

STUDENT WRITING COMPETITION

2021 WRITING COMPETITION VIRTUAL ROUNDTABLE

The California Supreme Court Historical Society convened a video conference to congratulate the 2021 winners of its annual Selma Moidel Smith Student Writing Competition in California Legal History.

The award-winning students introduced themselves and presented summaries of their papers. Participating in the discussion were California Chief Justice Tani Cantil-Sakauye, recently retired Justice Kathryn Mickle Werdegar, Society President Richard H. Rahm, and Selma Moidel Smith who initiated and conducts the competition.

The following is a lightly edited transcript of the video conference that took place on August 5, 2021.¹ The complete papers appear immediately following in this volume of *California Legal History* (vol. 16, 2021).

RICHARD H. RAHM: I want to welcome everyone. My name is Richard Rahm. I'm president of the California Supreme Court Historical Society, and I want to welcome you here today to honor the recipients of the Selma Moidel Smith Student Writing Competition in California Legal History. I want to say that the competition was first proposed by Selma in 2007,

¹ The video conference is available on the Society's website at <https://www.cschs.org/programs/student-writings> or on the Society's YouTube channel at https://www.youtube.com/watch?v=Iw5DIdz_SF8.

and she's been producing it ever since. In 2014, on the occasion of her 95th birthday, the competition was named for her. The competition this year was judged by distinguished legal historians: Professor Stuart Banner, UCLA School of Law; Professor Emeritus Christian Fritz, University of New Mexico School of Law; as well as Professor Sara Mayeux, Vanderbilt University School of Law, who incidentally was the first-place winner of the competition in 2010.

Next, I would like to introduce the chief justice of the California Supreme Court, Tani Cantil-Sakauye, who's been chief justice for eleven years now. The chief justice has championed the cause of bail reform, and she leads an initiative called "The Power of Democracy" to support civil discourse education for students. This is my own opinion, but I think that during her tenure there have been an incredible number, maybe a record number, of unanimous decisions on the Court. I haven't done an analysis, but it seems like a record to me, and congratulations on that. Finally, and perhaps most importantly, the chief justice is also chair of the California Supreme Court Historical Society.

Next, I would like to introduce a former associate justice of the California Supreme Court, Kathryn Mickle Werdegarr, who is also a long-standing member of the Society. Justice Werdegarr, who a couple of years ago, retired after twenty-three years on the Court, was then and remains a champion of environmental law. She has also funded and established a student travel grant at the Society to help California legal history research.

And finally, there's Selma, our Selma. Selma became an attorney in 1943, and practiced for more than forty years. She took over the editor-in-chief position of the Society's *California Legal History* journal in 2009, doubling its size and making it into the preeminent journal it has become. At 102, Selma has remained a leader in the legal profession, being honored by the ABA, the National Association of Women Lawyers, almost every other legal organization, and then some. And did I also mention that Selma was honored by the UCLA School of Music this year by the creation of the Selma Moidel Smith Annual Recital recognizing Selma's 100-plus musical compositions.

Without further ado, Chief, I think this is where you give your greeting.

CHIEF JUSTICE: Thank you, Richard, and thank you for being such an excellent and, I want to say, inspiring president of the historical society,



VIRTUAL ROUNDTABLE PARTICIPANTS —

TOP, LEFT TO RIGHT: CHIEF JUSTICE TANI CANTIL-SAKAUYE, JUSTICE KATHRYN MICKLE WERDEGAR (RET.), COMPETITION CHAIR SELMA MOIDEL SMITH, AND SOCIETY PRESIDENT RICHARD H. RAHM.

BOTTOM, LEFT TO RIGHT: WINNING AUTHORS KAYLEY BERGER, BROOK TYLKA, AND KELLY SHEA DELVAC.

and how you led in time of crisis and that the work of the historical society has only flourished under you. I also want to say hello to Chris,² without whom so many things with the historical society, including us being here today, could not happen. And I'm going to save the best for last, and that's Selma, but I will say also, when Kay and I served together on the California Supreme Court, it was a joy, always a learning experience. Kay Werdegarr is a force, an intellectual force, and poised, and graceful. No one can exceed that. And every day, we miss Kay. And many of Kay's dissents turn out to be, later on, majority — resounding majority — opinions. And so, Kay, if you don't already know it, we miss you dearly every day. Your name has not faded at the Supreme Court amidst our discussions, and so it's a pleasure to see you. Now, let me just say this about Selma. As you know, this

² Chris Stockton, CSCHS Director of Administration.

writing competition is named after Selma because it's Selma's brainchild. But Selma is the mother of countless, infinite number, of tremendous ideas in the legal field. I hope you have a chance, if you have not already Googled Selma. Selma has created, started, inspired, been a part of — and this is important to us here, since all three winners are female — the female-empowered movement in the law. Selma Moidel Smith is the conqueror, the starter of that, at a time when it wasn't necessarily popular, or understood, or considered anything that anyone would join, but Selma has been a tremendous, remarkable, extraordinary voice, and she inspires, she mentors, she sponsors, and I'm proud to be in her company. So, when you hear Selma speak and address you, you'll know what I'm talking about. We've also had the pleasure, Kay and I, as well as another justice from the California Supreme Court, Carol Corrigan, to honor Selma many times, and one of our most recent opportunities — they played some of Selma's music, the music she composes and plays, and we had the pleasure of sharing the stage with Selma as she led us through some of her music.

I'll be brief in terms of the rest of my remarks, only to say how impressed I know I am, and all of us here are, not only with the topics that you chose to write about, which reflects your awareness and your keen insight into the issues that trouble our legal profession, and hence California and the United States today, but that I look forward to reading your inner thoughts regarding these ideas. But what you have touched upon, in terms of, well, Kayley with vagrancy and racial exclusion, sit-lie, and the right to exist in public — how poignant that is, especially now, more than ever, so the fact that you were able to anticipate and write this in a time that it now means so much to us, will serve you well in your years to come in law school because you're prescient. And then, of course, to Brook, for "Getting to *Tarasoff*: a Gender-Based History of Tort Law Doctrine." *Tarasoff* continues to be a case of such magnitude that we discuss it regularly at the California Supreme Court, and I look with interest for your view on this with, as you state in your title, the gender-based history of tort law. And of course, next, let me say, Kelly, your article on California wrongful incarceration compensation law — I don't know that there is a week that goes by that we don't read about something like that in the paper, and when we talk about something like that, of course, it brings with it the weight of what has happened to a person because of wrongful incarceration, and the

contrariness that is to our justice system. So your insight is also important for us, and reminds us about the important work we should be doing, always fairly, accurately, and with transparency. So, I look forward to your articles, I congratulate all of you, and wish you the best. I turn this back to you, Richard.

RAHM: Thank you, Chief. Now that we've heard something about these papers, I'd like to hear them described. The first-place winner is Kayley Berger, who will be in the class of 2022 at UC Irvine School of Law. Kayley's paper, as the Chief mentioned, is "Surveying the Golden State, 1850–2020: Vagrancy, Racial Exclusion, Sit-Lie, and the Right to Exist in Public." Kayley, can you tell us something about yourself and something about your paper?

KAYLEY BERGER: Yes, I'm a J.D./M.B.A. candidate. I'm going into my fourth and final year at the amazing UC Irvine School of Law, and I have recently accepted an offer to join Kirkland & Ellis after graduation as a corporate associate, and then, after that, I will actually be clerking on the Ninth Circuit. So, I have an exciting future lined up. My article traces legal and quasi-legal policies that criminalize the right to exist in public. These include early vagrancy laws aimed at Indians, "greasers," "Okies," Chinese racial exclusion, sundown towns, sit-lie ordinances, and probably a more recent phenomenon, the civil unrest emergency curfews. My point in highlighting the ways in which the Golden State has participated in, or even innovated, discriminatory law and policy is for the reader to consider the potential similarities between these contemporary laws such as sit-lie and contemporary curfew laws and older laws that we actually now consider embarrassing. Are they aimed at removing a population that is broadly disliked? Are they legitimate concerns, or a pretext? Does the enforcement broadly infringe on recognized liberties? These are the questions that I want my paper to invoke, not only when you look at these old laws which we now all can agree are not our state's proudest moments, but recent laws, and laws that still exist today.

RAHM: Kayley, how did you come to write about that, or was there some specific event that occasioned this paper?

BERGER: Actually, I wrote this paper last spring, when a lot of the George Floyd protests were going on, and these curfews were being put in place in California. And whenever I think of curfews and civil unrest, I often think

back to the Rodney King incident and those protests, and the amount of people that were arrested and actually hurt and people who died during those protests. Some of that was at the hands of law enforcement, enforcing those curfews, and so I wanted to make a statement at the time about how I felt about that incident that was going on at that time and relate it back to California's history because we think of California — a lot of people think of it — as a very liberal state, and it is, and there's a lot of liberal policies. Maybe that's because we're considered a sanctuary state; California gave COVID aid to undocumented immigrants when the federal government didn't; California has done some amazing things. But we also have been an innovator in discriminatory policy as well, and so I did want to highlight that.

RAHM: Thank you very much, Kayley. Our second-place winner was Brook Tylka, who graduated this year from Boston University School of Law. Brook's paper is entitled, "Getting to *Tarasoff*: A Gender-Based History of Tort Law Doctrine," and, Brook, can you tell us something about yourself, and how you came to write this?

BROOK TYLKA: I graduated this past spring from Boston University. I was a dual-degree J.D. and M.A. in history student, so definitely, I've always been interested in history and knew I wanted to write some legal history papers during my time in law school. I've now moved back to Wisconsin, which is where I'm from originally. I'm working at a small plaintiff-side employment firm here. I really came to this idea in my 1L Torts class, when we first read *Tarasoff*. I was really struck by all the things I felt were going on in this case as far as issues of national origin, race, gender, domestic partner violence, and all these things, and how those dimensions aren't necessarily usually talked about. In a 1L Torts class, you focus on the issue of duty and that kind of role rather than the more in-depth issues. So I wanted to look backwards from *Tarasoff* and see, was this decision really in line with prior decisions, did it represent a turning point, and so I looked backwards to different torts that disproportionately affected women, and these had a very wide range from early breach of promise cases, which involved women bringing suit for a man's failure to follow through on a marriage proposal, all the way to high-standard claims for negligent infliction of emotional distress, which usually disproportionately impacted women in caretaker roles, usually with a negligent injury to a child or a

spouse — even up to the present day, with issues of revenge porn on the internet — there's a lot of gender dynamics of torts that I was interested in. Taking a historical look more closely at California, I argue that *Tarasoff* represents the culmination of an expansion of tort law in California, to include recovery for situations that disproportionately affect women. I also discuss a little bit about how this didn't necessarily take place in a vacuum, but there also was, of course, a large women's rights movement going on at this time, and there was a lot of activism here towards bringing greater attention to domestic abuse against women more broadly, so I examined that as well to look at how this was able to bring more attention to the issue of intimate partner violence which was at issue in *Tarasoff*.

RAHM: As you mentioned, you also go past *Tarasoff* to the present, and I think one of your observations was that there's been some kind of retraction in the *Tarasoff* doctrine. Do you want to say something about that?

TYLKA: Looking a little bit past *Tarasoff*, I argue that *Tarasoff* represented the culmination and then following that there was a bit of a retraction which would seem to be tied to a rightward shift on the California Supreme Court. That helped as well to show how *Tarasoff* fits within the broader framework of torts in California.

RAHM: That's great. I very much appreciate it. When we're in law school, of course, we learn about duty of care, and breaching that duty, and what have you, and to look at this from a different perspective, that is, from the lens of women's rights, was extremely interesting.

We'll go now to the third-place winner, Kelly Shea Delvac, who graduated this year as well, from Pepperdine University School of Law. Kelly's paper is entitled, "California Wrongful Incarceration Compensation Law: A History that Is Still Being Written." Kelly, can you tell us a little bit about yourself and your paper?

KELLY SHEA DELVAC: To Selma, first, thank you so much for running an amazing competition, and it's such an honor to be on this call with all of you, so thank you. I come to the law after a career as a circus performer, but the law is just as thrilling as being a circus performer. I just graduated from Pepperdine Law. I just took the bar exam from my home, and that was a harrowing experience, but writing this article was amazing. I had done another article arguing for wrongful conviction as a Fifth

Amendment taking,³ and to give some compensation that way, because there are many states that don't have compensation statutes for people who have been wrongly convicted, so I wanted to see, what has California done? I was so pleasantly surprised by the history — the first wrongful conviction was in 1852, and wrongful convictions have gone on since the beginning of our statehood. In 1852 when it happened, people actually raised a fund for this man who was wrongly convicted, and the Senate refused to give it to him because, they said, "In society it too often happens that the innocent are wrongfully accused of a crime. This is their misfortune, and the Government has no power to relieve them." That's horrifying, looking back on that, that it's "their misfortune." California has responded. In 1913 was the first time they passed a compensation statute, and every decade — more so in recent history, every few years — they've tweaked the statute to make sure that those who are being wrongly convicted and who have been wrongly incarcerated are not missing out [on the benefits of the compensation law] because, maybe, there was a bad fact on their side, or the Compensation Board — they used to have a totally separate ruling on the merits, separate from the court, and that's been abolished. There are still tweaks that can happen, and California has been responsive, and it's such a testimony to the heart of our justice system here in California that the judiciary does seek justice and seek to right the wrongs that do happen, because we know that they happen, and it's what we do after the fact, and so that's why I titled it "a history still being written" because unfortunately it will probably never happen that we will never have any wrongful convictions, but at least when we have them, we can reverse them and we can also compensate as best as possible.

RAHM: I thought it was particularly interesting, Kelly, that the agency that approves the compensation for those who have been wrongly convicted, one of the things, as Kelly points out, you have to show that you were damaged in terms of your worth, your compensation, things like that. Of course, someone in prison isn't getting any compensation, and it's not that you were thrown into prison wrongfully, and that would be a tort in and of itself, but rather to get reimbursement from the state you actually have

³ "Liberty and Just[Compensation] for All: Wrongful Conviction as a Fifth Amendment Taking," *Connecticut Law Review* (forthcoming 2021).

to show that you're not the *sort* of person who would be subjected and put into prison, which is also a type of demonization of anyone who's a little bit different, who might be put in prison because they look different, different race, nationality, things like that. I thought that was very interesting.

DELVAC: Thank you.

RAHM: What I'd like to do now, just for a couple of minutes, is an overview of the papers, because they were all interesting in their own right, but, starting with Kelly's — your paper was the history of a reform, going back to the 1850s, to the present, that gradually it's working itself free, the law is becoming better, and it is getting more reformed, and hopefully it will continue in the future, so it's a policy reform. I want to look at it from social policy. Where do you see the law going in this regard?

DELVAC: I see the law being responsive to who we're leaving behind and changing to make sure that those people are not left behind. Recently, we have our factual innocence ruling, and before 2016, the board that was deciding the compensation didn't have to take that factual innocence ruling — they could make their own, and in 2016 the court said, no, you have to take the exonerating court's ruling as the ruling here, and I think that's just one example — that, as they continue to tweak and find we're leaving people behind that they can continue, and I think the court has been very responsive to doing that, and I see that continuing.

RAHM: Very good.

Brook, your paper, by examining tort through a gender-based lens, points to different sorts of reforms that we *might* have. I thought a lot of the paper was focused on how one can *see* tort through a gender-based lens. Where do you see that sort of policy, or leading to what sort of policy or reform?

TYLKA: Some of the things I mentioned in my paper were current issues involving torts against women, like involving technology and the internet. I think that just a greater awareness of the gendered aspects of some of these torts will lead to more legislative or judicial action in those realms, rather than having that realm be kind of ignored. So, I think just examining the more contemporary issues that are arising with more technology,

through a gender-based lens, will lead to some more acknowledgment of some reforms that need to be done in those areas.

RAHM: Certainly, enough that we're sensitized to what we're doing in the law when we either enact new laws or decide laws.

I want to come back to you, Kayley. Your paper was very interesting in that it was very much a cautionary tale of — here, things got better, but remember that things have not always been that way, and there's been a lot of demonization of the Other, whether it be vagrants, indigents, African Americans, Chinese. At one time or another, these were all the Other, and public policy was against them. It doesn't end on a note of reform, and so, I wanted to ask you, perhaps it's enough to say, "Be cautious," in terms of using the state power. "You have a huge hammer that you're wielding, be careful with it." But do you see it going toward some sort of policy or reform?

BERGER: Yes, it's definitely a cautionary tale, and part of the tale is that it's not just law. Quasi-legal policies like sundown towns — the way society *was* made it illegal to be in public if you were an African-American person at that time, so I guess the hope is that when we do pass laws, as a society we think for example civil unrest curfew is a law that's beneficial for society overall, we consider that maybe it's not and that enforcement of something like a civil unrest curfew can actually lead to a lot of different discrimination arrests and even death. It's a paper to ask people to think — what problem do you have with that, keeping the peace, what problem do you have with that? The problem might be with the way it's enforced. The problem might be why the law was put in place, because what kind of people are we trying to enforce it against? And, even if it's not the intent of the law, in practice, look at what the law does. It's asking people to think and remember that, at the time each of these laws were passed, they weren't thought to be this "horrible" law. Before, they were more blatant — if you're Chinese, if you're indigent — it was more obvious, but then maybe the law becomes not so clear but, who it's enforced against if you look at the numbers, and you actually do the research, it does become clear that the law is targeted.

RAHM: You mentioned California's criminalization of indigency, or bringing indigents into the state in the 1930s — it leads to, there may be reform

and growth because in that case, they convicted someone of bring in his sister and brother-in-law because they were indigent, from Texas. These were primarily against white people — white people in the 1930s, mostly Christian, northern European, but they were indigent, and it was argued before the United States Supreme Court that California should have a right to keep these people out because they're syphilitic, they're inbred, low intelligence, they fill up the criminal calendars, and why shouldn't California be able to keep them out. The law got overturned by the U.S. Supreme Court, but just to let you know, the attorney general who argued on behalf of the state of California was Earl Warren. He later referred to this case, which was *Edwards v. California*, in support of his civil rights cases. So, things *can* get better.

BERGER: In my paper, I also talk about Gov. Gavin Newsom, who, at the time when he was mayor of San Francisco, was actually a proponent of sit-lie, which is so interesting because you also see him as this — like Earl Warren — very liberal policy for the underdog. So it's very interesting when you look back and you see who was making these decisions.

RAHM: Absolutely. What I'd like to do now is go to you Chief, for your responses, followed by Justice Werdegar, and then by Selma. Chief —

CHIEF JUSTICE: Thank you, Richard, and thank you for your probing questions. It makes us all think, and certainly in the business of law, that's what we do. I again reiterate that I'm inspired by your thoughts, and I hope that all of you, sometime in your future, decide to either go into policy, go into judging, or advise someone who is in a decision-making position, because, of all the decisions that are made here in California that have been made in the past, that are going to be made in the future, they're always influenced by current events and influenced by majority feelings, but it's imperative in the law, and for sound policy, that we all be critical thinkers, and as long as there is an us-versus-them mentality, we'll never win. So, I have appreciated all of your thoughts, and it gives me things to think about in the future. Thank you. Thank you, Richard.

RAHM: Thank you very much, Chief. Justice Werdegar —

WERDEGAR: I am so impressed with these three outstanding articles, all of which explore aspects of our law in California that we need to be

educated about. The beauty of this competition that Selma created is it brings to mind for our historical society bits of history that perhaps would not be studied in such depth. These articles in particular give each of us so much to think about with respect to what's the good, the bad, and the ugly in California. In the evolution of the law, we hope we're always going forward. We hope we are always correcting. So, they are fascinating, and I am so pleased they received these awards, and I congratulate all of you. So, those are my comments. I look forward to returning to each of the articles. They are so educational, and they foretell the bright futures that clearly are on the horizon for you.

RAHM: Thank you very much, Justice Werdegar. And Selma, our Selma —

SMITH: Congratulations to our three winning students, Kayley, Brook, and Kelly, and I want to mention that their papers — that we are discussing — will appear in our journal later this summer. I want to give a big thank-you to my dear “Chief Tani.” Thank you for making yourself available again for this event. As the chief justice of California, you honor us with your presence and your welcome remarks. And I want to thank my dear friend Kathryn, after your many years on the Court, for the good thoughts and kindness you have brought every year since this competition began in 2007. And I want to thank our fine president, Richard, for his moderating, and our able Chris for making the arrangements. To everyone, thank you all so very much.

RAHM: Thank you, Selma. You're truly an inspiration to all of us. [applauding] And so, to Kayley, Brook, and Kelly, thank you so much. I really enjoyed reading your papers. Also, please don't hesitate to reach out to me to discuss your papers further. If you have other ideas, I'd be more than happy to discuss those with you. Again, thank you very much, Chief, for your remarks. Thank you very much, Justice Werdegar. And thank you, Chris, for organizing and putting this all on. And thank you, Selma. I think this concludes this little awards ceremony, but this isn't goodbye forever. It's a beginning.

SURVEYING THE GOLDEN STATE (1850–2020):

Vagrancy, Racial Exclusion, Sit-Lie, and the Right to Exist in Public

KAYLEY BERGER*

TABLE OF CONTENTS

I. INTRODUCTION	210
II. EARLY VAGRANCY LAWS: “INDIANS,” “GREASERS,” & “OKIES”	212
A. AN ACT FOR THE GOVERNMENT PROTECTION OF INDIANS — 1850	212
B. THE GREASER ACT — 1855.	215
C. THE ANTI-OKIE LAW — 1937	216
III. CHINESE RACIAL EXCLUSION & SUNDOWN TOWNS	216
A. ANTI-CHINESE RACIAL EXCLUSION.	217
B. ANTI-BLACK RACIAL EXCLUSIONS: THE PHENOMENON OF SUNDOWN TOWNS	226
IV. SIT-LIE ORDINANCES.	230
V. EMERGENCY CURFEW ORDERS IN RESPONSE TO “CIVIL UNREST”	232
VI. CONCLUSION	235

This paper was awarded first place in the California Supreme Court Historical Society’s 2021 Selma Moidel Smith Student Writing Competition in California Legal History.

* J.D./M.B.A. Candidate, Class of 2022, UC Irvine School of Law, Paul Merage School of Business.

I. INTRODUCTION

In the modern era, it is all too easy to label California as a liberal state that works to protect social and ethnic minorities. Perhaps this is because California was effectively the first “sanctuary state.”¹ Or, maybe it is because California even offered \$500 in COVID-19 aid to undocumented immigrants when the U.S. Federal Government failed to offer them stimulus funds in the wake of the COVID-19 Pandemic.² However, at the same time, it is all too easy to forget that California politicians were the pushing force behind the Chinese Exclusion Act.³ And that California cities have been quick to pass sit-lie ordinances despite California having the largest homeless population in the United States.⁴ California is, like the rest of the nation, plagued by inequality.⁵ “As of January 2020, California

¹ Rose Cuison Villazor & Pratheepan Gulasekaram, *The New Sanctuary and Anti-Sanctuary Movements*, 52 UC DAVIS L. REV. 549, 556 (2018) (“California became the first ‘sanctuary state’ with the passage of SB 54, the California Values Act, which limits state and local law enforcement officers’ ability to communicate with federal immigration authorities about a person’s immigration status.”).

² Miriam Jordan, *California Offers \$500 in Covid-19 Aid to Undocumented Immigrants*, N.Y. TIMES (May 18, 2020), <https://www.nytimes.com/2020/05/18/us/coronavirus-undocumented-california.html>.

³ Ryan Reft, *Before It Embraced Immigrants, California Championed the Chinese Exclusion Act of 1882*, KCET (Feb. 9, 2017), <https://www.kcet.org/shows/lost-la/before-it-embraced-immigrants-california-championed-the-chinese-exclusion-act-of-1882> (“By 1875, California’s Senators pressured Washington to pass the Page Act of 1875, which prohibited convicted felons, prostitutes, and Asian contract laborers from entering the U.S. The Page Act functioned as a precursor to the more sweeping Chinese Exclusion Act of 1992, which doubled down on these restrictions, banning all Chinese laborers.”).

⁴ Farida Ali, *Limiting the Poor’s Right to Public Space: Criminalizing Homelessness in California*, 21 GEO. J. ON POVERTY L. & POL’Y 197, 198 (2014).

⁵ Hannah Knowles, *Homelessness in the U.S. rose for a third year, driven by a surge in California*, HUD says, WASH. POST (Dec. 21, 2019), <https://www.washingtonpost.com/nation/2019/12/21/homelessness-us-rose-third-year-driven-by-surge-california-hud-says/>; Berkeley Law’s Policy Advocacy Clinic, *California’s New Vagrancy Laws*, 1 (June 2016), <https://www.law.berkeley.edu/wp-content/uploads/2015/12/Californias-New-Vagrancy-Laws.pdf> (“More than one in five people who are homeless in the United States live in California, and two-thirds of all people experiencing homelessness in California are unsheltered.”).

had an estimated 161,548 experiencing homelessness on any given day.”⁶ And this number has been increasing annually.⁷ It is only expected to get much worse over the next four years due to the economic impact of the COVID-19 Pandemic.⁸ But this inequality is nothing new. The state has been criminalizing vagrancy since it became a national issue in the mid-1800s.⁹

Rather than focusing on the innovative progressive legislation that originated in California, this article seeks to draw attention to the ways the Golden State participated in or even innovated in discriminatory laws or policies.

This article will proceed in five parts. Section II provides an overview of nineteenth- and twentieth-century California vagrancy laws that discriminated against “Indians,” “Greasers,” and “Okies.” Section III discusses California history as it relates to racial exclusion. Specifically, it dives into California’s discrimination against Chinese and African Americans. Section IV discusses a number of California’s sit-lie ordinances. Section V questions the effects of civil unrest curfew laws by relating the Rodney King Riots to the recent George Floyd Protests. Finally, Section VI concludes.

⁶ *California Homelessness Statistics*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (Jan. 2020) <https://www.usich.gov/homelessness-statistics/ca>.

⁷ *The 2020 Annual Homeless Assessment Report (AHAR) to Congress*, U.S. Dep’t Housing & Urban Dev. 11 (Jan. 2020), <https://www.huduser.gov/portal/sites/default/files/pdf/2020-AHAR-Part-1.pdf> (showing 6.8 percent increase in homelessness in California from 2019 to 2020 and an overall increase of 16.2 percent from 2007 to 2020); Katelyn Newman, *Homelessness Spike in California Causes National Rise*, U.S. News (Dec. 26, 2019), <https://www.usnews.com/news/best-states/articles/2019-12-26/homelessness-spike-in-california-causes-national-rise-for-third-year-in-a-row>.

⁸ Daniel Flaming et al., *Locked out: Unemployment and Homelessness in the COVID Economy*, ECONOMIC ROUNDTABLE (Jan. 11, 2021), <https://economicrt.org/publication/locked-out/>; Rob Hayes, ‘Catastrophic:’ Chronic Homelessness in LA County expected to skyrocket by 86% in next 4 years, ABC 7 (Jan. 12, 2021), <https://abc7.com/la-county-homelessness-socal-homeless-crisis-economic-roundtable-population/9601083>.

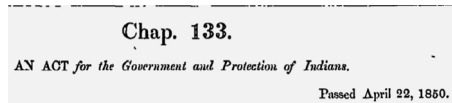
⁹ Sara Bloomberg, *A Legacy of Criminalizing Transience and Homelessness*, SF PUBLIC PRESS (June 30, 2017), <https://www.sfpublicpress.org/a-legacy-of-criminalizing-transience-and-homelessness>.

II EARLY VAGRANCY LAWS: “INDIANS,” “GREASERS,” & “OKIES”

“Despite much-touted myths of American upward and outward mobility, [vagrancy] laws proliferated along with English colonists on this side of the Atlantic too.”¹⁰ Upward mobility was a pipe dream for those who found themselves labeled as Indians, Greasers, and Okies. To be called an Indian, Greaser, or Okie was akin to being called a vagrant because California ingrained into law the association between vagrancy and each of these labels.

A. AN ACT FOR THE GOVERNMENT PROTECTION OF INDIANS — 1850

With the Compromise of 1850, California became the thirty-first U.S. state on September 9, 1850.¹¹



However, California began criminalizing certain individuals' right to exist in public months earlier when on April 22, 1850 the first session of the California State Legislature passed "The Act for the Government Protection of Indians" in Chapter 133.¹² Although the name of this act may lead one to think it advocates for the protection of Indians, the name is a misnomer. The act is more appropriately referred to as "The Indenture Act of 1850" because it functioned to enslave California Indians.¹³ Specifically, Section 20 provided for public auctions whereby the indigent Indian would go to the highest bidder who would then use the Indian for labor.¹⁴ Such a practice cannot be explained as anything but the state selling indigent Indians

¹⁰ Risa Goluboff, *The Forgotten Law That Gave Police Nearly Unlimited Power*, TIME (Feb 1, 2016), <https://time.com/4199924/vagrancy-law-history>.

¹¹ Since California was admitted as a "free" state, the state lacked slave labor and so created these vagrancy statutes to meet their labor demands. *California becomes the 31st state in record time*, HISTORY.COM (Nov. 16, 2009), <https://www.history.com/this-day-in-history/california-becomes-the-31st-state-in-record-time>.

¹² Sections 3, 6, 14 and 20 are particularly demeaning. 1850 Cal. Stat. 408, Ch. 133, available at <https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1850/1850.pdf>.

¹³ ROBERT F. HEIZER ET AL., *THE OTHER CALIFORNIANS: PREJUDICE AND DISCRIMINATION UNDER SPAIN, MEXICO, AND THE UNITED STATES TO 1920*, 46 (1977).

¹⁴ 1850 Cal. Stat. 408, Ch. 133.

into slavery. In that same vein, Section 14 allowed a white person to post a bond for an Indian and “in such case the Indian shall be compelled to work for the person so bearing, until he has discharged or cancelled the fine assessed against him.”¹⁵ Moreover, the act allowed whites to take ownership of Indian children via Section 3 which provided instructions for “[a]ny person obtaining a minor Indian . . . and wishing to keep it.”¹⁶ The act also functioned to deny California Indians equal status under the law, as Section 6 provided that “in no case shall a white man be convicted of any offence upon the testimony of an Indian.”¹⁷

It took lawmakers a tremendous amount of time to repeal this act. After sixteen years in effect, Section 3 was repealed in 1863.¹⁸ Then, it was not until the early 1870s that Section 20 was “indirectly, but effectively, repealed in the Penal Code of California in [S]ections 487 (1870) and 647 (1872), which exempt California Indians from the crime of vagrancy.”¹⁹ And it was not until 1937 when the act (Chapter 133) was repealed in its entirety by the Fifty-Second Session of the California Assembly.²⁰

CHAP. CCCCLXXV.—An Act for the repeal of Section Three of an Act for the Protection and Government of Indians, passed May twenty-second, one thousand eight hundred and fifty, and Section One of an Act amendatory thereof, passed April eighteenth, one thousand eight hundred and sixty.

[Approved April 27, 1863.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section three of an Act entitled an Act for the protection and government of Indians, passed May twenty-second, A. D. one thousand eight hundred and fifty, and section one of an Act amendatory thereof, passed April eighteenth, A. D. one thousand eight hundred and sixty, are hereby repealed.

SEC. 2. This Act shall be in force from and after its passage.

DIVISION XX. REPEALS.

20000. The following acts and sections, together with all amendments thereof and all acts supplementary thereto, are hereby repealed:

GENERAL LAWS.

Year	Ch.	Page	Year	Ch.	Page	Year	Ch.	Page
1850:	133:	408	1854:	2:	131	1855:	180:	238
1851:	27:	208		Special Law		1856:	44:	52
1851:	87:	384	1854:	7:	134	1860:	40:	60
1851:	130:	511		Special Law		1860:	60:	69
1853:	60:	33	1854:	60:	177	1860:	112:	134
1853:	140:	203		Special Law		1860:	142:	223
1853:	150:	203	1855:	23:	18	1857:	73:	72
1854:	2:	13	1855:	57:	67	1857:	104:	187
1854:	4:	13	1855:	90:	120	1857:	174:	188
1854:	62:	87	1855:	148:	188	1857:	211:	243

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Within the text is an image of the original. 1863 Cal. Stat. 743, ch. 475, § 1, available at <https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1863/1863.PDF#page=65>.

¹⁹ HEIZER, *supra* note 12, at 48.

²⁰ 1937 Cal. Stat. 1180, ch. 369; CAL. WELF. AND INST. CODE §20,000, available at https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1937/37vol1_Chapters.pdf#page=4.

CHAPTER CLXXV.

AN ACT

To punish Vagrants, Vagabonds, and Dangerous and Suspicious Persons.

(Approved April 30, 1855.)

The People of the State of California, represented in Senate and Assembly, do enact as follows :

SECTION 1. All persons except Digger Indians, who have no visible means of living, who in ten days do not seek employment, nor labor when employment is offered to them, all healthy beggars, who travel with written statements of their misfortunes, all persons who roam about from place to place without any lawful business, all lewd and dissolute persons who live in and about houses of Ill-Fame ; all common prostitutes and common drunkards may be committed to jail and sentenced to hard labor for such time as the Court, before whom they are convicted shall think proper, not exceeding ninety days.

SEC. 2. All persons who are commonly known as "Greasers" or the issue of Spanish and Indian blood, who may come within the provisions of the first section of this Act, and who go armed and are not known to be peaceable and quiet persons, and who can give no good account of themselves, may be disarmed by any lawful officer, and punished otherwise as provided in the foregoing section.

SEC. 3. It shall be the duty of any Justice of the Peace, on knowledge or on written complaint from any creditable person of the State, to issue his warrant to apprehend such person or persons, and upon due conviction to send such person or persons to jail, as prescribed in section first of this Act ; and on a second conviction for the same offense any offenders may be sentenced to the County Jail for such additional time as the Court may deem proper, not exceeding one hundred and twenty days ; and in case of a conviction for either of the offenses aforesaid, an appeal may be taken to the Court of Sessions, in the same manner as provided for by law in criminal cases in this State.

SEC. 4. The keeper of the Jail or such other person, as the Sheriff of the county may appoint, shall be master or keeper of such prisoners after conviction and shall employ them at any kind of labor that the Board of Supervisors of the county may direct, and each and every person so convicted, shall be secured whilst employed outside of the County Jail, by ball and chain of sufficient weight and strength to prevent escape.

SEC. 5. When the Board of Supervisors of the county shall be of opinion that any person, who may have been committed under the provisions of this Act, has so conducted himself or herself, whilst so confined or employed, that he or she should be no longer held, said Board of Supervisors may discharge such person from confinement, upon his paying what may remain due of the costs of prosecution and commitment, including his support whilst so confined, or upon giving bond with two or more good and sufficient sureties in the sum of five hundred dollars for future good behavior ; provided, that the Board of Supervisors shall have power to discharge any person committed under the provisions of this Act without such conditions, when the health of said person is such as to require his or her discharge.

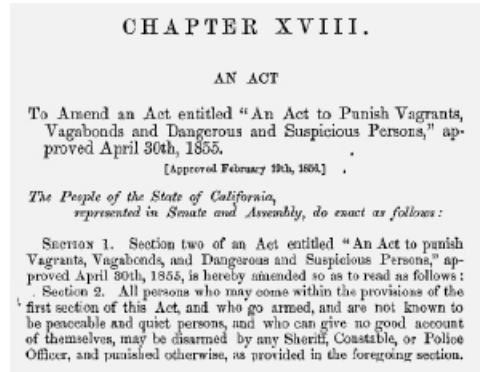
SEC. 6. This Act shall go into effect thirty days after its passage.

B. THE GREASER ACT

Ready for a more general statute that allowed the state to force more vagrants into labor, and wanting to protect “honest people from the excesses of vagabonds,” on April 30, 1855 an act “To punish Vagrants, Vagabonds, and Dangerous and Suspicious Persons” was enacted in

California (an image of the original publication is pictured on the left).²¹ Section 1 of the act provided for the jailing and sentencing to hard labor of all vagrants in the state except “Digger Indians.”²² The vagrants, according to Section 2, were also to be secured “by ball and chain of sufficient weight and strength to prevent escape.”²³

Colloquially this act became known as the “Greaser Act” because Section 2 of the act originally provided for the disarming of “[a]ll persons who are commonly known as ‘Greasers’ or the issue of Spanish and Indian blood.”²⁴ And as history has shown, the true goal of the act was to restrict the movement of Californians of Mexican descent.²⁵ However, a year later the act was amended eliminating “Greaser” from the text, in what many assume was an attempt to hide the racial exclusion intent behind the law, but by that time “Greaser” had already become a commonplace derogatory term for U.S. citizens of Mexican ancestry.²⁶



²¹ This act is referred to as the “Greaser Act.” 1855 Cal. Stat. 217, Ch. 175, *available at* <https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1855/1855.PDF>.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ JOSE LUIS MORIN, *LATINOS AND CRIMINAL JUSTICE: AN ENCYCLOPEDIA*, 49 (Mar. 28, 2016) (“De jure discrimination and the racial profiling of Mexicans and Latinas/os had become the order of the day.”); *see* 1937 Cal. Stat. 1102, § 2615, *available at* https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1937/37voll_Chapters.pdf#page=4.

²⁶ An Image of the original publication is pictured above. 1856 Cal. Stat. 32, Ch. 18, *available at* <https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1856/1856.PDF#page=12>.

C. THE ANTI-OKIE LAW — 1937

With the Great Depression and Dust Bowl came an Anti-Okie Law in California. “Okie” was a term used by Californians for “refugee farm families from Southern Plains who migrated to California in the 1930s to escape the ruin of the Great Depression and the Dust Bowl.”²⁷ They traveled from a broad range of places including Oklahoma, Texas, Arkansas, Missouri, Kansas, Colorado, and New Mexico.²⁸ California’s Anti-Okie Law was designed to target “people who migrated to California to escape the Dust Bowl. The California Anti-Okie law made

Article 5. Bringing Indigent into the State.

2615. Every person, firm, or corporation, or officer or agent thereof that brings or assists in bringing into the State any indigent person who is not a resident of the State, knowing him to be an indigent person, is guilty of a misdemeanor.

it a crime to bring anyone who was indigent into the state. By definition, those escaping the Dust Bowl at the height of the Great Depression were indigent.”²⁹ However, the law was short lived as the U.S. Supreme Court was “of the opinion that Section 2615 [was] not a valid exercise of the police power of California, that it impose[d] an unconstitutional burden upon interstate commerce, and that the conviction under it [could not] be sustained.”³⁰

III. CHINESE RACIAL EXCLUSION LAWS & SUNDOWN TOWNS

The battles throughout California’s history to exclude unwanted people from its communities often took a sharply racial character. Some efforts were overt, such as Article XIX of California’s 1879 Constitution.³¹ Others, such as boycotts or neighborhood covenants, existed in the background. Many of these efforts occurred on a local level, relying on mob energy to effect a community-wide exclusion.

²⁷ David J. Wishart, ed., *Oakies*, *ENCYCLOPEDIA OF THE GREAT PLAINS* (last visited June 28, 2021), <http://plainshumanities.unl.edu/encyclopedia/doc/egp.ii.044.xml>.

²⁸ Wishart, *supra* note 26.

²⁹ *An Overview of California Vagrancy Laws*, *ECOBear* (last visited June 28, 2021), <https://ecobear.co/knowledge-center/california-vagrancy-laws>.

³⁰ *Edwards v. People of State of California*, 314 U.S. 160, 177 (1941).

³¹ *CAL. CONST. of 1879, ART. XIX*, available at <https://www.cpp.edu/~jlkorey/cal-con1879.pdf>.

A. ANTI-CHINESE RACIAL EXCLUSION

California's history of legal and quasi-legal race-based public exclusions dates back to early statehood. The most well-known examples, of course, are the publicly promoted federal statutes that primarily affected (and were promoted by) California constituents. Beginning with the Page Act of 1875, a series of federal bills was enacted to limit the population of Chinese laborers.³² Article V of the Burlingame Treaty of 1868 established the right of mutual migration between the United States and China, while Article VI clarified that such migrants would "enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation."³³ Although the treaty made unilateral limitation of Chinese immigration by statute difficult, the Page Act attempted to do so by focusing on the business relationships involved in facilitating migration, making it a crime to assist or arrange for the importation of prostitutes or indentured laborers.³⁴ The Angell Treaty of 1880 revised the unlimited immigration provision of the Burlingame Treaty, granting the U.S. government sole discretion to limit or suspend Chinese immigration, provided the U.S. did not absolutely prohibit it.³⁵ Teachers, students, merchants, tourists, and the attendants thereof would not be subject to exclusions, nor would laborers already in the United States.³⁶ The Chinese Exclusion Act of 1882 went a step further, banning all Chinese laborers, allowing only non-laborers specifically identified by the Chinese government to enter, while providing a practical means for previously admitted laborers to obtain documentation to return, a right stipulated by the Angell Treaty.³⁷ In 1888, responding to a backlog of habeas cases for detained Chinese claiming returning status, the Scott Act

³² Reft, *supra* note 3.

³³ Burlingame Treaty, China-U.S., art. V & VI, July 28, 1868, 16 Stat. 739, *available at* <https://iowaculture.gov/history/education/educator-resources/primary-source-sets/immigration-regulation-response-and/burlingame-treaty>.

³⁴ Page Act, ch. 141, 18 Stat. 477, §§ 2–3 (1875) (repealed 1974), *available at* <https://loveman.sdsu.edu/docs/1875Immigration%20Act.pdf>.

³⁵ Angell Treaty, U.S.-China, Nov. 17, 1880, 22 Stat. 826, 827, *available at* <https://www.loc.gov/law/help/us-treaties/bevans/b-cn-ust000006-0685.pdf>.

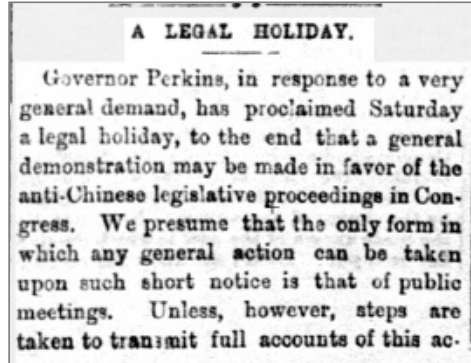
³⁶ *Id.*

³⁷ Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58.

removed the returning status exception altogether.³⁸ Then, the Geary Act of 1892 not only renewed the Chinese Exclusion Act, but established an enforcement mechanism, placing the onus on any legal Chinese resident to obtain documents of authorized residency from a Treasury office and subjecting him to arrest and a sentence of hard labor if found without said documents.³⁹

It is clear that any provisions of national legislation or treaty regarding Chinese immigration were motivated by California interests. The 1870 Census records 49,277 Chinese in California, out of 63,199 in the United States and its territories.⁴⁰ This majority is even more substantial when territories, which had no legisla-

tive voice, are excluded: the total for all U.S. states is just 56,115.⁴¹ California political figures from the lowly Denis Kearney, leader of the Workingmen's Movement, to Leland Stanford, governor, senator, and even an employer of Chinese labor, publicly agitated for excluding Chinese.⁴² And so did John Franklin Swift, a California assemblyman and one of the three American delegates to sign the Angell treaty.⁴³ Also, when the Chinese Exclusion Act was being discussed in Congress, Governor George C. Perkins went so far



³⁸ Scott Act, ch. 1015, 25 Stat. 476 (1888) (repealed 1943).

³⁹ Geary Act, 27 Stat. 25 (1892).

⁴⁰ Calculated from page 8 and by subtracting Japanese counts in the footnotes. 1870 U.S. Census, *available at* <https://www2.census.gov/library/publications/decennial/1870/population/1870a-04.pdf#>.

⁴¹ *Id.*

⁴² Roger Olmsted, *The Chinese Must Go!*, CAL. HIST. Q. (1971), <https://online.ucpress.edu/ch/article-pdf/50/3/285/97466/25157337.pdf>.

⁴³ Journal of the Proceedings of the Assembly, Twentieth Session, 6 (1873–74), https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/DailyJournal/1873/Volumes/1873_74_jnl.PDF; Angell Treaty, U.S.-China, Nov. 17, 1880, 22 Stat. 826, 827, *available at* <https://www.loc.gov/law/help/us-treaties/bevans/b-cn-ust000006-0685.pdf>.

as to declare a holiday for the purpose of demonstrating in favor of the law.⁴⁴

While the federal responses demonstrate the significance of the issue, they were not the only means attempted within California to exclude Chinese. California's 1879 Constitution was written with implicit and explicit attention to the issue of Chinese immigrants. Article I, declaring the rights of citizens and residents in California, clarifies in Section 17 that these rights extend to "[f]oreigners of the white race or of African descent . . . ,"⁴⁵ conspicuously omitting Asian foreigners. Article II Section 1 specifically precluded natives of China from voting.⁴⁶ Article XIX, concisely titled "Chinese," authorized or promised measures to discourage Asian immigration.⁴⁷ Section 1 rationalized the measures on the grounds that aliens "are or may become vagrants, paupers, mendicants, criminals, or invalids afflicted with contagious or infectious disease. . . ." and promises to restrict aliens by imposing "conditions upon which persons may reside in the State"⁴⁸ Section 2 forbids corporations from employing Chinese and Section 3 forbids state, county, and municipal offices from employing Chinese.⁴⁹ Section 4 obligates the legislature to discourage immigration "by all the means within its power," and to delegate to cities and towns the power to relocate or remove Chinese residents.⁵⁰

These provisions of the California Constitution clearly conflicted with the U.S. Constitution. *In re Tiburcio Parrott* asserted the primacy of the federal treaty-making power and found that the Burlingame Treaty granted China open immigration and most favored nation status.⁵¹ It also ruled explicitly that Chinese or Mongolians in California are "persons" and therefore subject to due process by the Fourteenth Amendment of the U.S.

⁴⁴ *A Legal Holiday*, SAC. DAILY UNION, Vol. 15, No. 9 (Mar. 3, 1882), available at <https://cdnc.ucr.edu/?a=d&d=SDU18820303.2.7&e=-----en--20-1--txt-txIN-----1>.

⁴⁵ CAL. CONST. of 1879, ART. I, § 17, available at <https://www.cpp.edu/~jlkorey/cal-con1879.pdf>.

⁴⁶ *Id.* at ART. II, § 1.

⁴⁷ *Id.* at ART. XIX.

⁴⁸ *Id.* at ART. XIX, § 1.

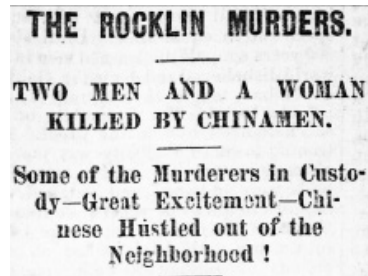
⁴⁹ *Id.* at ART. XIX, §§ 2–3.

⁵⁰ *Id.* at ART. XIX, § 4.

⁵¹ 1 F. 481 (C.C.D. Cal. 1880).

Constitution, effectively nullifying the provisions of Article XIX.⁵² Section 2 of Article XIX is particularly dealt with, finding that even though the formation of corporations is a reserved power, the arbitrary ability to dictate who may be employed by corporations is of such a sweeping nature that when it is used with discriminatory intent, it violates both the Burlingame Treaty and the Fourteenth Amendment. *In re Ah Chong* follows up by closing a loophole in which access to natural resources through state-issued licenses is claimed to be a reserved power that is not subject to federal oversight as a right of interstate citizenship.⁵³ The court ruled that since the Burlingame Treaty granted them most favored nation status, they could not be restricted from receiving fishing licenses.

For many California communities, town halls and ad hoc citizens' committees or town assemblies were the means by which Chinese were expelled. On Saturday, September 15, 1877, in Placer County, after a Chinese cook allegedly killed three residents of Rocklin, four of his associates were arrested and removed by a mob from a train.⁵⁴ On Monday morning, the citizens of Rocklin met and decided to notify all Chinese to vacate town by 6 p.m. that same evening, at which time, a posse razed all twenty-five dwellings in the Chinese neighborhood.⁵⁵ Two other towns in the area, Roseville and Penryn,



⁵² *Id.*; U.S. CONST. amend. XIV.

⁵³ 2 F. 733 (C.C.D. Cal. 1880); see also *McCready v. Virginia*, 94 U.S. 391 (1876) (explaining limitation on rights of interstate citizenship).

⁵⁴ *The Rocklin Murders*, PLACER HERALD, Vol. 26, No. 7 (Sept. 22, 1877), available at <https://cdnc.ucr.edu/?a=d&d=PH18770922&e=15-09-1876-30-09-1876--en--20--1--txt-txIN-placer-----1>.

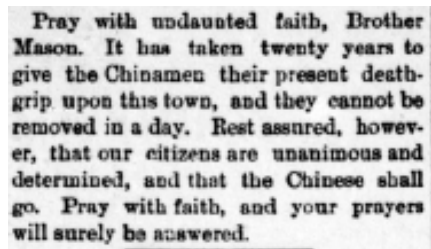
⁵⁵ *Rocklin Murders*, *supra* note 53.

formed committees the following day to notify Chinese to leave by the following day at noon.⁵⁶

This tactic was followed by other communities. On February 6, 1885, Eureka City Councilman David Kendall was killed in the crossfire between two feuding Chinese.⁵⁷ A mob quickly gathered, and city officials quickly formed an ad hoc committee to arrange for the expulsion of Chinese.⁵⁸ The committee notified Chinese leaders that all Chinese had to leave by noon of the following day. Not only did all the Chinese leave, but on February 14 the committee reported to a town meeting, which adopted the following resolutions at the committee's recommendations:

- 1) That all Chinamen be expelled from the city and that none be allowed to return.
- 2) That a committee be appointed to act for one year, whose duty shall be to warn all Chinamen who may attempt to come to this place to live, and to use all reasonable means to prevent their remaining. If the warning is disregarded, to call mass meetings of citizens to whom the case will be referred for proper action.
- 3) That a notice be issued to all property owners through the daily papers, requesting them not to lease or rent property to Chinese.⁵⁹

The following year, Eureka held an anniversary celebration of the expulsion of its Chinese, attended by a delegation from nearby Arcata. In March, they held a town meeting and resolved to remove all Chinese. Similar meetings were held in Ferndale and Crescent City, also in Humboldt County.⁶⁰ Subsequent attempts to reintroduce Chinese were answered by similar town meetings



Pray with undaunted faith, Brother Mason. It has taken twenty years to give the Chinamen their present death-grip upon this town, and they cannot be removed in a day. Rest assured, however, that our citizens are unanimous and determined, and that the Chinese shall go. Pray with faith, and your prayers will surely be answered.

⁵⁶ *Id.*

⁵⁷ Lynwood Carranco, *Chinese Expulsion from Humboldt County*, 30 PAC. HIST. REV. No. 4, 329, 329 (Nov. 1961), available at <https://www.jstor.org/stable/3636420>.

⁵⁸ Carranco, *supra* note 56.

⁵⁹ *The Last Local Horror*, HUMBOLDT TIMES, Vol. XXIII, No. 33, 8 (Feb. 8, 1885), available at <https://cdnc.ucr.edu/?a=d&d=HTS18850208.2.10&e=-----en--20--1--txt-txIN-----1>.

⁶⁰ Carranco, *supra* note 56, at 336.

and threats of expulsion, although exceptions were made.⁶¹

Meanwhile in Nevada County, a town meeting was held on November 28, 1885, where the following resolutions were adopted:

Resolved, That we, citizens of Truckee, in mass-meeting assembled, are determined that we will use every means in our power, lawfully, to drive them from our midst, and to assist the white laborers of California in forcing them back across the Pacific. Resolved, That the Chinese must go.⁶²

This language falls short of calling for a forceful expulsion. Rather, a meeting the following weekend discussed available methods, and settled on a total economic boycott of Chinese labor, with plans to supplant Chinese businesses with white equivalents.⁶³

Both the Humboldt County forcible expulsion and the Nevada County boycott were effective. Between the 1880 and 1890 censuses, the Chinese population in Humboldt County declined from 241 to 19, while the decline in Nevada county was from 3,003 to 1,053.⁶⁴

On February 25, 1880, in San Francisco, the Board of Health convened a special meeting and appointed an ad hoc committee consisting of Mayor Isaac Kallloch, Dr. Henry S. Gibbons, Jr., and Health Officer J. L. Meares to perform an inspection of Chinatown and report back to the committee

Anti-Chinese Movement at Truckee.
A public meeting was held at Truckee on Saturday evening to consider the Mongolian question, and the tenor of all the speech-making was that "the Chinese must go!" The following preamble and resolutions were then adopted:
WHEREAS, We recognize the Chinese as an unmitigated curse to the Pacific Coast and as a direct menace to the bread and butter of the workingmen; therefore,
Resolved, That we, citizens of Truckee, in mass-meeting assembled, are determined that we will use every means in our power, lawfully, to drive them from our midst, and to assist the white laborers of California in forcing them back across the Pacific.
Resolved, That the Chinese must go.
Another meeting is called for next Saturday evening, when plans are expected to be adopted to carry out the intention of the resolutions. As these resolutions pledge the citizens to "lawful" measures in disposing of the Chinese it is to be hoped that they will abide by this determination. Truckee

⁶¹ *Id.* at 337.

⁶² *Anti-Chinese Movement at Truckee*, MORNING UNION, Vol. 36, No. 6650 (Dec. 2, 1885), available at <https://cdnc.ucr.edu/?a=d&d=MU18851202.2.10&srpos=8&e=-----188-en-20--1--txt-txIN-----1>.

⁶³ *An Appeal to Neighbors*, TRUCKEE REPUBLICAN, Vol. XIV, No. 101 (Dec. 9, 1885), available at <https://cdnc.ucr.edu/?a=d&d=SSTR18851209.2.12&srpos=1&e=06-12-1885-12-12-1885-188-en-20--1--txt-txIN-----1>.

⁶⁴ 1890 U.S. Census Tabulation Record, available at https://www2.census.gov/prod2/decennial/documents/1890a_v1-13.pdf.

later that day.⁶⁵ The inspection, report, and resolution were clearly a pretext for excluding an undesired group from a desired public area, as evidenced by the impromptu nature of the committee and the unveiled bigotry of the resolution, which expressed concern that Chinatown would “make San Francisco an Asiatic rather than American city.”⁶⁶ The resolution of the Board of Health was to completely condemn Chinatown, giving the residents thirty days to voluntarily leave or be forcibly driven out.⁶⁷ However, the Board of Health’s authority was mainly limited to fining the property owners, generally white men, and the National Guard was dispatched to the armories in case of any anti-Chinese mob uprising.⁶⁸

San Jose convened a similar town meeting on March 8, 1887.⁶⁹ Expert reports condemning Chinatown were submitted by a health officer, a city engineer, the commissioner of streets, the chief of police, and the chief engineer.⁷⁰ The reports were part of an ongoing strategy by Mayor C. W. Breyfogle to find a pretext to remove Chinatown, an effort that included an attempt to solicit doctors to make a series of home wellness visits to Chinatown and report on unsanitary conditions.⁷¹ This effort exemplifies the use

THE BOARD OF HEALTH.

Resolutions of Condemnation Adopted.

The action of the Council in authorizing legal measures to declare Chinatown a nuisance and cause its demolition will be applauded by all right-minded people. Such a plague-spot should not be allowed to exist in this fair city. Its presence is an eye-sore and the sooner it is removed the better. Let the good work proceed.

⁶⁵ *Chinatown Declared a Nuisance!*, WORKINGMEN’S COMMITTEE OF CALIF. (Mar. 1880), available at <http://www.sfmuseum.org/hist2/nuisance.html>.

⁶⁶ *Resolutions of Condemnation Adopted*, BD. OF HEALTH, available at <http://www.sfmuseum.org/hist2/wpc3.html>.

⁶⁷ *Chinatown Declared a Nuisance!*, *supra* note 64.

⁶⁸ *Pacific Coast News*, HUMBOLDT TIMES, Vol. XIII, No. 74 (Mar. 27, 1880), available at <https://cdnc.ucr.edu/?a=d&d=HTS18800327.2.6&srpos=8&e=10-03-1880-30-04-1880--en--20--1--txt-txIN-----1>.

⁶⁹ *Chinatown Condemned by the Council in Committee of the Whole*, SAN JOSE MERCURY NEWS, Vol. XXXI, No. 58 (Mar. 9, 1887), available at <https://cdnc.ucr.edu/?a=d&d=SJMN18870309.2.22&e=-----en--20--1--txt-txIN-----1>.

⁷⁰ *Chinatown Condemned by the Council in Committee of the Whole*, *supra* note 68.

⁷¹ The mayor published the letter he circulated to physicians, complaining that one physician spoiled the attempt by warning the Chinese, who then

of prima facie neutral regulations for the purposes of targeted enforcement, for while Mayor Breyfogle makes reference to the leniency that Chinatown received with respect to existing regulations regarding fire safety, sanitation, and crime, he then goes on to propose that his abatement strategy is “that the Chinese be ordered to vacate the premises now occupied by them” and “that proceedings be instituted at the earliest possible moment for the condemnation of Chinatown and for its removal and disinfection.”⁷² The proceedings mentioned took the form of a court case against the landlords, which alleges that the soil of Chinatown is so polluted that “no adequate means of exposing the soil and surface of said lands to the rays of the sun or healthful draughts of air, or of applying thereto other antiseptic or purifying remedies without the removal of said structures [exists]” and demands that “said structures and all others overshadowing and covering the filth and slime be required to be removed, and the foundations, floors and soil be disinfected and purified”⁷³ While health hazard may have been a real concern, the blanket claim made against all structures, the demand that they all be torn down, and the further demand “that defendants be restrained from maintaining said or any nuisance in or upon said lands,” all strongly indicate a targeted effort to dislocate the Chinese from Chinatown.⁷⁴ Rather than resolve the suit in court, San Jose’s Chinatown was entirely destroyed by a fire on May 4, 1887.⁷⁵ Some suspected



reacted with suspicion. *A Cable Ordinance Reported to the Council*, SAN JOSE MERCURY NEWS, Vol. XXXI, No. 57 (Mar. 8, 1887), available at <https://cdnc.ucr.edu/?a=d&d=SJMN18870308.2.24&e=-----en--20--1--txt-txIN-----1>.

⁷² *A Cable Ordinance Reported to the Council*, *supra* note 70.

⁷³ *Suits to Condemn Chinatown-Arrangements., Etc.*, SAN JOSE WEEKLY MERCURY, Vol. XXXV, No. 15 (Apr. 9, 1887), available at <https://cdnc.ucr.edu/?a=d&d=SJWM18870409.2.77&e=-----en--20--1--txt-txIN-----1>.

⁷⁴ *Suits to Condemn Chinatown-Arrangements*, *supra* note 72.

⁷⁵ *Laid in Ashes: Complete Destruction of Chinatown*, SAN JOSE WEEKLY MERCURY, vol. XXXV, no. 19 (May 7, 1887), available at <https://cdnc.ucr.edu/?a=d&d=SJWM18870507.2.2&e=-----en--20--1--txt-txIN-----1>.

arson, and one unidentified witness claimed to have seen the fire ignite in three separate places.⁷⁶

These indirect attempts by San Francisco and San Jose to use targeted enforcement of nuisance ordinances seem to be an implicit recognition of the impossibility of attempting to accomplish the same result by a more direct means. Yet in 1890, San Francisco did attempt to empty Chinatown and confine the Chinese population to another neighborhood by Order 2190, better known as the Bingham Ordinance. The order simply made it “unlawful for any Chinese to locate, reside, or carry on business within the limits of the city and county of San Francisco, except in that district of said city and county hereinafter prescribed for their location.”⁷⁷ Judge J. Sawyer, writing the opinion for the test case, *In re Lee Sing*, cited the Fourteenth Amendment to the U.S. Constitution and Article 6 of the Burlingame Treaty (granting Chinese in the United States protections equal to those of visitors from the most favored nation) and succinctly stated that he was “unable to comprehend how this discrimination and inequality of operation, and the consequent violation of the express provisions of the constitution, treaties and statutes of the United States, can fail to be apparent to the mind of every intelligent person, be he lawyer or layman.”⁷⁸

Over time, the sequence of federal legislation culminating in the Geary Act made Chinese migration to the United States more and more difficult. But interim attempts to regulate Chinese presence in various California communities were creative and sometimes effective. Broad-based support, frequently through town meetings, was key, but the flat failure of the Bingham Ordinance demonstrates the strategic importance of leveraging that support in ways that did not rely on courts. Smaller municipalities such as Rocklin, Eureka, and Truckee successfully expelled Chinese, and, in the latter two cases, limited their return. This restriction was accomplished through public resolutions that endured in local memory without leaving behind a numbered, written ordinance.

⁷⁶ *Laid in Ashes*, *supra* note 74.

⁷⁷ *In re Lee Sing*, 43 F. 359, 359 (1890) (laying out text of Order No. 2190).

⁷⁸ *Id.* at 360.

B. ANTI-BLACK RACIAL EXCLUSIONS: THE PHENOMENON OF SUNDOWN TOWNS

A direct successor to the late-nineteenth-century racial exclusion of Chinese is the twentieth-century phenomenon of sundown towns. There is ample evidence that in certain communities in California, Black people were not welcome in public after dark. There is also evidence that these prohibitions were not only organized, but had some form of official legitimacy, even if they largely circumvented court enforcement.

The ability to summarily exclude a race from a town by court-enforced statute would have been impossible. *In re Lee Sing* (discussed above) was sufficient precedent.⁷⁹ But since that decision was from 1890 and *Plessy v. Ferguson* was from 1896, some might have believed the door to local residential discrimination had been opened.⁸⁰ This was addressed when *Buchanan v. Warley* (1917) struck down a Louisville, Kentucky ordinance prohibiting Black people from occupying homes on predominantly white blocks.⁸¹ Justice William Day, writing the unanimous opinion, explained that since the “interdiction is based wholly on color,”⁸² it is a violation of the Fourteenth Amendment and not a valid application of police power.⁸³ The opinion resolved the potential conflict with *Plessy* by asserting that “in that case there was no attempt to deprive persons of color of transportation in the coaches of the public carrier, and the express requirements were for equal though separate accommodations for the white and colored races.”⁸⁴ The emphasis of *Buchanan* was on “the right of the individual to acquire, enjoy, and dispose of his property,”⁸⁵ which it held could not be abridged by local ordinance. Logically, if towns cannot legally bar Blacks from residing in a town, they cannot legally bar them from being in a town.

Glendale is an informative case study on the question of whether or not sundown ordinances existed. One local resident, Lois Johnson, recalls the 1940s when she would watch maids running to bus stops “so they would not

⁷⁹ *Id.*

⁸⁰ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁸¹ *Buchanan v. Warley*, 245 U.S. 60 (1917).

⁸² *Id.* at 73.

⁸³ *Id.* at 74.

⁸⁴ *Id.* at 79.

⁸⁵ *Id.* at 80.

be caught there after dark.”⁸⁶ Historian Clayton Cramer recalls neighbors telling him in the 1970s that Glendale had maintained a sundown ordinance until at least World War II.⁸⁷ Although this merely confirms that at least some locals believed such an ordinance existed, historian James Loewen argues two points about difficult-to-confirm local ordinances. First, local ordinances are first passed orally “by voice vote of the body passing them.”⁸⁸ They may or may not then be written down, depending on “several factors, including the level of record keeping in the town.”⁸⁹ Second, rumors might have the same effect as law on a local level, because most rules are transmitted informally from incumbents to newcomers, and especially because some rules can be effectively enforced by a sufficiently organized mob: “If whites have *not* had the power, legally, to keep African Americans out of town since 1917, so what?”⁹⁰ The rumor might be sufficiently potent.

Here, again, Glendale is informative. Glendale’s reputation as a sundown town was known to columnist Drew Pearson, who helped promote the national tour of the Freedom Train in 1947. The train carried original copies of patriotic documents, such as the Declaration of Independence. Pearson declared on a national radio broadcast that the train would not stop in Glendale because Negroes were not welcome there after dark.⁹¹ Even more tellingly, the Civilian Conservation Corps, a federal agency, attempted to locate a camp for African-American workers in Griffith Park, which borders Burbank and Glendale. Park commissioners refused to allow it, on the grounds that both Burbank and Glendale had sundown ordinances.⁹² If the ordinance were merely a rumor, it was a rumor for which the town sacrificed a temporary amenity rather than correct and also a rumor that had the force of restraining a federal agency.

In other towns, the existence of an ordinance can be confirmed by credible sources. Historian James Loewen quotes Vincent Jaster, former superintendent of schools in Brea:

⁸⁶ JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM*, 283 (2005).

⁸⁷ *Id.* at 220.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ LOEWEN, *supra* note 85, at 219.

⁹¹ *Id.* at 443.

⁹² *Id.* at 240.

Brea used to have a law that no black person could live in town here after six o'clock. . . . But for years there were no black people in Brea at all. The shoeshine man was black, but he had to leave town by six o'clock. It was an illegal law, of course, if you'd gone to the Supreme Court.⁹³

Racial exclusions also occurred at the neighborhood level, achieved through mutual covenants. In 1945, DeWitt Buckingham, a Black doctor, purchased a home in Berkeley's Claremont neighborhood, where all properties had a covenant prohibiting non-whites from occupying residences.⁹⁴ The neighborhood association filed suit, and Dr. Buckingham was ordered to leave.⁹⁵ Between 1937 and 1948, there were more than a hundred such suits in Los Angeles alone.⁹⁶ In Culver City in 1943, air raid wardens, tasked with the wartime responsibility of notifying residents what to do in case of a Japanese attack, were instructed by the city attorney to circulate restrictive covenants for white property owners to sign.⁹⁷ Covenants such as these were, of course, nationwide, strengthened by risk evaluation guidelines from the Federal Housing Association, which recommended deed restrictions that prohibited "the occupancy of properties except by the race for which they are intended."⁹⁸

These covenants represented an efficient means of avoiding the type of enforcement made impossible by *Buchanan* — court enforcement of explicitly racial language in official local ordinances. By relocating the enforcement to a civil contract between neighbors, it avoided state action. This parallels the manner in which Truckee had effectively ejected the Chinese by making promises to one another to discharge their servants, not hire their labor, and replace their businesses. This means survived as an effective strategy until 1948, when the U.S. Supreme Court struck down

⁹³ *Id.*

⁹⁴ RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA*, 80 (2017).

⁹⁵ Marisa Kendall, *For whites only: Shocking language found in property docs throughout Bay Area*, MERCURY NEWS (Feb. 26, 2019), <https://www.mercurynews.com/2019/02/26/for-whites-only-shocking-language-found-in-property-docs-throughout-bay-area>.

⁹⁶ ROTHSTEIN, *supra* note 92, at 80.

⁹⁷ *Id.* at 81.

⁹⁸ *Id.* at 82.

such covenants in *Shelley v. Kraemer*.⁹⁹ The crux of the opinion was that, by the local court's interference in a mutually agreeable sale of property with a racial covenant attached, there was state action, in violation of the Fourteenth Amendment.¹⁰⁰

One final method of enforcement further blurs the line between legal and extra-legal racial exclusion. In December 1945, O'Day Short moved to Fontana, where he was promptly threatened with violence by a "vigilante committee" and subsequently visited by two deputy sheriffs, Joe Glines and "Tex" Cornelison, who warned him that neighbors had been complaining about his presence.¹⁰¹ Short reported these threats to his lawyer, the FBI, and the *Los Angeles Sentinel*.¹⁰² On December 16, Short's home caught fire, and his wife and two children died at the scene.¹⁰³ O'Day Short died weeks later of his injuries at a hospital.¹⁰⁴ Although an inquest was made by the coroner's office in response to public pressure, no information regarding the vigilante committee or the deputy sheriffs' visit was allowed to be presented, and the fire was deemed accidental.¹⁰⁵ This case illustrates the effectiveness of illegal exclusions when supported

Violence Threat Against Short Must Not Go Unchallenged

by the community and endorsed by law enforcement.

O. H. SHORT 4TH FONTANA VICTIM DIES

Lacked
Interest In
Recovery

The ability to control who lives in a town enables the ability to completely control who has access to anything within the town. In 1960, Sunland resident Bob Johnson recalled of an incident in Glendale:

We took the kids to the Verdugo Plunge [swimming pool] in Glendale. There was a sign that said only for residents of Glendale. We are white and did not want to go back home, so we paid our money

⁹⁹ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

¹⁰⁰ *Id.* at 19.

¹⁰¹ *Violence Threat Against Short Must Not Go Unchallenged: An Editorial*, L.A. SENTINEL (Jan. 3, 1946).

¹⁰² *O. H. Short 4th Fontana Victim Dies: Lacked Interest In Recovery*, L.A. SENTINEL (Jan. 24, 1946).

¹⁰³ *Violence Threat Against Short Must Not Go Unchallenged*, *supra* note 100.

¹⁰⁴ *O. H. Short 4th Fontana Victim Dies*, *supra* note 101.

¹⁰⁵ *Id.*

and they did not ask for our drivers license or identification. I was puzzled how they monitored whether or not I was from Glendale. Then I realized that was a way to keep blacks out since no blacks lived in Glendale.¹⁰⁶

The practice of racialized traffic stops was enabled by racial exclusions. Lois Johnson, a Glendale resident, recalls a police officer explaining that they stopped any Black drivers after dark because they knew they did not live in town.¹⁰⁷

It is difficult to know how many other towns in California practiced some form of racial exclusion. James Loewen, author of *Sundown Towns: Hidden in Plain Sight*, maintains an internet database to collect oral histories and other evidence that a town had used some means to exclude a racial category.¹⁰⁸ The extent or effectiveness of many attempted or successful exclusions may be lost to history.

IV. SIT-LIE ORDINANCES

Vagrancy laws that were as blatant as the Chinese Exclusion Act, Greaser Act and Anti-Okie Law are no longer accepted by the courts or society at large.¹⁰⁹ However, that does not mean California does not still have laws that target people because of their housing status or race. Today, vagrancy laws take the form of laws prohibiting: loitering, sleeping outside, sleeping in vehicles, food sharing, panhandling, fortune telling, gambling, prostitution, etc.¹¹⁰ One of the most contested and popular at the same time in California are sit-lie ordinances; these are ordinances that ban sitting or

¹⁰⁶ LOEWEN, *supra* note 85, at 255.

¹⁰⁷ *Id.* at 236.

¹⁰⁸ Matt Cheney et al., Sundown Towns in the United States, Map (1997–2019), available at <https://sundown.tougaloo.edu/content.php?file=sundowntowns-whitemap.html>.

¹⁰⁹ For example, the U.S. Supreme Court found Cal. Penal. Code § 647(e) unconstitutional. *Kolender v. Lawson*, 461 U.S. 352, 361 (1983) (“We conclude § 647(e) is unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute.”).

¹¹⁰ *An Overview of California Vagrancy Laws*, *supra* note 28.

lying down in public.¹¹¹ It is often claimed that the first sit-lie ordinance was established in Seattle, Washington in 1993, but the first sit-lie ordinance in history was established in San Francisco in 1968—a victory, if speed is the main measure, for the Golden State.¹¹²

The law made it a misdemeanor to willfully sit, lie or sleep in or upon any street, sidewalk or other public place in such a manner as to obstruct the free passage or use in the customary manner of such street, sidewalk, or public place. A violation could carry up to a \$500 fine and up to a six-month jail sentence. . . . Ultimately, the ACLU challenged the ordinance from a number of angles and the law was repealed by the Board of Supervisors in 1979.¹¹³

Then, in 2010 a new sit-lie ordinance was approved by San Francisco voters making “sitting or lying on public sidewalks in San Francisco between 7 a.m. and 11 p.m.” a crime.¹¹⁴ Interestingly, the 2010 ordinance was first introduced by then–San Francisco Mayor, and now California Governor, Gavin Newsom.¹¹⁵ The same politician who today is pushing hotels to house the homeless during the COVID-19 Pandemic is the politician who a decade ago proposed an ordinance that arguably targets the homeless.¹¹⁶

¹¹¹ *No Safe Place: The Criminalization of Homelessness in U.S. Cities*, NLCHP.ORG 22, available at https://nlchp.org/wp-content/uploads/2019/02/No_Safe_Place.pdf (“Proponents of sit/lie laws argue that such laws are necessary to improve the economic activity in commercial districts where visibly homeless people are present. However, there is no empirical evidence of such an effect. To the contrary, these laws impose enforcement and other criminal justice costs on jurisdictions.”).

¹¹² Courtney Oxsen, *Embracing “Choice” and Abandoning the Ballot: Lessons from Berkeley’s Popular Defeat of Sit-Lie*, 25 HASTINGS WOMEN’S L.J. 135, 145 (2014), available at <https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1144&context=hwlj>.

¹¹³ Oxsen, *supra* note 80.

¹¹⁴ Jessica Cassella et al., *Implementation, Enforcement and Impact: San Francisco’s Sit/Lie Ordinance One Year Later*, CITY HALL FELLOWS (Mar. 2012), available at https://sfbos.org/sites/default/files/FileCenter/Documents/42452CHF_SitLieReport_FINAL-wAppendices_7.2.12.pdf.

¹¹⁵ Cassella, *supra* note 82.

¹¹⁶ 82; Katy Murphy et al., *Is Hotel California a permanent answer to homelessness?*, POLITICO (June 3, 2020), <https://www.politico.com/states/california/story/2020/06/03/is-hotel-california-a-permanent-answer-to-homelessness-1288189> (“California Gov. Gavin Newsom is pushing to parlay short-term federal pandemic relief into a long-term

V. EMERGENCY CURFEW ORDERS IN RESPONSE TO “CIVIL UNREST”

“NOT seldom has the curfew served as a tool of repression in history.”¹¹⁷ Civil unrest curfews are another way to control who gets to exist in public, when, and for what purposes. They do this by empowering police to control who is outside during certain hours. Essentially, these curfews have become an excuse for police to use violence during certain hours against those they subjectively perceive to be a threat.¹¹⁸ In effect, civil unrest curfew orders “put more police on the street and empower them to behave repressively in a[n] [already] tense situation.”¹¹⁹ This has led to costly mass arrests of peaceful protestors, injuries caused by tear gas and rubber bullets, and even death.¹²⁰ In California, curfews are addressed by California Code § 8634 which provides that:

During a local emergency the governing body of a political subdivision, or officials designated thereby, may promulgate orders and regulations necessary to provide for the protection of life and property, including orders or regulations imposing a curfew within designated boundaries where necessary to preserve the public order and safety. Such orders and regulations and amendments and rescissions thereof shall be in writing and shall be given widespread publicity and notice. The authorization granted by this chapter to impose a curfew shall not be construed as restricting in

remedy for the state’s homelessness crisis by buying vacant hotels and turning them into permanent housing.”).

¹¹⁷ A G Noorani, *Curfew as Tool of Repression*, 19 ECON. & POLITICAL WEEKLY no. 34, 1463 (Aug. 25, 1984), available at <http://www.jstor.com/stable/41625636>.

¹¹⁸ See Note, *Judicial Control of the Curfew*, 77 YALE L.J. 1560, 1561 (1968), available at <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5934&context=ylj> (“Because of their simplicity, curfews can be used in a thoughtless manner at times when they can fulfill no valid governmental policy and can aggravate the very conditions which cause riots.”); see also Emily Elena Dugdale, *Everyone’s Imposing Curfews. But Do They Work?*, LAIST (June 2, 2020), https://laist.com/2020/06/02/la_curfews_protests_do_they_work.php.

¹¹⁹ Zeeshan Aleem, *Dozens of cities across the country are imposing curfews. Do they work? Experts say curfews could backfire. Here’s why*, Vox (May 31, 2020), <https://www.vox.com/2020/5/31/21275996/curfew-george-floyd-protest-los-angeles>.

¹²⁰ *Id.*

any manner the existing authority of counties and cities and any city and county to impose pursuant to the police power a curfew for any other lawful purpose.¹²¹

In California history, one of the most notable curfew orders was issued in response to civil unrest following the April 1992 acquittals of the Los Angeles police officers who beat Rodney King.¹²² These acquittals sparked civil unrest in Los Angeles because the beating that caused King to suffer a “fractured cheekbone, 11 broken bones at the base of his skull, and a broken leg” was videotaped by a bystander and aired on national television.¹²³ A devastating result of this curfew was death, as law enforcement used lethal force on occasion to enforce the curfews.¹²⁴ For instance, “two National Guard soldiers fired eight shots, fatally wounding a [20-year-old] Hispanic man driving a car who [allegedly] tried to run them down after curfew in south Los Angeles.”¹²⁵

In the wake of the Rodney King riots, “[t]he Los Angeles Times reported that the arrests for curfew violations and other ‘civil disturbance’ offenses outnumbered those of looting, and that 51 percent of those arrested were Latino and 36 percent were Black.”¹²⁶ Despite attempts by those accused of violating the curfews to have the California courts rule that these

¹²¹ CAL. GOV'T CODE § 8634 (West); [§ 15] Violation of Curfew., 2 Witkin, Cal. Crim. Law 4th Crimes — Public § 15 (2020).

¹²² Los Angeles Times Staff, *The L.A. Riots: 25 years later*, L.A. TIMES (Apr. 26, 2017), <https://timelines.latimes.com/los-angeles-riots>.

¹²³ *The Rodney King Affair*, L.A. TIMES (Mar. 24, 1991), <https://www.latimes.com/archives/la-xpm-1991-03-24-me-1422-story.html>.

¹²⁴ Anna Hopkins, *Justice unserved: 25 years after Rodney King riots that reduced Los Angeles to ashes and claimed dozens of lives, 23 homicides remain unsolved*, DAILY MAIL (May 2, 2017), <https://www.dailymail.co.uk/news/article-4467960/25-years-Rodney-King-riots-deaths-unsolved.html>.

¹²⁵ Paul Taylor & Lou Cannon, *Quiet Los Angeles Ends Curfew Today*, WASH. POST (May 4, 1992), <https://www.washingtonpost.com/archive/politics/1992/05/04/quiet-los-angeles-ends-curfew-today/aff13000-3425-4599-818e-749d2c80c793>.

¹²⁶ Fernanda Echavarri, *Curfews “Definitely Work”—If We Define “Work” as Increasing the Possibilities for Police Violence*, MOTHER JONES (June 2, 2020), <https://www.motherjones.com/crime-justice/2020/06/do-curfews-work-confusion-los-angeles>; see Paul Lieberman, *51% of Riot Arrests Were Latino, Study Says: Unrest: RAND analysis of court cases find they were mostly young men. The figures are open to many interpretations, experts note*, L.A. TIMES (June 18, 1992), <https://www.latimes.com/archives/la-xpm-1992-06-18-me-734-story.html>.

curfew regulations were unconstitutional because they were overly broad and encouraged arbitrary enforcement, they were upheld.¹²⁷

Recently, across the U.S., city-wide and county-wide curfews have been imposed in an attempt to halt public protests after George Floyd, a forty-six-year old father, was murdered by police officers in Minneapolis, Minnesota on May 25, 2020.¹²⁸ In California, on May 31, 2020 Los Angeles County's Board of Supervisors put in place an executive order "following proclamation of existence of a local emergency due to civil unrest."¹²⁹ The order placed Los Angeles County residents on notice that they should remain in their homes from 6 p.m. to 6 a.m.; instructed that they should only leave their homes if they need to seek medical care or work at an essential job. Violation of the executive order is a misdemeanor "punishable by a fine not to exceed \$1,000 or by imprisonment for a period not to exceed six months, or both."¹³⁰ Meanwhile, in San Francisco, Mayor London Breed established a similar curfew that lasted from 8 p.m. to 5 a.m. and said it would "be extended indefinitely."¹³¹ Further, in San Jose, a curfew from 8:30 p.m. to 5:00 a.m. was imposed following the city's proclaiming "a local state of emergency within the City of San Jose resulting from the civil unrest following the death of George Floyd."¹³²

¹²⁷ *In re Juan C.*, 28 Cal. App. 4th 1093, 33 Cal. Rptr. 2d 919 (1994).

¹²⁸ Amir Vera et al. *May 31 George Floyd Protest News*, CNN (June 5, 2020), https://www.cnn.com/us/live-news/george-floyd-protests-05-31-20/h_faf6a71e06b13309403ff7cfbf1ded2d; *George Floyd: What happened in the final moments of his life*, BBC News (May 30, 2020), <https://www.bbc.com/news/world-us-canada-52861726>; Christina Palladino, *Who was George Floyd? Family, friends, coworkers remember 'loving spirit'*, Fox9 KMSP (May 27, 2020), <https://www.fox9.com/news/who-was-george-floyd-family-friends-coworkers-remember-loving-spirit>.

¹²⁹ L.A. County Curfew Order (May 30, 2020), available at <https://lacounty.gov/wp-content/uploads/Curfew-order.pdf>.

¹³⁰ *Id.*

¹³¹ S.F. City Curfew Order (May 31, 2020), available at <https://sfmayor.org/sites/default/files/Order%20Setting%20Curfew%20During%20Local%20Emergency.pdf>; see also Amanda Bartlett, *SF officials choke up as they announce new curfew: 'We don't want to see it go up in flames'*, SFGATE (June 1, 2020), <https://www.sfgate.com/crime/article/City-officials-SF-curfew-George-Floyd-protests-15306879.php>; *Mayor London Breed and Public Safety Officials Announce Curfew in San Francisco to Begin Tonight at 8 PM*, SFMAYOR.ORG (May 31, 2020), <https://sfmayor.org/article/mayor-london-breed-and-public-safety-officials-announce-curfew-san-francisco-begin-tonight-8>.

¹³² San Jose City Curfew Order (May 31, 2020), available at <https://www.sanjoseca.gov/home/showdocument?id=59288>.

These curfews have resulted in the arrest of thousands of peaceful protesters.¹³³ “Many of the arrests are made when police sweep a protest, lining up demonstrators against walls and tying their hands with zip ties.”¹³⁴ These massive sweeps have led police to need to create booking sites and field jails at places like UCLA’s stadium and utilize city buses to haul away arrested protesters.¹³⁵ Rather than curbing violence, the curfews increased police-instigated violence and increased the number of persons involved in the criminal justice system.¹³⁶ This begs the question: If civil unrest curfews are not *proven* to be effective at curbing violence and only arguably seem to result in blanket arrests, why have California courts not worked to amend or limit police power surrounding curfews? The financial and resource strain caused by civil unrest curfews alone should be enough to justify a closer look by California courts.

VI. CONCLUSION

This article was written to highlight history that needs to be remembered and learned from because:

Progress, far from consisting in change, depends on retentiveness. When change is absolute there remains no being to improve and no direction is set for possible improvement: and when experience is not retained, as among savages, infancy is perpetual. Those who cannot remember the past are condemned to repeat it.¹³⁷

What lesson does this article attempt to highlight? First, that the law can be used to target disadvantaged groups and exclude them from communities and public spaces. It stands to reason that guarantees of equal protection and due process would be unnecessary without the potential of

¹³³ Josh Cain et al., *LAPD processes hundreds of arrested protesters at UCLA’s Jackie Robinson Stadium*, L.A. DAILY NEWS (June 3, 2020), <https://www.dailynews.com/2020/06/03/lapd-processes-hundreds-of-arrested-protesters-at-uclas-jackie-robinson-stadium>.

¹³⁴ Cain, *supra* note 101.

¹³⁵ Cain, *supra* note 101; Ryan Fonseca, *Why Are LA Metro Buses Taking People Arrested in Protests To Jail?*, LAIST (June 3, 2020), https://laist.com/2020/06/03/why_are_la_metro_buses_taking_people_arrested_in_protests_to_jail.php.

¹³⁶ Echavarri, *supra* note 125.

¹³⁷ GEORGE SANTAYANA ET AL., *THE LIFE OF REASON OR THE PHASES OF HUMAN PROGRESS* (Published 1905–06), available at <https://muse.jhu.edu/chapter/682206/pdf>.

law to be used against certain groups. California is not exempt from this problem. Second, that the law can be creatively crafted to avoid the appearance of discrimination. Third, that as with the Page Act or Anti-Okie Law, laws may be written in language targeting those who would assist a targeted group, rather than the group itself. Fourth, laws need not be official to have an impact, as was the case with sundown towns. Fifth, when all else fails, private contracts can replace public ordinances.

Moving forward, California needs to consider potential similarities between contemporary laws, such as sit-lie ordinances and temporary curfew laws, and older laws that are now considered embarrassing. Are they aimed at removing a population that is broadly disliked? Are the legitimate concerns a pretext for a broader discrimination? Does the enforcement broadly infringe on recognized liberties? When the answer to any of these questions is yes, there is reason to believe that we will look back on the law with shame.

★ ★ ★

GETTING TO TARASOFF:

A Gender-Based History of Tort Law Doctrine

BROOK TYLKA*

INTRODUCTION

When Tatiana Tarasoff began her sophomore year at the University of California-Berkeley, she never could have guessed that her last name would soon become synonymous with a new legal doctrine which would be the subject of analysis and criticism for decades to come. But everything changed when Prosenjit Poddar, a fellow student, killed her on October 27, 1969. In the legal case that followed, the Supreme Court of California concluded that mental health professionals have a duty to protect third parties who are at risk from their patients.¹ California's decision was followed in a majority of other states.² This decision raised issues of patient privacy, burdens on mental health professionals, and the possible effects of deterring patients from sharing information with their doctors.

This paper was awarded second place in the California Supreme Court Historical Society's 2021 CSCHS Selma Moidel Smith Student Writing Competition in California Legal History.

* J.D., 2021, Boston University School of Law.

¹ Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 340 (Cal. 1976).

² Rebecca Johnson et al., *The Tarasoff Rule: The Implications of Interstate Variation and Gaps in Professional Training*, 42 J. AM. ACAD. PSYCHIATRY L. 469, 470 (2014).

Many legal scholars and professionals in the psychotherapy field have written about the impact of the *Tarasoff* decision and how its imposition of duties on third parties impacted the field of psychology. Additional scholarship tends to view the case from a medical or mental illness angle. For example, Glenn S. Lipson and Mark J. Mills have discussed Poddar's behavior from a psychiatric perspective, writing about Poddar's erotomania and examining issues of cultural differences.³

However, a few sources discuss *Tarasoff* from the perspective of gender-based violence. *Tarasoff* has been interpreted as a case about violence against women by Stephanie W. Wildman, who argued that in tort cases such as *Tarasoff*, courts ignored or minimized the issue of the abuse of women and saw these issues as "marginal to legal discussion."⁴ She also posed the question of whether gender of victims in other cases, such as *Dillon v. Legg*, influenced their outcomes.⁵ Mary McNeill in "Domestic Violence: The Skeleton in *Tarasoff*'s Closet" also argues that *Tarasoff* and similar cases that came after involve domestic violence issues that are not addressed by the courts in judicial opinions or by legal commentators.⁶ These understandings are relevant for examining legal developments of the past, as well as contemporary issues. For example, contemporary issues arise around "rejection killings," which are not sufficiently analyzed or even tracked.⁷ These types of killings, generally stemming from a man killing a woman for cutting off a romantic relationship with him or failing to reciprocate his romantic feelings, are precisely the type of situation that gave rise to *Tarasoff*.

In this gender-based context, the questions raised by *Tarasoff* can be broadened into both the past and the future. How does *Tarasoff* fit into the trends of California tort law over the twentieth century, particularly

³ Glenn S. Lipson & Mark J. Mills, *Stalking, Erotomania, and the Tarasoff Cases*, in *THE PSYCHOL. OF STALKING: CLINICAL AND FORENSIC PERSPECTIVES* 257–73 (1998).

⁴ Stephanie M. Wildman, *Review Essay: The Power of Women*, 2 *YALE J.L. & FEMINISM* 435, 444 (1990).

⁵ *Id.* at 444–45.

⁶ Mary McNeill, *Domestic Violence: The Skeleton in Tarasoff's Closet*, in *DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE* 197, 199 (Daniel Jay Sonkin ed., 1987).

⁷ Jessica Valenti, "Rejection Killings" Need to Be Tracked, *MEDIUM* (Nov. 21, 2018), <https://gen.medium.com/revenge-killings-need-to-be-tracked-37e78a1cf6ce>.

involving torts that are committed disproportionately against women? How did the California courts use tort law to expand duties owed to others, especially in the context of protecting women?

In this paper I will argue that *Tarasoff* represents the culmination of an expansion of tort law doctrines in California to include recovery for situations that disproportionately affect women, including torts that relate to intimate partner violence, and torts that disproportionately affect women in a caretaker role, such as emotional damage in the context of a familial death caused by negligence. Following *Tarasoff*, there was a retreat from this expansion due to political shifts on the Supreme Court. In addition to this discussion of *Tarasoff*, I will examine broader questions about how feminists have engaged with the legal system and the differing ideological opinions of feminist groups regarding expanding tort and criminal liability for intimate partner violence.

I will begin by examining existing feminist scholarship regarding tort law, as well as the battered women's movement, which demonstrates the interactions between the women's rights movement and the legal system. Next, I will discuss current issues relating to gender-based crimes and torts related to intimate relationships. I will also examine the historical development of tort laws relating to gender and emotional harm, particularly "breach of promise" cases. Then, I will trace the developments coming from the California Supreme Court over the twentieth century to demonstrate a case study of expanding tort doctrine that culminated in *Tarasoff*. I will discuss reactions to *Tarasoff* and shifts in the California Supreme Court that led to a retraction of the prior tort law expansion, although *Tarasoff* has not been overruled. Through these lines of cases, I will examine how the legal system has engaged with torts that are primarily committed against women and how political and social changes have influenced changes in these types of laws.

TORT HISTORY AND FEMINIST TORTS SCHOLARSHIP

Duty is a central concept in tort law. As a general rule, a person does not owe a duty to another person. Tort law creates the exceptions to this rule, such as when a person creates the danger or when the two parties are in

a special relationship. The expansiveness of these duties has changed over time in response to societal shifts and new legal understandings.

Although torts are not always seen as a gendered topic, there are certain torts that are disproportionately committed against women. These include torts around emotional harm, which frequently results from an injury or death of a family member, as well as those related to intimate partner violence.

Feminist torts scholarship seeks to bring a gender-based analysis to this field. In 1988, Professor Leslie Bender published an article entitled “A Lawyer’s Primer on Feminist Theory and Tort.” In this article, she applied feminist theory to different aspects of tort law. For example, she discussed the implicitly male norms that have been imposed in negligence law through the articulation of the reasonable person standard as the “reasonable man” standard.⁸ She notes that the “reasonable man” standard was postulated by men and was written into judicial opinions, treatises, and casebooks by men.⁹ As such, even a change in wording to “reasonable person” still means “reasonable man.” Additionally, the concept of “reasonableness” is inherently gendered, due to the traditional attribution of reason to men, while emotion is attributed to women.¹⁰ In 1993, Bender published another article titled, “An Overview of Feminist Torts Scholarship.”¹¹ She discussed how, at that point, feminist legal scholars had just begun to “apply feminist theories and methods to analyzing and ‘revisioning’ tort law.”¹² She discussed works including Martha Chamallas and Linda Kerber’s analysis of the gendered aspects of the law of fright and negligent infliction of emotional distress, as well as Carl Tobias’s work on interspousal tort immunity doctrine.¹³ Bender applied the feminist importance of “ending power imbalances stemming from systematic practices that subordinate groups of people” to argue that courts should intervene to balance the relative power of the parties, particularly in mass tort litigation involving defendant

⁸ Leslie Bender, *A Lawyer’s Primer on Feminist Theory and Tort*, 38 J. OF LEGAL EDUC., 3, 20–21 (1988).

⁹ *Id.* at 22.

¹⁰ *Id.* at 23.

¹¹ Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV., 575, 575–96 (1993).

¹² *Id.* at 575.

¹³ *Id.* at 577–79.

corporations.¹⁴ She also discussed Adrian Howe's proposal of shifting to the concept of social injury to women, rather than the traditional tort notion of individualized, privatized injury.¹⁵ Lucinda Finley also discussed how tort law fails to understand harms to women. Doctrines such as interspousal tort immunity can remove intentional marital injuries from the tort system and force a move to the criminal or family court systems, which would not allow women to recover monetary damages.¹⁶ Additionally, as this paper will discuss in the overview of tort law development in California, courts have failed to provide compensation for women's emotional injuries when their children are negligently killed "because damages are frequently limited to pecuniary losses."¹⁷ These typically are torts that disproportionately affect women, Finley noted, because the "female parenting role closely links self-identity with caretaking duties and children's well-being."¹⁸ Damage calculations also fail to place adequate value on homemaker and caretaking labor and tend to rely on gender bias to underestimate earnings projections of women.¹⁹

CURRENT GENDER-BASED TORT AND CRIMINAL LAW ISSUES

Gender-based torts have existed throughout all time periods, but they exist in a unique form today. In the current age of technology, torts and crimes in the context of intimate partner relationships have taken on a different form. In *Jane Doe No. 14 v. Internet Brands, Inc.*, a plaintiff sued for negligence in California after a situation that began online. The plaintiff had posted information about herself on the website modelmayhem.com.²⁰ She stated that in February 2011, two men used her profile on the site to lure her to a fake audition and proceeded to drug her, rape her, and record the acts.²¹ Her claim rested on the fact that the owner of the website, Internet

¹⁴ *Id.* at 582.

¹⁵ *Id.* at 583.

¹⁶ *Id.* at 585.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 586.

²⁰ *Jane Doe No. 14 v. Internet Brands, Inc.*, 824 F.3d 846, 848 (9th Cir. 2016).

²¹ *Id.* at 849.

Brands, knew of the perpetrators's criminal activity but failed to warn her and the other users of the site.²² She argued that Internet Brands had a special relationship with her that imposed the duty to warn.²³

Additionally, attention has grown in recent years around revenge porn — the releasing of nude images sent during a relationship, usually by an ex-boyfriend after the relationship has ended as a way of punishing his ex-girlfriend — as well as other types of nonconsensual pornography which could have been obtained originally with or without consent.²⁴ In our society, which has a “poor track record in addressing harms that take women and girls as their primary target,” revenge porn and other technology-based sexual crimes have been slow to garner attention and legal changes that would allow the perpetrators to be punished.²⁵ In recent years, there has been some movement toward criminalizing these behaviors and many courts have held that such statutes do not violate the First Amendment.²⁶ These issues relate to the realm of emotional harm in intimate relationships and how the law should respond to such harm. Although such on-line behaviors do not directly inflict physical violence as in *Tarasoff*, they demonstrate a similar motive of revenge in intimate relationships that has a gender-based component.

Additionally, recent social movements have focused on both criminal and civil law reforms. These movements have also been able to change the consciousness around certain issues relating to crimes and torts against women.

For example, the “battered women’s movement” was able to bring attention to domestic violence in a way that had not previously existed. Feminist organizations in the mid-1970s began emphasizing the problem

²² *Id.*

²³ *Id.*

²⁴ See Danielle Citron and Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV., 345, 346 (2014).

²⁵ *Id.* at 347.

²⁶ See, e.g., *People v. Austin*, No. 124910, 2019 WL 5287962, at *12-*14, *17 (Ill. 2019) (holding, *inter alia*, that statute served substantial government interest in protecting privacy of persons who had not consented to dissemination of their private sexual images, was narrowly tailored to serve that substantial government interest, and was not unconstitutionally overbroad under the First Amendment); *State v. Van Buren*, 214 A.3d 791, 814 (Vt. 2019) (holding that nonconsensual pornography statute was narrowly tailored to serve compelling state interest as needed to survive facial challenge to its constitutionality under the First Amendment).

of domestic violence against women, with the National Organization for Women forming a National Task Force on Battered Women / Household Violence at its eighth annual conference in October 1975.²⁷ Around this time, other groups had been organizing to provide shelter and crisis services to women who needed assistance fleeing from their abusive partners. In 1972, Women's Advocates, Inc. established a telephone crisis hotline in St. Paul, Minnesota to aid women who were victims of domestic violence.²⁸ Other groups such as the Rainbow Retreat in Phoenix and the Haven House in Pasadena began in the early 1970s as shelters to help women beaten by alcoholic husbands and later expanded to women suffering from physical abuse in general.²⁹

The battered women's movement achieved success in legislation to increase criminal penalties for domestic abuse, as well as strengthening civil protections and making it easier for women to file charges in these circumstances.³⁰ Additionally, U.S. government agencies have created or extended programs for battered women, and information has expanded on the factors that could place a woman at risk for domestic violence and how such violence can be combated.³¹ Writing in 1982, Kathleen Tierney described how "wife beating has been transformed from a subject of private shame and misery to an object of public concern."³² She examined articles from *The New York Times* and noted that there "was not a single reference to wife beating as a social or community issue from 1970 to 1972," and the only references to violence against wives were present in reports of assaults or murders by assailants who were married to or living with their victims; however, some mentions of domestic violence began in 1973 and more intense coverage started in 1976.³³ This increasing visibility of domestic violence helped to create an understanding of the pervasiveness of the issue and raise discussion about how to end it. Through the new understanding of domestic violence brought from the battered women's

²⁷ Kathleen J. Tierney, *The Battered Women Movement and the Creation of the Wife Beating Problem*, 29 *SOCIAL PROBLEMS*, 207, 208 (1982).

²⁸ *Id.* at 207.

²⁹ *Id.*

³⁰ *Id.* at 209.

³¹ *Id.*

³² *Id.* at 210.

³³ *Id.* at 212–13.

movement, domestic violence was seen as a pervasive concept throughout history and was put into broader understandings of legal history. A document from 1999 put out by SafeNetwork: California's Domestic Violence Resource showed a "herstory of domestic violence" and presented a timeline of violence against women that linked the battered women's movement to practices of the past.³⁴

The participants in the battered women's movement did not always share an ideological background. Some entered the movement from a women's rights perspective that sought equality with men where it could be gained through reform of existing social and legal institutions; others possessed a more radical notion of feminism that saw the division of labor and power between men and women as the basis for other forms of exploitation.³⁵ Socialist feminists saw the root of women's oppression within the material reality of this division of labor and believed that only sweeping societal transformation, including a restructuring of the family, would be able to end violence against women.³⁶ Additionally, women who were the victims of domestic violence themselves could be involved in the movement to end violence against women but did not always consider themselves to be feminists or aligned with a certain ideology.³⁷

Partly due to these ideological differences, movements relating to the criminal law, such as the battered women's movement, have faced internal debates within feminist circles about strengthening the power of the state. Policies advocated by those who support strong state intervention can include mandatory arrest, mandatory prosecution, and mandatory reporting by medical personnel.³⁸ In response, others have argued for a survivor-centered model that includes acceptance, respect, reassurance,

³⁴ SafeNetwork, *Herstory of Domestic Violence: A Timeline of the Battered Women's Movement* (Sept. 1999), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.208.6955&rep=rep1&type=pdf>.

³⁵ Susan Schechter, *The Roots of the Battered Women's Movement: Personal and Political*, in *APPLICATIONS OF FEMINIST LEGAL THEORY* 296, 302 (D. Kelly Weisberg ed., 1999).

³⁶ *Id.* at 303.

³⁷ *Id.* at 304.

³⁸ See generally, Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550 (1999).

engagement, resocialization, empowerment, and emotional responsiveness.³⁹ An approach to domestic violence that advocates for increased policing, prosecution, and imprisonment as the solution to ending violence against women is deemed “carceral feminism.” Opponents of carceral feminism note that women who are already more marginalized, such as immigrants and women of color, are more likely to be arrested or mistreated themselves by the legal system.⁴⁰ Therefore, they argue that additional law enforcement involvement in these situations does not always make victims safer. Additionally, critics of criminal justice policies such as mandatory arrest and mandatory prosecution have argued that these policies give police and prosecutors the power to determine victimhood.⁴¹ Other laws surrounding domestic violence situations can unfairly target women. For example, “failure to protect” laws that punish survivors of domestic violence for failing to protect their children from being exposed to domestic violence or failing to stop their abuser from also abusing the victim’s children disproportionately punish mothers.⁴² Critics of such laws discuss how they are administered in a gender-biased manner, although some critics see the issue with these laws as broader, because the laws themselves “rest on deeply entrenched gendered ideologies of motherhood.”⁴³ More broadly, critics argue that these laws function as a criminalizing ideology, based on the notion that individuals can and should be punished for the actions of another.⁴⁴

Such debates can also arise in the field of tort law. Those who oppose carceral feminism would also recognize the potential impact of a decision such as *Tarasoff* on individuals with mental health issues. A criticism of

³⁹ *Id.*

⁴⁰ Krishna de la Cruz, *Exploring the Conflicts Within Carceral Feminism: A Call to Revocalize the Women Who Continue to Suffer*, ST. MARY’S L. REV. & SOC. JUST. 79, 98 (2017).

⁴¹ Deborah M. Weissman, *The Politicization of Domestic Violence*, in THE POLITICIZATION OF SAFETY: CRITICAL PERSPECTIVES ON DOMESTIC VIOLENCE RESPONSES, 38, 46 (Jane K. Stoeber ed., 2019).

⁴² Alisa Bierria & Colby Lenz, *Battering Court Syndrome: A Structural Critique of “Failure to Protect,”* in THE POLITICIZATION OF SAFETY: CRITICAL PERSPECTIVES ON DOMESTIC VIOLENCE RESPONSES, 91, 91 (Jane K. Stoeber ed., 2019).

⁴³ *Id.* at 94–95.

⁴⁴ *Id.* at 97.

the duty to protect third parties could also raise issues similar to domestic violence policing, such as a greater impact on patients of color, whose statements may more easily be interpreted as having violent intent or as having the potential to endanger others.⁴⁵ Additionally, a feminist approach to tort law would not just advocate for higher recoveries in general, but also would focus on the differential impact on women throughout all points of the legal system.

Another contemporary issue relating to duty and violence against women occurred in recent years in Nebraska. In an article that frequently discusses *Tarasoff*, Gretchen S. Obrist wrote in 2004 about the Nebraska Supreme Court case *Bartunek v. State*. In this case, George Andrew Piper broke into the home of DaNell Bartunek, his former girlfriend, and violently attacked her, stabbing her with a butcher knife and attempting to rape her before being confronted by a police officer who responded to Bartunek's 911 call.⁴⁶ Piper was on intensive supervision probation ("ISP") at the time of the attack for a January 1997 burglary.⁴⁷ For this charge he served sixty days in jail, followed by ISP.⁴⁸ After his release from jail, he moved in with Bartunek and her two children from a previous marriage.⁴⁹ Piper began violating the terms of his probation almost immediately, including in the form of physical abuse directed at Bartunek's youngest child and later through harassment and threats against Bartunek.⁵⁰ Piper's ISP officer, Fred Snowardt, was informed of the child abuse and the harassment, but Snowardt did not report any violations to his supervisors or to

⁴⁵ For example, in considering the implication of *Tarasoff* warnings regarding persons with AIDS, one article notes that recent research suggested that "a patient's sex, race, and sexual orientation may significantly control whether a physician decides to reveal that such person carries the AIDS virus." Michael Perlin, *Tarasoff and the Dilemma of the Dangerous Patient: New Directions for the 1990's*, 16 L. & PSYCHOL. REV. 29, 44 (1992).

⁴⁶ Gretchen S. Obrist, *The Nebraska Supreme Court Lets Its Probation Department off the Hook in Bartunek v. State*, 266 Neb. 454, 666 N.W.2d 435 (2003): "No Duty" As a Non-Response to Violence Against Women and Identifiable Victims, 83 NEB. L. REV. 225, 220 (2004).

⁴⁷ *Id.* at 230.

⁴⁸ *Id.* at 231.

⁴⁹ *Id.*

⁵⁰ *Id.* at 232–34.

the sentencing court.⁵¹ When Bartunek attempted to go to the police for help, they told her that they could do little to aid her because Piper was the responsibility of Snowardt.⁵²

Obrist described how the Court in this case “missed an opportunity to impose a narrowly defined yet workable duty on the state probation service to act with reasonable care while supervising violent felons on intensive supervision probation.”⁵³ Obrist argued that there was legal support for imposing a duty based on either a special relationship between Bartunek and the State or between the State and Bartunek’s attacker, the basis for which is found in section 315 of the Restatement (Second) of Torts and subsequent case law.⁵⁴ She noted that “imposing or withholding a duty is also an expression of public policy.”⁵⁵ This case involved more egregious and pervasive behavior than in *Tarasoff*, with more of an opportunity to prevent the attack, and an individual who was in an even better position to prevent the violence than the therapist in the *Tarasoff* case — a parole officer. Despite the expansion that has taken place in some areas, such as with mental health professionals in *Tarasoff*, the imposition of duties is not pervasive enough to allow liability for many situations in which women are harmed. Obrist argues that, although violence against women is pervasive both in Nebraska and the rest of the country, the “legal analysis and ensuing public policy set forth in *Bartunek* deny this reality.”⁵⁶ She states that using a legal analysis that incorporates the reality of violence against women is the best way to see the duty that state actors should have and quotes Leslie Bender’s statement that “[i]f something is factually incoherent from women’s experiences and understandings, then it must also be legally incoherent,” concluding that *Bartunek* is an example of a legal system where male-centered perspectives dominate.⁵⁷

⁵¹ *Id.* at 234–35.

⁵² *Id.* at 236–37.

⁵³ *Id.* at 226.

⁵⁴ *Id.* at 227.

⁵⁵ *Id.* at 242.

⁵⁶ *Id.* at 293.

⁵⁷ *Id.*

BREACH OF PROMISE

Emotional harm and intimate relationship torts coalesced in a past line of cases. In a reverse of the cases around hurt feelings of men in a relationship, cases of the tort of “breach of promise” focused on the emotional harm done to a woman when a man broke off an engagement to marry. In 1639, the case of *Stretch v. Parker* was likely the first case that allowed an action in this circumstance.⁵⁸ Although this action was based on a contracts concept of the breach of an agreement, the aspects of damages were largely grounded in tort.⁵⁹ Damages were allowed based on mental anguish and injury to feelings, as well as losses of opportunity.⁶⁰

Other provisions in some jurisdictions’ enforcement of this action also show the importance of gender dynamics in these cases involving interpersonal relationships. In an 1870 Wisconsin Supreme Court case, the defendant claimed in his answer that during the period in which the plaintiff stated she had been waiting for him to marry her, she was actually attempting to marry a man named McGill and she also “receive[d] visits from different men with a view to matrimony.”⁶¹ The defendant asked for a jury instruction stating that if they found that the defendant had failed to show that the plaintiff “engaged herself to McGill while engaged to [the defendant], this should not aggravate the damages which they might find for the plaintiff.”⁶² The defendant likely sought this instruction because he did not want the jury to increase the damages for what they could interpret as an untrue attack on the character of the plaintiff. The court did not give the instruction requested by the defendant and the Supreme Court of Wisconsin considered this issue. In this case, the Court concluded that the instruction was correct and should have been given.⁶³ However, the Court also discussed a line of cases which concluded that “where the defendant attempts to justify the breach of promise of marriage by proving that the plaintiff was guilty of lascivious conduct with other men, *of which he knew that she*

⁵⁸ Columbia Law Review Association, Inc., “Contracts” to Marry, 25 COLUM. L. REV., 343, 343 (1925) (citing *Stretch v. Parker*, 1 Rolle Abr. 22 (1639)).

⁵⁹ *Id.* at 345.

⁶⁰ *Id.*

⁶¹ *Simpson v. Black*, 27 Wis. 206, 207 (Wis. 1870).

⁶² *Id.*

⁶³ *Id.*

was not guilty, this was a circumstance which aggravated the damages.”⁶⁴ Although this did not affect the outcome of this case, because there was no reason to believe that the defendant was lying about McGill and the others, this doctrine and the Supreme Court of Wisconsin’s affirmation of it show the way that the law was involved with interpersonal relationships and how this doctrine inherently contains a gendered aspect. Language in other opinions demonstrates the female plaintiff’s portrayal of herself as innocent and of the male defendant as cruel. A Kentucky case in 1872 describes the plaintiff’s petition and states that “at the time of making [the marriage] contract she was chaste and virtuous, but the defendant, not regarding his promise, and wrongfully, wickedly and fraudulently intending at the time by craft and artifice to deceive and injure her, and blight her reputation, did not, nor would not at the time aforesaid, nor since, consummate said agreement.”⁶⁵

Breach of promise was actionable only when the promise was mutual; the consideration of the one promise was the other promise.⁶⁶ Therefore, the plaintiff had to prove mutual promises. A Kentucky court held that, on the female plaintiff’s side, “her carrying herself as one consenting and approving was sufficient evidence of her having mutually promised, and that no other evidence is usually given.”⁶⁷ In a discussion of proof, a New Hampshire court in 1850 noted that “young marriageable ladies, at least prudent ones, do not allow themselves to be engaged in correspondence with unmarried men, unless they suppose a marriage contract exists between them.”⁶⁸ As such, the court held that correspondence between the parties was “competent to be submitted to a jury.”⁶⁹ This discussion again illuminates the gendered expectations of interpersonal relationships at the time. The evidence considered in these cases and the language used by the courts in their decisions conform closely to gender roles of the times and expectations of respectability, especially for women.

⁶⁴ *Id.* at 208.

⁶⁵ *Squires v. Hancock*, 5 Ky.Op. 767, 769 (Ky. Ct. App. 1872).

⁶⁶ *Hoitt v. Moulton*, 21 N.H. 586, 593 (Super. Ct. of Judicature of N.H. 1850).

⁶⁷ *Id.* at 593–94.

⁶⁸ *Id.* at 595.

⁶⁹ *Id.*

SIGNIFICANT TORT LAW DEVELOPMENTS IN CALIFORNIA PRIOR TO 1976

Several early-twentieth-century cases in California demonstrate the initial limitations on recovery for torts that disproportionately affect women and how the possibilities for recovery expanded over the years. Many of these cases focused on emotional harm suffered by women. Gendered thinking influenced decisions in this area, but gender issues in the cases were not examined by the courts and are rarely discussed by present legal scholarship, as Martha Chamallas and Linda Kerber argue.⁷⁰ Because injuries of this sort are socially constructed, and courts or the legislature must make a determination of when these emotional injuries are actionable, the gender of the plaintiff can affect the way the legal system conceptualizes harm.⁷¹ The English case *Lynch v. Knight* in 1861 held that an emotional injury alone is not an actionable legal harm. Some opinions in the case itself demonstrate ideas of gender inherent in English society at the time and, therefore, in the legal decision-making process. Lord Campbell's opinion drew a distinction between the tortious consequences of adultery for men and for women. He stated that "by the adultery of the husband, the wife does not necessarily lose the consortium of her husband," so the betrayed wife could not sue her husband's lover for loss of consortium, "whereas condonation of conjugal infidelity is not permitted to the husband, and, by reason of the injury of the seducer, the consortium with the wife is necessarily for ever lost to the husband."⁷² Chamallas and Kerber describe this analysis as demonstrating that the harm to the woman in loss of consortium is conceived of as inside her own mind and subjective, while the same harm to the man is viewed as objective.⁷³ An understanding of gendered legal thinking can also illuminate the decision-making in tort cases in California.

Many tort cases for emotional harm in California arose from a mother's fear for herself or her children. In 1918, the California Supreme Court decided *Lindley v. Knowlton*. In this case, O. P. Lindley and his wife Lillian sued for damages relating to personal injuries "alleged to have been

⁷⁰ Martha Chamallas & Linda Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 815 (1990).

⁷¹ See *id.* at 816.

⁷² *Id.* at 818 (citing 11 Eng. Rep. 854 (1861)).

⁷³ *Id.* at 818–19.

sustained by Mrs. Lindley because of fright occasioned by the appearance and acts of a chimpanzee owned by Knowlton.”⁷⁴ Mrs. Lindley did get a financial recovery in this case, but this recovery was based on the fact that she must have feared for herself. The court understood that if Mrs. Lindley only feared for the lives of her children, no recovery would be justified.⁷⁵

Other plaintiffs were not able to receive favorable legal results as Mrs. Lindley did, because they did not fear that they were in danger themselves or because their emotional harm did not happen at the time of the injury. A later case that clarified limits on recovery for emotional harm in California arose in 1932 and involved a male plaintiff. George Kalleg had been driving when he attempted to make a left-hand turn and collided with the defendant’s car.⁷⁶ Kalleg’s claim included a bruised shoulder and some nervous shock while his wife, Dorothy Kalleg, had a slight scar above the right eyebrow along with some bruising around the hip and both children had been cut on the face by broken glass.⁷⁷ The trial court had issued a jury instruction that Kalleg was “not entitled to recover because of grief, sorrow, or resentment . . . on account of any injury sustained by his wife or children . . . or because of . . . any scars, blemishes or disfigurement on the faces of the wife or children.”⁷⁸ Kalleg argued that this instruction limited the jury in considering the element of “nervous shock” and cited *Lindley* along with *Easton v. United Trade School Contracting Company*. *Easton* was decided in 1916 and, among other things, held that a woman involved in a collision between a buggy and an automobile was entitled for recovery based on her fright because it was due not only to concern for her child, but also fright for herself as she suffered physical injuries from the collision.⁷⁹ The *Kalleg* court drew a distinction between the case at hand and *Lindley* and *Easton*, each of which involved a parent’s fear for herself and for her child at the time of an accident, while the situation in *Kalleg* involved “the

⁷⁴ *Lindley v. Knowlton*, 179 Cal. 298, 299 (Cal. 1918).

⁷⁵ See *id.* at 302. This would later be confirmed in *Amaya v. Home, Ice, Fuel & Supply Co.*

⁷⁶ *Kalleg v. Fassio*, 13 P.2d 763, 764. (Cal. Dist. Ct. App. 1932).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Easton v. United Trade Sch. Contracting Co.*, 159 P. 597, 202 (Cal. 1916) (“Fright here was but a natural and direct consequent of the defendant’s injurious trespass, which trespass resulted in direct physical injury to Mrs. Easton.”).

element of grief and sorrow after the collision and . . . subsequent distress by the contemplation of scars or disfigurements on the faces of the other members of the family.”⁸⁰

Many of the cases where plaintiffs failed to get a recovery for emotional harm involved female plaintiffs. Another car accident case, *Clough v. Steen*, arose in 1934. The plaintiff was in a car accident in which she was injured and her son was killed.⁸¹ The court held that the trial court should not have included in the judgment damages for the “grief and shock and consequent damage suffered by the plaintiff when she learned of the death of her child.”⁸² Instead, she was only entitled to recovery for her own mental and physical injuries proximately caused by the accident.⁸³ The court drew a distinction between this case and *Lindley*, deciding that this case was more similar to *Kalleg*.⁸⁴ Cases such as this demonstrate the limitation that courts drew on mental suffering that occurred after the time of the accident or injury.

Another similar emotional harm case from 1963, *Amaya v. Home, Ice, Fuel & Supply Co.*, would later be overruled by *Dillon v. Legg* in 1968.⁸⁵ In *Amaya*, a mother pursued legal action due to her fright, nervous shock, and bodily injury when she was “compelled to stand helpless and watch her infant son be struck and run over by the defendants’ truck.”⁸⁶ She stated that she became “violently ill and nauseous and was hurt and injured in her health, strength and activity, sustaining injury to her body and shock and injury to her nervous system and person.”⁸⁷ When the court offered her attorneys an opportunity to state that the fear she suffered was fear for her own safety, they stated that the plaintiff’s fright and shock were rather the “result of being compelled to watch her infant child crushed beneath the wheels of an ice truck” and it was the result of her fear for the safety of her child, rather than fear for her own safety.⁸⁸ The court held that she

⁸⁰ *Kalleg*, 13 P.2d at 764.

⁸¹ *Clough v. Steen*, 39 P.2d 889, 889 (Cal. Dist. Ct. App. 1934).

⁸² *Id.*

⁸³ *Id.* at 889–90.

⁸⁴ *Id.* at 890.

⁸⁵ *Dillon v. Legg*, 441 P.2d 912, 914 (Cal. 1968).

⁸⁶ *Amaya v. Home, Ice, Fuel & Supply Co.*, 379 P.2d 513, 514 (Cal. 1963).

⁸⁷ *Id.*

⁸⁸ *Id.*

could not recover based on her own fright.⁸⁹ The dissent conceded that a defendant who negligently injures someone should not be liable to any other person who is shocked by the accident, but notes that “the plaintiff is not just anyone” but rather is the mother of a 17-month-old child.⁹⁰ Although the dissent acknowledged the prior case authority that denies liability in situations such as this case, the dissenter noted that this is “partly due to the sheer inertia caused by the doctrine of stare decisis, and the apparent reluctance of appellate courts to disturb the status quo.”⁹¹ The dissenting justice stated that “old cases, no matter how numerous, should not stand, if, under modern and different conditions, they cannot withstand the impact of critical analysis.”⁹² This statement foreshadowed further broadening of tort law, both in *Dillon*, with its departure from the former line of cases that *Amaya* was part of, and in *Tarasoff*, which emphasized the differing circumstances of modern society. Cases such as *Amaya* emphasize the feminist critique that tort law has traditionally failed to value the “emotional interests inherent in the parent-child relationship,” a relationship which, particularly in the mid-twentieth century, would likely have the mother as the primary caretaking parent.⁹³

Not all cases of emotional harm were devoid of physical injuries. One such case of physical injury resulting from emotional harm took place in 1957. The plaintiff suffered both “severe emotional strain, mental shock and fright” as well as a miscarriage which were the “direct and proximate result” of seeing a car crash that her husband was involved in.⁹⁴ At the time of the accident, she was approximately 130 feet away from the point of impact.⁹⁵ Because she was far enough away that she was not in fear for her own safety, but solely for the safety of her husband, the court held that she was not entitled to recovery for her mental and physical injuries.⁹⁶ As Lucinda Finley argues, even when a woman suffers physical injury, such

⁸⁹ *Id.* at 525.

⁹⁰ *Id.* at 526 (Peters, J., dissenting).

⁹¹ *Id.*

⁹² *Id.*

⁹³ See Lucina M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 50 (1989).

⁹⁴ *Reed v. Moore*, 319 P.2d 80, 81 (Cal. Dist. Ct. App. 1957).

⁹⁵ *Id.*

⁹⁶ *Id.* at 82.

complaints have “often been dismissed as emotional or hysterical complaints” and are less likely to be treated seriously than the physical harm that men may experience.⁹⁷ Therefore, even physical injuries claimed by women in a tort suit would be less likely to receive compensation.

In addition to their familial roles, women and girls are disproportionately in caretaker roles for non-family members, such as babysitting. Cases resulting from harm in these non-familial caretaker roles demonstrate issues involving warning, an aspect also prominently present in *Tarasoff*. In *Ellis v. D’Angelo* in 1953, the plaintiff brought not only a count of battery by a four-year-old defendant, but also a count seeking to recover from the parents of the child accused of battery for their negligence in “failing to warn or inform plaintiff of the habit of the child violently attacking other people.”⁹⁸ Another case of harm in a caretaker role took place in *Johnson v. State* in 1968. In this case, a female foster parent brought an action against the state based on assault by a sixteen-year-old boy placed in her home.⁹⁹ The court held that the state was not immune from liability in this situation and remanded the case to the trial court.¹⁰⁰

The California Supreme Court expanded other general tort doctrines during the mid-twentieth century. In *Rowland v. Christian*, decided in 1968, the Court abolished the old distinctions between different types of persons entering land. Instead, the court imposed a general duty of care regarding negligence.¹⁰¹ Similarly, in 1975, the court rejected the strict doctrine of contributory negligence and instead embraced the doctrine of comparative negligence.¹⁰²

One of the best-known cases that expanded tort liability was *Dillon v. Legg*, which was decided in 1968. Similar to some prior cases, this case involved a mother who witnessed a truck run over her child, who subsequently died.¹⁰³ This case represents a turning point in the expansion of recovery for emotional damage. An analysis of this opinion reveals a more

⁹⁷ Finley, *supra* note 82, at 65.

⁹⁸ *Ellis v. D’Angelo*, 253 P.2d 675, 675 (Cal. Dist. Ct. App. 1953).

⁹⁹ *Johnson v. State*, 447 P.2d 352, 354 (Cal. 1968).

¹⁰⁰ *Id.* at 363.

¹⁰¹ *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968).

¹⁰² *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1243 (Cal. 1975).

¹⁰³ *Dillon*, 441 P.2d at 914.

liberal view of the potential of expanding liability. The Court discussed the history of the concept of duty and quoted Prosser's statement in *Law of Torts* that duty "is not sacrosanct in itself but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."¹⁰⁴ The *Dillon* Court also acknowledged the way that the law of torts had evolved, noting that "the successive abandonment of these positions exposes the weakness of artificial abstractions which bar recovery contrary to general rules."¹⁰⁵ The Court also stated that "legal history shows that artificial islands of exceptions, created from the fear that the legal process will not work, usually do not withstand the waves of reality and, in time, descend into oblivion."¹⁰⁶ This demonstrates a contrast from prior cases that stuck firmly to rules limiting recovery in these emotional damage cases. The dissent points out that all of the arguments in the *Dillon* opinion had recently been considered by the California Supreme Court and rejected only five years previously in *Amaya*.¹⁰⁷ However, this time the Court was ready to bring about change in these types of recoveries.

Tarasoff was initially decided in 1974. The Supreme Court of California vacated and remanded the case, issuing a new opinion with a slightly different holding in 1976. A case involving intimate partner violence also arose in the year between the two *Tarasoff* decisions. On September 4, 1972, Ruth Bunnell called the San Jose Police Department to report that her estranged husband, Mack Bunnell, had called her to say that he was coming to her house to kill her.¹⁰⁸ Less than an hour later, Mack Bunnell carried out his threat.¹⁰⁹ The San Jose police had made at least twenty responses to Mrs. Bunnell's home during the year before her death, due to complaints about Mr. Bunnell's violent acts committed on her and her two daughters.¹¹⁰ The administrator of Mrs. Bunnell's estate brought a wrongful death action against the city, but it was not successful. He argued that

¹⁰⁴ *Id.* at 916.

¹⁰⁵ *Id.* at 925.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (Burke, J., dissenting).

¹⁰⁸ *Hartzler v. City of San Jose*, 46 Cal.App.3d 6, 8 (Cal. Ct. App. 1975).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

the police department was liable for its omission due to its special relationship with Mrs. Bunnell, “based on the fact that the department was aware of Mack Bunnell’s violent tendencies, since decedent had called police 20 times prior to the night of her death, complaining of threats of violence made by Bunnell, and since the department had on one occasion arrested him for assaulting her.”¹¹¹ Similar to *Johnson v. State*, the court found no liability on behalf of the state actors to prevent this foreseeable injury. The court stated that the allegation of twenty police responses did not show that the police department had assumed a duty toward Mrs. Bunnell that was greater than the duty owed to another member of the public.

THE *TARASOFF* DECISION

Prosenjit Poddar was born in India as a member of the “untouchable” caste and came to UC Berkeley as a graduate student in September 1967.¹¹² He met Tatiana Tarasoff at a folk dancing class in the fall of 1968; the two became friends and saw each other weekly.¹¹³ On New Year’s Eve, they shared a kiss which Poddar interpreted to be a recognition of a serious relationship.¹¹⁴ However, Tatiana told him that she was not interested in such a relationship with him.¹¹⁵ Poddar subsequently suffered an emotional crisis.¹¹⁶ He continued talking with Tatiana and tape-recorded many of their conversations to listen to later and attempt to figure out why she did not return his love for her.¹¹⁷

In the summer of 1969, Tatiana went to South America.¹¹⁸ At the urging of his friend, Poddar sought psychological assistance that summer, which he stopped in October 1969.¹¹⁹ His psychologist wrote to campus police saying Poddar was suffering from paranoid schizophrenia and gave his recommendation that Poddar should be civilly committed.¹²⁰

¹¹¹ *Id.* at 10.

¹¹² *People v. Poddar*, 518 P.2d 342, 344 (Cal. 1974).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 344–45.

¹²⁰ *Id.* at 345.

On October 27, 1969, Poddar went to Tatiana's house.¹²¹ First, she was not home and her mother told him to leave, but he returned later when Tatiana was alone.¹²² She refused to speak with him and Poddar shot her with a pellet gun.¹²³ After she ran away, he fatally stabbed her.¹²⁴ Poddar was convicted of second-degree murder, which was later overturned on the grounds that the jury was inadequately instructed.¹²⁵ He was released on the condition that he would return to India, which he did.¹²⁶

Tatiana's parents, Vitaly and Lydia Tarasoff, filed a civil suit against the university. The first opinion was issued on July 6, 1973. On appeal, the California Supreme Court issued the decision known as *Tarasoff I* on December 23, 1974. The opinion provides very little detail as to the background that started the situation, merely stating, "On October 27, 1969, Prosenjit Poddar killed Tatiana Tarasoff."¹²⁷ Although the defendants argued that they owed no duty of care to Tatiana, the court cited *Dillon* to restate that "legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done."¹²⁸ In this sense, the *Tarasoff* decision represents a similar expansion as seen in the *Dillon* decision. Additionally, the Court recognized particular elements of the era in which they were writing that weighed toward imposing additional duties in situations such as this. The decision noted that the "current crowded and computerized society compels the interdependence of its members."¹²⁹ The Court continued on to state that in this "risk-infested society" they could not tolerate the potential danger that would come from a therapist concealing knowledge of the potential danger his patient could inflict.¹³⁰ The Court held that, "if in the exercise of reasonable care the therapist can warn the endangered party or

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Tamonud Modak et al., *The Story of Prosenjit Poddar*, 21 J. OF MENTAL HEALTH AND HUM. BEHAV. 138, 138 (2016).

¹²⁶ *Id.*

¹²⁷ *Tarasoff v. Regents of Univ. of Cal.*, 529 P.2d 553, 554 (Cal. 1974).

¹²⁸ *Id.* at 557.

¹²⁹ *Id.* at 561.

¹³⁰ *Id.*

those who can reasonably be expected to notify him, we see no sufficient societal interest that would protect and justify concealment.”¹³¹

In 1975, multiple social work and psychiatric organizations, including the American Psychiatric Association, California State Psychological Association, and California Society for Clinical Social Work, jointly signed onto an amicus brief in support of a petition for rehearing the *Tarasoff* case. This brief argued that the duty to warn enunciated by the Court established an unworkable standard.¹³² This was partially due to the lack of clarity in the standard. The brief argued that the issues of whom and how to warn “defy description in terms which may be implemented in the day-to-day practice of psychotherapy.”¹³³ Additionally, they argued that psychotherapists cannot predict violence, that the duty to warn is not consistent with the nature of psychotherapeutic communication, and that the “reasonable” therapist standard is not realistic.¹³⁴ The brief further stated that the California Supreme Court did not properly weigh the balance between the need of psychotherapy and the need for public safety; it argued instead that the Court overestimated the value to society of the warnings that were prescribed and underestimated both the value of psychotherapy as a way of preventing violence and the seriousness of the breaches of patient rights that would result from the duty to warn.¹³⁵ The brief also argued that warning victims would not protect them because the victims could do little to prevent the violence; therefore, such a warning may lead to anxiety over an extended period of time.¹³⁶ The duty would also infringe on the patient’s right to confidentiality, and the amicus brief argued that the statutory commitment procedure is the proper method for protecting society against violent patients.¹³⁷

The case was re-heard, and the decision known as *Tarasoff II* was issued on July 1, 1976. The California Supreme Court likely took into account the reactions from the mental health community when they altered their holding from their previous “duty to warn” standard. *Tarasoff II* confirmed

¹³¹ *Id.*

¹³² Brief for American Psychiatric Ass’n et al. as Amici Curiae Supporting Petitioner at 4, *Tarasoff v. Regents of Univ. of Cal.*, S.F. No. 23042.

¹³³ *Id.* at 11.

¹³⁴ *Id.* at 16.

¹³⁵ *Id.* at 20.

¹³⁶ *Id.* at 22–23.

¹³⁷ *Id.* at 31–42.

that when a therapist determines or reasonably should determine (pursuant to the standards of the profession) that a patient presents a serious danger of violence to another person, the therapist has an obligation to use “reasonable care to protect the intended victim against such danger.”¹³⁸ The *Tarasoff II* Court held that the duty could be fulfilled by various steps, depending on the nature of the case, which may include warning the intended victim or others who are likely to tell the victim of the danger, notifying the police, or taking whatever other steps are “reasonably necessary under the circumstances.”¹³⁹

AFTER TARASOFF

Tarasoff represents a difficult case in which a multitude of interests must be weighed by a court. Mary McNeill notes that the *Tarasoff* case imposed a duty on therapists “to respond to the hidden violence that we all learned to ignore” and sees it as a possible foreshadowing that we all have a duty to respond to potential violence in our midst.¹⁴⁰ At the same time, some feminist scholars, including McNeill, have critiqued the decision for failing to place the issue of violence against women in the forefront. McNeill deemed domestic violence to be “the skeleton in *Tarasoff*’s closet” and states that although “virtually every case that the California Supreme Court relied on in deciding *Tarasoff* involved domestic violence, and nearly every case where psychotherapists have been found liable for failing to protect readily identifiable victims based upon *Tarasoff*’s rationale have involved domestic violence, those facts are consistently unmentioned by commentators.”¹⁴¹ The *Tarasoff* decision is one of the cases being rewritten in the tort opinions volume of the U.S. Feminist Judgments Project, which seeks to expose how courts, when confronted with issues of gendered harm to women, have “often distorted or misapplied conventional legal doctrine to diminish the harm or deny recovery.”¹⁴²

¹³⁸ *Tarasoff*, 551 P.2d at 340.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 216.

¹⁴¹ McNeill, *supra* note 6, at 199.

¹⁴² Martha Chamallas & Lucinda M. Finley eds., *FEMINIST JUDGMENTS: REWRITTEN TORT OPINIONS* (2020); *Torts Opinions Rewritten — Authors & Cases*, U.S. FEMINIST

After the *Tarasoff* decisions, legal scholars and those in the mental health community reacted in a largely critical manner. For example, in one law review article authored in 1976, Professor of Law and Psychiatry at Harvard University Alan Stone criticized the decision.¹⁴³ Stone stated that that holding of *Tarasoff* would have “adverse consequences for the treatment of potentially dangerous patients” because it would deter those who provide psychotherapy to mentally ill individuals who are thought to be dangerous. Additionally, he stated that the effectiveness of such treatment would be limited by restricting the assurance of confidentiality available when such treatment is given. He stated that there was no “evidence in either [*Tarasoff* decision] of any recognition of the policy of protecting the rights of patients” and that the Court in *Tarasoff II* focused almost wholly on the issue of public safety.¹⁴⁴ The *Tarasoff* decision also raised issues about which other professions could have a duty to protect third parties. For example, one student article from about a decade after *Tarasoff* analyzed the possibility of applying such a duty to clergy.¹⁴⁵ The extension of such a duty to groups like clergy would likely raise similar concerns about confidentiality and rights of the individuals disclosing such information.

Several years after *Tarasoff*, many of the concerns about the impact on the mental health profession appeared to be less damaging than anticipated. According to a 1984 study, between 75 and 80 percent of a sample of 3,000 mental health professionals stated that *Tarasoff*’s requirement of exercising reasonable care to protect foreseeable victims applied as a matter of personal ethics, regardless of what the law proscribed.¹⁴⁶ Additionally, the same study found that the majority of psychiatrists were more likely to continue treating a dangerous patient when they believed that they were legally bound by *Tarasoff*.¹⁴⁷ This refuted Alan Stone’s prediction that imposing liability on these psychiatrists would make them more reluctant to take

JUDGMENTS PROJECT, <https://law.unlv.edu/us-feminist-judgments/series-projects/torts-opinions-rewritten/authors-cases>.

¹⁴³ Alan A. Stone, *The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV., 358–78 (1976).

¹⁴⁴ *Id.* at 363.

¹⁴⁵ See Terry Wuester Milne, *Bless Me Father, for I Am about to Sin . . . : Should Clergy Counselors Have a Duty to Protect Third Parties?*, 22 TULSA L. REV., 139–65 (1986).

¹⁴⁶ McNeill, *supra* note 6, at 207.

¹⁴⁷ *Id.*

on potentially dangerous clients or to continue treating those patients once they were identified as dangerous. Another concern expressed by critics of *Tarasoff* was that the therapeutic community would be unable to predict violence, but over 75 percent in another study stated that they felt they could make a prediction in this area ranging from “probable” to “certain;” only 5 percent felt that it was impossible to predict violence.¹⁴⁸

The trajectory of tort opinions in California would change in the 1980s. Shortly after *Tarasoff*, the California Supreme Court experienced a rightward shift. Voters removed liberal Chief Justice Rose Bird who served as the chief justice from 1977 to 1987 and two of fellow liberals (Cruz Reynoso and Joseph Grodin) from the Supreme Court in the 1986 general election, mainly due to their opposition to capital punishment.¹⁴⁹ They were the first justices to be removed from the court since 1934, when the California Constitution had been amended to require appointed appellate judges to be periodically reconfirmed by voters.¹⁵⁰ A newspaper article from the time describes the supporters of Bird, Reynoso, and Grodin as denouncing what they deemed “a right-wing effort to ‘politicize’ the court” while the opponents of the justices stated they were only “applying the state constitutional requirement that justices be held accountable to voters.”¹⁵¹ At the time, legal experts predicted that the more conservative court would “affirm more death sentences, limit the rights of criminal defendants, and be less sympathetic to plaintiffs in civil cases than was the so-called ‘Bird court.’”¹⁵² Nine months after the new Court was seated, *The New York Times* reported that, although the new court was clearly more conservative, “its decisions and actions so far have been deliberate, pragmatic, cautious, and marked by no fervid ideological agenda,” and they reported that the Court’s “most forceful actions have related to the

¹⁴⁸ *Id.*

¹⁴⁹ Robert Lindsey, “The Elections: The Story in Some Key States; Deukmejian and Cranston Win as 3 Judges are Ousted,” *The N.Y. Times*, Nov. 6, 1986. <https://nyti.ms/2yzziZU>.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Scott Armstrong, “California Supreme Court is about to take a turn to the right,” *The Christian Science Monitor*, Boston, Mass. Feb 23, 1987.

death penalty.”¹⁵³ Nicholas Georgakopoulos studied the votes of justices around death penalty issues.¹⁵⁴ He notes that the pre-election sample from 1984 and 1985 shows a Court that is reluctant to impose the death penalty, while the opinions after the elections present a very different image.¹⁵⁵

While the rightward shift of the California Supreme Court may not have been as strong as initially anticipated, the shift did exist, and it impacted areas of law outside the realm of the death penalty. After the new Court took over, a subsequent retraction of certain tort law doctrines that had been expanded in the mid-twentieth century took place. David Eagleson was appointed to the Supreme Court in March 1987 and his role on the court was significant in this rightward shift. In *Thing v. La Chusa*, the Court rejected their development in *Dillon* and established necessary factors for a claim of emotional distress caused by observing a negligently inflicted injury: the plaintiff must be closely related to the victim, the plaintiff must be present at the scene of the injury-producing event at the time it occurs and at the time be aware that the event is causing injury to the victim, and as a result the plaintiff must experience severe emotional distress beyond that which would be anticipated in a disinterested witness.¹⁵⁶ Eagleson authored this opinion and his daughter, Elizabeth Eagleson, later stated that this opinion was most representative of his life philosophy.¹⁵⁷ She discussed Eagleson’s explanation that “emotional distress is a condition of living that simply has to be borne” and compared it to the similar words he had spoken to her as a child, describing his watchword as “no sniveling.”¹⁵⁸ This demonstrates an outlook which leads to the diminishing of emotional injuries and a consideration of a stereotypically male “reasonable person” that feminist tort scholars had previously criticized.

¹⁵³ Robert Reinhold, “No Tilt as Yet From New California High Court,” *The N.Y. Times*, Jan 1, 1988. <https://nyti.ms/2RUrnNF>.

¹⁵⁴ See generally, Nicholas L. Georgakopoulos, *Judicial Reaction to Change: The California Supreme Court Around the 1986 Elections*, 13:405 CORNELL J.L. & PUB. POL’Y, 405–30 (2003).

¹⁵⁵ *Id.* at 413, 414.

¹⁵⁶ *Thing v. La Chusa*, 771 P.2d 814, 829–30 (Cal. 1989).

¹⁵⁷ David N. Eagleson, CAL. SUP. CT. HIST. SOC’Y, <https://www.cschs.org/history/california-supreme-court-justices/david-n-eagleson> (last visited June 26, 2021).

¹⁵⁸ *Id.*

CONCLUSION

Tort law, as with other areas of law, has inherently gendered angles that are often ignored. In recent years, more scholarship has emerged that understands the issues of gender that have historically influenced how women relate to the tort system, as with the legal system more broadly. Certain torts have disproportionately affected women, namely those relating to emotional harm and intimate partner relationships. From the past torts of breach of promise to current issues with revenge porn and deepfakes, torts that disproportionately affect women and those that relate to intimate relationships ought to be evaluated from a gender-based perspective.

Additionally, legal changes in these realms have been shaped by social movements and political change. Movements such as the battered women's movement in the mid- to late-twentieth century demonstrate how feminists and women's rights activists organized to change consciousness around a social problem — domestic violence — from something that was an individualized and private issue to something that was a societal problem which needed to be addressed through policy changes. The battered women's movement and changes in the law, particularly in criminal law, also expose debates and differing tactics in feminist activists and thinkers, particularly a divide between those who advocate for greater involvement of law enforcement and those who see this as an expansion of the carceral state that ultimately harms both women and men.

Examining the development of tort law in California demonstrates the expansion of recovery in torts that are disproportionately committed against women, such as a broadening of when plaintiffs could recover from emotional damages resulting from witnessing the negligent injury or death of a family member. *Tarasoff* was one of the cases at the culmination of this era, with its new duties imposed on mental health professionals. Although *Tarasoff* involved an issue of a "rejection killing" and clearly involved gender-based elements, the Court did not frame the case in this way. The reaction to *Tarasoff* was largely critical on the part of mental health professionals, arguing that the decision imposed too high a burden on psychiatrists, would lead to violations of patient confidentiality, and would not adequately protect potential victims or society as a whole. In the 1980s, there was a retraction from the prior tort law expansions, partially owing to the rightward shift on the California Supreme Court at the time.

These changes included a limitation on emotional harm recovery that had previously been established in *Dillon v. Legg*.

As a whole, examining the history of torts that disproportionately affect women and emotional harm cases leading up to *Tarasoff* demonstrates the importance of a gender-based analysis for understanding angles of tort law that are frequently ignored. Looking at the changes in law, the rationales articulated for these changes, and the social movements advocating for change, show the complex social and political elements that influence legal thought and legal change.

★ ★ ★

CALIFORNIA WRONGFUL INCARCERATION COMPENSATION LAW:

A History That is Still Being Written

KELLY SHEA DELVAC*

REPRINTED WITH PERMISSION FROM MANITOBA LAW JOURNAL

I. INTRODUCTION

From current popular media and social commentary, one might imagine that the issue of wrongful incarceration and compensating the victims of it is only a twenty-first-century issue. Quite the contrary is true; the issue is as old as the criminal justice system itself — and in California, the history of wrongful conviction parallels the state’s history.

Judge Learned Hand remarked that our system of justice “has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.”¹ California alone has had over 200 wrongfully convicted people

This paper was awarded third place in the California Supreme Court Historical Society’s 2021 CSCHS Selma Moidel Smith Student Writing Competition in California Legal History.

*J.D., 2021, Pepperdine Law. This article is dedicated to my exonerated friends David and Derrick, and the Los Angeles District Attorney Conviction Review team, who encourage me to do better every day. Thank you to the California Supreme Court Historical Society and Selma Moidel Smith for the inspiration to write this piece on California history. Special thanks to the *Manitoba Law Journal* for their careful editing, and permission to reprint this piece. All errors are my own.

¹ United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923). Judge Hand lived from 1872 to 1961. GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 1, 585 (2011).

exonerated since 1989.² Of these exonerees, fewer than 40 percent have received any type of compensation for the time they spent wrongfully imprisoned.³ That is because “exoneration guarantees only one thing — release from prison.”⁴ While the laws in California have been steadily changing to support the people the state has wrongly convicted monetarily, the law still leaves far too many exonerees with nothing.

This article will mark through the history of wrongful convictions in California, explain California’s compensation laws and how they have been amended over time, and discuss possible remedies to strengthen the current iteration of the law. Part II of this article will give the history of wrongful convictions in California and the impact those wrongful convictions have on exonerees and society. Part III will look at California’s compensation statute and how it has been applied throughout the State’s history. Part IV will conclude with recommendations for the future.

II. HISTORY OF CALIFORNIA WRONGFUL CONVICTIONS

Wrongful convictions are not new to society. The history of wrongful convictions in California is as old as statehood itself. The first recorded wrongful conviction in California occurred in 1851.⁵ Sheriff Charles Moore was murdered in Yuba County, and an arrest was made of a man known as

² *Exonerations total by year: California*, NAT’L REG. EXONERATIONS, (last visited Dec. 18, 2020), <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx> (“The National Registry of Exonerations . . . provides detailed information about every known exoneration in the United States since 1989 — cases in which a person was wrongly convicted of a crime and later cleared of all the charges based on new evidence of innocence. The Registry also maintains a more limited database of known exonérations prior to 1989.”).

³ Anthony Accurso, *California Exonerees Not Quite Innocent Under the Law*, PRISON LEGAL NEWS (April 1, 2020), <https://www.prisonlegalnews.org/news/2020/apr/1/california-exonerees-not-quite-innocent-under-law>.

⁴ *Making Up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, INNOCENCE PROJECT 9–10 (2016), https://www.innocenceproject.org/wp-content/uploads/2016/06/innocence_project_compensation_report-6.pdf [hereinafter *Lost Time*].

⁵ Anne Pachciarek, *Thomas Berdue*, NAT’L REG. EXONERATIONS (last visited Dec. 18, 2020), <https://www.law.umich.edu/special/exoneration/Pages/casedetailpre1989.aspx?caseid=15>.

“English Jim.”⁶ A few days after his arrest, however, English Jim escaped from jail.⁷ Two months later, another man was attacked, but this man survived and described his attacker as looking like English Jim.⁸ Within a day the police arrested Thomas Berdue, who bore an uncanny resemblance to English Jim.⁹

Berdue was subsequently put on trial for the second assault and the murder of Sheriff Moore.¹⁰ He was convicted of both crimes and sentenced to death by hanging.¹¹ A few days after Berdue’s conviction, English Jim was caught committing a robbery.¹² English Jim was tried by a mob that named themselves the “Vigilance Committee,” and before the Committee, he confessed to the murder of the Sheriff and the second assault.¹³ The Committee put English Jim to death by hanging and informed the authorities of Berdue’s innocence.¹⁴ Berdue had become destitute trying to prove his innocence, and in response, the Committee proposed a fund to compensate him for his hardship.¹⁵ However, the California Senate refused to give the fund to Berdue for his expenses because they feared it would “establish a precedent which, if carried out in all cases of the kind, would more than exhaust the entire revenue of the State.”¹⁶ They opined: “In society it too often happens that the innocent are wrongfully accused of a crime. This is their misfortune, and the Government has no power to relieve them.”¹⁷

Between 1852, when Berdue was exonerated, and 1989, there was no official counting of exonerations. Today, the National Registry of Exonerations keeps a current record of every modern exoneration.¹⁸ As of this writing,

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ “Our Mission” NAT’L REG. EXONERATIONS, (last visited Dec. 18, 2020), www.law.umich.edu/special/exoneration/Pages/about.aspx.

there have been more than 2,600 exonerations nationally since 1989.¹⁹ Information about exonerations before 1989 is sparse. However, the Registry keeps an anecdotal list of pre-1989 exonerations.²⁰ There are 431 exonerations on that list, 43 of which happened in California.²¹ Of the California cases, all the exonerees were male but one.²² They were of all different ages and races.²³ All of the crimes were either murder (or attempted murder), bribery, or robbery.²⁴ Their sentences ranged from one year to death.²⁵ Twenty-five were given life sentences, four received the death penalty.²⁶ While most served less than five years, three served over ten.²⁷

There is not another recorded exoneration after Berdue's until 1924.²⁸ There were seven exonerations that decade, six for robbery, and one for murder.²⁹ The 1930s picked up with eleven exonerations.³⁰ The subsequent decades only have anecdotes of exonerations as follows: two in the 1940s, five in the 1950s, four in the 1960s, six in the 1970s, and seven in the 1980s.³¹

With the advent of official reporting, the number of exonerations went up exponentially in the subsequent decades. In the 1990s California had forty-four exonerations, followed by ninety-eight from 2000 to 2009, and eighty-one from 2010 to 2019.³² "It is impossible to fully grasp the

¹⁹ *Exonerations total by year*, NAT'L REG. EXONERATIONS, (last visited Dec. 18, 2020), <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx>. 1989 was the first year the registry started an accurate compilation of exonerations. *Id.*

²⁰ *Exonerations Before 1989*, NAT'L REG. EXONERATIONS (last visited Dec. 18, 2020), <https://www.law.umich.edu/special/exoneration/Pages/ExonerationsBefore1989.aspx>. The data underlying stats referred to throughout this section come from the Registry, however I have spent dozens of hours extrapolating statistics from the raw data provided on these pages.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Exonerations Total by Year*, *supra* note 19.

magnitude of the injustice and suffering these [exoneration] numbers represent: careers and opportunities that were lost forever; children who grew up³³ and parents who died while the innocent defendants were in prison; marriages that fell apart — or never happened.”³⁴

A. Impact on the Exoneree

Every exoneree is impacted by financial consequences caused by lost wages and legal bills, building up from accusation through appeal.³⁵ The financial blow is heightened because many exonerees were wrongfully convicted and imprisoned when they were young.³⁶ While their peers were finishing their education and building careers, the exoneree’s imprisonment created an education and work history deficit that most exonerees can never surmount.³⁷

Compounding the financial injury, services available to parolees — people who committed crimes, served their sentences, and are released — such as job placement, temporary housing, and medical care are generally not afforded to exonerees.³⁸ These services provide a safety net for released prisoners to get back on their feet and reintegrate into society.³⁹ The lack of

³³ See Sion Jenkins, *Secondary Victims and the Trauma of Wrongful Convictions: Families and Children’s Perspectives on Imprisonment, Release and Adjustment*, 46(1) J. CRIMINOLOGY 119, 123–27 (2013) (reporting the effects of parental incarceration on the children of exonerees).

³⁴ *Milestone: Exonerated Defendants Spent 20,000 Years in Prison*, NAT’L REG. EXONERATIONS 1 (2018), <http://www.law.umich.edu/special/exoneration/Documents/NRE.20000.Years.Report.pdf>.

³⁵ See *Lost Time*, *supra* note 4, at 9–10 (2016), https://www.innocenceproject.org/wp-content/uploads/2016/06/innocence_project_compensation_report-6.pdf (“After serving nearly 10 years in prison for a crime he didn’t commit, David Shephard’s wages were garnished for failing to pay child support because his girlfriend and their son had been on welfare for a year while he was away. Larry Peterson was expected to retroactively pay for his own public defender. The New Jersey Public Defender’s Office put a lien . . . on Peterson to pay for the cost of representing him. Peterson had to undergo litigation to have the lien removed.”).

³⁶ *Id.*

³⁷ *Id.* at 9.

³⁸ *Id.* at 10.

³⁹ *Id.* David Shepherd was exonerated after spending ten years in prison for a crime he did not commit, and then was turned away from four different agencies that provide services for ex-offenders. *Id.* The agencies told him that “he could not receive services since he had not committed a crime.” *Id.* at 9–10.

these services to the exoneree is particularly problematic because exonerees are especially vulnerable since they face all the same struggles of reacclimating to life outside of prison that parolees do,⁴⁰ but with the added psychological trauma of being wrongfully imprisoned.⁴¹

An exoneree also must deal with detrimental effects from prison life, which often provokes and normalizes criminal behavior.⁴² This exposure

⁴⁰ See Adrian Grounds, *Psychological Consequences of Wrongful Conviction and Imprisonment*, 46 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 165, 171 (2004) (The study found the exonerees “had marked and embarrassing difficulties in coping with ordinary practical tasks in the initial days and weeks — for example, crossing busy roads and going into shops. Some had more persistent difficulties (not knowing, for example, how to work central heating, TV remote controls, videos, credit cards, or cashpoints at banks) and experienced shame that prevented them from asking for help. One said, ‘It’s like when someone has a stroke; you have to be taught how to do things again.’ He felt humiliated by his lack of ability and the fact that his wife had to teach him elementary skills. The men also typically had little sense of the value of money, had difficulty budgeting, spent recklessly, and got into debt.”).

⁴¹ *Id.* at 168–70 (finding evidence of long-term personality changes, PTSD, and other psychiatric disorders in exonerees specifically not found in parolees; the prison sentences for this study group ranged from nine months to nineteen years; all of the subjects had no psychological issues before incarceration). The long-term psychological effects found in this study were similar to the psychological effects found in war veterans. *Id.* at 175. These psychological consequences were found to be specific to long-term imprisonment coupled with the miscarriage of justice. *Id.* at 176 (“The miscarriage of justice typically entailed acute psychological trauma at the time of initial arrest and custody, involving experiences of overwhelming threat. In addition, there was chronic psychological trauma: years of notoriety, fear, and isolation in their claims of innocence. Most spent years preoccupied in pursuing their case, despite knowing or believing that they would never be released on parole as long as they refused to admit their guilt. Additional features specific to the wrongfully convicted were the absence of preparation for release and of post-release statutory support. The long-term imprisonment entailed psychological adaptation to prison, as well as losses — separations from loved ones, missed life opportunities, the loss of a generation of family life, for some, and of years of their expected personal life history.”).

⁴² See generally Francis T. Cullen et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S (2011); Paul Nieuwebeerta et al., *Assessing the Impact of First Time Imprisonment on Offenders’ Subsequent Criminal Career Development: A Matched Samples Comparison*, 25 J. QUANTITATIVE CRIMINOLOGY 227 (2009); G. Matthew Snodgrass et al., *Does the Time Cause the Crime? An Examination of the Relationship Between Time Served and Reoffending in the Netherlands*, 49 CRIMINOLOGY 1149 (2011).

and acclimatization to prison life increases the risk that an exoneree will commit a crime after being released.⁴³

B. Impact on Society

Blackstone said, “it is better that ten guilty persons escape, than that one innocent suffer.”⁴⁴ All of society suffers when someone is wrongly convicted.⁴⁵ The societal harms include a more dangerous society, re-victimization of victims, and financial costs to the justice system.⁴⁶

⁴³ See generally Evan J. Mandery, Amy Shlosberg, Valerie West, & Bennett Callaghan, *Compensation Statutes and Post-exoneration Offending*, 103 J. CRIM. L. & CRIMINOLOGY 553 (2013) [hereinafter *Post-exoneration Offending*].

⁴⁴ 4 WILLIAM BLACKSTONE, COMMENTARIES *352. This has come to be known as the Blackstone ratio. See *Blackstone Ratio*, OXFORD REFERENCE (last visited Jan. 26, 2020), <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095510389> (“The ratio of 10:1 expressed in the maxim ‘Better that ten guilty persons escape than that one innocent suffer’”).

⁴⁵ See Danial Bier, *Quote Files: John Adams on Innocence, Guilt, and Punishment*, THE SKEPTICAL LIBERTARIAN (Aug. 11, 2014), <https://blog.skepticallibertarian.com/2014/08/11/quote-files-john-adams-on-innocence-guilt-and-punishment> (quoting John Adams’s opening statement for the defense in the 1770 murder trial of eight British soldiers after the Boston Massacre, “We are to look upon it as more beneficial, that many guilty persons should escape unpunished, than one innocent person should suffer. The reason is, because it’s of more importance to community, that innocence should be protected, than it is, that guilt should be punished; for guilt and crimes are so frequent in the world, that all of them cannot be punished; and many times they happen in such a manner, that it is not of much consequence to the public, whether they are punished or not. But when innocence itself, is brought to the bar and condemned, especially to die, the subject will exclaim, it is immaterial to me, whether I behave well or ill; for virtue itself, is no security. And if such a sentiment as this, should take place in the mind of the subject, there would be an end to all security what so ever.”).

⁴⁶ See generally JENNIFER THOMPSON-CANNINO, RONALD COTTON, & ERIN TORNEO, PICKING COTTON (explaining that when Ronald Cotton was imprisoned for a rape that Bobby Poole perpetrated, Poole was free to subsequently commit twenty more crimes including robberies, burglaries, and rape before he was finally caught and convicted of one of those subsequent crimes); See also Frank R. Baumgartner, Amanda Grigg, Rachelle Ramirez, & J. Sawyer Lucy, *The Mayhem of Wrongful Liberty Documenting the Crimes and True Perpetrators in Cases of Wrongful Incarceration*, 81 ALB. L. REV. 1263 (2017) (documenting cases where subsequent crimes were committed by perpetrators who were free because others were falsely convicted of their previous crimes).

Society is less safe because of wrongful convictions since they leave the real perpetrators free to commit more crimes.⁴⁷ Second, since the criminal justice system is set up to deter crime, a wrongful conviction sends a message to the criminal and society that criminals can get away with their crimes, thereby diminishing the deterrent effect of the entire system.⁴⁸ As a result, this decreases public confidence in the criminal justice system.⁴⁹ Lastly, recidivism in the exoneree population is high, and this shows that imprisonment of an innocent person possibly creates criminal conduct in someone otherwise not predisposed to that behavior.⁵⁰

Society also pays a financial cost for wrongful convictions.⁵¹ These include costs associated with trial and appeals, prison housing, compensation for wrongful convictions, and civil litigation costs from wrongful

⁴⁷ See *id.*

⁴⁸ See generally Nuno Garoupa & Matteo Rizzoli, *Wrongful Convictions Do Lower Deterrence*, 168 J. INSTITUTIONAL & THEORETICAL ECON. 224 (2012).

⁴⁹ *Id.*

⁵⁰ Recidivism is “[a] tendency to relapse into a habit of criminal activity or behavior.” *Recidivism*, BLACK’S LAW DICTIONARY (10th ed. 2014). This term is problematic for exonerees, however, because they are not committing a crime *again*, but are merely committing a crime after imprisonment. See generally *Post-exoneration Offending*, *supra* note 43. That being said, for efficiency, the term will be used here to refer to an exoneree committing a crime after exoneration. This cycle illustrates the quintessential “but for” causation first year law students are taught to seek out. See But-For Test, LEGAL INFO. INST. (last visited Jan. 20, 2020), https://www.law.cornell.edu/wex/but-for_test. “But for” the wrongful conviction and imprisonment of this innocent person, this person would never have committed a crime now. See generally *id.* For theories on why recidivism in the exoneree population happens, see *Post-exoneration Offending*, *supra* note 43 (showing lack of resources leads to recidivism); Bier, *supra* note 45 (stating when innocent men know they will be punished whether or not they commit a crime; they are more apt to commit a crime); Cullen, *supra* note 42 (analyzing how prisons normalize and create more criminal behavior).

⁵¹ See generally Erik Kain, *The High Cost of Wrongful Convictions*, FORBES.COM (Jun. 29, 2011), <https://www.forbes.com/sites/erikkain/2011/06/29/the-high-cost-of-wrongful-convictions/#1876ee3c72ec> (reporting on a study that found from 1989 to 2010 Illinois had eighty-five exonerations that cost Illinois \$214 million dollars); Rebecca Silbert, John Holway, & Darya Larizadch, *Criminal Injustice: a Cost Analysis of Wrongful Convictions, and Failed Prosecutions in California’s Criminal Justice System*, CHIEF JUST. EARL WARREN INST. L. & PUB. POL’Y (2015) (finding over twenty-four years California spent \$282 million on wrongful convictions, \$120 million for incarceration alone).

imprisonments.⁵² Even the most aggressive, tough-on-crime advocates admit that the statistics prove wrongful convictions put an undue strain on state budgets.⁵³ California has paid out almost \$26 million dollars over the last twenty-three years to indemnify exonerees.⁵⁴ That does not factor in the cost of civil suits against the counties throughout California.⁵⁵ However, despite the cost to the state of compensating a person wrongfully convicted, it pales in comparison to the cost that the wrongfully convicted person has borne for the state because of their misplaced “justice.”

III. EXONERATION COMPENSATION LAWS IN CALIFORNIA

Compensation statutes allow the state to indemnify exonerees for their time served in prison. These statutes, in theory, facilitate a streamlined process for an individual who has been wrongly incarcerated to pursue a claim against the state.⁵⁶ Today, thirty-six states, Washington D.C., and the federal government have compensation statutes.⁵⁷ State statutes are

⁵² See Jaclyn Gioiosa, *The Cost of Wrongful Convictions*, SANTA CLARA L. BLOG (Nov. 8, 2016).

⁵³ *Id.*

⁵⁴ *Claims for Erroneously Convicted Persons (PC4900)*, CALIFORNIA VICTIMS COMPENSATION BOARD (last visited June 19, 2020) [hereafter CALVCB], <https://web.archive.org/web/20200627225053/victims.ca.gov/board/pc4900.aspx>.

⁵⁵ See Melissa Etehad, *L.A. County to Pay \$15 Million to Man Wrongly Convicted of Murder*, L.A. TIMES (May 21, 2017), <https://www.latimes.com/local/california/la-me-ln-frank-oconnell-settlement-20171121-story.html>.

⁵⁶ Lauren C. Boucher, *Comment: Advancing the Argument in Favor of State Compensation for the Erroneously Convicted and Wrongfully Incarcerated*, 56 CATH. U.L. REV. 1069, 1084 (2007). See also, e.g., 2009 Cal. Legis. Serv. 4394 (West) (explaining that the intent of the statute is to “remedy some of the harm caused to all factually innocent people . . . and . . . ease their transition back into society.”).

⁵⁷ *Compensating the Wrongly Convicted*, INNOCENCE PROJECT (last visited Jan. 20, 2021), <https://www.innocenceproject.org/compensating-wrongly-convicted>. Of these fifteen, four states have pending legislation: Delaware, 2019 Bill Tracking DE H.B. 196 (LEXIS) (citing a high chance of passing its next legislative stage); Georgia, 2019 Bill Tracking GA H.B. 172 (LEXIS) (citing a low chance of passing its next legislative stage); Rhode Island, 2019 Bill Tracking RI H.B. 7086 (LEXIS) (citing a high chance of passing its next legislative stage) and South Carolina, 2019 Bill Text SC H.B. 3303 (LEXIS) (citing a low chance of passing its next legislative stage). See *Compensating the wrongly convicted*, *supra* note 57. Of the remaining eleven states, four have had bills in their

regarded as the most equitable avenue for compensation in comparison to lawsuits and private bills.⁵⁸ However, a state has the authority to write a statute in whatever way it wants, often excluding most people they purportedly sought to help.⁵⁹ This has been the case in California.

The first exoneration law in California was passed and enacted in 1913.⁶⁰ This legislation was proof that over the years, minds had changed from the time of Berdue's conviction on who should bear the burden of society's mistake in wrongfully convicting someone. The 1913 statute, later to become Penal Code Section 4900, provided that a person could make a claim for compensation as long as the person: (1) was wrongfully convicted of a felony; (2) was incarcerated in prison; (3) could show the conviction was overturned by a finding that the crime was not committed, or not committed by the one convicted, or by a pardon from the governor; and (4) could show a pecuniary injury.⁶¹ The exoneree was required to submit a statement of facts to the California Victims Compensation Board (CalVCB) within six months of the judgement "and at least four months prior to the next meeting of the legislature of the state."⁶² At that point, CalVCB would set a hearing date⁶³ where it would hear the exoneree's claim, as well as any opposition from the Attorney General.⁶⁴ This would essentially become a re-litigation of the underlying case. Except, in this new compensation proceeding, CalVCB was not bound to the exonerating court's decision.⁶⁵ If CalVCB was satisfied that the crime was not done by the claimant and the claimant "did not by act or omission, intentionally

legislatures that have failed, Alaska, 2017 Bill Tracking AK H.B. 118 (LEXIS); Arizona, 2019 Bill Tracking AZ S.B. 1359 (LEXIS); New Mexico, 1997 Bill Tracking NM H.B. 267 (LEXIS); and Pennsylvania, 2013 Bill Tracking PA H.B. 1885. See *Compensating the wrongly convicted*, *supra* note 57. This leaves the last six states — Arkansas, Kentucky, North Dakota, Oregon, South Dakota, and Wyoming — showing no legislative movement on the topic. *Id.*

⁵⁸ See, e.g., *Compensating the Wrongly Convicted*, *supra* note 57.

⁵⁹ *Id.*

⁶⁰ 1913 Cal Stat. ch. 165 ("An act to provide indemnity to persons erroneously convicted of felonies in the State of California.")

⁶¹ *Id.* at § 1.

⁶² *Id.* at § 2.

⁶³ *Id.* at § 3.

⁶⁴ *Id.* at § 4.

⁶⁵ *Id.* at § 5.

or negligently, contribute to bringing about the conviction,” then CalVCB could recommend that the legislature approve compensation for up to the sum of \$5,000.⁶⁶ Exoneration alone is a massive feat of litigation, and, in turn, this process for compensation should have been easy. In reality, however, that was not the case.

The first known compensation claim was filed for a crime committed in 1928.⁶⁷ Mike Garvey, Harvey Leshar, and Phil Rohan were convicted of murder and sentenced to life in prison.⁶⁸ They were convicted on the evidence of three witnesses.⁶⁹ One witness, who was not at the crime scene, claimed Leshar had confessed to him.⁷⁰ Leshar was the only reason his acquaintances Garvey and Rohan were linked to the crime.⁷¹ After the conviction, that witness recanted, explaining he was too drunk to remember the night the confession was made, and that police had threatened to charge him with the murder if he did not testify.⁷² The other witnesses were found to be uncredible by the exonerating court.⁷³ Alibis came forward for the convicted men for the night of the crime, and the fingerprints at the crime scene did not match any of the convicted.⁷⁴ The convictions of all three men were overturned in 1930 after they spent two years and eight months in prison.⁷⁵ All three men applied for compensation under the 1913 statute; they were the first — on record — ever to apply.⁷⁶ CalVCB denied their claims ruling on the basis that the evidence presented at the original trial was not “erroneous.”⁷⁷ Dissatisfied with the ruling, the men

⁶⁶ *Id.* In 1913 \$5000 was equivalent to \$129,491.92 in 2020. CPI INFLATION CALCULATOR, <https://www.in2013dollars.com/us/inflation/1913?amount=5000> (last visited June 17, 2020).

⁶⁷ Damon McLean, *Mike Garvey*, NAT’L REG. EXONERATIONS (last visited June 17, 2020), <https://www.law.umich.edu/special/exoneration/Pages/casedetailpre1989.aspx?caseid=111>.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

applied for a rehearing.⁷⁸ At the rehearing, Leshner and Garvy's claims were denied.⁷⁹ CalVCB explained that Leshner and Garvy were "men of such unsavory character" and that CalVCB was not satisfied that the men did not contribute in some way to their conviction by past acts — yet CalVCB gave no other evidence for this finding.⁸⁰ Rohan, however, was awarded \$1,692⁸¹ — same crime, same evidence, same conviction, same time served, but totally different compensation rulings.⁸²

California's compensation statute was amended in 1931.⁸³ The amendment to section 1 simply provided that a pardon by the governor would be considered for indemnification only when a crime was not committed or not committed by the one convicted.⁸⁴ The amendment to section 5 clarified that the board of control was to give recommendations and conclusions to the legislature, as well as a monetary amount under \$5,000⁸⁵ if approved.⁸⁶

Walter Evans and Miles Ledbetter were successful under this amended statute.⁸⁷ In 1928, Evans and Ledbetter were detectives with the Los Angeles Police Department (LAPD).⁸⁸ They were convicted of taking bribes from bootleggers and sentenced to one to fourteen years in prison.⁸⁹ After the conviction, the LAPD continued to investigate and found new evidence to

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* In 1930 \$1692 was equivalent to \$25,977.16 in 2020. CPI INFLATION CALCULATOR, (last visited June 17, 2020), <https://www.in2013dollars.com/us/inflation/1930?amount=1692>.

⁸² McLean, *supra* note 67.

⁸³ 1931 Cal Stat. ch. 775 ("An act to amend sections 1 and 5 of an act entitled '[a]n act to provide indemnity to persons erroneously convicted of felonies in the State of California.' [A]pproved May 24, 1913, relating to the indemnification of persons erroneously convicted.").

⁸⁴ *Id.* at § 1.

⁸⁵ In 1931 \$1692 was equivalent to \$84,340.13 in 2020. CPI INFLATION CALCULATOR, (last visited June 17, 2020) <https://www.in2013dollars.com/us/inflation/1931?amount=5000>.

⁸⁶ 1931 Cal Stat. ch. 775 § 5. Reading the plain language of the amendment it is unclear what actually was changed other than the language of the statute now provided that CalVCB would give "recommendations and conclusions" to the Legislature.

⁸⁷ Meghan Barrett Cousino, *Miles H. Ledbetter*, NAT'L REG. EXONERATIONS (last visited June 19, 2020), <https://www.law.umich.edu/special/exoneration/Pages/casede-tailpre1989.aspx?caseid=189>.

⁸⁸ *Id.*

⁸⁹ *Id.*

exonerate Evans and Ledbetter.⁹⁰ In light of the new evidence, the governor gave them full and unconditional pardons.⁹¹ They applied for compensation under the California statute, and each of them received “several thousand dollars.”⁹²

The next known claims were not until the 1950s.⁹³ In 1953, Frank Hamlin was identified by a store clerk in San Francisco as a jewelry thief.⁹⁴ Hamlin insisted he was not in San Francisco the day of the robbery.⁹⁵ Based on the positive identifications by the store clerk and his assistant, Hamlin was convicted of the crime.⁹⁶ He was sentenced to five years to life in prison.⁹⁷ A year later, another man was arrested for a string of burglaries in northern California.⁹⁸ During his interrogation, the man confessed to the 1953 robbery in San Francisco.⁹⁹ In response to this new evidence, the governor gave Hamlin a full and unconditional pardon.¹⁰⁰ Hamlin filed for compensation with the state and received \$5,000.¹⁰¹

The last person to receive compensation under the amended 1931 statute was John Fry in 1959.¹⁰² Fry’s common-law wife, Elvira Hay, was found dead in a bathtub at the Venice Hotel.¹⁰³ Fry, who had been seen fighting with her the night before, was blamed for the crime.¹⁰⁴ Stating he was too drunk to remember what happened that night, he confessed to manslaughter for fear

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Exonerations Before 1989*, *supra* note 20.

⁹⁴ Meghan Barrett Cousino, *Franklin Hamlin*, NAT’L REG. EXONERATIONS (last visited June 19, 2020), <https://www.law.umich.edu/special/exoneration/Pages/casedetailpre1989.aspx?caseid=134>.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* In 1953 \$5000 was equivalent to \$48,013.86 in 2020. CPI INFLATION CALCULATOR, (last visited June 19, 2020), <https://www.in2013dollars.com/us/inflation/1953?amount=5000>.

¹⁰² *Exonerations Before 1989*, *supra* note 20.

¹⁰³ *Id.*

¹⁰⁴ Meghan Barrett Cousino, *John Fry*, NAT’L REG. EXONERATIONS (last visited June 21, 2020), <https://www.law.umich.edu/special/exoneration/Pages/casedetailpre1989.aspx?caseid=108>.

of being charged with a more serious charge.¹⁰⁵ Fry was sentenced to one to ten years in prison.¹⁰⁶ The next year, a janitor at the Venice Hotel turned himself in after killing another person in the exact same way as Hay.¹⁰⁷ He then confessed to killing Hay a year earlier.¹⁰⁸ In light of this new evidence, Fry was pardoned by the governor and released from prison.¹⁰⁹ He was able to receive compensation from the state in the amount of \$3,000.¹¹⁰

The next amendment was effectuated in 1969.¹¹¹ This increased the amount an exoneree could collect from the 1913 maximum of \$5,000 to \$10,000.¹¹² There is no recording of a claim under this new statute on the Registry or the CalVCB website until 1997.¹¹³ Although there were not many exonerees making claims for compensation under the statute, civil lawsuits in tort and for civil rights violations were pursued in more cases during this time period.¹¹⁴ The exonerees sued municipalities, prosecutors, and defense attorneys.¹¹⁵ They sued under false imprisonment, prosecutorial misconduct, and malpractice.¹¹⁶ During this time, the California case of *Imbler v. Patchmen* went all the way to the U.S. Supreme Court, cementing prosecutorial immunity into the foundation of the modern Court's immunity doctrines.¹¹⁷ From 1969 to 1986, the amounts for which exonerees sued were anywhere from \$17,000 to \$1.4 million.¹¹⁸

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* In 1959 \$3000 was equivalent to \$26,432.37 in 2020. CPI INFLATION CALCULATOR, (last visited June 19, 2020), <https://www.in2013dollars.com/us/inflation/1959?amount=3000>.

¹¹¹ 1969 Cal Stat. ch. 704 ("re wrongful imprisonment: damages. Increases from \$5000 to \$10,000 the amount which may be recommended to Legislature by the Board of Control, to indemnify individual who was erroneously convicted of and imprisoned for a crime he did not commit.").

¹¹² *Id.* In 1969, \$10,000 was equivalent to \$69,862.13 in 2020. CPI INFLATION CALCULATOR, (last visited June 19, 2020), <https://www.in2013dollars.com/us/inflation/1969?amount=10000>.

¹¹³ CALVCB, *supra* note 54.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ 424 U.S. 409 (1976).

¹¹⁸ *Exonerations Before 1989*, *supra* note 20 (showing little is known of the actual amounts collected. Many were confidential settlements and even those that were not

The first and only person documented to claim the \$10,000 offered by statute was Kevin Lee Green in 1997.¹¹⁹ In 1979, Dianna Green, Kevin's pregnant wife, was struck in the head, losing the ability to communicate.¹²⁰ When she got to the hospital, the baby's fetal heart tones appeared to be fine, but later that day, they could not be detected.¹²¹ The baby was declared stillborn.¹²² A medical exam found spermatozoa in Dianna.¹²³ Kevin testified that when the attack occurred, he was at a hamburger stand to get food.¹²⁴ Dianna was the only witness to the crime and suffered amnesia.¹²⁵ Kevin was convicted on Dianna's testimony and the testimony of mutual friends who said Kevin and Dianna had a volatile relationship.¹²⁶ He was sentenced in 1980 to fifteen years to life in prison.¹²⁷ Sixteen years later, the spermatozoa found on Dianna was run through a DNA database and matched to a felon known as the "Bedroom Basher."¹²⁸ The police were able to secure a confession, and Kevin was exonerated and released.¹²⁹ In 1997, Kevin filed a claim with CalVCB and collected the maximum \$10,000 allowed by statute.¹³⁰ The governor awarded Green an additional \$620,000 in 1999 for the time he spent wrongly incarcerated.¹³¹

confidential nothing is known about what was collected from the settlement).

¹¹⁹ *Kevin Green*, CALVCB, (last visited June 19, 2020), <https://web.archive.org/web/20200630055126/https://victims.ca.gov/docs/pc4900/PC-4900-Approved-Green.pdf?2019-06-27> (displaying documents of claims for compensation for Kevin Green).

¹²⁰ *Kevin Green*, INNOCENCE PROJECT (last visited June 19, 2020), <https://www.innocenceproject.org/cases/kevin-green>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Kevin Green*, CALVCB, *supra* note 119. In 1997 \$10,000 was equivalent to \$15,974.70 in 2020. CPI INFLATION CALCULATOR, (last visited June 19, 2020), <https://www.in2013dollars.com/us/inflation/1997?amount=10000>.

¹³¹ *Kevin Green*, INNOCENCE PROJECT, *supra* note 120.

The 2000 legislative session saw another amendment to the compensation statute, Penal Code Section 4900.¹³² This amendment raised the amount an exoneree could be granted from a maximum of \$10,000 to a time-based approach, granting \$100 per day for every day of wrongful incarceration.¹³³

The first person to be granted a claim under this new amendment was Frederick Renee Daye.¹³⁴ In 1984, a woman was grabbed by two men while walking to her car.¹³⁵ She was pushed into the car, beaten, and raped.¹³⁶ She was then pushed out of the vehicle as the assailants drove off.¹³⁷ Daye was identified by the victim in a photo line-up and subsequently identified in an in-person line-up.¹³⁸ At trial, Daye was again identified, and a forensic analyst said the forensic evidence collected was “likely” Daye’s.¹³⁹ Daye was convicted and sentenced to life in prison.¹⁴⁰ In 1990, his co-defendant made a statement that Daye was not involved.¹⁴¹ Daye was able to secure DNA testing in 1994.¹⁴² That testing affirmatively excluded Daye from the crime.¹⁴³ His conviction was thus overturned.¹⁴⁴ Daye’s claim for compensation was approved in 2002 for \$386,000.¹⁴⁵ \$100 for each of the 3,860 days (over ten years) that he was incarcerated.¹⁴⁶

¹³² 2000 Cal Stat. ch. 630 (amending PC 4900 to remove the \$10,000 limit and change the collection to \$100 per day which will be classified as gross income to the exoneree).

¹³³ *Id.* In 2000, \$100 was equivalent to \$148.89 in 2020. CPI INFLATION CALCULATOR, (last visited June 19, 2020), <https://www.in2013dollars.com/us/inflation/2000?amount=100>.

¹³⁴ *Frederick R. Daye*, CALVCB (last visited June 19, 2020), <https://web.archive.org/web/20200630054943/https://victims.ca.gov/docs/pc4900/PC-4900-Approved-Daye.pdf?2019-06-27> (displaying documents of claims for compensation for Frederick Daye).

¹³⁵ *Frederick Daye*, INNOCENCE PROJECT (last visited June 19, 2020), <https://www.innocenceproject.org/cases/frederick-daye>.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Frederick R. Daye*, CALVCB, *supra* note 134. In 2002 \$386,000 was equivalent to \$550,128.32 in 2020. CPI INFLATION CALCULATOR, (last visited June 19, 2020), <https://www.in2013dollars.com/us/inflation/2002?amount=386000>.

¹⁴⁶ *Frederick R. Daye*, NAT’L REG. EXONERATIONS, (last visited June 19, 2020), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3163>.

The \$100 per day amendment was not changed again until 2016 when it was changed to \$140 per day of wrongful incarceration.¹⁴⁷ Between 2000 and 2015, fifty-nine exonerees made a claim for compensation to CalVCB.¹⁴⁸ Of those claims thirty-eight were denied, while twenty-one were recommended by CalVCB to the Legislature to pay.¹⁴⁹ The approved and recommended claims over this period of time totaled \$8,673,800. This represents 86,738 days or 237 years of wrongful incarceration.¹⁵⁰

Claims can be denied for a variety of reasons, but denials before 2015 generally fell into four categories laid out by the statutory language.¹⁵¹ The statute dictated that an exoneree had to prove by a preponderance of the evidence that the claimant was innocent of the crime.¹⁵² The exoneree had to also prove that the exoneree's own behavior did not contribute to the conviction.¹⁵³ The claimant had a statute of limitations of six months from when the conviction was overturned to file a claim,¹⁵⁴ and the claimant had to show a pecuniary loss to collect.¹⁵⁵

The California statute requires CalVCB to make a separate ruling on the facts of the case to decide if an exoneree qualifies for compensation.¹⁵⁶ The separate ruling puts the burden of proof on the exoneree to show that

¹⁴⁷ 2016 Cal Stat. ch. 31.

¹⁴⁸ CALVCB, *supra* note 54. There were more the fifty-two claims during this time period. However, the claims that were not claims from an exoneration I did not include in this reporting. Those claims were generally improperly filed because they were either not a felony, did not result in imprisonment, or the conviction was not overturned.

¹⁴⁹ *Id.* While all the raw data was supplied by the CalVCB website, all the statistical analysis is the author's own work.

¹⁵⁰ *Id.*

¹⁵¹ 2016 Cal Stat. ch. 31.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Cal. Pen. Code 4901. Frederick Daye's claim was actually found to be untimely. However, the CalVCB has the authority under the Tort's Claim Act by allowing the claim in equity under Gov. Code § 905.2. CalVCB chose to indemnify Daye in this way and used PC 4900 as a guide for their grant. *Frederick R. Daye*, CALVCB, *supra* note 134 (displaying documents of claims for compensation for Frederick Daye).

¹⁵⁵ Pen. Code § 4903; *Tennison v. Victim Compensation and Government Claims Board*, 152 Cal. App. 4th 1164 (2006).

¹⁵⁶ Justin Brooks & Alexander Simpson, *Find the Cost of Freedom: The State of Wrongful Conviction Compensation Statutes Across the Country and the Strange Legal Odyssey of Timothy Atkins*, 49 SAN DIEGO L. REV. 627, 640 (2012).

they are innocent of the crime by a preponderance of the evidence.¹⁵⁷ This showing is made before CalVCB — usually a panel of three — and requires new briefing and argument on the case with more relaxed evidentiary rules.¹⁵⁸ Thus, where evidence considered improper or prejudicial towards the defendant at trial is excluded, it is now allowed to be entered into evidence at these hearings.¹⁵⁹

This separate agency ruling is problematic because it calls into question the extent of deference that the agency gives to the exonerating court's decision in the compensation ruling.¹⁶⁰ The deference question is an important one and one that has been troubling for California exonerees during this iteration of the statute. The original exonerating court pored through the record, often with an inmate who has been convicted of a heinous crime standing before it.¹⁶¹ In the face of that prejudicial conviction, the exonerating court finds the evidence does not support the conviction, and with that new ruling, an inmate is released — an inmate who was once thought of as a dangerous risk to society.¹⁶² Without deference, a new set of eyes can make a wholly inconsistent ruling on the same facts for the sole purpose of not compensating the exoneree for the conviction that the court has already ruled was wrong.¹⁶³ In the case of the fifty-nine exonerees who made claims between 2000 and 2015, CalVCB's rulings were inconsistent with the exonerating court 64 percent of the time.¹⁶⁴

¹⁵⁷ *Id.* “Preponderance of the evidence” means there is a greater than 50 percent chance the claim is true. *Preponderance of the Evidence*, LEGAL INFO. INST. (last visited Feb. 5, 2020), https://www.law.cornell.edu/wex/preponderance_of_the_evidence.

¹⁵⁸ *Id.*

¹⁵⁹ CALVCB, *supra* note 54.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *See, e.g., id.* (“Even though the original superior court judge made findings that Tim [Atkins] was innocent and that his habeas filings and evidence presented at the habeas hearing completely undermined the prosecution’s case and pointed unerringly to innocence, the compensation board found that Tim had not met his burden of proof.”).

¹⁶³ *Id.*

¹⁶⁴ CALVCB, *supra* note 54. Those 64 percent are based on the cases where the exonerating courts made factual rulings on the merits of the case different from the factual rulings of the exonerating court. The other 36 percent primarily were exonerated on legal grounds without the exonerating court ruling on the merits. *Id.*

A further problem is the three-person panel's makeup and the trends that emerge during a single panel's tenure.¹⁶⁵ From 2000 through 2006, twenty-one claims were filed.¹⁶⁶ Of those twenty-one claims, eight were approved, and thirteen were denied.¹⁶⁷ Among those denied were Antoine Goff and John J. Tennison, who, while the exonerating court made a ruling that the men were factually innocent, CalVCB ruled "findings of 'factual innocence,' . . . are not binding and [are] inapplicable to the instant proceeding."¹⁶⁸ CalVCB then ruled that they did not find the men had proven their innocence by a preponderance of the evidence and denied their claims.¹⁶⁹ In 2009, the Legislature fixed this particular inconsistency, amending Penal Code Section 4900 to expressly say that a finding of "factual innocence" by the exonerating court is binding on CalVCB.¹⁷⁰

Looking at the time period from 2007 through 2012, twenty-three claims were filed, and only two were recommended for compensation, while the other twenty-one were denied.¹⁷¹ One of the two exonerees to get a recommendation for compensation during this six-year period was David Allen Jones.¹⁷² In 1992, Jones was charged with four murders.¹⁷³ He had an IQ of 62, was classified as intellectually disabled person, and confessed to the murders after detectives took him to the four crime scenes.¹⁷⁴ There were no witnesses to the crimes.¹⁷⁵ The perpetrator's blood, however, was found at the scene.¹⁷⁶ A serologist testified that the perpetrator had type A blood.¹⁷⁷

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Antoine Goff*, CalVCB, (last visited June 20, 2020), <https://web.archive.org/web/20200630080740/https://victims.ca.gov/docs/pc4900/PC-4900-Denied-Tennison-and-Goff.pdf?2019-06-27> (displaying documents of claims for compensation for Antoine Goff and John J. Tennison).

¹⁶⁹ *Id.*

¹⁷⁰ 2009 Cal. Legis. Serv. 4394 (West).

¹⁷¹ *Id.*

¹⁷² CalVCB, *supra* note 54.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

Jones had type O blood.¹⁷⁸ This was a discrepancy pointed out to the jury by the defense.¹⁷⁹ Regardless, Jones was convicted of three of the murders but acquitted of the fourth.¹⁸⁰ He was sentenced to thirty-six years to life in prison.¹⁸¹ In 2004, the Post-Conviction Assistance Center was appointed to help Jones pursue post-conviction DNA testing.¹⁸² There was enough genetic material from two of the crime scenes for testing, but evidence from the other two had been destroyed.¹⁸³ The testing excluded Jones and hit on a serial killer who had been charged with ten other murders.¹⁸⁴ Because of the signature nature of the murders, all of Jones's convictions were overturned, and he was released from prison.¹⁸⁵ Jones was successful in his claim for compensation and received \$74,600 — CalVCB reduced his statutory grant because he prevailed in a civil lawsuit against the police.¹⁸⁶ This reduction in the compensation was solely a decision of CalVCB; there was no statutory reasoning or precedent to decrease the compensation based on a successful civil suit.¹⁸⁷

Of the fifteen claims filed from 2013 through 2015, four were denied and eleven were approved.¹⁸⁸ Richard Hendrix was one of the exonerees denied compensation.¹⁸⁹ In 2009, Hendrix had an altercation with a security guard at his apartment complex.¹⁹⁰ The security guard used pepper

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *David Jones*, CALVCB (last visited June 19, 2020), <https://web.archive.org/web/20200630055212/https://victims.ca.gov/docs/pc4900/PC-4900-Approved-Jones.pdf?2019-06-27> (displaying documents of claims for compensation for David Jones). While some states have written into their compensation statute that if a claimant prevails in a civil suit based on the wrongful conviction their claim will be reduced, California has no such provision.

¹⁸⁸ CALVCB, *supra* note 54.

¹⁸⁹ *Id.*

¹⁹⁰ *Richard Hendrix*, CALVCB (last visited June 20, 2020), <https://web.archive.org/web/20200630080828/https://victims.ca.gov/docs/pc4900/PC-4900-Denied-Hendrix.pdf?2019-06-27> (displaying documents of claims for compensation for David Jones).

spray on Hendrix and shot at him before calling the police.¹⁹¹ When the police got there, they found Hendrix.¹⁹² It was dark, and Hendrix was uncooperative.¹⁹³ He was eventually subdued and charged with “attempting by means of threats and violence to deter an officer from performing his duties.”¹⁹⁴ The first jury deadlocked, and a mistrial was called.¹⁹⁵ At the second trial, the judge allowed evidence of two prior occasions where Hendrix resisted arrest.¹⁹⁶ After the second trial, Hendrix was convicted and sentenced to six years in prison.¹⁹⁷ Hendrix appealed.¹⁹⁸ The appellate court found an abuse of discretion by allowing evidence of the prior conduct into the trial and overturned the conviction.¹⁹⁹ The District Attorney’s office decided to drop the case, and Hendrix was released.²⁰⁰ Hendrix applied for compensation for his 1,136 days of wrongful incarceration equaling \$113,600.²⁰¹ CalVCB ruled that Hendrix had not proven by a preponderance of the evidence that he did not unlawfully use force to resist Officer Mosely and denied the claim.²⁰² Essentially, in this case, CalVCB put themselves in the place of the jury and relied on the evidence the overturning court ruled prejudicial to come to their conclusion.²⁰³ There is a fundamental problem with a ruling such as this in that it is not made to keep society safer, as is the purpose of our normal criminal justice process. This ruling is solely to keep the state from having to pay for what it already acknowledged as a miscarriage of justice. That is, in essence, the picture of injustice.

Another statutory bar to compensation involves the statute of limitations for filing claims, access to the compensation system, and other timing

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

issues.²⁰⁴ A statute of limitations balances the competing interest of giving enough time to the exoneree to file a claim and giving the state protection from an onslaught of delayed claims that undermine its ability to plan for budgetary liabilities.²⁰⁵

These time limits, which start to run at the moment the conviction is overturned, can become a problem to access relief.²⁰⁶ An exoneree struggling with re-entry into life after incarceration may be unable to navigate the legal system for the claim in an efficient and timely manner.²⁰⁷ This difficulty is exacerbated by the fact that the legal team that has been involved up to this point in the criminal appellate work of exoneration generally does not specialize in the legal area of civil actions under which compensation claims fall.²⁰⁸

To add further complication, because CalVCB is outside the normal civil courts, the process is not governed by the California Rules of Civil Procedure.²⁰⁹ Under the 2010 and earlier versions of Penal Code Section 4900, this meant that while the claim had to be filed within the statute of limitations (six months in California), the government was not under any such time constraint to file an answer.²¹⁰ This issue was particularly apparent in the case of Timothy Atkins.²¹¹ Charged with murder in 1985, Atkins was exonerated in 2007 and filed a timely claim for compensation.²¹² The attorney general did not submit a written reply brief until two years later.²¹³

²⁰⁴ See Daniel S. Kahn, *Presumed Guilty until Proven Innocent: The Burden of Proof in Wrongful Conviction Claims Under State Compensation Statutes*, 44 U. MICH. J.L. REFORM 123, 144 (2010).

²⁰⁵ *Id.*

²⁰⁶ See Jessica R. Lonergan, *Protecting the Innocent: A Model for Comprehensive, Individualized Compensation of the Exonerated*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 405, 419–20 (2008).

²⁰⁷ See generally Elina Tetelbaum, *Remedying a Lose-Lose Situation: How No Win, No Fee Can Incentivize Post-Conviction Relief for the Wrongly Convicted*, 9 CONN. PUB. INT. L.J. 301 (2010).

²⁰⁸ *Id.*

²⁰⁹ See Brooks & Simpson, *supra* note 156, at 634.

²¹⁰ *Id.*

²¹¹ Maurice Possley, *Timothy Atkins*, NAT'L REG. EXONERATIONS (last visited June 20, 2020), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3001>.

²¹² *Id.*

²¹³ See Brooks & Simpson, *supra* note 156, at 634.

This lack of timely process undermined the whole aim for judicial efficiency and budgetary foresight while leaving the exoneree languishing in judicial limbo.²¹⁴

In 2016, the Legislature amended Penal Code Section 4900 once again.²¹⁵ One of the amendments was changing the six-month statute of limitations to two years.²¹⁶ The amendment also included that the attorney general had sixty days from the time the claim was submitted to respond or apply for an extension for good cause.²¹⁷ This change provided a more compassionate timeframe for an exoneree re-entering society. Another change was raising the compensation amount to \$140 per day for each day of wrongful incarceration.²¹⁸

With all the positive changes in the 2016 amendments, Penal Code Section 4900 still maintained some problematic disqualifiers. One such disqualifier is that the statute precludes compensation for a claimant whose behavior is deemed to have contributed to the wrongful conviction.²¹⁹ This contributing behavior can happen before the crime, during the arrest, or prior to conviction.²²⁰ These behaviors can include prior criminal acts,²²¹ false confessions,²²² fleeing from police,²²³ or entering a guilty plea.²²⁴

²¹⁴ *Id.*

²¹⁵ 2016 Cal Stat. ch. 31 (SB 836).

²¹⁶ *Id.* at § 251.

²¹⁷ *Id.* at § 252.

²¹⁸ *Id.* at § 253.

²¹⁹ See Robert J. Norris, *Assessing Compensation Statutes for the Wrongly Convicted*, 23 CRIM. JUST. POL'Y REV. 352, 359 (2012). See Brooks & Simpson, *supra* note 156, at 649.

²²⁰ *Id.*

²²¹ Kelly Carrington, CALVCB (last visited June 20, 2020), <https://web.archive.org/web/20200630075930/https://victims.ca.gov/docs/pc4900/PC-4900-Denied-Carrington.pdf?2019-06-27> (displaying documents of claims for compensation for Kelly Carrington).

²²² *Facts and Figures*, FALSECONFESSIONS.ORG (last visited Jan. 20, 2020), <https://falseconfessions.org/fact-sheet> ("According to the Innocence Project, 25% of wrongful convictions overturned by DNA evidence involve a false confession and many of those false confessions actually contained details that match the crime-details that were not made to the public.").

²²³ See Brooks & Simpson, *supra* note 156, at 650.

²²⁴ See *Innocents Who Plead Guilty*, NAT'L REG. EXONERATIONS (Nov. 24, 2015), www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf (explaining that 15 percent of known exonerees pled guilty).

Kelly Carrington was convicted of possession of a controlled substance.²²⁵ He pled guilty and was sentenced to sixteen months in prison.²²⁶ Carrington's conviction was overturned on an unopposed writ of habeas corpus alleging police misconduct and the planting of evidence.²²⁷ He filed a timely claim for compensation.²²⁸ CalVCB ruled that a granted writ of habeas corpus is not a ruling on innocence and that "Mr. Carrington has a number of prior convictions involving moral turpitude. These convictions cast doubt on Mr. Carrington's credibility."²²⁹

Back to the case of Timothy Atkins, CalVCB found he "contributed" to his conviction because he ran when the police first approached him.²³⁰ CalVCB found this even though Atkins's testimony was ruled credible, and Atkins testified that he ran because he was a teenager on probation and was worried about interaction with the police.²³¹ This flight was not brought up at trial and had no bearing on his actual conviction, yet CalVCB felt it was enough of a contributing factor to deny Atkins compensation.²³²

In 2009, Connie R., who had a prior sex crime conviction in another state and was arrested for not registering as a sex offender in California, pled guilty to the offence.²³³ She was sentenced to three years in prison.²³⁴ A year later the appellate court overturned the conviction because Connie was not required to register in California.²³⁵ CalVCB denied her claim because she had pled guilty and, therefore, had contributed to her conviction.²³⁶ It seems rather illogical to hold Connie responsible for not understanding she was pleading guilty to a crime that did not apply to her when

²²⁵ *Kelly Carrington.*, CALVCB, *supra* note 221.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ See Brooks & Simpson, *supra* note 156, at 650.

²³¹ *Id.*

²³² *Id.*

²³³ *Connie R.*, CALVCB (last visited June 20, 2020), <https://web.archive.org/web/20200630083638/https://victims.ca.gov/docs/pc4900/PC-4900-Denied-Connie-R.pdf?2019-06-27> (displaying documents of claims for compensation for Connie R.).

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

the prosecutor, defense attorney, and judge were not able to ascertain this fact either.

A final bar to compensation is lack of pecuniary evidence of damages.²³⁷ This is particularly egregious in the age where most able-bodied prisoners hold prison jobs.²³⁸ This means that the state can profit from the wrongly convicted inmates labor and then rule that had the person been free, they would not have been able to be gainfully employed and, therefore, will not be compensated.

Charles Holmes III was denied compensation.²³⁹ Holmes had a lengthy criminal history that required him to register as a sex offender.²⁴⁰ In 2005, after being released from prison on a burglary charge, he registered as an offender at the police department.²⁴¹ A few days later, he moved, and a few days after that, he was stopped by the police and charged with not re-registering at the new address, as well as being under the influence of drugs and providing false information to the police.²⁴² He pled guilty to the charges and was sentenced to nine years in prison.²⁴³ He served almost seven years of that sentence before being paroled.²⁴⁴ Shortly after his release, he was charged and convicted for a drug possession.²⁴⁵ While in jail, Holmes discovered that as of 2005, he was no longer required to register as a sex offender.²⁴⁶ He was thus able to get his prior conviction vacated.²⁴⁷ He applied for compensation in the amount of \$215,200 for the 2,152 days he had

²³⁷ Cal. Pen. Code 4900 (2016).

²³⁸ General Accounting Office, *Prisoner Labor: Perspectives on Paying the Federal Minimum Wage*, GAO/GGD-93-98, p. 19. (May 1993).

²³⁹ See, e.g. *Charles Holmes III*, CALVCB (last visited June 20, 2020), <https://web.archive.org/web/20200630080845/https://victims.ca.gov/docs/pc4900/PC-4900-Denied-Holmes.pdf?2019-06-27> (displaying documents of claims for compensation for Charles Holmes III).

²⁴⁰ Maurice Possley, *Charles Holmes III*, NAT'L REG. EXONERATIONS (last visited June 20, 2020), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4747>.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

been imprisoned on that conviction.²⁴⁸ CalVCB put out a tentative recommendation based on his application granting him compensation.²⁴⁹ After the tentative recommendation came out, the attorney general responded in opposition.²⁵⁰ A hearing was held, and at the conclusion, CalVCB denied Holmes compensation.²⁵¹ The reasoning they gave for the denial was “that given Holmes’ extensive criminal history and unemployment status at the time of his arrest and currently, he has not demonstrated that he suffered any pecuniary loss as a result of his incarceration.”²⁵² The ruling was appealed to the California Superior Court and then to the California Court of Appeal where the judgement was upheld and affirmed.²⁵³

The 2016 amendment did not clear up all the problems with Penal Code Section 4900, but the amendments did allow more exonerees to access justice. From 2016 to 2019, twenty-seven exonerees filed claims for compensation, nine were denied, eighteen were granted.²⁵⁴

Notably, among the exonerees granted compensation during this period was the aforementioned Timothy Atkins.²⁵⁵ Mr. Atkins had a long road to justice.²⁵⁶ Many of Penal Code Section 4900’s problematic disqualifiers were the reason his compensation took so long to be granted. In 1985, Vicente Gonzalez and his wife were carjacked by two men on New Year’s Eve.²⁵⁷ Vincente was murdered.²⁵⁸ A witness came forward alleging she heard a man bragging about the crime.²⁵⁹ With Atkins as the accomplice and another man, Evans, alleged to be the gunman, they were arrested.²⁶⁰ Both men were allegedly assaulted in their jail cells because gang members

²⁴⁸ *Id.*

²⁴⁹ *Charles Holmes III*, CALVCB, *supra* note 239 (displaying documents of claims for compensation for Charles Holmes III).

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ Possley, *Charles Holmes III*, *supra* note 240.

²⁵⁴ *Id.*

²⁵⁵ CALVCB, *supra* note 54.

²⁵⁶ Maurice Possley, *Timothy Atkins*, *supra* note 211.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

believed they would blame someone else for the crime.²⁶¹ Evans was beaten to death.²⁶² Atkins went to trial in 1987, was convicted, and sentenced to thirty-two years to life.²⁶³ In 2007, Atkins's writ of habeas corpus was granted after the star witness recanted and admitted that the police had threatened her with a narcotics charge if she did not testify.²⁶⁴ Atkins was released, and he filed a claim with CalVCB.²⁶⁵

When Atkins filed his claim in 2007, the attorney general, who was required to file a reply, did not respond until 2009.²⁶⁶ Shortly after the answer was filed a hearing was held.²⁶⁷ That claim was denied.²⁶⁸ CalVCB ruled that Atkins had "not met the statutory requirements to receive compensation."²⁶⁹ CalVCB held that he did not show by a preponderance of the evidence that he was innocent and that his flight from the police was a contributing factor to his conviction.²⁷⁰

Undeterred, Atkins went back into court on a writ of habeas corpus to be granted a finding of "factual innocence."²⁷¹ In 2014, he was granted the ruling of factual innocence, and he once again applied for compensation from CalVCB.²⁷² Astonishingly, CalVCB denied Atkins claim once again.²⁷³ It stated that since his exoneration occurred in 2007, before the 2010 amendment to Penal Code Section 4900 making a factual innocence ruling binding on CalVCB, they were thus not bound to the factual innocence ruling as it applied to his 2007 case.²⁷⁴

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ See Brooks & Simpson, *supra* note 156 at 635.

²⁶⁷ *Timothy Atkins-denied petition*, CALVCB, 1 (last visited June 20, 2020), <https://web.archive.org/web/20200630065756/https://victims.ca.gov/docs/pc4900/PC-4900-Denied-Atkins.pdf?2019-06-27> (displaying documents of claims Denied for compensation for Timothy Atkins).

²⁶⁸ Possley, *Timothy Atkins*, *supra* note 211.

²⁶⁹ *Timothy Atkins-denied petition*, CALVCB, *supra* note 267.

²⁷⁰ See Brooks & Simpson, *supra* note 156, at 650.

²⁷¹ Possley, *Timothy Atkins*, *supra* note 211.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Timothy Atkins-denied petition*, CALVCB, *supra* note 149, at 19.

Atkins appealed the decision in superior court and won in 2017.²⁷⁵ The State appealed.²⁷⁶ In October 2018, the judgment in favor of Atkins was upheld.²⁷⁷ However, the courts did not specify whether the pre-2016 rate of \$100 per day — which would have applied at the time of both previous compensation hearings and would equal \$713,700 — or the current rate of \$140 per day — equaling \$1,129,660 — would be applied to Atkins’s appeal.²⁷⁸ In 2019, thirty-four years after the murder, thirty-two years after his wrongful conviction, twelve years after being released from prison, five years after being given a ruling of factual innocence, Timothy Atkins was finally given his compensation of \$1,129,660 at the \$140 per day amount for the 8,069 days he spent wrongfully imprisoned.²⁷⁹

The most current amendment to Penal Code Section 4900 went into effect January 1, 2020.²⁸⁰ This amendment changed the statute of limitations to ten years from the time the conviction is overturned.²⁸¹ It further provides that “the factual findings and credibility determinations establishing the court’s basis for granting a writ of habeas corpus, a motion for new trial . . . or . . . a certificate of factual innocence . . . shall be binding on the Attorney General, the factfinder, and the board.”²⁸² Lastly, it adds a section stating that if an exoneree knowingly pleads “guilty with the specific intent to protect another from the underlying conviction” they will be denied compensation.²⁸³ In the first quarter of 2020, five people — all with rulings of factual innocence — made claims for compensation, and all five claims were granted.²⁸⁴

²⁷⁵ Possley, *Timothy Atkins*, *supra* note 211.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Timothy Atkins-granted petition*, CALVCB, 1 (last visited June 20, 2020), <https://web.archive.org/web/20200630054417/https://victims.ca.gov/docs/pc4900/PC-4900-Approved-Atkins.pdf?2019-06-27> (displaying documents of claims granted for compensation for Timothy Atkins). There was a discrepancy about which days of incarceration would count that was also part of the claim. As that argument was not statutorily driven it will not be expounded upon here.

²⁷⁹ Possley, *Timothy Atkins*, *supra* note 211.

²⁸⁰ 2020 Cal Stat. ch. 473 (SB 269).

²⁸¹ *Id.* at § 2.

²⁸² *Id.* at § 3(b).

²⁸³ *Id.* at § 3(c).

²⁸⁴ CALVCB, *supra* note 54.

IV. CONCLUSION

Wrongful convictions and what to do about them are legal issues that have been with us throughout all of statehood. The law has evolved, albeit slowly, in favor of exonerees but with some bumps along the way. It was over sixty years from the first wrongful conviction in California until the first statute allowed exonerees compensation. There is sparse reporting on exonerations until 1989. With the advent of reporting, the number of exonerations has increased dramatically. Yet, exonerees have had widely differing results with compensation, in part due to antiquated versions of the compensation statute and what appears to be result-oriented compensation grants by CalVCB to minimize costs to the state.

All told, between 1997 and the first quarter of 2020, ninety-three exonerees have applied for compensation, forty-six claims have been granted, and forty-seven claims have been denied.²⁸⁵ Those forty-six compensated exonerees were granted a combined total of \$26,156,379 for their 208,410 days — or 571 years — they spent wrongfully incarcerated.²⁸⁶ That is only a drop in the bucket for the more than 200 California exonerees since 1989, but it is a good start.²⁸⁷

California has come a long way from the 1851 Legislature declaring “the innocent are wrongfully accused of a crime. This is their misfortune.”²⁸⁸ California has frequently led the way in compassionate compensation laws for the wrongfully convicted, and each amendment has been an even greater improvement. However, there is still room for refinement.

One proposal for improvement would be that in cases where a crime cannot be proved to have occurred — often referred to as a no-crime case — a claimant should not have to prove “if the crime occurred,” then by a preponderance of the evidence that they are innocent of the crime. Perhaps CalVCB will be bound to the lower court’s factual finding as an outcome of the most recent amendment,²⁸⁹ but only time will tell.

²⁸⁵ *Id.* There are another twenty-seven claims marked as denied on the CalVCB website. Those claims were not filed by exonerees. *Id.* CalVCB’s earliest claim reported on the website is from 1997, no information is currently available on claims before that time. *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ Anne Pachciarek, *Thomas Berdue*, *supra* note 5.

²⁸⁹ 2020 Cal Stat. ch. 473 at § 3(b) (SB 269).

A second proposal would be to strike the showing of pecuniary injury. It does not make sense to have a compensation scheme based on a static amount per day if CalVCB gives the same amount to a millionaire that they would give to a minimum wage employee but would then deny compensation to a homeless person because they cannot show pecuniary loss. It is even more troubling if that person, denied compensation for lack of pecuniary loss, was employed in a prison job while they were incarcerated because that would show an appropriation of the exoneree's labor that CalVCB then rules would have had no value if the person had not been incarcerated.²⁹⁰

"Compensation can never [fully] make up for the losses [exonerees endure] But if you don't have money . . . you can't afford medical care . . . and you can't get a car, . . . a job, . . . [or an] education . . . and that's what happens to so many people."²⁹¹ Never was the maxim "the delay of justice, is great injustice" more poignant than in the case of those wrongly convicted.²⁹² California has done a great job of trying to right those wrongs, but the job is not done yet.

One can be sure that there will be wrongful convictions so long as there is a criminal justice system. Further, society's view of the need for justice and compensation will likely evolve, and with it, the law to compensate exonerees will follow. This is a topic whose history is not yet fully written.

★ ★ ★

²⁹⁰ See *Section III: The Prison Economy*, PRISON POLICY INITIATIVE (last visited Jan. 25, 2020), <https://www.prisonpolicy.org/prisonindex/prisonlabor.html> (citing United States General Accounting Office, *Prisoner Labor: Perspectives on Paying the Federal Minimum Wage*, GAO/GGD-93-98, p. 19 (May 1993)). These jobs pay on average less than \$2/hour. See Wendy Sawyer, *How Much do Incarcerated People Earn in Each State*, PRISON POLICY INITIATIVE (April 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages> (reporting the average low wage as \$0.14/hour, with the average high being \$1.41/hour).

²⁹¹ See *Compensating the Wrongly Convicted*, *supra* note 57, at 1 (quoting Barry Scheck, Co-Director, The Innocence Project in *Burden on Innocence*, *Frontline*, PBS (2003)).

²⁹² JOHN MUSGRAVE, *ANOTHER WORD TO THE WISE, SHEWING THAT THE DELAY OF JUSTICE, IS GREAT INJUSTICE* 1 (London, 1654). See Fred Shapiro, *You can Quote them "Justice Delayed is Justice Denied,"* YALE ALUMNI MAG. (Sep/Oct 2010), <https://yalealumnimagazine.com/articles/2967-you-can-quote-them>, for further reading on historic uses of this phrase.