yet again, this prohibition on capital punishment in California did not last long. The California Legislature rewrote the California death penalty law in 1977, specifically allowing mitigating evidence and adding the possible sentence of life in prison without parole, therefore effectively

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[110] *California,* Death Penalty Information Center, *available at* http://www.deathpenaltyinfo.org/california-1 (last accessed April 26, 2015).

[111] *Gregg, supra* note 11 (holding that North Carolina and Louisiana's death penalty laws were unconstitutional).

[112] Rockwell v. Superior Court, 18 Cal.3d 420 (1976).

[113] *Id.* at 428.

[114] *Id.*

[115] *Id.* at 445.

re-enacting the death penalty statute.[116] Proposition 7 superseded the 1977 death penalty statute in November of 1978, and is California's current death-penalty statute.[117]

California Penal Code section 3604(a) constitutes the death-penalty statute for California:

> The punishment of death shall be inflicted by the administration of a lethal gas or by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections.[118]

The prisoner has the choice between lethal gas and lethal injection. However, although they have the right to choose their execution method, in making this choice the inmates effectively waive their right to claim that the method is unconstitutional.[119]

Although the California Supreme Court has not yet ruled on cases alleging the unconstitutionality of California's execution methods, U.S. District Courts in California have addressed such claims. In 2006, U.S. District Court Judge Jeremy Fogel held in *Morales v. Tilton* that California's procedures for execution by lethal injection violated the Eighth Amendment of the United States Constitution.[120] Judge Fogel found that California's protocol was unreliable, lacked transparency, and contained serious deficiencies.[121] These deficiencies included inconsistent and unreliable screening of execution team members, a lack of meaningful training, supervision, and oversight of the execution team, inconsistent and unreliable recordkeeping, improper mixing preparation and administration of sodium thiopental by the execution team, and inadequate lighting,

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116 *History of Capital Punishment in California,* California Department of Corrections and Rehabilitation, *available at* http://www.cdcr.ca.gov/Capital_Punishment/history_of_capital_punishment.html (last accessed April 22, 2015).

117 *Id.*

118 Cal. Pen. Code §3604(a).

119 Stewart v. Lagrand, 526 U.S. 115 (1999).

120 Morales v. Tilton, 465 F. Supp. 2d 972, 981 (N.D. Cal. 2006).

121 *Id.* at 979–80, 81.

overcrowded conditions, and poorly designed facilities where the execution team works.[122]

Judge Fogel's *Morales* opinion resulted in a de facto moratorium on capital punishment in California because no licensed medical professional would perform the procedure.[123] This injunction was lifted in August 2010 when the California Department of Corrections and Rehabilitation adopted newly approved regulations, but California has still not executed a prisoner since 2006.[124]

However, in 2014, another District Court judge imposed a second moratorium on the death penalty in California. In *Jones v. Chappell,* Judge Cormac J. Carney held that California's death penalty administration violated the cruel and unusual punishment provision of the Eighth Amendment because it "is so plagued by inordinate and unpredictable delay that the death sentence is actually carried out against only a trivial few of those sentenced to death."[125] Therefore, the system is arbitrary in that many are sentenced to death but only a few are actually executed and such a system constitutes arbitrarily inflicting the ultimate punishment of death.[126]

The fact that California has been subject to two separate moratoriums on capital punishment just ten years apart for two completely different reasons demonstrates that the death penalty in California is on tenuous grounds. One federal court in California has even ruled an execution method to be unconstitutional.[127] While the United States Supreme Court has yet to do so, this may change in the upcoming year or so.

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122 *Id*. at 979–80.

123 *A Timeline of the Death Penalty in California,* Stanford Progressive, *available at* http://web.stanford.edu/group/progressive/cgi-bin/?p=1773 (last accessed April 23, 2015).

124 *California's Lethal Injection Protocol Deemed Invalid by State Court,* Prison Legal News, *available at* https://www.prisonlegalnews.org/news/2014/jun/5/californias-lethal-injection-protocol-deemed-invalid-state-court (last accessed April 22, 2015).

125 Jones v. Chappell, 31 F. Supp. 3d 1050, 1062 (C.D. Cal. 2014).

126 *Id*. at 1063 (noting that "arbitrariness in execution is still arbitrary, regardless of when in the process the arbitrariness arises").

127 It should be noted that this ruling was "as applied" and not "facial." It held lethal injections in California to be unconstitutional because of the way in which they were administered.

IV. THE NATIONAL DEBATE REIGNITED: HOW THE UNITED STATES SUPREME COURT WILL APPLY THE EIGHTH AMENDMENT IN *GLOSSIP V. GROSS* TO STATES' NEWLY PROPOSED EXECUTION METHODS AMID A LETHAL DRUG SHORTAGE

For at least a year, states have been unable to procure pentobarbital for their executions. Pentobarbital is one drug in the typical three-drug cocktail used in lethal injections.[128] This shortage has forced states to turn to other similar drugs as a substitute. In April of 2014, Oklahoma used midazolam, which is a sedative, and two other drugs to execute Clayton Lockett.[129] This three-drug combination had never been used in Oklahoma before and the execution went horribly wrong; Lockett regained consciousness during the procedure, tried to sit up, and then died of a massive heart attack.[130]

This is not the first botched execution since states have substituted other drugs for pentobarbital. In Ohio, a prisoner took twenty-five minutes to die and was gasping for breath after he was given an untested cocktail containing midazolam.[131]

The Supreme Court of the United States has finally decided to consider the issue of states' substituting drugs for the originally approved three-drug cocktail upheld in *Baze*.[132] On January 23, 2015, the Supreme Court granted certiorari to hear the appeal of three death-row inmates in Oklahoma who are challenging the state's new three-drug protocol.[133]

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128 *States Scramble to Deal With Shortages of Execution Drugs,* National Public Radio, *available at* http://www.npr.org/2015/03/11/392375383/states-scramble-to-deal-with-shortages-of-execution-drugs (last accessed April 26, 2015).

129 *Oklahoma Execution: What Went Wrong and What Happens Now*?, NBC News, *available at* http://www.nbcnews.com/storyline/lethal-injection/oklahoma-execution-what-went-wrong-what-happens-now-n93556 [hereinafter *Oklahoma Execution*] (last accessed April 26, 2015).

130 *Id.*

131 *Id.*

132 *Baze, supra* note 93 (holding that a popular three-drug lethal injection method is constitutional).

133 *Court To Rule on Lethal-Injection Protocol,* Supreme Court of the United States Blog, *available at* http://www.scotusblog.com/2015/01/court-to-rule-on-lethal-injection-protocols/ [hereinafter *Court To Rule*] (last accessed April 25, 2015).

Earlier that week, the Court had voted 5–4 to grant delays in four inmates' executions and denied a stay to one inmate, who was executed later that same night. The three remaining inmates bring the case currently before the Court.[134]

On April 29, 2015, the Supreme Court heard oral arguments in *Glossip v. Gross*. This case presents the following question: whether it is constitutional for a state to carry out an execution using a three-drug protocol where there is a well-established scientific consensus that the first drug has no pain-relieving properties and cannot reliably produce deep, coma-like unconsciousness and it is undisputable that there is a substantial risk of pain and suffering from the administration of the next two drugs when a prisoner is conscious.[135]

A. A STEP-BY-STEP ANALYSIS OF THE *BAZE* PLURALITY OPINION, CONCURRENCES, AND DISSENTS

The *Baze* Court upheld lethal injection in a 7–2 plurality opinion written by Chief Justice Roberts and joined by Justices Kennedy and Alito.[136] The plurality opinion emphasized that the Court has never invalidated a state's chosen procedure for carrying out an execution and that "simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual."[137] The plurality also denied several of the petitioner's claims that Kentucky's use of sodium thiopental is cruelly inhumane.[138]

Justice Alito wrote his own concurring opinion in which he states that *Baze* demonstrates the high standard for modifying lethal injection

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134 *Id.*

135 Glossip v. Gross, Supreme Court of the United States Blog, *available at* http://www.scotusblog.com/case-files/cases/glossip-v-gross/ [hereinafter Glossip] (last accessed April 24, 2015).

136 *Baze, supra* note 93 at 41.

137 *Id.* at 48, 50.

138 *Id.* at 53–56 (dismissing claim that there is a substantial risk of suffocation when there is an insufficient dose of sodium thiopental; petitioners did not establish a substantial risk of harm related to the IV lines; there is no excessive wait time to establish the IV).

protocol.[139] He wrote: "In order to show that a modification of a lethal injection protocol is required by the Eighth Amendment, a prisoner must demonstrate that the modification would '*significantly* reduce a *substantial* risk of *severe* pain.' Showing merely that a modification would result in some reduction in risk is insufficient."[140]

Justice Stevens wrote his own concurrence as well.[141] He predicted that instead of settling the death penalty debate once and for all as the Court intended to do with this opinion, *Baze* would actually incite more debate about the constitutionality of the three-drug protocol.[142] Although he voted with the plurality, his concurrence seemed hesitant. Justice Stevens is no longer on the Court, however, so his opinion in *Baze* is inconsequential for the purposes of predicting the Court's decision in *Glossip*.

Justice Scalia wrote a concurrence that Justice Thomas joined.[143] This concurrence was, essentially, a response to Justice Stevens' relatively liberal concurrence; Justice Scalia argued that Justice Stevens' conclusions are not supported by the available data and strongly advocated that the death penalty serves a retributive purpose.[144]

Justice Thomas also wrote a concurrence that Justice Scalia joined.[145] His concurrence specifically addressed the constitutionality of a method of execution and wrote that "in my view, a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain . . . ."[146] Therefore, in Justice Thomas' view, there is an extremely narrow standard for determining that an execution method is unconstitutional.

Justice Thomas conceded that not all methods of execution are constitutional, but the unconstitutional methods he listed so clearly constitute "cruel and unusual punishment" that his concession is not necessarily meaningful.[147] For example, he noted that burning at the stake is an

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139 *Id.* at 67.

140 *Id.*

141 *Id.* at 72.

142 *Id.*

143 *Id.* at 87.

144 *Id.* at 89, 90.

145 *Id.* at 94.

146 *Id.*

147 *Id.* at 95–96 (noting that former methods of burning at the stake, gibbeting, public dissection, emboweling alive, beheading, and quartering are clearly unconstitutionally cruel).

unconstitutional method of execution because, unlike hanging, it was "always painful and burned the body . . . . [I]t was considered 'a form of super-capital punishment, worse than death itself.'"[148] Gibbeting, where the prisoner was hung in an iron cage and his body would decay in public, was another unduly painful method.[149] Justice Thomas wrote that these methods violated the Eighth Amendment because they were purposely designed to inflict more pain and suffering than was necessary to cause death.[150] His concurrence ended with a recapitulation of his conservative argument: "In short, I reject as both unprecedented and unworkable any standard that would require the courts to weigh the relative advantages and disadvantages of different methods of execution or of different procedures for implementing a given method of execution."[151]

Justice Breyer wrote the last concurring opinion, in which he agreed with Justice Ginsburg that the relevant factors in assessing an execution method consist of "the degree of risk," "the magnitude of pain," and "availability of alternatives," and are all interrelated.[152] Justice Breyer appeared highly skeptical of petitioner's reports alleging that the lethal injection method may produce unnecessary suffering. He referred to the study as possibly being "seriously flawed" and noted that the research "casts a shadow of uncertainty upon the ready availability of some of the alternatives to lethal injection methods."[153] Thus, Justice Breyer's concurrence focused heavily on the studies and research supporting petitioner's claims.

Justice Ginsburg wrote the sole dissent, which Justice Souter joined.[154] A staunch liberal, she was unconvinced that inmates were adequately anesthetized by the first drug in the three-drug protocol.[155] She proposed that although the Court has addressed and preserved various methods of execution in the past, there is still "no clear standard for determining the constitutionality of a method of execution."[156]

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148 *Id.* at 95.
149 *Id.*
150 *Id.* at 96.
151 *Id.* at 106.
152 *Id.* at 107–08.
153 *Id.* at 109, 111.
154 *Id.* at 113.
155 *Id.* at 114.
156 *Id.* at 115.

B. A PREDICTION OF THE UNITED STATES SUPREME COURT'S *GLOSSIP V. GROSS* OPINION

The Court's composition has changed since *Baze,* but only slightly. Chief Justice Roberts, author of the *Baze* plurality, is still on the Court and will hear the *Glossip* case. The current Court has been called the "most conservative" Supreme Court in generations.[157] Republican Justices Scalia and Thomas, who both wrote strongly-worded conservative concurrences in *Baze,* remain on the Court. Justice Alito, a conservative who joined the *Baze* plurality and wrote his own concurrence, still holds his seat on the Court. Justice Breyer is also still on the Court and, although he wrote a concurring opinion in *Baze,* he is generally considered more liberal.

The only two justices who heard *Baze* and are no longer on the Court are Justices Souter and Stevens. Justice Souter joined Justice Ginsburg's dissent in *Baze* and was difficult to classify as either conservative or liberal.[158] Justice Stevens, too, avoided political labels but seemed to become a voice of moderation when the Court became more conservative with the appointments of Justice Alito and Chief Justice Roberts.[159]

Justices Kagan and Sotomayor have since replaced Justices Stevens and Souter. Justice Sotomayor replaced Justice Souter and many believe that her views mostly align with her predecessor's although she identifies as an independent.[160] Justice Kagan succeeded Justice Stevens. This also is not a marked ideological change because, although Justice Kagan is a steadfast liberal, Justice Stevens was often considered a leader of the liberals during his time on the Court.[161]

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157 *John Roberts,* Forbes, *available at* http://www.forbes.com/profile/john-roberts/) (last accessed April 26, 2015).

158 *David H. Souter,* The Oyez Project at IIT Chicago-Kent College of Law, *available at* http://www.oyez.org/justices/david_h_souter (last accessed April 24, 2015).

159 *John Paul Stevens,* The Oyez Project at IIT Chicago-Kent College of Law, *available at* http://www.oyez.org/justices/john_paul_stevens (last accessed April 26, 2015).

160 *Sotomayor Confirmed By Senate, 68–31,* The New York Times, *available at* http://www.nytimes.com/2009/08/07/us/politics/07confirm.html (last accessed April 26, 2015).

161 *Elena Kagan Confirmed as Supreme Court Justice,* CBS News, *available a*t http://www.cbsnews.com/news/elena-kagan-confirmed-as-supreme-court-justice (last accessed April 26, 2015).

Therefore, the current Court that will hear *Glossip* is predominately conservative, and seven out of the nine current members participated in the *Baze* opinion. Out of these seven members, six voted with the plurality with only Justice Ginsburg dissenting.[162]

As mentioned earlier, the predominant question to be presented in *Glossip* is whether it is constitutional for a state to carry out an execution using a three-drug protocol where there is a well-established scientific consensus that the first drug has no pain-relieving properties and cannot reliably produce deep, coma-like unconsciousness and it is undisputable that there is a substantial risk of pain and suffering from the administration of the next two drugs when a prisoner is conscious.[163] Although this is a slightly different question than that presented in *Baze,* both cases address the legality of a lethal-injection method. *Glossip,* however, is being decided in a different context because there is currently a shortage of the already-approved pentobarbital; this could mean that the Court may have to engage in an analysis of available alternative methods.

It may be a foreshadowing of the Court's decision that they denied one of the petitioner's requests to grant a delay of his execution.[164] It can be argued that, after the Court read the parties' briefs and still decided to allow the execution, this may be a sign that it does not think the lethal-injection method is unconstitutional. But others can also argue that simply because the Court did not grant a stay does not bear any indication of their ruling on the merits of the case.

The fact that the Court is laden with conservatives will likely be the determining factor in deciding *Glossip* and will probably result in an outcome similar to that of *Baze's*. Chief Justice Roberts will most likely vote that Oklahoma's use of midazolam in their drug cocktail is not unconstitutional even if it does cause the inmate pain; he wrote in *Baze* that simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual.[165] Therefore, he might argue in *Glossip* that this risk of pain from the midazolam

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162 *Baze, supra* note 93 at 113.

163 *Glossip, supra* note 134.

164 *Court To Rule, supra* note 132.

165 *Baze, supra* note 93 at 48, 50.

does not necessarily establish the "objectively intolerable risk of harm" that petitioners must prove.

There is hardly any doubt that Justices Scalia and Thomas will vote that the use of midazolam does not violate the Eighth Amendment. The use of this drug, likely to be held comparable to that of pentobarbital, definitely does not meet Justice Thomas' high standards of "cruel and unusual punishment" and in no way compares to the methods that he would deem unconstitutional (i.e. burning alive and decomposing in public). Justice Thomas will likely argue that the use of this new drug is not substituted solely for the purpose of "inflict[ing] more pain and suffering than was necessary to cause death" and therefore is constitutional.[166] Justice Scalia, whose *Baze* concurrence was mostly a rebuttal to Justice Stevens' concurrence, will certainly vote that the method is constitutional. There has not been one United States Supreme Court case that he has heard where he voted that the death penalty was unconstitutional.[167]

Justice Alito will also likely vote that Oklahoma's new method is constitutional. His concurrence in *Baze* highlighted the extremely high standard he applies for proving a violation of the Eighth Amendment.[168]

Justice Kennedy did not write a concurrence in *Baze* but voted with the plurality. He has been an inconsistent vote in the Supreme Court's death penalty cases: he voted with the majority in *Stanford v. Kentucky* to uphold the death penalty for juveniles but then voted with the majority in *Roper v. Simmons,* which overturned *Stanford*.[169] He also wrote the opinion of the Court in *Kennedy v. Louisiana,* where the Court struck down the execution of a child rapist. Therefore, his vote in *Glossip* is not as clearcut.

Justice Ginsburg will just as likely vote to remand the case, continuing the stay of execution. Her dissent in *Baze* indicated that she was highly

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166 *Id*. at 96.

167 *See, e.g.,* Thompson, *supra* note 64 (where he dissented in the Court's ruling that juveniles 15 years or younger could not be executed); *Stanford, supra* note 71 (where he wrote the opinion holding that 16-year-olds could be given the death penalty); Roper, *supra* note 74 (dissenting where the Court overturned *Stanford* and held that minors cannot be executed); *Atkins, supra* note 17 (dissenting when the Court ruled that mentally ill offenders cannot be executed).

168 *It's All Right With Sam,* The New York Times, *available at* http://www.nytimes.com/2015/01/08/opinion/its-all-right-with-samuel-alito.html (last accessed April 27, 2015).

169 *Stanford, supra* note 71; *Roper, supra* note 74.

skeptical of the humaneness of the pentobarbital, so this wariness will probably transfer to *Glossip*. This is especially true because the new drug, midazolam, has only been used a few times, and one of the executions in which it was used went horribly wrong.[170]

Justices Kagan and Sotomayor's votes are more dubious. Although Justice Kagan is liberal, she has expressed before that she has no reservations about ruling that the death penalty is constitutional.[171] Justice Sotomayor, a self-identified Independent, led the dissent in the Supreme Court opinion that denied the *Glossip* petitoner's request for his execution to be delayed.[172] She was joined by Justices Ginsburg, Breyer, and Kagan.[173] In this dissent, all four justices appeared skeptical about the effects of the untested drug midazolam.[174]

Justice Breyer wrote a concurring opinion in *Baze* where he focused mostly on the reliability and credibility of the studies in that case.[175] He seemed distrustful of the reports that alleged the lethal-injection drugs were inhumane. Because *Glossip* relies heavily on reports that allege the use of the new drug midazolam leads to an inhumane death, Breyer's analysis in *Glossip* will likely mirror that of his in *Baze*.

The fact that Justices Sotomayor, Ginsburg, Breyer, and Kagan were proponents of halting one petitioner's execution does not necessarily mean that they will find Oklahoma's new drug protocol unconstitutional. But it does suggest that the *Glossip* opinion may be slightly different than *Baze* in that more justices will find that the Oklahoma drug protocol is unconstitutional.

To conclude, because the California Supreme Court no longer has an independent state constitutional basis on which to suspend the death penalty, a ruling in *Glossip* upholding the use of midazolam in lethal

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170 *Oklahoma Execution, supra* note 128.

171 *Statements of Elena Kagan on the Death Penalty,* Texas Moratorium Network, *available at* http://www.texasmoratorium.org/archives/1287 (last accessed April 26, 2015).

172 *Sotomayor Leads Dissent in Oklahoma Death Case,* The National Law Journal, *available at* http://www.nationallawjournal.com/id=1202716150323/Oklahoma-Asks-Supreme-Court-to-Delay-Scheduled-Executions (last accessed April 26, 2015).

173 *Id.*

174 *Id.*

175 *Baze, supra* note 93 at 109.

injections will likely lead to the resumption of executions in California absent an adoption of an initiative amendment to the California Constitution abolishing the death penalty. Although California voters have previously rejected such initiatives, the recent approval of Proposition 47[176] has indicated that a liberal movement is sweeping the state. An initiative completely abolishing the death penalty may be in California's near future.

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[176] *California Proposition 47,* Ballotpedia.org, *available at* http://ballotpedia.org/California_Proposition_47,_Reduced_Penalties_for_Some_Crimes_Initiative_(2014) (last accessed June 27, 2015).

GENDER EQUITY IN THE WORKPLACE:

A Comparative Look at Pregnancy Disability Leave Laws in California and the United States Supreme Court

BY MEGHA BHATT*

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INTRODUCTION TO PREGNANCY DISCRIMINATION IN THE UNITED STATES

Pregnant women have historically faced barriers in being recognized as a special class of people in the workplace in need of greater protections. Until the last half-century, legislatures in the United States "protected" women by 1) systematically encouraging their total exclusion in the workplace except as teachers, secretaries, nurses and nannies and 2) regulating the

number of hours that pregnant women could work.[1] But this "protection" was often a pretext for preserving better jobs for men and keeping women out of certain roles.[2] The challenge we face today is how to protect women's access to the modern labor market without ignoring the difficulties and disabilities that affect women only. Many legislatures and employers do not recognize pregnancy as a valid "disability" condition that sometimes requires reasonable accommodations, temporary leave from work or other workplace protections. State and circuit courts are split regarding the idea of whether facially neutral laws violate the Pregnancy Discrimination Act (PDA) when they fail to recognize a disparate impact on pregnant women. I will discuss laws such as the PDA of Title VII of the Civil Rights Act of 1964 that was enacted to protect pregnant women, as well as California and federal case law that give women increasing protections in the workplace.

This paper will comparatively present the evolution of cases from the federal courts as well as California courts on the subject of job-protected pregnancy leave and reasonable-accommodation laws. I will also discuss how the history of cases affects women and families in their daily lives and what this means for the future of sex jurisprudence. The way that the United States Supreme Court has interpreted how the status of pregnancy fits into sex discrimination has evolved over the past forty to fifty years. Due to the Americans with Disabilities Act — which provides for reasonable accommodations in the disability rights context — groups have advocated for similar protections for women. However, the Supreme Court has been reluctant to accept this comparative approach. There are many explanations of how the law should protect pregnant women in the workplace. In this paper, I argue that when courts fail to recognize a lack of pregnancy

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[1] Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 Duke J. Gender L. & Pol'y 67, 71–72 (2013); 208 U.S. 412, 422 (1908).

[2] *See, e.g.,* Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1219, 1237–38, 1239 (1986) (observing that "[f]etal vulnerability policies excluding all fertile women have been adopted only in male-dominated industries," while "women are generally allowed to work in women's jobs without restrictions based on fetal safety"); David L. Kirp, *Fetal Hazards, Gender Justice, and the Justices: The Limits of Equality,* 34 Wm. & Mary L. Rev. 101, 115 (1992) ("Expressions of corporate concern for the plight of fetuses . . . have been highly selective. Businesses that depend heavily on women workers have been much less scrupulous about the dangers they impose on the unborn . . .").

leave or reasonable accommodations in the workplace as having a disparate impact on women, it furthers sex discrimination. It may seem obvious that lack of reasonable accommodation leads to a disparate impact for women, but surprisingly, California courts and the United States Supreme Court have been slow to make this recognition explicit. In order to establish statutorily reasonable accommodations, the courts must first recognize the disparate impact.

Lack of proper leave laws and reasonable accommodations put women at risk of losing their livelihood, medical benefits, career trajectory and sense of security. It is important that when deciding cases that interpret the PDA, our federal judiciary should act in a way that will allow pregnant women to get reasonable accommodations that are necessary in the workplace. In California, there are more protective laws than those in the federal system. However, the California judiciary also has great potential for improvement in pregnancy discrimination jurisprudence.

II. HOW TO RECONCILE TITLE VII WITH MORE ADVANCED STATE LAWS: PDA AND PREGNANCY DISCRIMINATION LAWS

A. FEDERAL STATUTORY AND CASE LAW

Pregnancy-discrimination jurisprudence in the United States made some significant strides over the past fifty years. Early cases about pregnancy decided that pregnancy discrimination was not considered sex discrimination and pregnancy was not considered a disability.[3] A brief overview of the progress that our legislature and judiciary have made will be presented.

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employment discrimination on the basis of sex and several other protected classifications. While it seems obvious now that treating an employee differently because she is pregnant would fall within the protections of Title VII, this was not always the case. In *Geduldig v. Aiello,* in 1974, the U.S. Supreme Court held that there was no equal protection violation for denying

[3] Martinez v. NBC Inc., 49 F. Supp. 2d 305, 308 (S.D.N.Y. 1999) ("Every court to consider the question to date has ruled that pregnancy and related medical conditions do not, absent unusual conditions, constitute a [disability] under the ADA.").

normal pregnancy disability benefits from the California state disability insurance program.[4] The four plaintiffs in *Geduldig* argued that being denied disability insurance for pregnancy although they were otherwise qualified for the program was a violation of the Equal Protection Clause because the policy adversely affected women. Regarding the Equal Protection Clause arguments, the Court reasoned that "the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all."[5] The Court was quick to dismiss the gender discrimination issue in a footnote — reasoning that the potential recipients of disability funds are either pregnant women or non-pregnant persons.[6] While the first group is all-female, the second group consists of males and females and therefore members of one sex only were not discriminated against.[7] At this time, the Supreme Court was not ready to accept pregnancy discrimination as sex discrimination but did not say so explicitly.

Two years later, In *General Electric v. Gilbert,* the Supreme Court addressed the issue of whether a disability policy that excluded pregnant women was a violation of Title VII.[8] In *Gilbert,* the Court stated that the *Geduldig* equal protection rationale was directly on point to the Title VII discrimination claims in the present case. The Court held that discrimination based on pregnancy was not sex discrimination, as prohibited by Title VII.[9] *Gilbert* was the first instance in which the Court held explicitly that Title VII of the Civil Rights Act did not protect women from pregnancy-based discrimination.[10]

In *Nashville Gas Co. v. Satty,* decided only one year after *Gilbert,* the Supreme Court invalidated an employer policy forcing pregnant women to take leave from work and then denying them their previously accumulated seniority when bidding for new positions thereafter.[11] As the Court reconciled this position with *Gilbert,* employers were not required to provide

4 Geduldig v. Aiello, 417 U.S. 484, 494 (1974).

5 *Id.* at 485.

6 *Id.* at 496 n.20.

7 *Id.*

8 General Electric Co. v. Gilbert, 429 U.S. 135–36 (1976).

9 *Id.*

10 *Id.*

11 Nashville Gas Co. v. Satty, 434 U.S. 136, 142 (1977).

benefits to "one sex or the other 'because of their differing roles in the scheme of human existence,"' but neither could they "burden female employees in such a way as to deprive them of employment opportunities."[12] The next year in 1978, Congress passed the Pregnancy Discrimination Act which marked a reversal of the foregoing trend in case law.

1. Pregnancy Discrimination Act

In 1978, Congress swiftly enacted the Pregnancy Discrimination Act, an amendment to Title VII, for the express purpose of repudiating *Gilbert*.[13] The purpose of the PDA was to "enable women to maintain labor-force attachments throughout pregnancy and childbirth."[14] It amended Title VII to require that women affected by pregnancy "be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work."[15] The Pregnancy Discrimination Act also prohibits discrimination based on pregnancy with respect to pay, job assignments, promotions, layoffs, training, fringe benefits, firing, and any other term or condition of employment.[16] The PDA applies only to workplaces with fifteen or more employees, as well as all employment agencies, apprenticeship or training programs, and labor organizations.[17]

Under the federal Pregnancy Discrimination Act (PDA), an employer that allows temporarily disabled employees to take disability leave or unpaid leave, must allow an employee who is temporarily disabled due to pregnancy to do the same. After the Court's decision in *Gilbert,* Congress endeavored to expand protections to pregnant workers statutorily.[18] The

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12 Brake & Grossman, *supra* note 1 at 73–74.

13 AT&T Corp. v. Hulteen, 556 U.S. 701, 727 (2009).

14 Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality,* 46 Harv. C.R.–C.L. L. Rev. 484 (2011).

15 42 U.S.C. § 2000e(k).

16 U.S. Equal Employment Opportunity Commission, Pregnancy Discrimination, *available at* http://www.eeoc.gov/eeoc/publications/fs-preg.cfm.

17 Legal Aid Society — Employment Law Center, Pregnancy Discrimination, Pregnancy Accommodations, and Pregnancy Disability Leave, *available at* http://las-elc.org/fact-sheets/pregnancy-discrimination-pregnancy-accommodations-and-pregnancy-disability-leave#sthash.oLjdUtZG.dpuf.

18 *See* Nicholas Pedriana, *Discrimination by Definition: The Historical and Legal Paths to the PregnancyDiscrimination Act of 1978,* 21 Yale J.L. & Feminism 1 (2009)

PDA was a fundamental turning point because it nullified the decision in *Gilbert* by providing that discrimination based on pregnancy is sex discrimination, within the meaning of Title VII.

The Pregnancy Discrimination Act contains two key provisions. First, it provides that unlawful sex discrimination under Title VII includes discrimination "on the basis of pregnancy, childbirth, or related medical conditions."[19] Second, it provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."[20] Most of the litigation relating to the PDA centers on the second provision. Lower courts have tied the reach of the second clause to the scope of the first instead of seeing clause two as sufficient to establish a violation of the PDA standing alone.[21] Nevertheless, as Brake and Grossman argue, the text and legislative history of the PDA point to the second clause as establishing a defense to pregnancy discrimination if pregnant women are treated the same as others in their ability to work. Or it could be treated as an independent violation of the Act if pregnant workers are treated worse than those similar in their ability to work.[22] The scope of the comparative right of accommodation is not fully known but should be made more clear with the decision in *Young v. UPS*.[23]

Five years after enactment of the PDA, in *Newport News Shipbuilding v. EEOC,* the EEOC brought a discrimination claim. The EEOC made two claims: 1) the failure of the employer's health insurance plan to provide its female employees with hospitalization benefits for pregnancy-related conditions to the same extent as other medical conditions and 2) providing less favorable pregnancy benefits for spouses of male employees were both discriminatory under the PDA.[24] The Court held, "The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes,

(chronicling the passage of the PDA).

19 42 U.S.C. § 2000e(k) (2012).

20 *Id*.

21 See Brake & Grossman, *supra* note 1.

22 *Id*.

23 Young v. United Parcel Serv., Inc., 707 F.3d 437 (4th Cir. Apr. 10, 2015).

24 Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C., 462 U.S. 669, 670–71 (1983).

discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex."[25] In a span of ten years from the 1974 *Geduldig* ruling to *Newport News* in 1983, the United States Supreme Court began to recognize that discrimination on the basis of pregnancy is sex discrimination.[26] However, there is still a grey area with respect to the extent of reasonable accommodations that are necessary under the PDA. For example, in *Newport News,* the Court failed to link a lack of reasonable accommodations to a disparate impact on pregnant women. And they failed to link the disparate impact to a furtherance of sex discrimination against women.

In 1990, the Americans with Disability Act (ADA) was enacted to provide protections against employment discrimination for qualified individuals with disabilities.[27] The ADA requires reasonable accommodations for employees with disabilities that will allow the employee to perform the essential functions of his or her job. Courts have generally concluded that a normal pregnancy does not constitute a "disability" under the ADA.[28]

Unlike the ADA, however, the Pregnancy Discrimination Act does not contain a reasonable-accommodations provision."[29] Without accommodations, some women cannot perform the essential functions of their jobs. The lack of a reasonable-accommodations provisions gives some employers the ability to deny accommodations to pregnant workers and therefore to force them out of their jobs. For example, Peggy Young is a UPS worker who was initially denied accommodations to lift less-heavy packages due to her pregnancy. The *Young* case will be discussed in greater depth later in this paper.

In 2009, the Supreme Court heard *AT&T v. Hulteen*.[30] The issue was whether AT&T violated the PDA by paying retired female employees lower pensions because they took unpaid pregnancy-related leaves between 1968 and 1974, before passage of the PDA. The majority sided with AT&T, ruling that the service credit system was not the product of intent to discriminate,

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25 *Id*. at 669, 684.

26 *Young,* 707 F.3d 437.

27 42 U.S.C. §§ 12111–12117.

28 *Id*.

29 John Ashby, *EEOC Enforcement Guidance Expands Protections Against Pregnancy Discrimination,* 58 Advocate 31, 31–32 (2015).

30 *AT&T Corp. v. Hulteen,* 556 U.S. 701 (2009).

since the system was not unlawful at the time and therefore was a "bona fide seniority system," a defense to Title VII claims.[31] As Justice Ginsburg points out in her dissent, however, this ruling extends the effects of *Gilbert* into another millennium, despite the clear intent of Congress to repudiate it.[32] In *Gilbert,* the Court reasoned that policies that are "facially nondiscriminatory" and do not have "any gender-based discriminatory effect" are permissible.[33] In the same vein, in *AT&T,* the Court reasoned that the retired female employees in receipt of lower pensions were analogous to the disadvantageous treatment described in *Gilbert*: "facially nondiscriminatory," and without "any gender-based discriminatory effect."[34] However, the *AT&T* ruling does not serve to cease disadvantageous treatment for "all employment-related purposes on the basis of pregnancy, childbirth, or related medical conditions," as required by the PDA.[35] Instead the ruling serves to further discriminate against women for their pregnant status by paying them lower pensions, when compared to other similar employees, for the rest of their lives.

The language of the PDA indicating that pregnant women should be treated the same for all employment-related purposes implicitly suggests that any workplace policy that creates an invidious adverse impact for pregnant women should be re-examined. In the *AT&T* case, the adverse impact was a lower pension benefit for female employees who took unpaid pregnancy-related leaves during a certain timeframe. Ideally, the text of the PDA should read, "shall be treated the same for all employment-related purposes and shall not suffer a disparate impact due to employment policies. . . . " Since the PDA is not explicit in its language to indicate that adverse or "disparate" impacts on pregnant women are a violation of the statute, this can be realized only by the Supreme Court through its rulings or by Congress in amending Title VII to include the disparate impact language.

Over the years, gender-discrimination jurisprudence in the Supreme Court has evolved to include pregnancy discrimination. However, pregnant women continue to experience adverse implications both during

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31 *Id.* at 707–15.

32 *Id.* at 719.

33 *General Elec. Co.,* 429 U.S. at 136–38.

34 *AT&T Corp.,* 556 U.S. at 701, 721.

35 42 U.S.C. § 2000e(k).

pregnancy and even afterward. The Supreme Court must explicitly address the idea of disparate impact on child-bearing women, to show women that they will not be punished for choosing to have a baby and raise a family while maintaining a career.

2. What is the best way to secure reasonable accommodations for pregnant workers?

a. Equal Employment Opportunity Commission (EEOC) Guidance Document calls for reasonable accommodations

The Equal Employment Opportunity Commission (EEOC) has created a guidance document for how the Pregnancy Discrimination Act should be interpreted. The EEOC Guidance document is meant to summarize the law, as opposed to advocating for a change in the law.[36] Nevertheless, the most controversial part of the EEOC guidance document advocates for a change in the law — providing reasonable accommodations for pregnant women. The document states that even if they do not have a disability under the ADA, pregnant employees may be entitled to "workplace adjustments similar to accommodations provided to individuals with disabilities."[37] In accordance with the PDA, the EEOC guidance lists actions of the employer that may occur — current pregnancy, past pregnancy, potential pregnancy and related medical conditions — as examples of conduct that would be deemed discriminatory. However, the courts have rejected the notion that reasonable accommodations are required under the PDA.[38]

Although the PDA makes great strides by outlining employer actions that are discriminatory, there is still no legislation or case law that declares lack of adequate leave laws or reasonable accommodations to have a disparate impact on pregnant women. The jurisprudence in the field of pregnancy discrimination needs work. In order to secure statutorily reasonable accommodations for pregnant workers, the courts would first need to acknowledge the disparate impact.

Members of Congress have introduced the Pregnant Workers Fairness Act, which would expand the Pregnancy Discrimination Act to require that

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[36] Ashby, supra note 29 at 32.

[37] *Id.*

[38] *Id.*

pregnant employees be granted reasonable accommodations.[39] In addition, many states such as California have more protective laws than the PDA.[40] No federal court of appeal has adopted the position that failure to provide light duty or reasonable accommodations to pregnant women is a violation of the PDA. Doing so would be an important step in the federal scheme for women to gain the necessary accommodations in the workplace.

b. A limitation to the PDA is "no similarly situated" employees

Even if women are granted reasonable accommodations in line with the PDA, it is unclear how pregnant women will be accommodated in relation to others similar in their ability to work and how the various conditions related to reproduction will be handled. The PDA has been extremely useful in reshaping pregnancy-discrimination jurisprudence in the Supreme Court. However, the language of the statute does include some limitations. For example, the PDA states that pregnant women, "shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . ."[41] This language is not helpful because it is not clear what constitutes employees who are similar in their ability to work. The experience of pregnancy is unique to each woman. All pregnancies to some degree involve an enlarged abdomen, hormonal changes, weight gain, fetal movement and increased blood volume.[42] A woman dealing with complications due to pregnancy may experience depression, gestational diabetes, and severe, persistent nausea and vomiting.[43] In some cases women experience persistent nausea and vomiting throughout the entire pregnancy due to a condition called hyperemesis gravidarum (HG).[44] Hospitalization may be required in order to "be fed fluids and nutrients through a tube in their veins."[45] Additionally, some women may experience complications pre-pregnancy with fertility treatments and post-pregnancy with breastfeeding and postpartum depression.

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39 *See* Ashby, *supra* note 29; Pregnant Worker's Fairness Act, S. 942, 113th Cong. (2014).

40 Cal. Gov. Code § 12945; Cal. Gov. Code 12945.2 (a).

41 42 U.S.C. § 2000e(k).

42 Stages of Pregnancy, Women's Health, *available at* http://womenshealth.gov/pregnancy/you-are-pregnant/stages-of-pregnancy.cfm (last visited May 19, 2015).

43 *Id.*

44 *Id. See* Pregnancy Complications.

45 *Id.*

Every woman's body copes with pregnancy in a different way and comparing the symptoms of pregnancy with those of others "similar in their ability to work" is not always practical or fair for women.

For example, in 1994 in *Troupe v. May Department Stores Company,* a pregnant worker was terminated because of excessive tardiness due to abnormal morning sickness.[46] The plaintiff brought suit under the PDA but was unsuccessful in her claim. The U.S. District Court for the Northern District of Illinois granted summary judgment for the employer.[47] On appeal, the Seventh Circuit held that because the worker could not provide evidence of a non-pregnant employee with similar tardiness that was treated better, she could not bring a claim for pregnancy discrimination.[48] Instead, the Court noted that her tardiness demonstrated that she could not meet the employer's requirements for her job and therefore her termination was not due to a pretext.[49] In *Troupe,* the plaintiff's recovery depended upon proving more favorable treatment of a non-pregnant but similarly situated employee. If such a person does not exist, then pregnant workers are limited in their recovery, and discrimination can occur without remedy. This case might have been decided differently if there had been a specific accommodations provision for pregnant workers rather than an approach demanding comparison with other similarly situated employees.

Due to the wide range of experiences with pregnancy, pregnant women cannot adequately be compared to other employees who do not share the highly-individualized experience of pregnancy.[50] The only effective way to accommodate women for whatever symptoms are manifested during pregnancy is to realize the unique experiences that pregnancy presents to each individual and provide reasonable accommodations accordingly. The PDA could be strengthened if it added language in line with this understanding.

As Maryn Oyoung suggests, a reasonable-accommodations provision in the PDA could be modeled after California law. Such provisions could

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46 Troupe v. May Department Stores Company, 20 F.3d 734, 735 (7th Cir. 1994).

47 *Id. a*t 734.

48 *Id.* at 734, 736–37.

49 *Id.*

50 Maryn Oyoung, *Until Men Bear Children, Women Must Not Bear the Costs of Reproductive Capacity: Accommodating Pregnancy in the Workplace to Achieve Equal Employment Opportunities,* 44 McGeorge L. Rev. 515, 535 (2013).

include "job restructuring, modified work schedules, reassignment, modifications to examinations, policies, and other similar adaptations for individuals experiencing pregnancy or conditions related to the unique female reproductive capacity."[51] The exceptions to such accommodations would depend on whether such accommodations would cause an undue hardship on the employer, and the employer would be responsible for proving that the proposed accommodations would impose "significant difficulty or expense."[52] Instead, the reasonableness of the accommodations would be determined by the court based on the totality of circumstances. This test would include factors such as size, financial resources, nature, or structure of the employer's business.[53] When female employees file complaints with the EEOC claiming a violation of the PDA they often are not able to recover for discrimination or lack of reasonable accommodations claims. Adding specific provisions relating to reasonable accommodations and the totality of circumstances test would give teeth to the PDA and allow it to fulfill its mission to eliminate sex discrimination in the workplace due to pregnancy related conditions.

B. CALIFORNIA STATUTORY AND CASE LAW

In California, the Fair Employment and Housing Act and, more recently, the Pregnancy Disability Leave Law protect pregnant workers from discrimination in the workplace. These laws have generally been successful for securing greater protections for pregnant workers in California than provided by federal law. Nevertheless, the jurisprudence in California does not explicitly recognize a disparate impact due to lack of proper leave and reasonable accommodations.

1. Fair Employment and Housing Act (FEHA) and Pregnancy Disability Leave Law (PDLL)

Under the California Fair Employment and Housing Act, there is a prohibition against employment discrimination on the basis of sex.[54] The definition of the term "sex," includes, but is not limited to, pregnancy, childbirth,

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[51] *Id.* at 515, 540.

[52] Cal. Gov. Code § 12926(u).

[53] *See, e.g.,* 29 U.S.C. § 207(r)(3) and Cal. Gov. Code § 12926(u)(2).

[54] Cal. Gov. Code 12940(a).

or medical conditions related to pregnancy or childbirth.[55] The California Fair Employment and Housing Act applies only to workplaces with five or more employees, as well as all employment agencies, labor organizations, state licensing boards, and state and local governments.[56]

The Pregnancy Disability Leave Law (PDLL) is a part of California's FEHA. It explicitly prohibits employers from harassing, demoting, terminating, or otherwise discriminating against any employee for becoming pregnant, or for requesting or taking pregnancy leave.[57] It also requires employers with five or more employees to provide reasonable accommodations and job-protected disability leave of up to four months for pregnancy, childbirth, and related conditions.[58] The PDLL is meant to provide a reasonable period of leave to workers disabled by their pregnancy, not to exceed four months.[59] An employee who is disabled by her pregnancy and entitled to PDLL leave may take the leave all at once, or in increments. An employer is not required to pay wages to an employee taking PDLL leave, unless it has a policy of paying wages for other types of temporary disability leaves. Furthermore, the employer must know the employee is pregnant in order for the employee to make a prima facie case of discrimination based on pregnancy.[60]

In California, there are considerably more protective laws for pregnant women such as the Paid Family Leave Act (PFL) and California Family Rights Act (CFRA). Certain employees have additional leave-and-return rights for health reasons or child bonding under the Family Medical Leave Act and the California Family Rights Act. CFRA allows new mothers and fathers to take up to twelve weeks to bond with a new baby or adopted child or to care for a family member or for their own medical condition. This means that a pregnant worker could take four months of PDLL leave and an additional leave for up to twelve weeks.[61] However these laws often do not meet the needs of all pregnant women because the female employee must be employed for twelve months with the employer and complete at least 1,250 hours of work

55 Cal. Gov. Code § 12926, (p).

56 Legal Aid Society, *supra* note 17.

57 CCR § 7291.3 and CCR § 7291.6.

58 CCR § 7291.2(h).

59 Cal. Gov. Code § 12945(b)(2); 2 Cal. Regs 7291.7(a).

60 Trop v. Sony Pictures Entertainment Inc., 129 Cal. App. 4th 1133 (2005).

61 Cal. Gov. Code § 12945.2(a).

within the preceding twelve months to be eligible for leave under FMLA.[62] The FMLA also leaves employees of smaller businesses unprotected because the protections only apply to employers with fifty or more employees.[63]

2. The delicate dance between Title VII and more protective state laws: PDA should be considered a floor beneath which protections cannot drop

In *California Federal Savings & Loan Association v. Guerra,* the U.S. Supreme Court was faced with the issue of whether a pregnant worker had a qualified right to reinstatement after a pregnancy leave of no more than four months.[64] This type of preferential treatment was not provided for employees who experienced other workplace disabilities.[65] The Court upheld the preferential treatment under the more protective California pregnancy leave laws and ruled that Title VII was intended as a floor beneath which pregnancy protection could not drop.[66] The Court in *California Federal Savings* held that Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, does not pre-empt a California statute (PDLL) that requires employers to provide leave and reinstatement to pregnant workers who are disabled. Congress was aware of state laws similar to the PDLL in California and did not consider them to be in conflict with the federal laws. Therefore, the Court in *California Federal Savings* held that the California statute was an acceptable expansion of pregnant workers' rights. Despite the favorable ruling for pregnant workers, the reasoning regarding disparate impact that the Supreme Court adopted in reaching its conclusion is problematic, as will be discussed later.

Courts are split over the idea of whether facially neutral laws violate the PDA when they have a disparate impact on pregnant employees. As Melissa Feinberg points out, the D.C. Circuit Court of Appeals and the Fourth Circuit Court of Appeals have held that a lack of adequate leave and disability benefits

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62 26 U.S. Code § 2611(2)(A)(i).

63 26 U.S. Code § 2611(2)(B)(ii).

64 California Federal Savings & Loan Association v. Guerra, 479 U.S. 272 (1987).

65 *Id.*

66 *Id.* at 562, 565.

for pregnancy violates the PDA due to a disparate impact on women.[67] For example, in *Abraham v. Graphic Arts International Union,* the plaintiff brought an action because as a full-time temporary worker, she was only given ten days sick leave; the normal pregnancy leave is six weeks.[68] The D.C. Circuit held that insufficient leave time could not lawfully lead to termination of an employee under the PDA.[69] In *Abraham,* the Court recognized that insufficient leave has a disparate impact on pregnant women because it almost inevitably leads to their dismissal from work.[70] Similarly, the Fourth Circuit in *Brown v. Porcher*[71] held that denying unemployment compensation to women because they left their previous employment due to pregnancy violates federal law regardless of how non-pregnant disabled employees are treated.[72] As will be discussed below, the *California Federal Savings* case gives more insight into how the Court would rule on the issue of whether preferential treatment due to a disparate impact may be required under the PDA.

III. DISPARATE IMPACT STANDARD

A. RECOGNIZING THAT THE DISPARATE IMPACT STANDARD IS ESSENTIAL TO ENSURE GENDER EQUALITY FOR PREGNANT WORKERS

1. What is "disparate impact?"

Courts and lawmakers prioritize gender equality in the workplace as an important theme in the modern labor market. Facially neutral laws that treat men and women the same would appear to give both sexes equal opportunity. However, women are unique in their ability to bear children and often deal with complications and disability due to this unique characteristic. Therefore, laws such as the PDA and California's PDLL aim to create equality

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[67] Abraham v. Graphic Arts International Union, 660 F.2d 811 (D.C. Cir. 1981); *see also* Melissa Feinberg, *After California Federal Savings and Loan Association v. Guerra: The Parameters of the Pregnancy Discrimination Act,* 31 Ariz. L. Rev. 141, 150–51 (1989).

[68] *Abraham,* 660 F.2d 811.

[69] *Id.* at 819.

[70] *Id.* at 819 n.64.

[71] Brown v. Porcher, 660 F.2d 1003–04. (1981).

[72] *See* Feinberg, *supra* note 67.

by giving women the opportunity to have children while maintaining their livelihood and career trajectory. Disparate impact in the arena of pregnancy discrimination is the concept that a lack of proper leave or reasonable accommodations disadvantages women by forcing women to choose between maintaining a career and having a family. Courts differ in how they reach conclusions regarding reasonable accommodations, disability benefits, and pregnancy leave for pregnant women. Courts that explicitly recognize a lack of certain minimum benefits as a "disparate impact" serve to close the gender gap while those courts that fail to make such recognition are furthering implicit gender discrimination in the workplace.

2. California and federal courts are slow to recognize disparate impact on pregnant women

The jurisprudence in California is more favorable toward pregnant employees due to more progressive state laws. However, both California and federal courts could do a better job of explicitly recognizing the disparate impact that pregnant women face in the workplace. In *Newport News Shipbuilding & Dry Dock Co. v. EEOC,* in 1983, the Court stated that the 1978 PDA makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions.[73] However, *Newport News* failed to link pregnancy discrimination to the disparate impact standard and furthermore to the need to have reasonable accommodations.

In *California Federal Savings & Loan Association v. Guerra,* in 1987, the Court ruled that Title VII does not preempt state statutes that accord preferential treatment to pregnancy.[74] The Court rejected the argument that the PDA prohibits all differentiation on the basis of pregnancy, and upheld a California statute that required employers to provide pregnancy leave for employees.[75] Even though the rulings in *Newport News* and *California Federal Savings* are favorable for pregnant employees, they failed to articulate specific limits on the scope of preferential treatment. As the Harvard Law Review Association notes, "Because the Court did not base its interpretation of the PDA on a finding that a lack of pregnancy leave has a disparate impact on women, *California Federal Savings* may create

[73] Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C., 462 U.S. 669, 684 (1983).
[74] California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 683, 693 (1987).
[75] *Id.*

the impression that pregnancy leave is merely a gratuitous dispensation to women, thereby reinforcing paternalistic stereotypes that traditionally have disadvantaged women in the workforce."[76] In order for pregnancy leave and reasonable accommodations to be deemed necessary, the Courts must get serious about recognizing the disparate impact of pregnancy discrimination and they must be serious about reversing the current trend. In addition, Congress and state legislatures must also take seriously the need to provide more statutory protections for pregnant employees that explicitly address the disparate impact that pregnancy employees currently face.

In *California Federal Savings,* the Court held that states might provide more protections than federal law under the PDA. However, it has not yet ruled on whether preferential treatment for pregnant employees is *required* under the PDA. Both the majority opinion in *California Federal Savings* and legislative history point to the proposition that the PDA does not require a disparate impact analysis to determine whether leave and benefit policies for pregnant employees are required.[77] However, Justice Stevens in the concurring opinion in *California Federal Savings* links the PDA with the broader agenda of Title VII. As Feinberg aptly notes, "Title VII case law recognizes discrimination claims grounded in disparate impact."[78] In a landmark Title VII case, *Griggs v. Duke Power,* the Court held that Title VII does not allow either overt or implicit discrimination.[79] As the EEOC Guidance document points out, when interpreting the PDA in line with other Title VII case law, courts should recognize disparate impact claims as a valid cause of action for pregnancy discrimination.[80] As noted above, pregnant women are a unique class of individuals and should be treated as such. Complications and disabilities that arise from pregnancy cannot adequately be compared to a group of non-pregnant, similarly situated employees without leading to disparate impacts for women. If there is no appropriate comparator, then women like the plaintiff in *Troupe* will have to deal with the harsh consequences of implicit discrimination in the workplace.

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76 Title VII-Pregnancy Discrimination, 101 Harv. L. Rev. 320, 320–21 (1987).

77 California Federal Savings, 479 U.S. at 286–88.

78 Griggs v. Duke Power, 401 U.S. 424.

79 *Id.* at 431.

80 29 C.F.R. § 1404.10(c) (1988).

What will it take for the Supreme Court and California courts to recognize that pregnancy discrimination has a disparate impact on women? No matter what the answer is to this question, lawyers and legal advocates should champion the voice of pregnant employees who have experienced disparate impacts in the workplace. Through telling stories and raising awareness, we may be able to see gradual change in the legal system.

IV. THE FUTURE OF SEX JURISPRUDENCE

A. OUTCOME OF *YOUNG* CASE COULD SHAPE PREGNANCY AND SEX JURISPRUDENCE GOING FORWARD

The Fourth Circuit on remand from the Supreme Court made a ruling that widely affects sex jurisprudence in the United States. As discussed above, Peggy Young brought an action as a pregnant UPS worker who was expected to lift packages as heavy as seventy pounds on her job. She asked for an accommodation to be put on light duty and be required to lift no more than twenty pounds. However, UPS would not grant the accommodation. UPS's policy limits light duty work to (1) employees who have been injured on the job and (2) employees who have a disability as defined by the ADA. Ms. Young did not fit into either of these categories. Her only alternative was to take unpaid leave with no medical benefits. Although the leave would be far beyond what is given through the Family and Medical Leave Act (FMLA), Ms. Young argued that she should be able to receive light-duty assignments just like a worker injured on the job or a worker who had a qualifying disability under the ADA. UPS made accommodations for "on-the-job injuries, for disabilities entitled to accommodation under the Americans with Disabilities Act (ADA), and for conditions, medical or otherwise, leading to the loss of driving certification."[81] Nevertheless, at the federal appeals level, the Fourth Circuit Court of Appeals ruled for UPS, holding that Young did not experience pregnancy discrimination and that allowing her to go on "light duty" would give pregnant employees an advantage over other employees. Surprisingly, courts have found ways

[81] Young v. United Parcel Service, Inc., 707 F.3d 437 (4th Cir. 2013), petition for cert. filed, No. 12-1226, 2013 WL 1462041 (U.S. Apr. 8, 2013).

to discount analogies to workers who are "similarly situated" to pregnant women as a way to deny reasonable accommodations.[82]

Many women's advocacy groups, law professors and other organizations submitted briefs in support of Young stating that ruling against her would have devastating impacts for women most harmed by pregnancy discrimination — those in low-wage jobs who are most likely to experience conflict between maintaining a healthy pregnancy and meeting their job requirements. The EEOC guidance document however, reaches the opposite conclusion to that of the Fourth Circuit — it states that under the PDA, employers are required to provide light duty assignments to pregnant workers if the employer has a policy limiting to light duty workers injured on the job and/or employees with qualifying disabilities under the ADA.[83]

The Supreme Court ruled that Young should have the opportunity to make her case at the very least and remanded the case to the Fourth Circuit. Although this was not a groundbreaking decision for pregnancy discrimination, the Court, in a 6–3 decision, said Young could further her case using the framework of a disparate-impact claim, "showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under [the relevant civil rights law]."[84] As a result, the burden then shifted to UPS to show nondiscriminatory reasons why pregnant women were not included among the classes of workers accommodated.[85] The majority held that pregnant women do not have to be accommodated in a manner similar to non-pregnant employees with similar conditions as long as there is a legitimate reason.[86] Such an accommodation would be too broad and would turn an anti-discrimination statute into "a requirement to provide accommodation to pregnant employees, perhaps even at the expense of other, non-pregnant employees."[87] The employee could, however, show

82 Brake & Grossman, *supra* note 1 at 109.

83 *See* Ashby, *supra* note 29.

84 Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1354 (2015).

85 *Id.* at 1338, 1341.

86 Young v. United Parcel Serv., Inc., 707 F.3d 437, 446-47 (4th Cir. 2013) *cert. granted,* 134 S. Ct. 2898, 189 L. Ed. 2d 853 (2014) and *vacated and remanded,* 135 S. Ct. 1338 (2015) and *opinion amended and superseded,* No. 11-2078, 2015 WL 1600406 (4th Cir. Apr. 10, 2015).

87 *Id.* at 448.

that she faced "disparate treatment" from her employer — if the employer's actions were more likely than not based on discriminatory motivation, and the employer's reasons for doing so were a pretext.[88] An approach that analyzes "disparate treatment" focuses on the employer's actions and motivations to discriminate. By contrast, the "disparate impact" analysis asks how the policy adversely affected the woman.

Justice Kennedy in his dissent aptly points out that the majority in *Young* conflated "disparate treatment" and "disparate impact" and only addressed disparate treatment.[89] As Kennedy notes, "[t]he PDA forbids not only disparate treatment but also disparate impact, the latter of which prohibits 'practices that are not intended to discriminate but in fact have a disproportionate adverse effect.'"[90] Confusing these two concepts in the *Young* case likely contributed to the unfavorable ruling for Ms. Young. Although the Supreme Court dances around the idea, they have not yet definitively ruled on whether employees are required to receive reasonable accommodations under the PDA. Nonetheless, it is promising that the Court was at least willing to hear Young's discrimination case."[91]

UPS recently announced since Young's lawsuit that it would change its policy going forward and allow pregnant workers to stay on the job performing light-duty work.[92] This gives hope to many women that perhaps the greatest tool for pregnancy-related accommodations is increasing awareness among the public that companies are discriminating against pregnant employees. Public shaming of such companies can be a useful mechanism to change policy and enforce a larger agenda of equitable workplace conditions for women. It will also be telling whether other employers change their policies as UPS did to follow the EEOC guidelines or whether they follow the strict interpretation of the PDA.

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88 *Id.* at 442.

89 Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1368 (2015).

90 *Id.* at 1367.

91 Nicole Flatow, U.S. Supreme Court sides with Pregnant Worker in Major Discrimination Case *available at* http://www.usnews.com/news/articles/2015/03/25/supreme-court-rules-against-ups-in-pregnancy-discrimination-case (last visited May 4, 2015).

92 *Id.*

V. PREGNANCY DISCRIMINATION IN THE FEMINIST CONTEXT

A. HOW TO ADDRESS THE PARTICULAR CONCERN OF WOMEN IN LOW-WAGE JOBS WHO EXPERIENCE PREGNANCY DISCRIMINATION

1. Pregnant women working in low-wage jobs, in lower socio-economic statuses, are more likely to suffer from pregnancy discrimination in the workplace

The women in low-wage jobs are at the highest risk when it comes to pregnancy discrimination. When women are paid less and are working in male-dominated jobs it becomes difficult to gain traction when they experience discrimination in any context. The PDA does not provide for additional protections for low-wage workers whose only comparators are employees who are treated just as badly as pregnant employees. If a minimum-wage employee needs leave or accommodations due to pregnancy but her "stingy" employer does not provide accommodations for any workers, the pregnant employee will receive the same poor treatment under the PDA.[93] This example again belies the assertion made earlier that pregnant women should be treated as a separate and unique class of employees who need varying accommodations in the workplace. Women in low-wage jobs with unforgiving bosses should not be punished for their socio-economic status.

As Brake and Grossman note,

> The women who lose the most under the courts' cramped readings of the PDA are the least privileged and most economically vulnerable women. The PDA is failing the women who need it most — those who work inflexible hours or in rigidly structured work settings or who perform physically demanding tasks. Cases like the one brought by a pregnant fitting room attendant at Wal-Mart who claimed that she was fired for carrying a water bottle at work (per doctor's orders) illustrate the problem. Professional women

[93] National Women's Law Center, It Shouldn't be a Heavy Lift: Fair Treatment for Pregnant Workers (2013) at 6–7, *available at* http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf (noting the inflexibility of employers in low-wage jobs).

> in more flexible work settings may still lose their cases, but they have a better chance of finding at least some protection under the Act, if they can prove that their opportunities were limited based on stereotyped and untrue assumptions about how pregnancy affects their work capacity or commitment. And they have a greater chance of reconciling the effects of pregnancy with work obligations without needing to resort to litigation. In short, while the PDA still offers some protection from animus-based discrimination, it has become increasingly unhelpful to those women whose pregnancies are most likely to harm their economic security.[94]

Furthermore, women in low-wage jobs with pregnancy complications may request reasonable accommodations such as temporary alternative duties, light duty or reassignment. These are all accommodations that may in some cases be required by the ADA.[95] For example, in *Arizanovska v. Wal-Mart Stores, Inc.*,[96] Ms. Arizanovska asked Wal-Mart for an accommodation when her doctor told her she could lift no more than ten pounds.[97] Wal-Mart denied the accommodation and placed her on an involuntary leave of absence.[98] The Court held that this Wal-Mart policy, which treats pregnancy different from disabilities accommodated by the ADA, was permissible.[99] Such disparate treatment of workers who are not treated the same as other non-pregnant employees similar in their ability to work is a violation of the PDA.

2. Recognizing the realities of childbirth rather than penalizing women for choosing to have a family

While the PDA may not leave room to provide benefits or incentives for women to have children, it does provide a floor for minimum protections. As Feinberg notes, "[i]nevitably, childbirth involves a period of disability.

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94 Brake & Grossman, *supra* note 1 at 69–70.

95 *See, e.g.,* Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999) (holding that the ADA requires reasonable accommodation of an employee with a disability to a vacant position to which he seeks to transfer).

96 Arizanovska v. Wal-Mart Stores, Inc., 682 F.3d 698 (7th Cir. 2012).

97 *Id.* at 5.

98 *Id.* at 5–6.

99 *Id.* at 702.

Failure to consider this fact in fashioning a leave policy constitutes discrimination on the basis of pregnancy. Under the PDA, this constitutes gender-based discrimination and is therefore prohibited."[100] Despite the progress in statutory law, pregnant women need extra protections so they do not have to face the disparate impacts that men would never have to encounter in the workplace.[101] The disparate impact analysis takes into account the realities of childbirth and the need for women to have adequate leave, disability benefits, and reinstatement in the same or similar role as before her pregnancy leave. Employers who fail to take into account the needs of pregnant women implicitly further gender discrimination and continue to force women to make the difficult and unnecessary choice between career and family.

VI. CONCLUSION

Throughout modern history, pregnant women have faced considerable obstacles in entering the workforce, maintaining a successful career trajectory, and making a decent living while often dealing with disabilities and complications arising from pregnancy. In this scheme, women at lower socio-economic levels are the most at-risk population; the PDA does little to protect poorer women from harsh workplace policies. At this time, the law can be exercised as a powerful tool to secure rights for pregnant women. The California and federal judiciary can expressly tackle the ideas of disparate impact, reasonable accommodations, and proper leave laws. In addition, state and federal legislatures can address the same ideas through legislation that will allow women to maintain dignity in their jobs, raise a family, and maintain a career without unnecessary complications.

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100 Feinberg, *supra* note 67 at 151; 42 U.S.C. § 2000e(k).

101 *Abraham, supra* note 67 at 819.

PROTECTING OUR CHILDREN:

The California Public School Vaccination Mandate Debate

ELAINE WON*

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INTRODUCTION

In late December of 2014, a measles outbreak sickened 147 people in the United States.[1] Of those cases, 131 were in California.[2] Six of these measles cases were among infants who were too young to be vaccinated.[3] Health officials suspected that this outbreak originated from an overseas visitor who spread the disease at Disneyland in Anaheim, California.[4] While measles outbreaks are rare in the United States, outbreaks have occurred in U.S. communities with low vaccination rates.[5] The Disneyland measles outbreak highlighted a small, but growing population of parents who refuse to vaccinate their children for religious or other personal reasons.[6]

While the United States does not have federal vaccination laws, each of the fifty states have laws mandating vaccination of children against diphtheria, tetanus, pertussis, polio, measles, and rubella as a condition of enrolling in public schools.[7] However, there are exemptions to this rule.[8] All states allow a medical exemption where vaccinations would complicate the health of the child; most states have a religious exemption; and nineteen states have a personal-belief exemption.[9] California is one of nineteen states that allow all three of these exemptions [prior to enactment of SB 277 in June 2015].[10]

As children, and particularly those who are unvaccinated, are at higher risk of contracting and spreading diseases, public schools have become

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[1] Alicia Chang, *Disney Mealses Outbreak That Sparked Vaccination Debate Ends,* Associated Press (Apr. 17, 2015, 4:44 PM), http://hosted2.ap.org/APDEFAULT/bbd825583c8542898e6fa7d440b9febc/Article_2015-04-17-US--Measles%20Outbreak-Things%20to%20Know/id-23d959cc52384abbb72c1b7c9d320a1b.

[2] *Id.*

[3] Christopher Ingraham, *California's Epidemic of Vaccine Denial, Mapped,* The Wash. Post (Jan. 27, 2015), http://www.washingtonpost.com/blogs/wonkblog/wp/2015/01/27/californias-epidemic-of-vaccine-denial-mapped/.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *State Vaccination Exemptions for Children Entering Public Schools,* ProCon.org, http://vaccines.procon.org/view.resource.php?resourceID=003597 (last visited Mar. 8, 2015).

[8] *Id.*

[9] *Id.*

[10] *Id.*

the hotbed for the vaccination debate. Pro-vaccinators argue that children must be vaccinated in the absence of a medical issue in order to maintain herd immunity.[11] Herd immunity occurs when approximately 90 percent of a community is vaccinated and protected from disease.[12] The higher this percentage of immunization is, the less potential there is for an outbreak.[13] This could be a matter of life or death in cases of children who cannot be vaccinated due to weak immune systems caused by chemotherapy or other health issues.[14] On the other hand, anti-vaccinators who claim a personal-belief exemption cite the purported link between vaccinations and autism.[15]

Recently, the California Senate introduced SB 277, a bill that would eliminate California's religious and personal-belief exemptions from the mandate requiring vaccinations for students seeking to attend public school.[16] The bill was recently passed by the California Senate and referred to the California Assembly Committee on Health for additional amendments.[17] Anti-vaccinators, however, continue to oppose the bill, arguing that the bill forces their children to be homeschooled.[18] They further contend that homeschooling is infeasible for single-parent and low-income families and would strip their children of their right to obtain a

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[11] *Community Immunity ("Herd Immunity"),* VACCINES.GOV, http://www.vaccines.gov/basics/protection/ (last visited Apr. 18, 2015).

[12] Emily Willingham & Laura Helft, *What is Herd Immunity,* KVIE, http://www.pbs.org/wgbh/nova/body/herd-immunity.html (last visited Mar. 8, 2015).

[13] *Id.*

[14] Lisa Aliferis, *To Protect His Son, A Father Asks School to Bar Unvaccinated Children,* NPR (Jan. 27, 2015, 5:05 PM), http://www.npr.org/blogs/health/2015/01/27/381888697/to-protect-his-son-a-father-asks-school-to-bar-unvaccinated-children.

[15] Steven Salzberg, *Anti-Vaccine Movement Causes the Worst Whooping Cough Epidemic in 70 Years,* FORBES (July 23, 2012, 6:00 AM), http://www.forbes.com/sites/stevensalzberg/2012/07/23/anti-vaccine-movement-causes-the-worst-whooping-cough-epidemic-in-70-years/.

[16] A Senate Bill Removing Religious and Personal Belief Exemptions from Vaccination Mandates, S.B. 277, 2015 Sess. (C.A. 2015), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB277 [hereinafter SB 277 Bill Text].

[17] *Id.*

[18] Tracy Seipel, *Vaccine Exemption: California SB 277 Opponents Vow to Pull Kids from School if Bill Passes,* SAN JOSE MERCURY NEWS (Apr. 13, 2015, 6:24 PM), http://www.mercurynews.com/health/ci_27907241/vaccine-exemption-california-sb-277-opponents-vow-pull.

public school education.[19] The fundamental issue underlying this debate is whether one student's right to an education trumps another student's right to stay healthy.[20]

This paper argues that SB 277 is constitutional. Part I provides background to the debate on balancing health and education in California public schools. Part II discusses foundational case law and statutes on vaccination. Part III analyzes the constitutional complexities that SB 277 brings to the debate. Part IV addresses concerns of inability to access vaccinations and adjustments to the terms of SB 277 with future biomedical advances. Part V is a summary and conclusion.

I. BACKGROUND: THE ANTI-VACCINATION DEBATE

This section provides a general background to the vaccination debate. It first discusses the idea of "herd immunity" and why low vaccination rates in public schools are of concern. It then tracks the increasing level of unvaccinated children in California and what contributed to the recent trend of unvaccinated children. Finally, this section discusses the demographics of anti-vaccinators in California.

A. HERD IMMUNITY

Pro-vaccinators emphasize the importance of immunization because of the idea of community immunity, or "herd immunity."[21] Herd immunity is critical to a community's health because it prevents the potential for outbreak and infection of individuals who are particularly vulnerable to disease.[22] These persons include infants, pregnant women, or immunocompromised individuals.[23] While the threshold vaccination percentage for herd immunity is dependent on the disease, most diseases meet

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19 Dave Marquis, *Bill Requiring Student Vaccinations Headed to Committee, Again,* News 10 ABC (Apr. 22, 2015, 10:48 AM), http://www.news10.net/story/news/local/california/2015/04/22/vaccine-bill-immunize-home-school-amendments-vaccinate/26167515/.

20 *Id.*

21 *Community Immunity, supra* note 11.

22 *Id.*

23 *Id.*

the minimum threshold at around 85 percent, but can range up to 94 percent.[24]

B. THE INCREASE OF ANTI-VACCINATORS IN CALIFORNIA

The anti-vaccination movement has existed for over one hundred years in the United States.[25] The theories that existed a century ago regarding the perils of vaccination tend to parallel the arguments for anti-vaccination today. In 1898, a pamphlet claimed that vaccination "increases disease and *mortality,* and is believed to be the most likely cause of the increase of *consumption* and *cancer,* and probably many other forms of disease."[26] A *Washington Post* article notes that anti-vaccination ideas included fear of cancer caused by impurities in the blood from vaccines and the belief that alternative medicine is a more effective option than vaccines.[27] Many of these anti-vaccination pamphlets appealed to mothers worried about what chemicals their children were exposed to.[28]

Despite the long history of anti-vaccination in the United States, vaccination exemptions of children in public and private schools have doubled in just the last eight years.[29] In 2000, 0.77 percent of California kindergarteners had personal-belief exemptions.[30] This number quadrupled to 3.15 percent by 2013.[31] This pattern is attributed to a 1998 study by Dr. Andrew Wakefield. A well-respected British medical journal, *The Lancet,* published Dr. Wakefield's research, which linked measles, mumps, and

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24 Willingham & Helft, *supra* note 12.

25 Abby Ohlheiser, *Meet the Crunchy, Chemical-Hating Anti-Vaccine Conspiracy Theorists. From 100 Years Ago,* The Wash. Post (Feb. 5, 2015), http://www.washingtonpost.com/blogs/wonkblog/wp/2015/02/05/meet-the-crunchy-chemical-hating-anti-vaccine-conspiracy-theorists-from-100-years-ago/.

26 *Id.*

27 *Id.*

28 *Id.*

29 Michael Hiltzik, *Rich, Educated and Stupid Parents are Driving the Vaccination Crisis,* L.A. Times (Sept. 3, 2014, 1:18 PM), http://www.latimes.com/business/hiltzik/la-fi-mh-vaccination-crisis-20140903-column.html.

30 Ingraham, *supra* note 3.

31 *Id.*

rubella vaccines to autism in children.[32] The study was widely reported, especially to parents with autistic children.[33] While Dr. Wakefield's study was retracted because no doctors could replicate the study and no other research has linked vaccines to autism, the anti-vaccination movement has continued.[34]

There are various factors that have contributed to the continuing vaccination scare. In the early 2000s, politicians in England and the United States sparked the modern vaccination debate.[35] However, the recent spread of the anti-vaccination scare was due to the media.[36] Prominent print and online magazines as well as veteran journalists printed various anti-vaccination articles which spread across the nation.[37] In 2011, the anti-vaccination debate found a staunch advocate in actress Jenny McCarthy.[38] Since then, various media personalities and shows have weighed in on the vaccination debate.[39] Although the Institute of Medicine and the Centers for Disease Control and Prevention released reports that disputed the link between vaccines and various developmental disorders, the U.S. media largely ignored this information.[40]

C. DEMOGRAPHICS OF ANTI-VACCINATORS IN CALIFORNIA

The *Los Angeles Times* reports that higher rates of personal-belief exemptions are correlated with high median incomes.[41] One study finds that in Los Angeles County, there are more than 150 schools "with exemption rates of 8 percent or higher for at least one vaccine [which] were located in census tracts where the incomes averaged $94,500 — nearly 60 percent

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[32] Brian Krans, *Anti-Vaccination Movement Causes a Deadly Year in the U.S.*, Healthline (Dec. 3, 2013), http://www.healthline.com/health-news/children-anti-vaccination-movement-leads-to-disease-outbreaks-120312.

[33] *Id.*

[34] *Id.*

[35] Curtis Brainard, *Sticking with the Truth,* Columbia Journalism Review (May/June 2013), http://www.cjr.org/feature/sticking_with_the_truth.php.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] Hiltzik, *supra* note 29.

higher than the county median." Another study reports that rich charter schools have the highest exemption rates.[42]

Although, as stated earlier in Part IA, most diseases meet the threshold vaccination percentage for herd immunity at around 85 percent, an 8 percent exemption seriously threatens this immunity and causes the community to be prone to an outbreak.[43] Another article demonstrates how, in the last thirteen years, vaccination exemptions have tended to increase in wealthy coastal California cities.[44] In certain school districts in California, these rates are even higher.[45] Ocean Grove Charter School in Boulder Creek reports a 51 percent personal-belief exemption.[46] Certain private schools report a 75 percent or higher personal-belief exemption rate.[47] In the Montecito Union School District in Santa Barbara, which reports a 27.5 percent exemption rate, the median income is nearly $103,000.[48]

One question is why higher-income families tend to avoid vaccination. One article reports that parents who avoid vaccination tend to have less trust in governmental authorities.[49] Anti-vaccinators also tended to have a wider social network, comprising books, blogs, websites, and magazines, which they utilized for information on vaccination, and to rely on trends.[50] Nina Shapiro, a professor at the UCLA School of Medicine, writes that this trend falls into the "whole natural, BPA-free, hybrid car community that says 'we're not going to put chemicals in our children.'"[51] Seth Mnookin, a journalist and author writing on the anti-vaccination

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42 Philip N. Cohen, *Charter, Private, and Wealthy Schools Lead California Vaccine Exemptions,* Family Inequality (Feb. 4, 2015, 7:00 AM), https://familyinequality.wordpress.com/2015/02/04/more-on-california-vaccine-exemptions/.

43 Hiltzik, *supra* note 29.

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 Hiltzik, *supra* note 29.

49 Whet Moser, *Why Do Affluent, Well-Educated People Refuse Vaccines?,* Chicago Mag. (Mar. 26, 2014), http://www.chicagomag.com/city-life/March-2014/Why-Is-Vaccine-Refusal-More-Prevalent-Among-the-Affluent/.

50 *Id.*

51 Alex Seitz-Wald, *What's With Rich People Hating Vaccines?,* Salon (Aug, 14, 2013, 4:45 AM), http://www.salon.com/2013/08/14/whats_with_rich_people_hating_vaccines/.

movement, reaffirmed this sentiment, noting that families with a higher income could afford the expensive consequence of avoiding vaccination, and "tended to be self-satisfied, found it difficult to conceive of a world in which their voices were not heard, and took pride in being intellectually curious, thoughtful, and rational."[52]

II. THE UNITED STATES AND CALIFORNIA VACCINATION MANDATES

This section discusses foundational vaccination cases that paved the way for the current debate over vaccinations for children in California public schools. *Jacobson v. Massachusetts*[53] introduces the law behind mandating vaccination, while *Abeel v. Clark*[54] and *Zucht v. King*[55] discuss the constitutionality of mandating vaccines for students entering public school in California. *Prince v. Massachusetts*[56] discusses why parental rights do not trump the preservation of community health and safety. *Wong Wai v. Williamson*[57] clarifies exactly when a vaccination mandate may be applied in an unconstitutional, discriminatory manner; this will provide a standard in determining whether SB 277 unfairly targets a certain class of individuals in California. *Williams v. State* is a settled California case that discusses public schools' duty to maintain the health of its students.[58] Finally, the next few sections introduce specific California statutes mandating vaccination — and amendments to the statutes in order to address a growing number of unvaccinated children — and explore instances in which excluding unvaccinated children may be warranted.

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[52] Moser, *supra* note 49.

[53] 197 U.S. 11 (1905).

[54] 84 Cal. 226 (1890).

[55] 260 U.S. 174 (1922).

[56] 321 U.S. 158 (1944).

[57] 103 F. 1 (N.D. Cal. 1900).

[58] *Notice of Class Action Settlement in the Williams v. State of California Education Lawsuit,* Cal. Dept. of Educ., http://www.cde.ca.gov/eo/ce/wc/noticeenglish.asp (last visited Apr. 3, 2015) [hereinafter Williams v. State of California *Settlement Notice*].

A. *JACOBSON V. MASSACHUSETTS:* THE BROAD VACCINATION MANDATE

Jacobson v. Massachusetts[59] was a 1905 United States Supreme Court case that upheld the right of the states to enforce compulsory-vaccination laws. In *Jacobson,* the court addressed a 1902 regulation that mandated vaccination against smallpox, which was a prevalent disease and growing threat in the city of Cambridge during the early 1900s.[60] While a medical exemption for children existed, Massachusetts maintained that individuals over the age of 21 were required to receive vaccinations or pay a fine of five dollars.[61] Henning Jacobson refused to be vaccinated, claiming that a vaccine had made him seriously ill as a child.[62] He was charged with criminally failing to be vaccinated despite being over the age of 21 and having access to free vaccinations.[63]

Jacobson broadly argued that the Massachusetts law requiring vaccination violated the "spirit" of the United States Constitution and cited the state's duty to uphold the Constitution through the Fourteenth Amendment.[64] He further argued that the law invaded his liberty when the state subjected him to a fine or imprisonment as a result of his choice to refuse vaccination.[65] He noted that it was "hostile to the inherent right of every freeman to care for his own body and health in such a way as to him seems best" and argued that such penalties would be "an assault upon his person."[66] The Supreme Court disregarded the Fourteenth Amendment argument, noting that it was not the source of any substantive power of the U.S. government.[67] Holding that the state had the authority to enact this statute under its police power, the Court discussed the validity of a compulsory-vaccination mandate.[68]

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59 197 U.S. 11 (1905).
60 Jacobson v. Massachusetts, 197 U.S. 11, 12–13 (1905).
61 *Id.* at 12.
62 *Id.* at 37.
63 *Id.* at 13.
64 *Id.*
65 *Id.* at 26.
66 *Id.*
67 *Id.* at 13, 26.
68 *Id.* at 26.

The Court concluded that individual constitutional rights may be reasonably constrained for the common good.[69] Specifically, the Court reasoned that real liberty in an organized society can only exist when weighed against the injury that may be inflicted on others as a consequence of individual action.[70] The Court acknowledged that the common good is facilitated by the legislature, which exercises the police power of the states.[71] Importantly, the Court noted that the opinion of a minority of individuals who believe in the harmful effects of vaccinations was trumped by the "common belief" of the majority of people and medical professionals who accept vaccinations as an effective method of preventing disease.[72] The Court further reasoned that a "common belief, like common knowledge, does not require evidence to establish its existence," and that the legislature and judiciary may act on this common belief without proof.[73] Thus, weight is given to common belief despite the possibility that it may be invalidated in the future.[74]

In this case, the Court noted that the state took reasonable and appropriate measures when mandating adult vaccination.[75] The state required vaccination during an emergency called by the board of health, which was composed of persons who would be fit to determine this need.[76] The Court determined that while blanket, compulsory vaccination is unconstitutional, a mandate with medical exemptions that results in a fine or imprisonment for refusing to vaccinate is valid.[77]

B. *ABEEL V. CLARK:* THE PUBLIC SCHOOL VACCINATION MANDATE IN CALIFORNIA

Abeel v. Clark[78] was an 1890 California Supreme Court case that affirmed that children could be denied admission to public schools for failing to

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69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.* at 34–35.
73 *Id.* at 35.
74 *Id.*
75 *Id.* at 27.
76 *Id.*
77 *Id.*
78 84 Cal. 226 (1890).

obtain necessary vaccinations. At the time of this case, a 'Vaccination Act' mandated the vaccination of all children seeking admission into school, unless the child obtained a medical exemption from a licensed physician.[79] James Abeel, the student seeking admission, argued that this act was unconstitutional because: (1) the subject of the act was not expressed in the title, and (2) the act was special, not general, in its scope.[80]

The first argument refers to what is now California Constitution article IV, section 9.[81] The purpose of this provision is to prevent legislators and the public from being misled by the title of legislation.[82] The Court quickly dismissed this argument, noting that 'Vaccination Act' is a reasonable title for a mandate that requires vaccination.[83] The second argument was that the act is discriminatory because it impacts a certain class of individuals.[84] The Court reasoned that the class of students who attend public schools in the state is general in its scope.[85] The act does not need to include all classes of individuals in the state to be considered nondiscriminatory.[86] *Abeel* confirms that a broad vaccination mandate for public school children is valid, but discriminatory application of such a mandate would be unconstitutional.[87]

In the 1922 case of *Zucht v. King,*[88] the U.S. Supreme Court ratified the holding in *Abeel,* holding that children who failed to obtain vaccinations and did not have a valid exemption could constitutionally be excluded from public and private schools.[89] Furthermore, the Court noted that this exclusion was valid even when there was "no [particular] occasion for requiring vaccination," because the board of health had full, constitutional discretion to determine when vaccinations were mandatory for school children.[90]

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79 Abeel v. Clark, 84 Cal. 226, 227–28 (1890).
80 *Id.* at 228.
81 *Id.* at 228; Ca. Const. art. 4, § 9.
82 *Clark,* 84 Cal. at 228.
83 *Id.* at 229.
84 *Id.*
85 *Id.* at 229–30.
86 *Id.* at 230.
87 *Id.*
88 260 U.S. 174 (1922).
89 Zucht v. King, 260 U.S. 174, 177 (1922).
90 *Id.* at 175.

C. *PRINCE V. MASSACHUSETTS:* PARENTAL RIGHTS

This 1944 U.S. Supreme Court case addressed the issue of when parental rights in caring for their children conflicts with another government interest.[91] In *Prince v. Massachusetts,* Sarah Prince was convicted for violating Massachusetts' child-labor laws, which mandated that no boy under twelve and no girl under eighteen be allowed to sell or offer for sale merchandise in any street or public place.[92] Prince allowed her two sons to engage in preaching activities, which consisted of selling copies of Jehovah's Witness religious material.[93]

In upholding Prince's conviction, the Court looked at the balance between Prince's rights and the legitimate exercise of the state's police power over individual behavior.[94] Prince's interests included "freedom of conscience and religious practice," which is connected with her authority over her household and the "rearing of her children."[95] On the other hand, these rights conflict with the state's interest in protecting the welfare of children.[96] Here, Prince's right to exercise her religion and to raise her children in her preferred manner conflicted with the state's interest in protecting children from being exploited for labor.[97] The Court concluded that family and parental rights are subject to regulation in order to maintain this public interest of protecting children from exploitation.[98]

The Court provided further instances where this principle may come into effect.[99] The Court noted that the state may restrict a parent's control by requiring children to attend school, by regulating child labor, and by mandating vaccination over religious objections.[100] In regard to vaccination, the Court argued that the "right to practice religion freely does not include liberty to expose the community or the child to communicable

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91 Prince v. Massachusetts, 321 U.S. 158, 159 (1944).
92 *Id.* at 159–60.
93 *Id.* at 161–62.
94 *Id.* at 165.
95 *Id.*
96 *Id.* at 165–66.
97 *Id.*
98 *Id.*
99 *Id.* at 166.
100 *Id.*

disease or the latter to ill health or death."[101] The Court placed higher restrictions on children's activities because the United States relies on a "healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."[102] While adults may choose specific actions that may harm themselves or make them "martyrs," they do not have the authority to subject their children to potentially harmful behavior "before they have reached the age of full and legal discretion when they can make that choice for themselves."[103]

D. *WONG WAI V. WILLIAMSON:* UNNECESSARY VACCINATION RESTRICTIONS

However, it is possible for a vaccination mandate to be invalid even when the government claims it is meant to protect the health and safety of the community. In *Wong Wai v. Williamson,*[104] a federal circuit-court injunction in San Francisco was overturned. This injunction required all Chinese residents in San Francisco to receive a dangerous vaccination for the bubonic plague as a requirement to leaving the city.[105] In overturning the injunction, the Supreme Court noted that this vaccination was not implemented to protect the community against the bubonic plague, but instead was "boldly directed against the Asiatic or Mongolian race as a class, without regard to the previous condition, habits, exposure to disease, or residence of the individual."[106] The Court further reasoned that the suggestion that a particular race was more susceptible to the plague than another was not sufficient justification for implementing such a mandate.[107]

E. *WILLIAMS V. STATE:* SCHOOLS HAVE THE DUTY TO MAINTAIN HEALTH STANDARDS

Williams v. State was a 2004 class-action lawsuit brought against the State of California, the California Department of Education, California

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101 *Id.* at 166–67.
102 *Id.* at 168.
103 *Id.* at 170.
104 103 F. 1 (N.D. Cal. 1900).
105 Wong Wai v. Williamson, 103 F. 1, 3 (N.D. Cal. 1900).
106 *Id.* at 7.
107 *Id.*

Board of Education, and California Superintendent of Public Instruction, alleging that students were attending substandard schools.[108] One of the deprivations that the lawsuit defined was an "inadequate, unsafe, and unhealthful" school facility where the students were subject to unsafe temperatures and unsanitary conditions that would subject them to disease.[109] While this lawsuit was ultimately settled, the state's reluctance to contest the merits of the lawsuit suggests that California schools may have the duty to preserve a healthy environment for their students.[110]

F. CAL. HEALTH AND SAFETY CODE SECTION 120325 ET SEQ.

California also mandates immunization for children entering public and private schools in its Health and Safety Code.[111] Section 120335 requires both public and private school districts (including those that govern childcare centers, day nurseries, nursery schools, family-care homes, or development centers) not to admit students who have not been fully immunized.[112] The section specifically mandates immunizations against the following diseases: diphtheria, haemophilus influenza type B, measles, mumps, pertussis (whooping cough), poliomyelitis, rubella, tetanus, hepatitis B, and chickenpox.[113] It further states that students need not be fully immunized against hepatitis B to advance to the seventh grade, but must be immunized against whooping cough to do so.[114] The Health and Safety Code also provides exemptions from this mandate.[115] Section 120365 provides a religious and personal-belief exemption. Section 120370 provides a medical exemption.[116]

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108 Williams v. State of California *Settlement Notice, supra* note 58.

109 *Id.*

110 *Id.*

111 Cal. Health & Safety Code § 120325 et seq. (West 2015).

112 Health & Safety § 120335.

113 *Id.*

114 Health & Safety §§ 120365, 120370.

115 Health & Safety § 120365.

116 Health & Safety § 120370.

G. AB 2109: AMENDING CAL. HEALTH AND SAFETY CODE SECTION 120365

In response to the growing anti-vaccination movement, the California legislature passed AB 2109 in late 2012.[117] This bill required parents to see a pediatrician or health-care practitioner before obtaining a religious or personal-belief exemption for their children.[118] However, upon signing the bill, Governor Brown added a directive that allowed for a separate religious exemption on the form.[119] The bill went into effect in January 2014.[120] In the first year of the bill's implementation, 20 percent fewer parents used the personal-belief exemption.[121]

H. EXCLUDING UNVACCINATED STUDENTS FROM PUBLIC SCHOOLS

Currently, California schools may exclude unvaccinated children during instances of an outbreak. The California Department of Public Health is vested with this ability to exclude students during outbreaks, which is outlined in the affidavit for personal-belief exemptions.[122] The specific regulation authorizing the Public Health Department to exclude unvaccinated students is 17 California Code of Regulations section 6060.[123] In cases of an outbreak, such as that of measles early in 2015, a local health officer

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117 An Assembly Bill Mandating Physician Consultation for Religious and Personal Belief Exemptions, A.B. 2109, 2012 Sess. (C.A. 2012), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB277 [hereinafter AB 2109 Bill Text].

118 *Id.*

119 *Jerry Brown Signs Bill Requiring Signatures for Those Opting Out of Vaccinations,* Capitol Alert, The Sac. Bee (Sept. 30, 2012), http://blogs.sacbee.com/capitolalertlatest/2012/09/jerry-brown-signs-bill-requiring-signatures-for-those-opting-out-of-vaccinations.html [hereinafter Capitol Alert].

120 *Id.*

121 David Greenwald, *Legislation Introduced That Would End California's Vaccine Exemption Loophole,* The People's Vanguard of Davis (Feb. 6, 2015), http://www.davisvanguard.org/2015/02/legislation-introduced-that-would-end-californias-vaccine-exemption-loophole/.

122 Giana Magnoli, *Hope School District Cleared to Exclude Unvaccinated Students in Case of Measles Outbreak,* Noozhawk (May 5, 2015, 11:21 AM), http://www.noozhawk.com/article/hope_school_district_could_exclude_unvaccinated_students_during_outbreak; Personal Beliefs Exemption to Required Immunizations, http://eziz.org/assets/docs/CDPH-8262.pdf (last visited Apr. 20, 2015).

123 Cal. Code Regs. tit. 17, § 6060 (2015).

will decide whether a specific school district may exclude unvaccinated children.[124]

While there are parents who are against exclusion of unvaccinated students from public schools, there are also parents who are pushing this further and are calling for the exclusion of unvaccinated children from public schools whether or not an outbreak has occurred.[125] An illustrative case for this need is found in Rhett Krawitt.[126] Rhett is a six-year-old student in Marin County, California, who fought leukemia for the last five years.[127] As a result of his chemotherapy, he is unable to be vaccinated because his immune system is still rebuilding.[128] While the measles may not be as serious for any other student, it would be extremely debilitating to Rhett.[129] This is one of the situations that SB 277 is attempting to address.

III. THE CONSTITUTIONALITY OF SB 277

SB 277 was introduced on February 19, 2015 by Senator Richard Pan (D-Sacramento), a pediatrician, and Senator Ben Allen (D-Santa Monica), a professor and attorney.[130] SB 277 seeks to combat the danger arising out of a growing population of unvaccinated children by eliminating the religious and personal-belief exemptions from the California Health and Safety Code. The approval of this bill would make California one of three states that offer only a medical exemption to state vaccination laws (the other two being Mississippi and West Virginia).[131] This section addresses how SB 277 alters California's vaccination laws, the criticisms of SB 277, and the constitutionality of the bill [signed into law by the governor, June 30, 2015].

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124 Magnoli, *supra* note 122.

125 Aliferis, *supra* note 14.

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

130 SB 277 Bill Text, *supra* note 16.

131 *State Vaccination Exemptions,* Nat'l Vaccine Info. Center, http://www.nvic.org/CMSTemplates/NVIC/pdf/state-vaccine-exemptions_blue.pdf (last visited Mar. 29, 2015).

A. THE TERMS OF SB 277

On April 22, 2015, an amended version of Senate Bill 277 was passed by the California Senate Education Committee.[132] This bill would remove both the religious and personal-belief exemptions from California's vaccination mandate for students, requiring unvaccinated students to receive a "home-based private school" or "independent study" education.[133] The amended bill specifically addresses concerns that unvaccinated children would have difficulty accessing an education by broadening an exemption for home-schooled children.[134] Under this broadened amendment, multiple families would be able jointly to homeschool their unvaccinated children.[135] Furthermore, unvaccinated children would be allowed to enroll in independent-study programs run by school systems.[136] If SB 277 passes, this would also negate AB 2109, which requires consultation with a pediatrician or health care practitioner before applying for a religious or personal-belief exemption.[137]

On April 28, 2015, the Senate Judiciary Committee passed the bill, as amended to clarify that the bill would only mandate vaccinations for ten diseases: diphtheria, hepatitis B, haemophilus influenza type b, measles, mumps, pertussis (whooping cough), poliomyelitis, rubella, tetanus, and varicella (chickenpox).[138] Any additional vaccinations would need to be deemed appropriate by several health groups and departments.[139] Furthermore, on June 10, 2015, the Assembly Health Committee passed the bill with an amendment that specifies that a licensed physician may consider

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132 *Senators Richard Pan and Ben Allen's SB 277 Passes Senate Education Committee on Bipartisan Vote,* California Senator Richard Pan (Apr. 22, 2015), http://sd06.senate.ca.gov/news/2015-04-22-senators-richard-pan-and-ben-allen% E2%80%99s-sb-277-passes-senate-education-committee.

133 SB 277 Bill Text, *supra* note 16.

134 *Id.*

135 Capitol Alert, *supra* note 119.

136 *Id.*

137 SB 277 Bill Text, *supra* note 16.

138 Senate Judiciary Committee, *Media Archive,* California State Senate (Apr. 28, 2015), http://senate.ca.gov/media-archive [hereinafter Senate Judiciary Committee Video].

139 SB 277 Bill Text, *supra* note 16.

family medical history when evaluating the necessity of a medical exemption for a child.[140]

Those opposed to SB 277 have raised several primary points of concern. The first is the idea that the bill violates the religious and parental rights of parents and children who oppose vaccinations for religious reasons.[141] The second is that the bill discriminates against a "class" of unvaccinated and partially vaccinated children.[142] Third, anti-vaccinators argue that the bill would interfere with a child's right to a public education.[143] Lastly, opponents of the bill claim that there is no compelling interest in this case because there is no pressing or medically verified need to pull unvaccinated children from public schools.[144]

B. GOVERNMENT INTEREST IN MANDATING VACCINATIONS IN PUBLIC SCHOOLS TO PRESERVE PUBLIC SAFETY TRUMPS RELIGIOUS AND PARENTAL RIGHTS

While the exclusion of unvaccinated students during an outbreak is standard procedure across the nation, there have been cases challenging the constitutionality of these directives. *Phillips v. City of New York,*[145] a recent New York federal district court case, addressed whether the exclusion policy violated the rights of children exempted on religious grounds.[146] The court ruled that there is no constitutional right to a religious vaccine-exemption.[147] The court noted that the Supreme Court has "strongly suggested that religious objectors are not constitutionally exempt from vaccinations" under *Jacobson v. Massachusetts,* and that sister courts in its Eastern District have rejected a constitutional exemption from vaccinations.[148]

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140 *Id.*

141 Senate Education Committee, *Media Archive,* California State Senate (Apr. 15, 2015), http://senate.ca.gov/media-archive [hereinafter Senate Education Committee Video 1].

142 *Id.*

143 *Id.*

144 Senate Judiciary Committee Video, *supra* note 138.

145 27 F. Supp. 3d 310 (E.D.N.Y. 2014).

146 Phillips v. City of New York, 27 F. Supp. 3d 310, 311 (E.D.N.Y. 2014).

147 *Id.* at 312.

148 *Id.*

This case suggests that laws which interfere with individual liberties in the name of public health, such as SB 277, may be valid.[149] Furthermore, this case affirms that California does not have to provide a religious exemption from mandated vaccinations in public schools in the name of protecting public health and safety.[150] *Prince v. Massachusetts* further confirms that freedom of religious practice and a parent's authority to raise his or her children does not trump the state's interest in protecting the welfare of children.[151] This Court was also specific about how this principle applied to the vaccination of children, strongly noting that individual preference to raise one's children does not warrant exposing the community and its children to preventable diseases that could ultimately lead to illness or death.[152]

C. THE BILL DOES NOT UNCONSTITUTIONALLY DISCRIMINATE AGAINST A "CLASS" OF UNVACCINATED OR PARTIALLY VACCINATED CHILDREN

Opponents of the bill have compared the effect of this bill to the "separate but equal" state of the public-education system before *Brown v. Board of Education*.[153] While the anti-vaccinators' legal argument for this assertion is vague, it appears there are two primary points of contention. The first is that it is discriminating against a class of children whose parents refuse vaccinations as a result of religious or personal beliefs, in effect discriminating against people of that particular faith or personal belief.[154] But while the state has a duty to uphold religious exemptions when they are legislated in place, as noted above, there is no underlying constitutional requirement for the states to enact a religious or personal-belief exemption. As held in *Phillips,* such convictions do not trump the state's interest in preserving community health.[155] Therefore, this argument does not hold.

The second argument appears to be a type of disabilities-discrimination claim. Various parents testified at the Senate Committee hearings on SB 277 that they were unable to obtain a medical exemption for their

149 *Id.*

150 *Id.* at 312–13.

151 Prince v. Massachusetts, 321 U.S. 158, 173–74 (1944).

152 *Id.* at 166–67.

153 Senate Education Committee Video 1, *supra* note 141.

154 *Id.*

155 Phillips v. City of New York, 27 F. Supp. 3d 310, 312 (E.D.N.Y. 2014).

"vaccine injured" children.[156] Anti-vaccinators argue that the bill discriminates against these children who are vaccine-injured, have the potential to become vaccine-injured, or have a condition that may not fall into a clear medical exemption but may cause the child to face higher risks with respect to certain vaccinations.[157] As Senator Pan noted in the Senate Judiciary Committee hearing held on April 28, 2015, "vaccine injured" is not a medical term, but a term of art used by opponents to the bill to explain a wide range of reactions to vaccines.[158] These "vaccine injured" children may range from death, to the inability to speak for 24 hours, to various minor reactions.[159] Children may be termed "vaccine injured" even if the vaccine was not linked to the injury (for instance, when the injury was coincidental to receiving the vaccine).[160] The United States has a no-fault compensatory infrastructure for those who suffer a reaction to a vaccine under the National Childhood Vaccine Injury Act of 1986.[161] In order to receive compensation under this system, the United States Court of Federal Claims must find by a preponderance of the evidence that the child sustained or suffered significant aggravation of an illness, disability, injury, or condition as a result of a vaccine.[162]

It is not clear whether the opponents of the bill will attempt to bring a disabilities-discrimination claim under the individual right to equal protection. The Equal Protection Clause of the Fourteenth Amendment states that no state will "deny to any person within its jurisdiction the equal protection of the laws."[163] In order to succeed on an equal-protection claim, the plaintiff must demonstrate that he or she was treated differently than others who occupied a position similar to the plaintiff's and that the

156 Senate Judiciary Committee Video, *supra* note 138; Senate Education Committee Video 1, *supra* note 140; Senate Education Committee, *Media Archive,* California State Senate (Apr. 22, 2015), http://senate.ca.gov/media-archive [hereinafter Senate Education Committee Video 2].

157 Senate Judiciary Committee Video, *supra* note 138

158 *Id.*

159 *Id.*

160 *Id.*

161 42 U.S.C. § 300aa-11.

162 *Id.* at (c)(1); Snyder ex rel. Snyder v. Secretary of Health and Human Services, 88 Fed. Cl. 706, 740 (2009).

163 U.S. Const. amend. XIV.

unequal treatment was both intentional and unjustified.[164] The court in *Workman v. Mingo County Board of Education*[165] noted that there is no facial discrimination on the basis of religion because the state is not required to provide a religious exemption and did not target a particular religious belief.[166] In this case, the plaintiff claimed that the defendant, the Mingo County Board of Education, violated her constitutional rights when the Board refused to admit her unvaccinated daughter, M.W., to public school.[167] The plaintiff chose not to vaccinate M.W. because her other child, S.W., had begun to suffer health problems that appeared around the same time that S.W. received vaccinations.[168] The plaintiff received a medical exemption for M.W., but this was later denied when a school nurse challenged the exemption.[169] One of the plaintiff's primary arguments was that the vaccination statute was facially discriminatory because it did not provide a religious exemption.[170] The court rejected her claim because she did not explain how the statute was facially discriminatory.[171] The court further reasoned that the plaintiff's complaint was not that the statute targeted a particular religion, but that it did not provide an exemption for her personal religious beliefs.[172] This reasoning indicates that anti-vaccinators must clearly demonstrate discriminatory impact or intentional targeting of a specific protected class for the court to consider a facial discrimination claim. Here, the plaintiff demonstrated only that the mandate goes against her personal beliefs, but not necessarily individuals who practice a particular religion.

Furthermore, a claim that the bill is facially discriminatory against "vaccine injured" children would not be valid. This argument should not hold in court because "vaccine injured" children are a vague and unrecognized "class" who are also not categorized as disabled.[173] Additionally, the

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164 Morrison v. Garraghty, 239 F.3d 648, 654 (4th Cir. 2001).

165 Workman v. Mingo County Bd. of Educ., 419 Fed. Appx. 348 (4th Cir. 2011).

166 *Id.* at 354–56.

167 *Id.* at 350–51.

168 *Id.* at 351.

169 *Id.*

170 *Id.*

171 *Id.* at 355.

172 *Id.*

173 Senate Judiciary Committee Video, *supra* note 138.

bill still provides a medical exemption for children who may suffer from vaccinations.[174] In this case, the duty should be on the doctor to provide an appropriate ground for medical exemption. In fact, the amended version of the bill specifically notes that a licensed physician may deem that a child should not be vaccinated due to family medical history, which would include a family member's previous adverse reactions to a vaccination. In comparison, this bill would not have the discriminatory effect that *Wong Wai v. Williamson* had. In that case, the potentially deadly bubonic-plague vaccination was specifically directed toward the Asian race "without regard to the previous condition, habits, exposure to disease, or residence of the individual."[175] In other words, that class-based vaccination was not a calculated and reasonable mandate meant to preserve the public health of the community. SB 277 does not unnecessarily target a group of children regardless of legitimate health concerns.

D. THE DEBATE SURROUNDING THE RIGHT TO A PUBLIC SCHOOL EDUCATION

While the amendment broadens the educational options for unvaccinated or partially vaccinated children, critics continue to view this as an unconstitutional infringement on their children's right to a free public education.[176] Since 1879, article IX, section 5, of the California Constitution has guaranteed a free public-school education, specifically noting that the "Legislature shall provide for a system of common schools by which a free school shall be kept up and supported."[177] In *Serrano v. Priest,* the California Supreme Court held that education was a "fundamental" interest guaranteed by the California Constitution.[178] The right to a free public school education is distinctly a matter of California, as opposed to federal, law.

In 1940, the State Board of Education implemented a regulation to uphold the "free school guarantee."[179] Title 5, California Code of Regulations, section 350, specifies that a student "shall not be required to pay any

174 SB 277 Bill Text, *supra* note 16.

175 Wong Wai v. Williamson, 103 F. 1, 7 (N.D. Cal. 1900).

176 Senate Judiciary Committee Video, *supra* note 138.

177 Cal. Const. art. IX, § 5.

178 Serrano v. Priest, 5 Cal. 3d 584, 589 (1971).

179 Cal. Code Reg. tit. 5, § 350.

fee, deposit, or other charge not specifically authorized by law."[180] These prohibited fees were clarified by the California attorney general and included fees like security deposits, membership fees for organizations, and necessary school supplies.[181] The Court reaffirmed and clarified how the educational guarantee functions in *Butt v. State of California,* noting that the California Constitution "prohibits maintenance and operation of the public school system in a way which denies basic educational equality to the students of particular districts."[182]

The California Supreme Court has since ruled on various fees that were allegedly in violation of the California Constitution's "free school guarantee." While fees for educational extracurricular activities, driving classes offered through the school district, and to compensate for lost state funding due to unexcused absences were unconstitutional, fees that were legitimately educational in nature were valid.[183] The following fees were also found not to be contrary to the "free school guarantee": optional attendance as an observer at a school event, food, replacement costs for materials that a student failed to return or deliberately defaced, field trips, transportation to school (so as long as indigent students could receive a waiver for the fee), medical insurance for field trips, physical-education attire, parking, direct cost of materials for projects kept by the student, duplication of public records, summer-employment transportation fees, out-of-state tuition fees, fingerprinting programs, deposits for musical instruments and other regalia that are taken overseas, and eye-safety devices.[184]

1. SB 277 Does Not Violate the "Free School Guarantee"

Those who oppose SB 277 argue that this mandate eliminates the "free school guarantee" for unvaccinated students. While private homeschooling and independent study are options, these can be time-intensive and at times, costly.[185] The opposition has also brought up the concern that single parents

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[180] *Id.*

[181] Ops. Ca. Atty. Gen. No. NS-4114.

[182] Butt v. State of California, 4 Cal. 4th 668, 685 (1992).

[183] *Guidelines for District Staff and Parents Regarding Student Fees, Donations and Fundraising,* San Diego United School Dist., http://www.sandi.net/Page/2570 (last visited Apr. 13, 2015).

[184] *Id.*

[185] Senate Education Committee Video 1, *supra* note 141.

or two-parent households with insufficient income would be unable to put their children in any homeschooling or independent study options.[186]

This argument does not have a strong foothold in California, as there are free-homeschooling options available for students.[187] These options include programs offered by public school districts, charter schools, and online education.[188] Though parents may argue that the quality of the free-homeschooling option available to them is not agreeable, this does not invalidate the fact that there are free-homeschooling and independent-study options for California students that would suffice to satisfy the "free school guarantee." Furthermore, under the second set of amendments by the Senate Education Committee, families now have more options to homeschool their children jointly with other families, alleviating the pressure on families who may not have as much time to care for their children.[189]

2. Subjecting the Mandate to Strict Scrutiny

While the American Civil Liberties Union (ACLU) agrees with the mandatory vaccination of children, the civil rights group argues that SB 277 lacks a "compelling interest" in requiring all students in schools to be vaccinated.[190] United States courts apply "strict scrutiny" in two situations: when a fundamental constitutional right is infringed,[191] or when a government action applies to a "suspect classification."[192] In this situation, the right to education in California is considered a fundamental constitutional right that has been

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186 *Id.*

187 *Free Public Homeschool Options in California,* HubPages (Sept. 2, 2014), http://learnthingsweb.hubpages.com/hub/Free-Homeschool-Options-in-Southern-California (last visited Apr. 13, 2015).

188 *Id.*

189 Senate Education Committee Video 2, *supra* note 156.

190 Kevin Baker, *ACLU Statement: SB 277, California Vaccination Bill,* American Civil Liberties Union of Northern Cal. (Apr., 28, 2015), https://www.aclunc.org/news/aclu-statement-sb-277-california-vaccination-bill [hereinafter ACLU Statement].

191 Graham v. Kirkwood Meadows Pub. Util. Dist., 21 Cal.App.4th 1631, 1642 (1994) ("California has followed the two-tier approach employed by the United States Supreme Court in reviewing legislative classifications under the equal protection clause."); Kevorkian v. Arnett, 939 F. Supp. 725, 732 (1996) ("Under this test, strict scrutiny is applied in cases involving suspect classifications or fundamental rights; rational basis analysis is applied to all other cases.").

192 Roe v. Wade, 410 U.S. 113, 155 (1973).

reaffirmed by the California Supreme Court.[193] Therefore, strict scrutiny would apply as a matter of California, rather than federal, constitutional law.

In order to survive strict scrutiny, the law or policy must satisfy three tests: it must be justified by a compelling government interest,[194] it must be narrowly tailored,[195] and it must be the least restrictive means for achieving that interest.[196] California's Legislative Analysts note that the ACLU opposes SB 277 because it conditions access to California's "free school guarantee" without a showing of a "compelling interest."[197] When evaluating the constitutionality of vaccination mandates, courts weigh individual liberties and the necessity of governmental interference into these liberties to preserve public health and safety.[198] According to Professor Lawrence Gostin, four overlapping standards are taken into consideration in weighing these interests: necessity, reasonable means, proportionality, and harm avoidance.[199] These standards should be taken into consideration when addressing the strict-scrutiny test.

3. The Compelling Interest of Public Health and Safety of California's Public School Students

The authors of SB 277 have articulated the government's compelling interest. In its non-partisan bill analysis, the Senate Judiciary Committee notes

193 Serrano v. Priest, 5 Cal. 3d 584, 589 (1971).

194 Somers v. Superior Court, 172 Cal. App. 4th 1407, 1412 (2009) ("But if the statutory scheme imposes a suspect classification, such as one based on race [citation], or a classification which infringes on a fundamental interest . . . the classification must be closely scrutinized and may be upheld only if it is necessary for the furtherance of a compelling state interest.") (quoting *Weber v. City Council,* 9 Cal. 3d 950, 959 (1973)).

195 Griffiths v. Superior Court, 96 Cal. App. 4th 757, 775 (2002) ("If a challenged law operates to the peculiar disadvantage of a suspect class or impinges on a fundamental right, this court subjects it to the severe standard of 'strict scrutiny.' Under strict scrutiny, a discriminatory law will not be given effect unless its classification bears a close relation to promoting a compelling state interest, the classification is necessary to achieve the government's goal, and the classification is narrowly drawn to achieve the goal by the least restrictive means.").

196 *Id.*

197 SB 277 Bill Analysis, Cal. Committee on Health (Apr. 8, 2015), http://leginfo.ca.gov/pub/15-16/bill/sen/sb_0251-0300/sb_277_cfa_20150407_101248_sen_comm.html.

198 Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944).

199 Lawrence Gostin, *Jacobson v. Massachusetts at 100 Years: Police Power and Civil Liberties in Tension,* 95(4) Am. J Pub. Health 1, 576–81 (2005).

that the government's compelling interest is to preserve the health and safety of the students in California's public school system by increasing herd immunity and protecting vaccine-deprived children from disease.[200] This interest has been continuously affirmed in both California and United States Supreme Court cases, including *Zucht v. King*[201] and *Prince v. Massachusetts*.[202] Furthermore, as noted above, *Williams v. State* suggests that the school has an affirmative duty to ensure the safety of its students.[203]

4. The Bill is Narrowly Tailored and Achieves its Goals

In order for the bill to meet strict scrutiny, it must also be narrowly tailored.[204] The law is narrowly tailored when it targets only that interest.[205] It is not narrowly tailored when it is overbroad or fails to address the essential aspects of that compelling government interest.[206]

The opposition argues that this bill is not narrowly tailored because vaccinations do not necessarily protect the public from communicable diseases.[207] Anti-vaccinators argue that non-vaccinated children do not necessarily lack immunity, while vaccinated children may not necessarily be protected.[208] An exchange between Senator Heff and Senator Pan during the Senate Education Committee hearing illustrates this dilemma.[209] During the April 15 hearing, Senator Robert Heff (R-Diamond Bar) noted that chickenpox may be transmitted six weeks after receiving the vaccination, and yet these recently immunized children are not sheltered from immunocompromised children.[210] Senator Pan noted that no vaccination

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200 SB 277 Bill Analysis, Senate Judiciary Committee (Apr. 22, 2015), http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0251-0300/sb_277_cfa_20150427_153640_sen_comm.html [hereinafter SB277 Judiciary Bill Analysis].

201 260 U.S. 174 (1922).

202 321 U.S. 158 (1944).

203 Williams v. State of California *Settlement Notice, supra* note 58.

204 *Wade,* 410 U.S. at 155.

205 *Id.*

206 *Id.*

207 Senate Education Committee Video 1, *supra* note 141.

208 Alan Phillips, *Vaccine Exemptions: Do They Really Put Others At Risk?,* Natural News (Feb. 18, 2012), http://www.naturalnews.com/035024_vaccine_exemptions_children_infectious_disease.html.

209 Senate Education Committee Video 1, *supra* note 141.

210 *Id.*

provides full protection from disease, but can provide near-perfect coverage.[211] In the case of chickenpox, the infectious agents created by recent vaccinations would be less potent than "wild" chickenpox.[212] Furthermore, the Federal Drug Administration sets the highest bar for potential risk that is unavoidable but very minimal.[213] He also acknowledges that every vaccination is different for every child, and certain vaccinations, such as that for whooping cough, are not as effective as others, like those for measles.[214]

Here, it is evident that this dilemma is caused by conflicting medical opinions. Supporters of the bill see the risks posed by vaccination as extremely minimal and necessary to preserving community health, while those who oppose it see vaccination as a potentially deadly choice that may ultimately make no difference in protecting herd immunity.[215] However, as noted in Part I, studies show that this is not true. The rate of personal-belief exemptions has in fact risen over the past decade, and there are school districts where the herd immunity levels fall far below the 90 percent rate.[216] This is because parents against vaccination tend to cluster in high-income communities, leading that particular community to be particularly susceptible to disease.[217] Senator Pan and various accounts of the recent Disneyland measles outbreak have reported that the measles tended to travel in those communities with higher personal-belief exemptions.[218] This is the case even with AB 2109 in place. Ultimately, the Legislature will need to weigh the credibility of these conflicting medical opinions. By removing unvaccinated and partially vaccinated children from public schools, the bill would ensure the safety of vaccine-deprived children while rapidly increasing the herd immunity of public schools. As noted earlier in Part IIID, the children removed from public schools would also still have reasonable access to their right to a free public education through alternative schooling, such as homeschooling and independent study.

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211 *Id.*
212 *Id.*
213 *Id.*
214 *Id.*
215 *Id.*
216 *Supra,* notes 45–46.
217 *Supra,* notes 41–42.
218 Senate Education Committee Video 1, *supra* note 141.

5. The Bill is the Least Restrictive Means for Achieving Public Safety and Health in Public Schools

Lastly, the bill must be the least restrictive means of achieving the government's compelling interest.[219] If there is an alternative method that achieves the same interests but causes less interference with the rights of the affected children, this bill would be considered unconstitutional.[220] The bill's opposition may find the most merit in this argument.

The bill seeks to remove unvaccinated and partially vaccinated children from California's public school in an effort to protect the community from outbreaks (ideally keeping all schools and districts over 90 percent in all vaccinations) and to protect children who are medically exempt from vaccinations from being subject to vaccine-preventable diseases.[221] Opponents will argue that AB 2109 better serves the bill's purpose, citing the 20 percent drop in personal-belief exemptions since the beginning of 2014.[222] The American Civil Liberties Union also contends that AB 2109 has had a short history in which to see results, but that the 20 percent drop in the use of personal-belief exemptions is a positive step toward achieving the same interests as SB 277.[223]

While AB 2109 has been relatively effective, it does not guarantee that school districts that have herd immunity rates below 90 percent would increase their rates to a safe level. This also places immunocompromised children such as Rhett Krawitt at high risk of contracting disease. This would then place the responsibility on Krawitt's parents, instead of the parents utilizing the personal-belief exemptions, to remove their child from public school to avoid exposure to others who can more readily transmit diseases to him. Therefore, AB 2109 does not meet the compelling government interest that SB 277 seeks to achieve.

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219 Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 656 (2004).

220 *Id.*

221 SB277 Judiciary Bill Analysis, *supra* note 200.

222 Robin Abcarian, *Fight Against Vaccination Bill Finds Ally in ACLU,* L.A. Times (Apr. 24, 2015, 4:30 AM), http://www.latimes.com/local/abcarian/la-me-abcarian-vaccination-bill-20150424-column.html.

223 *Id.*

E. A COMPARATIVE LOOK AT MASSACHUSETTS AND WEST VIRGINIA

California's vaccination debate is unique because it is one of only a few states that have a constitutional right to a public education and yet is removing both its religious and personal-belief exemptions. This would place California in the small minority of states that have only a medical exemption; the other two are Massachusetts and West Virginia.[224] This section analyzes how the lack of religious and personal-belief exemptions have impacted case law in these states.

The Supreme Court of Appeals of West Virginia case, *D.J. v. Mercer County Board of Education,* similarly addressed the issue of the conflict between the right to be healthy and the right to access a public education.[225] In this case, a child, T.J., was previously and fully vaccinated according to West Virginia's immunization code.[226] However, new vaccinations were required by West Virginia's interpretive rule.[227] The plaintiffs, the parents of T.J., argued that West Virginia's Department of Health and Human Resources (DHHR) exceeded its authority by enacting this rule; that its enforcement of the rule was discriminatory; and that the rule denied children the fundamental right to an education.[228]

In finding against the plaintiffs and for the Board of Education, the court analyzed whether the government met the strict-scrutiny test.[229] West Virginia also recognizes that education is a fundamental right in the state.[230] The court subjected the law to strict scrutiny, which required a compelling government interest, narrow tailoring, and least restrictive means in order to pass the test.[231] The court concluded that the compelling interest was satisfied because "the protection of the health and safety of the public is one of the most important roles of the State."[232] Furthermore,

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224 *State Vaccination Exemptions for Children Entering Public Schools, supra* note 7.

225 D.J. v. Mercer County Bd. of Educ., No. 13-0237, 2013 WL 6152363, at *1 (S.E. 2d Nov. 22, 2013).

226 *Id.* at *1.

227 *Id.*

228 *Id.* at *2.

229 *Id.* at *4.

230 *Id.*

231 *Id.*

232 *Id.*

it noted that the schools are responsible for maintaining the health of children.[233] The court did not extensively consider whether mandatory vaccinations are overbroad or the least restrictive means of meeting this compelling interest, as it relied on West Virginia's existing mandatory-vaccination laws.[234] While this case may not be exactly parallel to California's case, as California is in the position of repealing its religious and personal belief exemptions as opposed to maintaining medical-only exemptions, this case further affirms that the elimination of religious and personal-belief exemptions to school vaccinations is constitutional.

IV. ADDITIONAL CONSIDERATIONS

Although the bill may be constitutional, there are additional concerns the Legislature should consider as it moves forward with the mandate. The first is low-income-household access to vaccinations. Second is making a concerted effort to update its vaccination laws to balance concerns about vaccinations and future biomedical advances.

A. ACCESS TO VACCINATIONS

The ACLU issued a statement on April 28, 2015, clarifying its stance on SB 277.[235] Though the ACLU was previously seen as an ally to the bill's opposition, it states that it remains neutral on the bill because of its potential impact on low-income families. Specifically, it points out that in some cases, children are not vaccinated because "parents lack knowledge, have poor access to health care, face transportation problems, or other barriers." The California Legislature and school systems should have responsibility to mitigate these issues and ensure that children are not being penalized for being unable to obtain vaccines as a result of their families' financial status. The authors of the bill have expressed their willingness to work with school districts to maintain access to California's public school system.[236] Accordingly, the California Legislature should work with school districts to create on-site vaccination programs, to hold educational programs and

233 *Id.*

234 *Id.*

235 ACLU Statement, *supra* note 190.

236 Senate Judiciary Committee Video, *supra* note 138.

create materials for parents to learn about vaccinations, and to create a process for families who may be unable to afford the vaccinations.

B. MEDICAL ADVANCES

The anti-vaccination debate is, of course, an offshoot of a division in opinion as to whether vaccinations are medically necessary. California, West Virginia, and Massachusetts would have the same vaccination requirements if SB 277 passes: diphtheria, hepatitis B, haemophilus influenza type b, measles, mumps, pertussis (whooping cough), poliomyelitis, rubella, tetanus, varicella (chickenpox), and meningitis (primarily for postsecondary education).[237] These states have provisions that would allow for various health authorities to alter the specific list of mandatory vaccinations.[238]

As the country continues to make medical advances, it is possible that certain vaccinations may become obsolete, or alternative medications may become available that are equally effective as current vaccinations. One Note suggests distinguishing vaccines by two types of "necessity" for the public health or safety of the community.[239] The first would be a "medical necessity" and the second a "practical necessity."[240] "Medically necessary" vaccines are those that are the only known viable defenses against a disease in the community.[241] "Practically necessary" vaccines are those where there are efficacious alternatives, but these alternatives are not used by a significant number of people.[242] This Note suggests that vaccines not be permanently relegated to either of these categories.[243] Instead, whether a vaccine is "medically or practically necessary" would be dependent on future biomedical advances.

The Note emphasizes the need for this distinction in order to preserve civil liberties. According to Professor George Annas, compromising civil liberties would undermine the public's trust, "an essential ingredient in

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237 SB 277 Bill Text, *supra* note 16; Mass. Gen. Laws ch. 76, § 15 (2015), W. Va. Code § 64-95-4 (2015).

238 *Id.*

239 Harvard Law Review, *Toward a Twenty-First-Century* Jacobson v. Massachusetts, 121 Harv. L. Rev. 1820, 1820 (2008).

240 *Id.*

241 *Id.*

242 *Id.*

243 *Id.* at 1840.

any well-operating public health endeavor."[244] By having tailored vaccination mandates specific to the type of vaccine and effective alternatives, it allows individual choice, but "minimizes the number of opt-outs."[245] This would demonstrate to the community that the legislature is keeping its laws up-to-date with legitimate biomedical advances and balancing the concern of parents who are against vaccination with the current availability of equally efficacious alternatives to vaccination.

V. CONCLUSION

The focus of the vaccination debate should be the health and wellbeing of children — one of the most vulnerable classes of people in our society. As the courts across the nation have concluded, the interest in preserving the wellbeing of our children and the community is so critical that it takes precedence even when in conflict with individual liberties. This is because the ability to exercise individual freedoms should not unreasonably impinge on the welfare of the whole. As such, the legislature may create public health legislation that interferes with individual rights so long as it is narrowly tailored, reasonable, and the least restrictive means of doing so. SB 277 meets all of these requirements without interfering unduly with the child's right to a public education. Accordingly, the courts should find this bill to be constitutional under both California and federal law.

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244 *Id.* at 1835.

245 *Id.* at 1841.

BOOK REVIEWS

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GOLDEN RULES:
The Origins of California Water Law in the Gold Rush

BY MARK KANAZAWA

REVIEWED BY PETER L. REICH*

Chicago: University of Chicago Press, 2015. xvii+351pp.

Mark Kanazawa has written a thoroughly researched, highly focused study of the beginnings of the prior appropriation doctrine in California water law. He situates his examination within the considerable economic history literature on the Gold Rush, and expands our knowledge of the era with a detailed examination of miners' codes, trial and appellate court rulings, and water company records. Kanazawa's approach to the issue addressed makes his book more of an application of law and economics theory to aspects of the period than a history of how California water law developed.

Kanazawa introduces his subject by noting that the 1850s gold mining industry dramatically increased water demand, which in turn gave rise to

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"strong pressures to create legal rules to define and enforce property rights in water" (p. 4). He characterizes the water rights emerging from this period as appropriative, including rules that in order to be exclusive, claims had to have temporal priority over all others, be beneficial, have a quantified use, and be actually worked. The author surveys existing historical and economic literature on water in the Gold Rush, although he curiously omits the most comprehensive work on California water, Norris Hundley, Jr.'s *The Great Thirst* (1992/ 2001). Kanazawa finds that as a body, this literature fails to provide "a theoretical framework that permits sensible interpretation of the evidence in a coherent and consistent manner" (p. 8). He clearly identifies with the law and economics school of interpretation, asserting that common-law water doctrine incentivizes economic activity, reduces uncertainty, and was promulgated by judges "largely insulated from political pressures to rule in certain ways" (pp. 10–11).

Kanazawa's substantive chapters elaborate on his theoretical perspective, the effects of technology, ditch company development, informal mining camp law, the common law of water rights, the origins of appropriation, and liability for water degradation and bursting dams. In Chapter 2, on economic theory, he studies various types of disputes that emerged between water users, and states that "the central interpretive question concerns how, and the extent to which, the law promotes economic efficiency" (p. 44). Chapter 3 documents how technological improvements over simple placer mining, including sluice boxes to catch gold flakes on riffles and, later, high-pressure hydraulic hoses, dramatically increased water demand and hence legal disputes. In Chapter 4 Kanazawa discusses the growth of the ditch industry into massive integrated companies with reservoirs and miles of flumes, or wooden aqueducts, whose investments were constantly under legal attack due to their diversions, venting tail waters, leaky ditches, and collapsed dams. The author's minute examination of mining codes in the fifth chapter creates perhaps the most thorough description to date of mining camp self-governance, including provisions for unlimited claim purchases, permission for collaborative arrangements between miners, and requirements that claims actually be worked. The codes kept order and encouraged investment not only by miners but by companies as well.

When Kanazawa delves into the origins of common-law water rights, and specifically of prior appropriation, certain limitations of his paradigm

become apparent. In Chapter 6 he considers how the continuation of the Mexican system of local magistrates, or *alcaldes*, managed the doctrinal transition from the previous regime to American rule by allowing "fundamental changes in the application of the law" (p. 159) — that is, of the common law of water as informed by mining camp rules. The *alcaldes*, according to Kanazawa, "had little or no knowledge of Spanish law nor the ability to read what texts were available," so they "naturally fell back on common-law principles" (pp. 159–60). Yet this assertion is at odds with surviving *alcalde* memoirs, such as those of Edwin Bryant, who consulted the *Recopilación de leyes de las Indias*, and of Walter Colton, who possessed the standard nineteenth-century Mexican code compilations of Alvarez and Febrero. Miners in fact relied on Hispanic law in arguing for public access to minerals, in the California Supreme Court cases of *Stoakes v. Barrett* (1855) and *Biddle Boggs v. Merced Mining* (1859). Post-Gold Rush, substantial litigation over communal water sharing as practiced in the Mexican period continued through the end of the century. Kanazawa tends to conceptualize Gold Rush-era legal doctrine as if it emerged *ab initio* rather than being repeatedly invoked by miners and farmers attempting to preserve aspects of the prior system. Certainly, Mexican mining and water law was eventually replaced, but not for lack of argument.

In his seventh chapter, Kanazawa traces the origins of California water law in a particular manner. After showing previously that the mining industry's growth sparked numerous conflicts over usage, he now asserts that "the result was the creation of the basic doctrine of prior appropriation, which became the fundamental basis for water law not only in California but in much of the rest of the western United States" (p. 183). But as water historians Norris Hundley and Donald Pisani have shown, priority in right was only part of the story. Riparian (riverbank) land ownership, if acquired before appropriation by others, confers a water right, according to the California Supreme Court rulings in *Crandall v. Woods* (1857) and *Lux v. Haggin* (1886), both of which Kanazawa cites, thus making the state a mixed riparian and prior appropriation jurisdiction along with Oregon and Texas. Notwithstanding Kanazawa's contention that these cases were really conditioned on "temporal priority" (p. 199), Hundley has demonstrated that by the time of *Lux* all farmable riverbank land in California had passed into private hands without having been subject to any significant appropriations, giving ripar-

ian owners a distinct legal advantage and solidifying the incontrovertibly hybrid nature of the state's water law.

Chapters 8 and 9 of *Golden Rules* are well-crafted, dealing with water quality and dam failures, respectively. The courts imposed strict liability (proof of fault unnecessary) on upstream users who degraded the condition of water, particularly when the parties had been informed about the cause and damages were larger. When dams burst, causing harm to those downstream, the courts applied a negligence rule (liability only if fault), reflecting the ability of water companies to prevent damages in advance. Both of these scenarios support Kanazawa's economic efficiency thesis, given the belief held during this period that water pollution was more destructive than dam collapse.

Kanazawa concludes *Golden Rules* by summarizing his argument that the prior appropriation doctrine became law in California because it was economically efficient: "secure water rights were necessary to support investments in water infrastructure" (p. 266). Further, he defends the doctrine against long-standing criticism of its rigidity and environmental unsustainability by saying that "there is nothing in appropriation law that necessarily imposes restrictions on the transfer, and therefore the reallocation to higher value uses, of water" (p. 270). These assertions that California's system is monolithic and neutral exemplify a conceptual problem in the book. By assuming that law develops and operates as though in a vacuum, Kanazawa ignores the weight of the prior legal tradition of public mineral access and water sharing. More crucially, to support his "coherent and consistent" theoretical framework, he mischaracterizes California water law as solely appropriative, and then defends his construction as the best possible contemporary regime. As Norris Hundley noted, riparianism remained doctrine because it was supported by established ownership patterns, and in practice prior appropriation depleted many watersheds, such as Mono Lake. These failures to explore historical context fully confine the usefulness of *Golden Rules* to the analysis of specific case rationales, such as those in the water quality and dam failure decisions. But the book is less valuable as an explanation of the multifaceted, on-the-ground development of California water law.

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FORGING RIVALS:
Race, Class, Law, and the Collapse of Postwar Liberalism

BY REUEL SCHILLER

REVIEWED BY WILLIAM ISSEL*

New York: Cambridge University Press, 2015. xv+343pp.

Forging Rivals is a fascinating, and original, analysis of twentieth century United States political history. Reuel Schiller makes a compelling case for the role of legal history, specifically the history of the clash of two competing legal doctrines, in the rise and fall of Democratic Party liberalism from the early 1940s to the early 1970s. Liberalism's demise, often ascribed to the shortcomings, misjudgments, and failures of the Truman, Kennedy, Johnson, and Carter administrations' policies, and public rejection of federal government activism, was actually a far more complex phenomenon. The limited success of liberalism was also the product of a bitter divorce that ended what many imagined would be a happy marriage between the labor movement and the civil rights movement. The breakup was messy, and perhaps inevitable, with the two parties more often talking past one another than communicating effectively because they differed on how to use the law to achieve "the blessings of liberty." Their irreconcilable differences were rooted in what Schiller defines as "legal and institutional contradictions," which were in turn traceable to the conflicting "legal regimes" of labor law on the one hand and the law of employment discrimination on the other.

Schiller begins with a capsule history of how New Deal liberalism was "forged" in a way that would bedevil labor union and civil rights cooperation from the beginning. New Deal labor law reforms did not undo the right of white employees and employers to maintain, if they chose to do so, racial segregation and racial differentials in hiring, promotions, pay rates, and workplace conditions. Nonwhite workers challenged this feature of the New Deal Order as an egregious case of old racist wine in new administrative law bottles and demanded the addition of fair employment practices law to the liberal agenda. Predictably, white labor tended to regard the new fair employment rules to be as unwelcome an intrusion into their affairs as

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did business. From the early 1940s through the 1960s, the result was continuous conflict between white labor leaders and civil rights leaders and their respective memberships. A relationship that was rancorous from the start only got worse as the parties clashed in one after another episode of bickering, with the crackup following closely on the heels of the black nationalist turn in the civil rights movement in the mid-1960s.

Schiller ably develops his argument that postwar liberalism's legal infrastructure did more to forge rivals than to facilitate cooperation between the labor movement and the civil rights movement. His method is to provide "thick description" of the ways the two parties constructed incompatible legal regimes in cooperation with the executive, legislative, and judicial branches of federal, state, and local governments. His five vividly written vignettes from the San Francisco Bay Area nicely illustrate the complexities in the legal wrangling that developed in California and all across the nation. He shows how public officials, civil rights leaders, labor union bureaucrats, and ordinary employees with workplace grievances involved themselves in bitter disputes from the early years of World War II to the end of the Vietnam War. More often than not, the unanticipated consequences of their actions influenced the degree to which they could obtain justice under the law as much as, or even more than, their original intentions. By 1966, in one especially fraught San Francisco case, labor union officials forthrightly condemned a local civil rights ordinance as "intrusion into collective bargaining" that they were duty bound to "resist." The city's CORE president, unmoved, declared simply that "I don't give a damn about the labor unions." (p. 174)

Schiller uses a wide range of primary sources, including twenty-one archival collections and interviews, and synthesizes a fully up-to-date selection of local and national secondary sources that document the intersections of race, class, and law in the history of postwar liberalism. In its focus on legal history as integral to the origins, development, and demise of postwar liberalism, this book breaks new ground and makes a significant contribution to the fields of both legal history and political history. *Forging Rivals* will be of great value in undergraduate and graduate courses. Schiller's story of the complexities and contingencies of the liberal project beautifully weaves both "agency" and "structure," and most importantly law and institutional history, into the narrative of twentieth-century American politics and policy.

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