ARTICLES

THE CALIFORNIA PUBLIC DEFENDER:

Its Origins, Evolution and Decline

LAURENCE A. BENNER*

> "It is still the duty of the State and of the court, its instrument, quite as much to protect the innocent as to punish the guilty. Honest administration of justice is the end sought . . ."[1]
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> — Clara Shortridge Foltz, 1897

INTRODUCTION

As California approaches the centennial of the birth of the first Public Defender office in the state and the nation, it is perhaps appropriate to reflect upon the reasons for establishing an institutional Public Defender as part of government and make an appraisal of the institution's current

* Laurence A. Benner is Professor of Law and Managing Director of Criminal Justice Programs at California Western School of Law in San Diego, California, where he directs the San Diego Search Warrant Project, the Bail Project and the Center for the Advanced Study of Criminal Justice. He is co-founder of the Institute for Criminal Defense Advocacy, which operates the California Innocence Project. He is coauthor of L. Benner and B. Neary, The Other Face of Justice, NLADA (1973) [hereinafter The Other Face of Justice].

[1] Clara Shortridge Foltz, *Public Defenders*, 31 Am. L. Rev. 393, 395 (1897) [Foltz, *Public Defenders*].

health in California today. The concept of the Public Defender, considered radical at the time of its inception, was initially the brainchild of Clara Shortridge Foltz. A champion of women's rights and the first woman admitted to practice law in California, she spearheaded a national movement to create an elected office known as the Public Defender. The County of Los Angeles became the first government to establish a Public Defender office, which began providing representation in both criminal and certain civil cases in 1914. What would Clara Foltz think of the Public Defender system as it has evolved in California today? How does our present system differ from what she envisioned?

Sadly, while the road has been marked with many successes, and fortified by U.S. Supreme Court decisions establishing the right to the effective assistance of counsel under the Sixth Amendment, if Clara Foltz were to return today she would find a criminal justice system that has broken faith with one of its fundamental underlying premises: the presumption of innocence. Instead, as a consequence of local funding and control over indigent defense services, many counties have chosen to operate under a presumption of guilt, resulting in a system where processing the "presumed guilty" as cheaply as possible has been made a higher priority than investigating the possibility of their innocence.

This should not be surprising. Members of a county board of supervisors, many of whom are not lawyers, can easily be persuaded by political pressures arising from the competition for scarce tax dollars to provide only minimal resources for the defense of those who are accused of crime. That translates into just enough funding to facilitate the plea bargaining regime upon which the entire system relies, as no county has the resources to have trials in all cases. This may seem logical because many defendants are in fact guilty. But the system is based upon a false premise. It is assumed that those who are providing defense representation will somehow be able to distinguish between the many who are guilty and the few who are innocent. It also further assumes that the indigent defense system will be able to provide an effective defense for the innocent by managing to triage the limited resources available. This cannot be done, however, if the system does not ensure adequate defense investigation into the possibility of innocence in the first place. Yet recent empirical research conducted for the California Commission on the Fair Administration of Justice has

shown that the current structure within which indigent defense services are provided in many counties fails to ensure this important safeguard.

This is not to say that all of California's counties across the board are providing indigent defense services that are inadequate. What Clara Foltz would immediately recognize, however, are the glaring disparities that exist between counties in the adequacy of indigent defense services they provide. She would also be struck, although not surprised, by the tremendous disparity in funding that exists between the defense and the prosecution functions. Finally, she would no doubt be alarmed at the growing trend toward unregulated privatization of indigent defense services that threatens the very existence of competent and efficient institutional Public Defender offices. This is because in an ever expanding number of counties justice is now up for sale to the lowest bidder.

ORIGINS OF THE PUBLIC DEFENDER CONCEPT

Clara Foltz first introduced her proposal for an elected Public Defender in a speech at the Chicago World's Fair in 1893, given before the Congress of Jurisprudence and Law Reform.[2] She envisioned the Public Defender as a counterweight to even the scales of justice and correct the "grave evils" that plagued the administration of criminal justice in her day.[3] As she later explained in a law review article, "judicial crimes"[4] were repeatedly being committed because of 1) the abuses of unchecked and overzealous prosecutors,[5] 2) the incompetence of untrained, inexperienced and unpaid appointed counsel for the indigent accused,[6] and 3) the buzzard mentality

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[2] The speech was reprinted in the ALBANY LAW JOURNAL: *Public Defenders — Rights of Persons Accused of Crime — Abuses Now Existing*, 48 ALB. L.J. 248 (1893) [WORLD'S FAIR SPEECH]. Other notable presenters at the Congress included John Henry Wigmore, David Dudley Field and James Bradley Thayer. *See generally* Barbara Babcock, *Inventing the Public Defender*, 43 AM. CRIM. L. REV. 1267 (2006) [Babcock] for an excellent account of the life and times of Clara Shortridge Foltz and the influences that led her to originate the idea of a publicly funded attorney for all defendants accused of crime.

[3] *See* Foltz, *Public Defenders*, *supra* note 1.

[4] *Id*. at 393.

[5] *Id*. at 395-97.

[6] *Id*. at 399.

and dishonesty of a "shyster" element among the private bar who preyed upon those defendants with meager resources.[7]

Called the "Portia of the Pacific,"[8] Foltz was at the time of her World's Fair speech an able and experienced criminal defense practitioner, who shortly afterwards would win a notable victory in the California Supreme Court. In *People v. Wells*[9] — a case involving prosecutorial misconduct — she represented a successful business agent who had been charged as an accomplice to a client's forgery involving a promissory note and mortgage. Wells testified he had been deceived by the client who falsely represented herself as the owner of property which was mortgaged to secure the loan. The California Supreme Court reversed Wells's conviction because of "utterly inexcusable and reprehensible" conduct by the prosecutor who repeatedly employed improper questions on both direct and cross examination to interject inadmissible and unsubstantiated accusations for the sole purpose of prejudicing the jury against the defendant. In granting a new trial, Justice McFarland declared in a revealing statement:

> It is too much the habit of prosecuting officers to assume beforehand that a defendant is guilty, and then expect to have the established rules of evidence twisted, and all the features of a fair trial distorted, in order to secure a conviction. If a defendant cannot be fairly convicted, he should not be convicted at all; and to hold otherwise would be to provide ways and means for the conviction of the innocent.[10]

Foltz identified the causes of such prosecutorial abuse as naturally arising from human nature — the prosecutor's "vanity of winning," and "the fear of newspaper criticism" coupled with the ability to rationalize such

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[7] *Id*. at 397-98.

[8] *See* Los Angeles Times, Nov. 12, 1888 at 2, and Nicholas C. Polos, *San Diego's 'Portia of the Pacific' — California's First Woman Lawyer*, 26 Journal of San Diego History, No. 3, Summer 1980, San Diego Historical Society. Clara Foltz was an eloquent advocate. For an excerpt from one of her closing arguments, *see* Michael S. Lief, et al., Ladies and Gentlemen of the Jury : Greatest Closing Arguments in Modern Law, Chapter 6, *A Man's World No More*, 211 (1998).

[9] 100 Cal. 459 (1893). *Wells* was subsequently referenced by the U.S. Supreme Court in Berger v. United States, 295 U.S. 78 (1935), a seminal case on prosecutorial misconduct.

[10] *Id*. at 465.

behavior through the jaded "assumption that the defendant is always guilty."[11] Prosecutors were allowed to go unchecked, Foltz argued, because with rare exception they had no equal adversary. She pointed out that counsel appointed for the poor "have no money to spend in an investigation of the case, and come to trial wholly unequipped either in ability, skill or preparation to cope with the man hired by the State."[12] Those of modest means, moreover, had neither the knowledge nor the ability from within the walls of their jail cell to secure competent counsel. They were thus easy marks for the "runners" of unscrupulous "shyster" lawyers who, after having obtained a defendant's money, would "botch or neglect" their case.[13]

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11 Foltz, *Public Defenders*, *supra* note 1, at 396.

12 World's Fair Speech, *supra* note 2, at 249.

13 Foltz, *Public Defenders*, *supra* note 1, at 397. A vivid account of how such shyster lawyers operated in the lower criminal courts of New York is described in Arthur Train, The Prisoner at the Bar (1915) 76-77:

> A young girl who had fallen from virtue, but who had never been arrested before, was brought into the Jefferson Market prison. She had saved five hundred dollars with which she intended the following week to return to her native town in New Hampshire and start life anew. The [jailer] led her to believe that she would be imprisoned in the penitentiary for nearly a year unless she could "beat the case." One of these buzzards [i.e. a shyster lawyer] learned of her distress and offered to procure bail for her for the sum of fifty dollars. A straw bondsman was produced, and she paid him the money and was liberated. Meanwhile the lawyer had learned of the existence of her five hundred dollars. By terrifying her with all sorts of stories as to what would possibly happen to her, he succeeded in inducing her to pay him three hundred as a retainer to appear for her at the hearing in the magistrate's court. He had guaranteed to get her off then and there, but when her case was called he happened to be engaged in reading a newspaper and, looking up from where he was sitting, merely remarked, "Waives examination, your Honor." The girl had only one hundred and fifty dollars left, and as yet had had no defense, but the shyster now demanded and received one hundred dollars more for representing her in the Special Sessions. She now had but fifty dollars. Immediately after the hearing in the police court the bondsman "surrendered" her and she was locked up in the Tombs pending her trial, for she had not money enough to secure another bail bond. Here she languished three or four days. When at last her case appeared upon the calendar the shyster did not even take the trouble to come to court himself, but telephoned to another buzzard that she still had fifty dollars, telling him to " take her on." Abandoned by her counsel, alone and in prison, she gave up the last cent she had, hoping thus still to escape the dreadful fate predicted for her. When she was called to the bar the second

Indeed, at the time of the *Wells* decision California did not even have an integrated State Bar that could control the admission to practice law.[14] The reputation of the legal profession also hardly inspired confidence. As one of Foltz's contemporaries observed, the bar in general was considered "a pool of mediocrity."[15]

THE PUBLIC DEFENDER ENVISIONED BY CLARA FOLTZ

To remedy the evils afflicting the administration of criminal justice, Clara Foltz proposed that an office of the Public Defender be created in each county. The Public Defender was to be elected and hold office for a three-year term. Only an attorney who had been a resident of the county for at least one year was eligible to stand for election. The duties of the Public Defender were "to attend all criminal courts, and to appear for and defend all persons charged with violation of the law who are without counsel and who desire an attorney to appear for them."[16] The Public Defender's duties also included "appearing for and in behalf of all persons charged with being insane or lunatic."[17] The Public Defender was empowered to hire assistant Public Defenders and employees when such positions were authorized by the county.[18] When a capital or "other important criminal action" was

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lawyer informed her she had no defense and the best thing she could do was to plead guilty. This she did and was fined twenty-five dollars, but, having now no money, was compelled to serve out her time, a day for each dollar, in the City Prison, at the end of which time she was cast penniless upon the streets.

14 The California State Bar was not created until 1927.

15 Michal R. Belknap, To Improve the Administration of Justice: A History of the American Judicature Society (1992) at 12. As Professor Belknap points out, the movement to organize state bar associations and regularize admissions to the bar through bar examinations did not begin until the late 1800s. *Id*. The American Bar Association and the Los Angeles Bar Association were both formed in 1878. *Id*. *See also* Patricia Phillips, *Meeting Challenges: The Association's History of Accomplishment*, Los Angeles Lawyer, March 2003, 33.

16 *An Act to Create the Office of Public Defender, Provide for His Election, Define His Duties, and Fix His Compensation in the Several Counties, and Cities and Counties of New York*, reprinted in 55 Alb. L.J. 65 (1897) [Foltz's *Defender Bill*]. The bill is also available in the appendix to Babcock, *supra* note 2.

17 *Id*.

18 *Id*.

to be tried, the Public Defender could hire special co-counsel with judicial approval.[19]

It is noteworthy that Foltz's bill entitled *all* criminal defendants to representation by the Public Defender regardless of whether they were indigent or not. In her view the person of average means should not be "ruined by payment of counsel fees in order to be protected from a malicious prosecution."[20] She reasoned that because the right to the assistance of counsel was a constitutional right, it should be free like other constitutional rights such as the right to a jury.[21] There was also a practical reason. As Babcock has observed, Foltz correctly foresaw that if the Public Defender was only for "the friendless and destitute" the office "would not command the respect or resources necessary to do the job."[22] The bill nevertheless provided that a defendant with means still retained the option to hire his or her own counsel who could defend either alone or jointly with the Public Defender.[23]

Although Foltz lobbied tirelessly for the Public Defender concept and introduced bills in state legislatures across the country, it was not until 1913 that the County of Los Angeles amended its charter to create the first Public Defender office, which opened its doors on January 7, 1914.[24] In contrast to Foltz's Public Defender who would be available to all, the Los Angeles office represented only those who were financially unable to afford counsel.[25] The Los Angeles Defender was tasked with representing

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19 *Id.*

20 Foltz, *Public Defenders*, *supra* note 1, at 393.

21 *Id.* at 398.

22 Babcock, *supra* note 2, at 1272.

23 Foltz's *Defender Bill*, *supra* note 16.

24 Reginald Heber Smith, Justice and the Poor (1919) at 117 [Smith].

25 Section 23, charter of Los Angeles County, which provides:

> Upon request by the defendant or upon order of the court, the Public Defender shall defend, without expense to them, all persons who are not financially able to employ counsel and who are charged, in the Superior Court, with the commission of any contempt, misdemeanor, felony or other offense. He shall also, upon request, give counsel and advice to such person in and about any charge against them upon which he is conducting the defense, and he shall prosecute all appeals to a higher court or courts, of any person who has been convicted upon any such charge, where, in his opinion, such appeal will, or might reasonably be expected to, result in a reversal or modification of the judgment of conviction.

indigent defendants "charged in the Superior Court, with the commission of any contempt, misdemeanor, felony or other offense."[26]

Surprisingly, the Los Angeles charter also authorized the Public Defender to bring civil actions to collect unpaid wages (where the amount did not exceed $100) and to defend any person unable to employ counsel who was sued in civil court where in the opinion of the Public Defender the defendant was being "persecuted or unjustly harassed."[27] The reasons for providing civil legal aid appear to have their origins in the reform movement during the Progressive Era to improve the administration of justice generally. In *Justice and the Poor*, published in 1919, Reginald Heber Smith described in detail the defects in the administration of justice in America which had given rise to the widely held belief during that era that there was "one law for the rich and another for the poor."[28] Because the poor could not afford legal advice and representation, they were easily taken advantage of and exploited. In response to this need for legal assistance, legal aid societies sprang up in many of the larger cities.[29] Some, such as the Voluntary Defenders Committee of New York provided criminal defense representation.[30] While most legal aid offices were funded by private donations, there were also a handful that operated as public bureaus of city governments.[31] The Los Angeles County charter's provision of counsel in certain limited civil cases reflects a similar attempt to give the poor access to the courts, denied them due to the inability to afford counsel.

Although Smith devoted much of his analysis in *Justice and the Poor* to the need for legal aid in civil cases, he also asserted that nowhere was the injustice arising from the lack of adequate counsel more apparent than in the criminal justice system.[32] Smith examined the assumption that the rights and procedural protections given to a defendant were adequate safeguards against unjust conviction and concluded that standing alone they

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26 *Id*.

27 Section 23, charter of Los Angeles County, *supra* note 25. This same provision was also enacted in state legislation establishing Public Defender offices. *See* CAL. GOVT. CODE § 27706.

28 SMITH, *supra* note 24, at 105.

29 *Id*. at 176 and 187-191.

30 *Id*. at 117.

31 *Id*. at 173.

32 *Id*. at 105.

were ineffective because "[a]dequate protection, in the last analysis, depends on adequate representation."[33] Most defendants then, as now, could not afford to hire counsel. The fairness of the criminal justice system thus depended upon defense representation provided through a system of assigning counsel for the indigent accused.

Examining the assigned counsel system, Smith echoed many of Foltz's arguments. Although counsel assigned in capital cases were generally paid and given an allowance for expenses, in routine felonies, counsel was either not provided at all, or went unpaid and without funds to conduct any investigation.[34] Thus even a competent criminal defense lawyer appointed to a case was forced not only to provide representation for free, but also to pay for investigation expenses and expert witnesses out of his own pocket. The lawyers who could afford to provide such pro bono representation, however, were generally members of civil law firms and were largely exempt from assignment because they had no experience in criminal work.[35]

Smith moreover found that the "shyster" lawyers Foltz had complained about had taken over the assigned counsel system and corrupted it.[36] Smith observed:

> These men have learned how to make a living out of assigned cases. . . . They are willing to take assignments because they . . . know how to strip a prisoner and his relatives of every last cent . . . [by] magnify[ing] the crime . . . and the horrors of prison . . . .
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> If well paid, the professional assigned counsel undertakes a defence [sic] that knows no bounds of honesty or propriety. . . . If not paid, he is perfectly willing to betray his client by neglecting the case, or forcing him to plead guilty, or deserting him altogether.[37]

Thus except for murder cases, where reputable lawyers would step forward because of a sense of duty and the potential to enhance their reputation, the assigned counsel system deserved, in Smith's judgment "unqualified

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[33] *Id*. at 111.

[34] *Id*. at 112.

[35] *Id*. at 112-113.

[36] *Id*. at 111.

[37] *Id*. at 114. Smith maintained that it was because of the dishonest tactics of these shyster lawyers that prosecutors had become "aggressive" and "partisan." *Id*. at 111 and 114.

condemnation."[38] The salaried professional Public Defender envisioned by Smith, would, by contrast, be honest, ethical, and provide uniformly competent representation.

For Smith there was also an additional ideological reason for providing adequate defense services for the poor. This was necessary in his view to prevent a loss of confidence in the judicial system that might further encourage the anarchist movement. The turn of the century witnessed economic changes that gave rise to conflict as a result of the pressure from two growing influences — the escalating unrest between the laboring class and their employers and the great wave of immigration from eastern and southern European countries. It was a turbulent time in American history — from the Haymarket Square bombing in Chicago in 1886, and Panic of 1893 when the stock market crashed, to the assassination of President McKinley in 1901 by an anarchist and the bombing of the *Los Angeles Times* building in 1910.[39] The fear of "sedition and disorder" created by these and other similar events clearly emanated from Smith's writings.[40]

Smith was especially concerned about the masses of recently arrived unskilled immigrant workers.[41] The International Workers of the World (known as the Wobblies), actively recruited such unskilled workers to join

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38 *Id.*

39 *See generally* Arnold M. Paul, Conservative Crisis and the Rule of Law (1960), Robert H. Wiebe, The Search for Order: 1877–1920 (1967) and Ray Ginger, Eugene v. Debs: The Making of an American Radical (1970). *See also* PBS, The American Experience, Timeline: Anarchism and Emma Goldman, [PBS Timeline] *available at* http://www.pbs.org/wgbh/amex/goldman/peopleevents/e_freespeech.html (All online sources cited in this article were last visited Dec. 1, 2010).

40 Smith, *supra* note 24, at 11.

41 Due to political and religious persecution, famine and the lack of economic opportunity, immigration jumped to almost 9,000,000 during the decade from 1900 to 1910. *See* Table No. HS-8. Immigration — Number and Rate: 1900 to 2001, *available at* http://www.census.gov/statab/hist/HS-08.pdf. *See generally* Alan M. Kraut, The Huddled Masses: The Immigrant in American Society, 1880–1921. Smith observed in Justice for the Poor that the immigrant

> comes to this country . . . with high hopes, expecting to receive fair play and square dealing. It is essential that he be assimilated and taught respect for our institutions. . . . When he finds himself wronged or betrayed, keen disappointment is added to the sense of injustice. Through bitter disillusionment he becomes easily subject to the influence of sedition and disorder. *Id.*

its radical agenda, which was based upon Marxist principles.[42] During one such effort in 1912, for example, San Diego passed an ordinance banning union activity in its business district. This sparked protest demonstrations which were brutally suppressed by both law enforcement and vigilantes.[43] It was against this backdrop of violence and unrest that Smith warned in the *Journal of the American Judicature Society* that

> the revolutionary proponents of a new world order . . . may undermine public confidence in our justice if they attack its results, and demonstrate its inequality in case after case. Such an attack might come perilously near to succeeding because it has truth on its side. The present drive for Americanization furnishes an illustration. The plan is to educate the immigrant . . . so that he will understand and respect our institutions. But suppose after his education he finds in America institutions which, in part at least, do not deserve the respect of intelligent men. And if his contact with justice has been in the lower criminal courts where he has been preyed upon by runners, shysters and straw bondsmen,[44] may he not mistake

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[42] The I.W.W.'s constitution, drafted in 1908, called for class warfare, proclaiming:

> The working class and the employing class have nothing in common. There can be no peace so long as hunger and want are found among millions of working people, and the few, who make up the employing class, have all the good things of life. Between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system.

PBS Timeline, *supra* note 39.

[43] Rosalie Shanks, *The I.W.W. Free Speech Movement: San Diego, 1912*, 19 The Journal of San Diego History, San Diego Historical Society Quarterly, No. 1, Winter 1973.

[44] Straw bondsmen were individuals secured by shyster lawyers to swear false affidavits pledging non-existent property to secure the amount of the bond. If the prosecutor discovered the fraud, the bond was revoked, the defendant returned to jail, and of course the amount the defendant paid to the straw bondsman was lost. Even if the fraud went undiscovered, the bondsman would "surrender" his client at the first court appearance and the defendant would be returned to jail. News reports suggest that this practice was prevalent in California. A column reporting on court cases in a San Francisco paper in 1887, for example, noted two straw bondsmen were sentenced to significant prison terms (six and seven years, respectively) and described the trial judge's lengthy speech that "reviewed the evils of the straw bond business and severely cored lawyers who would desecrate their oaths by offering to procure such bonds." *The Straw*

> the part which he knows for the whole and conclude that our judicial institutions ought to be overthrown?[45]

Smith found a solution in the concept of the institutional Public Defender where counsel are paid for their services, resources are provided to cover needed expenses such as investigation and expert witnesses, and where "centralization of work makes for economy, efficiency, and responsibility."[46] Smith praised the results of the Los Angeles Public Defender experiment and cited its work as empirical proof that the concept of an institutional defender office was not "visionary" or "subversive of fundamental rights" as a prelude to socialism.[47]

In its first year of operation in 1914 the Los Angeles Public County Defender handled 260 felony cases.[48] Favorably comparing the results obtained by the Public Defender with that of privately retained counsel, Smith found that the Public Defender took approximately the same percentage of cases to trial as private counsel (22% vs. 26% for private counsel), had roughly the same success rate at trial (34% not guilty or hung jury vs. 36% for private counsel) and obtained probation for a slightly greater percentage of his convicted clients than private counsel (33% vs. 30%).[49] Smith also argued that the Public Defender had improved the efficiency of the court by filing fewer frivolous motions "for purposes of delay" and spending on average fewer days per trial than retained counsel.[50] For example, Smith cited statistics showing private counsel filed motions in 17% of their cases but were successful only 6% of the time, while the Public Defender filed motions in only 3% of its cases and was successful 25% of the time.[51]

One striking fact revealed by Smith's statistics was that 70% of the clients represented by the Public Defender pleaded guilty, while retained

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Bondsmen Sentenced, Daily Alta California, August 25, 1887, *available at* http://www.newspaperabstracts.com/link.php?id=25776.

45 R. H. Smith, *Denial of Justice*, 3 J. Am. Jud. Soc. 112, 113 (1919–1920).

46 Smith, *supra* note 24, at 115-16.

47 *Id*. at 115 and 122-24.

48 Id. at 122. After civil service examinations, Walton J. Wood was chosen as the first Public Defender. *Id*. at 117.

49 *Id*. at 123.

50 *Id*. at 122.

51 *Id*.

counsel entered guilty pleas in only 48% of their cases. Foltz had detested plea bargaining. In her view reducing a defendant's sentence because his guilty plea saved the county the time and expense of a trial was akin to bribery. She wrote: "Think of the spectacle of a *court* remitting part of a criminal's legal punishment for a money consideration!! And yet who has not witnessed it."[52]

Foltz was a strong proponent of the adversary system and believed the truth emerged from the contest at trial fought by ethical advocates on both sides. Smith and the reformers of the Progressive Era, on the other hand, while not rejecting the adversary system, believed in a more collaborative system of justice.[53] Reacting to the dishonest tactics in which the shyster lawyers had engaged with impunity, the Public Defender they envisioned was not just an ethical trial lawyer, but also an officer of the court who, while ensuring that the innocent were protected, would not stand in the way of the guilty being fairly punished. This vision of the Public Defender of course begs both the larger philosophical question of whether such "truth" is indeed knowable and the more practical question of whether a busy staff attorney at a Public Defender office with a heavy caseload and limited resources for investigation has the ability to know the truth regarding guilt or innocence. Smith's statistics, however, point to the Achilles' heel of the Public Defender concept: the high volume of cases handled.

As Smith chronicled in *Justice and the Poor*, the Los Angeles experiment was successful in eliminating the abuses of the shyster lawyers, and the California state legislature subsequently passed legislation in 1921 authorizing county governments to create an office of the Public Defender.[54] That legislation, however, left it up to county governments to determine whether or not to have a Public Defender and also whether the chief Public

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52 Foltz, *Public Defenders*, *supra* note 1, at 399 n.2.

53 Smith, for example, praised the Los Angeles Defender's handling of insanity cases because, instead of engaging in a battle of experts, the defender and prosecutor agreed to have the court appoint three physicians to examine the accused and stipulated that no other experts would be called at trial on that issue. Smith observed that "[i]nstead of working at odds, it has been possible for the two attorneys to work in harmony to a common end." Smith, *supra* note 24, at 121-22.

54 Cal. Govt. Code § 27700. The current statute is derived from legislation enacted in 1921.

Defender would be elected or appointed.[55] Thus in contrast to Foltz's bill which mandated an elected Public Defender in each county, California has evolved into a hodgepodge of arrangements for providing indigent defense services. Only the Public Defender of the City and County of San Francisco is an elected official.[56]

In the 1960s and 1970s U.S. Supreme Court decisions in *Gideon v. Wainwright*[57] and *Argersinger v. Hamlin*,[58] vindicated Clara Foltz's belief that defense counsel was constitutionally required in felony and misdemeanor cases. This spurred the growth of Public Defender offices to handle the constitutional mandate to provide counsel. The U.S. Department of Justice sponsored the National Advisory Commission on Criminal Justice Standards and Goals (1973)[59] and the National Study Commission on Defense Services (1979) which promulgated maximum attorney caseload standards and other guidelines for establishing such offices. In 1973, *The Other Face of Justice*, reporting the findings of a nationwide study of indigent defense delivery systems, found that California had 31 Public Defender offices and 16 assigned counsel systems.[60] In 11 counties defense services were provided through contractual arrangements with law firms or individuals.

THE PUBLIC DEFENDER TODAY

Clara Foltz envisioned that a professional Public Defender would represent virtually all criminal defendants. While this concept was never accepted in theory, as a practical matter today more than eight out of ten defendants accused of serious crimes in California are provided with counsel.[61] Foltz

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55 CAL. GOVT. CODE § 27701.

56 Web site of the San Francisco Public Defender's Ofice *available at* http://www.sfpublicdefender.org.

57 372 U.S. 335 (1963).

58 407 U.S. 25 (1972).

59 NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, 276 (1973). *See infra* note 97.

60 THE OTHER FACE OF JUSTICE, Appendix 1A, 90-91, and Appendix 1D, 112-13.

61 *See* L. Benner, *Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California* 45 CALIFORNIA WESTERN LAW REVIEW 263, 311 n.111 [*Systemic Factors*], reporting results from a survey of presiding Superior Court judges indicating a state-wide indigence rate in excess of 85%.

would be dismayed, however, at what has happened to the Public Defender concept and the current crisis confronting the delivery of indigent defense services. She, along with Reginald Heber Smith, would also find that like the themes from Greek tragedies, the problems they identified still persist.

In 2008, the California Commission on the Fair Administration of Justice ("Fair Commission") reported that 33 of California's 58 counties now have an institutional Public Defender office which serves as the primary provider of indigent defense services.[62] While the number of counties employing an institutional Public Defender office grew by only two since 1973, the number of counties using contract defenders more than doubled. In 24 counties (most having a population of less than 100,000) defense services are now provided by contractual arrangements with either a law firm or solo practitioners.[63] Only one county, San Mateo, uses a bar association administered assigned counsel system as the primary provider. The San Mateo system, known as the Private Defender Program, actually functions, however, much like an institutional defender office. It has an investigative staff and employs supervising attorneys who provide training and monitor the performance of assigned counsel panel members.[64]

While the San Mateo assigned counsel system has been a success, it appears that the assigned counsel systems in other counties were replaced by contract defenders. Unfortunately, California has had a disturbing history with respect to contract defenders. Contracts for indigent defense services are not regulated by any state standards nor is there even any requirement

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62 Final Report, California Commission on the Fair Administration of Justice 92 (2008) [CCFAJ Final Report] *available at* http://www.ccfaj.org/documents/CCFAJFinalReport.pdf. An institutional Public Defender is defined as a county department where attorneys are employed on a salaried basis as public employees. While the primary institutional defender office handles the lion's share of indigent cases, other arrangements must be made to represent co-defendants and other cases where the primary defender has a conflict of interest. This is done through the creation of one or more alternate defender offices, or through an assigned counsel panel or by contractual arrangement with a law firm or individual.

63 *Id*. There is a variety of contractual arrangements. One law firm, for example, provides representation in eight different counties, while one county has seven separate contracts with solo practitioners.

64 *See* San Mateo County Bar Association Private Defender Program Annual Report, Fiscal Year 2009–2010, *Administration and Structure*, 6-7; *Attorney Training*, 35-37; and *Attorney Evaluation*, 40-44.

that performance of the contractor be monitored for quality control. A monograph published by the U.S. Justice Department's Bureau of Justice Assistance revealed the dangers of such unregulated low bid contracts in the following report of a disastrous experience with a California contract defender:

> In 1997 and 1998, a rural county in California agreed to pay a low bid contractor slightly more than $400,000 a year to represent half of the county's indigent defendants. The contractor was a private practitioner who employed two associates and two secretaries, but no paralegal or investigator. The contract required the contractor to handle more than 5,000 cases each year. All of the contractor's expenses came out of the contract. To make a profit, the contractor had to spend as little time as possible on each case. In 1998, the contractor took fewer than 20 cases — less than 0.5 percent of the combined felony and misdemeanor caseload — to trial.
>
> One of the contractor's associates was assigned only cases involving misdemeanors. She carried a caseload of between 250 and 300 cases per month.[65] The associate had never tried a case before a jury. She was expected to plead cases at the defendant's first appearance in court so she could move on to the next case.
>
> One afternoon, however, the associate was given a felony case scheduled for trial the following week. The case involved multiple felony and misdemeanor charges. When she looked at the case file, the associate discovered that no pretrial motions had been filed, no witness list had been compiled, no expert witnesses had been endorsed, and no one had been subpoenaed. In short, there had been no investigation of any kind into the case, and she had no one to help her with the basics of her first jury trial.
>
> The only material in the case file was five pages of police reports. In these reports she found evidence of a warrantless search, which indicated strong grounds for suppression. She told the judge she was not ready to proceed and that a continuance was necessary to preserve the defendant's Sixth Amendment right to counsel. The continuance was denied. The associate refused to move forward with the case. The contractor's other associate took over

65 The national standard is only 400 misdemeanor cases per attorney *per year.*

> the case and pled the client guilty to all charges. The associate who had asked for a continuance was fired.[66]

The Justice Department report concluded: "In this California county, critics' worst fears about indigent defense contract systems came true. When contract systems are created for the sole purpose of containing costs, they pose significant risks to the quality of representation and the integrity of the criminal justice system."[67]

In a deposition arising out of a lawsuit brought by the associate who had been summarily dismissed, the contract defender stated that he was able to handle such a high volume of cases because he pleaded 70% of his clients guilty at the first court appearance after spending thirty seconds explaining the prosecutor's offer.[68] The county of Shasta, where this occurred, subsequently established an institutional Public Defender office.[69]

The Fair Commission observed that despite the notoriety of this disturbing example of abuse, nothing has been done to prevent its recurrence and reported that "flat fee contracts are still being negotiated for defense services with no separate funding for investigators and ancillary services."[70] Indeed, testimony before the Fair Commission revealed that some counties employing contract defenders have solicited bidding wars in an attempt to further cut the cost of indigent defense services. The Commission reported the story of one contract defender of long standing who had repeatedly fought off low bidders in the past with the support of the judiciary. His budget, which had been 41% of the District Attorney's budget in 2000, declined to only 27% in 2005. Yet in 2006, he was undercut by a bid from a competitor that was almost 50% less than his submission. He lost the contract he had repeatedly held since 1990. According to the Commission:

> He was undercut by a bid from John A. Barker & Associates, now operating as Richard A. Ciummo & Associates. Ciummo now contracts

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66 U.S. Dep't of Justice, Bureau of Justice Assistance, Contracting for Indigent Defense Services: A Special Report 1-2 (2000).

67 *Id.*

68 CCFAJ Final Report, *supra* note 62, at 95 (citing deposition of Jack Suter in Fitzmaurice-Kendrick v. Suter, Civ. S-98-0925 (E.D. Cal. 1999)). The lawsuit reportedly resulted in a substantial settlement for the plaintiff. *Id.*

69 *Id.*

70 *Id.*

> with eight California counties to provide defense services. . . . Ciummo's operation has been described as the "Wal-Mart Business Model" for providing defense services, "generating volume and cutting costs in ways his government-based counterparts can't and many private-sector competitors won't." Mr. Ciummo responds that he operates on a single-digit profit margin, and substantial savings result from hiring attorneys on a contract basis that does not include expensive benefit and retirement packages. While his contracts with counties provide separate reimbursement for interpreters and expert witness fees, there is no separate reimbursement for investigative services.[71]

The Commission noted that the successful bidder's Web site contains an advertisement stating: "What Would Your County Do With Hundreds of Thousands of Dollars?" The advertisement suggests the answer ("Better schools? Better fire protection? More police? Improved roads? More parks?") and boasts: "Every county we have contracted with has saved substantial funds over their previous method of providing these services. Additionally, our firm has an excellent record of containing cost increases."[72]

In hard economic times, competitive bidding can obviously lead to a dangerous downward spiral of cost-cutting that can result in bids that provide an inadequate number of attorneys who have little or no experience, and who are given little or no training, supervision, or support services.

Unfortunately, no action has been taken to regulate indigent defense contracting and evidence of abuse continues to be reported. For example, Fresno County awarded a flat fee contract for $80,000 to an attorney in a death penalty case where the Public Defender was unable to provide representation because of a conflict of interest. On appeal, after the defendant was sentenced to death, it was revealed that the contract attorney spent less than $9,000 for investigation and expert witnesses, although in justifying his bid he had budgeted $60,000 for such expenses. The attorney instead pocketed $71,000 of the $80,000 fee.[73] It was conceded that even

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71 *Id*. at 95 (quoting Cheryl Miller, *Calif. Defense Firm Borrows Wal-Mart Business Model*, The Recorder, Dec. 26, 2007).

72 CCFAJ Final Report, *supra* note 62, at 94-95 n.4.

73 People v. Doolin, 45 Cal.4th 390, 457-58 (2009) (opinion of Kennard, J. concurring and dissenting). The California Supreme Court assumed without deciding that

though counsel was aware that the defendant had a learning disability and had been abused as a child, the contract attorney failed to conduct a background investigation and social study of defendant as required by ABA standards governing the duties of defense counsel in capital cases.[74] In *Sears v. Upton*,[75] the U.S. Supreme Court recently held that the failure to conduct an adequate investigation into the defendant's background before deciding on a mitigation strategy constituted deficient performance, even where counsel employed a plausible mitigation strategy.

Another example that reveals the contrast in the quality of representation between flat fee contractors and institutional Public Defenders was seen in the case of two juveniles who were both charged with the same crime: assault with a deadly weapon. The older of the two was represented by the Public Defender, but the younger, aged 15, was assigned a contract attorney who took juvenile cases for a flat fee of $345 regardless of complexity. The Public Defender's client was adjudicated in juvenile court, but the younger boy, represented by the contract attorney, was charged as an adult. Upon transfer to Superior Court he was represented by the alternate Public Defender who immediately recognized that the child had serious mental deficits and should not have been transferred to adult court. It was later determined that the contract attorney had "failed to provide even a minimal level of representation" and the case was transferred back to juvenile court.[76]

The Fair Commission, noting that state laws impose standards for county contracts involving public works, has recommended that the state legislature adopt at least minimal standards to protect against such demonstrated abuses where the liberty of a citizen is at stake.[77]

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counsel's performance was deficient, but on the record produced on direct appeal found no prejudice was shown as required by Strickland v. Washington, 466 U.S. 668 (1984). Two Justices (Kennard and Werdegar) dissented arguing that prejudice should be presumed because of the inherent conflict of interest created by the flat fee contract. Post conviction proceedings are still pending.

74 American Bar Association, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989).

75 130 S. Ct. 3259 (2010).

76 Molly Hennessy-Fiske, *Juvenile Justice Diverges in Court*, Los Angeles Times, June 14, 2010.

77 CCFAJ Final Report, *supra* note 62, at 97.

THE IMBALANCE BETWEEN DEFENSE AND PROSECUTION

Clara Foltz saw the institutional Public Defender as a means of correcting the imbalance between counsel for the accused, who was often either inept or dishonest, and the strong district attorney, who was often overzealous because the "pride of contest" overcame the "spirit of justice."[78] The institutional Public Defender office has, when properly implemented, eradicated this gross imbalance. By providing an organization where properly trained and supervised attorneys can embark upon a professional career as a Public Defender, defense counsel can be on a par with their counterpart in the district attorney's office and provide excellent and cost-effective defense representation. The San Francisco Public Defender, for example, represented over 28,000 clients during 2009, obtained an acquittal rate at trial of 46.5% (which would be the envy of many private practitioners who get to choose their clients) and saved an estimated "$5 million in incarceration costs [through placement of clients] in vocational, educational, substance abuse and mental health programs."[79]

There can be no doubt, therefore, that the scales of justice have tipped toward a more even balance as thousands of dedicated career Public Defenders and their support personnel strive daily throughout California to provide the best representation possible. As a former client of the Los Angeles County Public Defender's Office stated in tribute after being acquitted of murder on the grounds of self defense:

> Even if I had $10,000 I couldn't buy that kind of defense. . . . And here I am a nobody, just a 52-year-old bartender in a jam. When a plain nobody gets a defense only a rich somebody could buy, you got a real great country.[80]

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78 C. Foltz, *Duties of District Attorneys in Criminal Prosecutions*, 18 Crim. L. Mag. & Rep. 415 (1896).

79 Web site of the San Francisco Public Defender's Office, *available at* http://sfpublicdefender.org/media/2010/01/ year-report-demand-public-defenders-remains-high-economic-crisis/.

80 Web site of the Los Angeles County Public Defender, *available at* http://pd.co.la.ca.us/History.html.

Despite such successes, however, serious imbalances still remain. Foltz could not have envisioned the tremendous volume of cases our criminal justice system handles today. As a nation we imprison more citizens per capita than any other country in the world.[81] Starting with only 260 felony cases in 1914, the Los Angeles County Public Defender (LACPD), for example, now handles an "estimated 420,000 misdemeanor cases, 100,000+ felony cases, 41,000 juvenile cases and 11,000 mental health cases, for a total of over 571,000 cases annually.[82]

Funding Disparities

The financial burden of providing counsel falls primarily upon county governments. Recent empirical research conducted in 2007 for the Fair Commission reveals, however, that tremendous disparities exist from county to county regarding the resources allocated to indigent defense services. For example, while the average spent per capita on indigent defense for all counties is $19.62, Sutter County with a population of 91,000 spends only $5.85 per capita.[83] Significant disparities in expenditure also exist between counties within the same population class. Butte County, for example, with a population of 217,000 spends less than $10.00 per capita on indigent defense while Yolo County, with a population of 190,000 spends almost $31.00 per capita.[84]

Still more glaring is the disparity between funding for the prosecution and funding for indigent defense. As a consequence of local budgetary decisions, the Yolo County Public Defender Office, for example, has been forced to provide representation (including representation in a death penalty case) with less than half of the resources of the prosecution.[85] Looked at from the viewpoint of resources per attorney, the district attorney has the advantage of over $100,000 more per staff attorney than the Public

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81 The United States imprisons over 700 persons per 100,000 population. R. Walmsley, World Prison Population List (7th ed.) King's College, London, International Centre for Prison Studies, *available at* http://www.kcl.ac.uk/depsta/law/research/icps/downloads/world-prison-pop-seventh.pdf.

82 County of Los Angeles, Annual Report 2009–10, 24.

83 *Systemic Factors*, *supra* note 61, at 309.

84 *Id*. at 310.

85 *Id*.

Defender.[86] An even more extreme example is Sutter County, which spends five times more on prosecution than it does on indigent defense.[87]

In *Argersinger v. Hamlin*, Chief Justice Burger declared that "the system for providing counsel and facilities for the defense should be as good as the system which society provides for the prosecution."[88] Yet statewide, for every dollar spent on prosecution, California counties spend only fifty-three cents on indigent defense.[89] At least 85% or more of the criminal docket in the Superior Courts of California, however, must be handled by the indigent defense system.[90] In some counties the indigence rate is as high as 95%.

Prosecutors have argued that they need greater resources because they have to screen arrests made by police that do not result in charges. This argument has been refuted, however, by a statistical analysis which shows that the additional prosecution workload to screen such arrests is more than offset by the additional workload imposed on indigent defense systems to handle non-traffic misdemeanor cases that occur within cities.[91] Because these cases are prosecuted by the city attorney rather than the district attorney, they are not part of the prosecution's workload. In addition, the indigent defense system has other added workloads not shared by the district attorney. It must also provide representation for clients involved in involuntary mental health commitments and conservatorships. Thus, even if privately retained counsel handle between 5% to 15% of the criminal caseload, one would not expect to see such gross disparities in funding between the prosecution and defense functions.

The disparity in funding between prosecution and defense is also not limited to less populated counties that might be expected to have less

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86 *Id.* This comparison actually overstates the resources per Public Defender staff attorney because it is based upon the indigent defense budget for the county as a whole and not all those funds go to Public Defender office. It also does not include additional investigative resources available to the prosecutor from the city police, county sheriff's department and state highway patrol.

87 *Id.* at 310.

88 Argersinger v. Hamlin, 407 U.S. 25, 43 (1972).

89 *Systemic Factors*, *supra* note 61, at 311.

90 *Id.* at 311 n.111.

91 *Id.* at 314 n.117. The comparison showed that indigent defenders handled over 60,000 more cases statewide than did county prosecutors.

adequate financial resources. The Fair Commission study conducted an in-depth examination of funding for the district attorney's office and the indigent defense system in Santa Clara County, one of the richest counties in the nation. In terms of per capita income, Santa Clara ranked 17th out of 3,000 counties in 2008.[92] Yet in terms of parity with the prosecution, funding for Santa Clara County's indigent defense system was below the state average. For fiscal year 2007 the Santa Clara prosecutor's budget was more than twice that of all the indigent defense components combined.[93] This translates into a dramatic disparity in staffing resources. The Santa Clara County District Attorney's Office, which has its own crime lab (funded out of a separate budget financed in part by fines from convicted drug offenders pursuant to Health and Safety Code section 11372.5) had a staff of over 500 in 2007.[94] The primary and alternate Public Defender offices combined had a budgeted staff of only 206.

This type of disparity in resources has consequences, as the indigent defense system simply cannot keep up with the volume of cases generated by the more generously resourced law enforcement and prosecution components of the criminal justice system. Once held to be an exemplary office, the primary Santa Clara County Public Defender was forced after budget cuts to ration representation and had to take the drastic step of no longer providing counsel at misdemeanor arraignments. After newspaper articles revealed that uncounseled defendants were pleading guilty at arraignment without being aware of the consequences, some funding was

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92 *Id*. at 318 n.122.

93 In addition to county funding, the Santa Clara District Attorney received $1.4 million from the State of California's Department of Insurance and $1.9 million from the federal government's Office of Emergency Services. Other grants included an Anti-Drug-Abuse Enforcement Program Fund, Child Abuse Vertical Prosecution Fund, D.A. Worker's Compensation Fraud Grant Fund, Hi-Tech Identity Theft Program Fund, and Welfare Fraud Investigation Fund. Combined with county funds and money from the Public Safety Sales Tax (known as Proposition 172 funds) the prosecutor's budget for 2007 totaled over $86 million. The total funding for the Santa Clara County Public Defender Office, Alternate Public Defender Office, and Legal Aid Society of Santa Clara County, which administers an assigned counsel panel to handle conflict of interest cases the Alternate Public Defender cannot represent, totaled only $42.7 million. *Id*. at 318 n.123.

94 *Id*. at 319.

finally restored to the office.[95] If a prosperous county like Santa Clara can only grudgingly muster the will to provide even basic defense services, the picture appears bleak for the future of indigent defense in counties across the state that are less financially well-endowed.

Excessive Caseloads

The disparity in funding might be less disturbing if Public Defender offices were given adequate staffing to handle the caseloads generated by the prosecution. However, as U.S. Attorney General Eric Holder candidly acknowledged in his keynote address at the 2010 National Symposium on Indigent Defense, Public Defender offices across the country are overloaded with too many cases. California is a prime example. When asked to rate the health of the institutional Public Defender in the county in which they practiced, 73% of private practitioners certified as criminal defense specialists indicated that excessive caseloads were a significant problem for the institutional Public Defender in their jurisdiction.[96] The majority of Public Defender offices in California carry caseloads that exceed the national standards promulgated by the National Advisory Commission on Criminal Justice Standards and Goals (NAC).[97] In Santa Clara County, for example, the Primary Public Defender office staff attorneys were attempting to handle more than 300 felonies annually, which is twice the national standard.

A recent examination of the Los Angeles County Public Defender (LACPD) shows the impact that the excessive caseload crisis has had on

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95 Aram James, *Public Defender Must Staff Misdemeanor Courts*, San Jose Mercury News, January 7, 2010; *Public Defender Access Expanded*, San Jose Mercury News, June, 26, 2010.

96 *Systemic Factors*, *supra* note 61, at 286.

97 *Id*. at 286 citing Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts, 276 (1973). Standard 13.12 specifies maximum caseload standards per attorney per year as follows: for felonies (150), misdemeanors (400), juvenile (200), mental health (200), and appeals (25). As the National Study Commission on Defense Services later observed, however, these standards should only be used as a starting point because only an actual workload study can determine the maximum number of cases an attorney can effectively handle given the unique practice environment in a particular jurisdiction, including logistical considerations and other operational characteristics that impact defense representation such as prosecutorial charging and plea bargaining practices and judicial sentencing practices.

misdemeanor defendants. Observing the arraignment of misdemeanor defendants, the author reported:

> The processing of L.A. citizens in misdemeanor arraignment court is nothing short of Orwellian. Detainees are brought into the courtroom in groups, shackled together in pairs at the wrist, and held in a cage-like enclosure [the 'box'] off to one side of the courtroom during the proceedings . . . and must communicate with the judge through slats.
>
> LACPD misdemeanor attorneys dispose of 1,200 cases per attorney per year, about three times the recommended national maximum. In-court observation supports the conclusion that LACPD's misdemeanor caseload is grossly excessive. . . . Only after their arrival at misdemeanor arraignment court do detainees have the opportunity to speak with counsel for the first time. Police reports are transported along with detainees, so that Public Defenders must await the arrival of their prospective clients before viewing the evidence [against them]. . . . The majority of misdemeanor cases are disposed of by guilty pleas at arraignment. Since detainees generally meet their Public Defenders only a few moments before appearing before the judge, many guilty pleas take place without any investigation into the facts or the opportunity for a full-scale interview. Terms of the plea agreement generally include a fee representing recoupment of a portion of the cost of providing Public Defender services.
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> The author witnessed a group of African American women paraded into the box in groups of six, each shackled to a partner. In order to rise and approach the slats when her case was called, each woman was dependent upon the willingness, or unwillingness, of her partner to rise and take a few steps. Each woman signed a plea agreement, clumsily juggling papers between her free hand and her shackled hand. . . .
>
> The confusion apparent in the L.A. misdemeanor arraignment court is illustrative of an assembly-line type of justice. On one occasion, a male defendant stood in the box, straining to hear the judge, who spoke in a soft voice. The defendant called out, "I can't hear you. I don't know what's going on!" A second defendant, a

> female, was informed that her bail would be $10,000, whereupon she changed her plea to guilty so that she could be released. In the latter case, California's bail bond system[98] and the defendant's poverty determined the outcome.[99]

Recent news reports reveal that excessive caseloads in several counties have become markedly worse. In June of 2010, for example, it was reported in a "Gideon Alert," published by the National Legal Aid and Defender Association, that both the Sacramento County and San Joaquin County Public Defender offices were operating with caseloads that were two to four times the maximum allowed by national standards.[100]

Lack of Investigative Assistance

The maximum attorney caseload standards, moreover, are predicated upon having adequate investigative assistance. Yet over two-thirds (69%) of the presiding Superior Court judges surveyed in the study conducted for the Fair Commission stated that the lack of resources to investigate indigent cases thoroughly was a problem in their jurisdiction.[101] Two rural Public Defender offices had no investigator on staff at all and one of those offices reported having significant difficulty in obtaining court approval for funds to obtain investigative assistance.[102]

Public Defender offices employing staff investigators reported that their investigators were also laboring under excessive workloads.[103] The

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98 To obtain bail the defendant would have had to pay the bondsman 10% ($1,000) which was apparently more than the fine. L. Benner, Bail Project Manual, 25, California Western School of Law (2010).

99 Nancy Albert Goldberg, *Los Angeles County Public Defender in Perspective*, 45 Cal. W. L. Rev. 445, 466-67 (2009).

100 *See* David Carroll, Gideon Alert: California counties exhibit wide disparity of services, National Legal Aid & Defender Association, *available at* http://www.nlada.net/jseri/blog/gideon-alert-california-counties-exhibit-wide-disparity-services.

101 *Systemic Factors*, *supra* note 61, at 278.

102 *Id*. at 288 and Figure 6 at 282. Also revealing was the fact that 100% of the institutional Public Defender offices reported that they had difficulty interviewing prosecution witnesses. More than one quarter (27%) classified this problem as "serious." *Id*. at 289.

103 *Id*. at 288.

recommended standard is one investigator for every three attorneys.[104] In several counties, however, the ratio was discovered to be as high as eight attorneys to just one investigator. One of these offices handled ten death penalty cases during the year.

As the U.S. Supreme Court has explained, the "core" of the Sixth Amendment right to counsel "has historically been and remains today, the opportunity for a defendant to consult with an attorney, and to have him investigate the case and prepare a defense for trial."[105] In *Powell v. Alabama* the Court recognized that the period between arraignment and trial is "perhaps the most critical period" of the proceedings against an accused.[106] Because the majority of felony cases in California are disposed of by guilty pleas that are entered less than 45 days after the filing of charges,[107] the inability of defense counsel to conduct a prompt investigation into guilt or innocence thus amounts to nonrepresentation at this critical investigative stage. Not surprisingly, an analysis of over 2,500 California appellate court decisions involving claims of ineffective assistance of counsel revealed that the failure to conduct an adequate investigation has been a major cause of ineffective representation.[108] By continuing to tolerate excessive attorney and investigator workloads, we continue to run an unnecessary and unacceptable risk that an innocent accused will be wrongfully imprisoned or executed.

It should be noted that the difficulty created by the lack of adequate investigative resources is aggravated by several additional factors. First, virtually all of the Public Defender offices have no contact with an indigent defendant until they are appointed at the arraignment, several days after arrest.[109] This delay jeopardizes the ability to preserve evidence and makes it more difficult to locate witnesses who may be favorable to the defense.

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104 National Study Commission on Defense Services, Guidelines for Legal Defense Systems, Standard 4.1 (1976).

105 Kansas v. Ventris, 129 S. Ct. 1841 (2009) at 1844-55.

106 Powell v. Alabama, 287 U.S. 45, 57 (1932).

107 *See* California Judicial Council, 2010 Court Statistics Report (covering fiscal year 2008–09) Tables 8a and 10a disclosing that the disposition of 71% of all felony filings in California occurs in less than 90 days, while over half (56%) are disposed of in less than 45 days.

108 *Systemic Factors*, *supra* note 61, at 277-78, Figure 3.

109 *Id*. at 290.

Second, as a result of the loss of California's traditional preliminary hearing, occasioned by the passage of Proposition 115, defense counsel no longer have the right to confront prosecution witnesses at a preliminary hearing.[110] The statements of witnesses, untested by cross-examination, can simply be presented by a police officer, who may not even have been the interviewing officer.[111] As a result, the preliminary hearing has become an empty ritual that deprives defense counsel of the ability to make an informed assessment of the prosecutor's witnesses' credibility and, given the limited investigative resources otherwise available to the defense, effectively precludes an intelligent evaluation of the merits of the case against an accused.[112] To make matters worse, almost half of the Public Defender offices surveyed by the Fair Commission study reported that felony cases are routinely disposed of at a disposition conference held approximately a week after the arraignment, prior to the time set for preliminary examination.[113] Where the prosecutor presents a "take it or leave it" offer at this early stage, pressure is thus placed upon the defendant to accept the plea bargain before there has been time to conduct any meaningful investigation.

Perhaps only a defense attorney who has advised a defendant to plead guilty to reap the benefits of a "good deal" — and later discovers that the client was innocent — can truly appreciate the wisdom of the law's command that a defendant should be presumed innocent until proven guilty. When defense counsel, without adequate investigation, recommends that a client pleaded guilty, the weight of that advice can tip the scales and cause an innocent defendant to rationally forego a trial, the outcome of which he believes is a foregone conclusion. Numerous cases have documented that innocent defendants have pleaded guilty to avoid a more severe prison sentence even though the evidence against them was later discovered to be perjured testimony and planted evidence.[114] Recognizing the vital role defense

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110 *Id*. at 335-339.

111 *Id*.

112 While the prosecutor retains the right to call key witnesses, both indigent defense providers and certified criminal defense specialists reported that key witnesses, such as victims and eyewitnesses, were rarely or only occasionally called at a preliminary hearing. *Id*. at 337.

113 *Id*. at 294.

114 *See* Ted Rohrlich, *Scandal Shows Why Innocent Plead Guilty*, Los Angeles Times, Dec. 31, 1999, reporting on the Rampart Division police scandal in Los Angeles

investigation serves in our adversarial criminal justice system, the ABA Standards on Criminal Justice state that counsel has a duty to investigate "the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case . . . regardless of the accused's admissions or statements to defense counsel."[115] An example demonstrating the necessity for fulfilling this duty is found in the reported case of an innocent juvenile who was charged with armed robbery of a cab driver and tried as a adult:

> Footprints in the snow led from the crime scene to the defendant's family home, where he was arrested and identified by the victim as the robber. Although the youthful defendant expressed his willingness to plead guilty, investigation disclosed that his older brother, who would have faced life imprisonment as a habitual offender, was the actual assailant. The family, believing the younger brother would only be sentenced as a juvenile, had kept silent about the misidentification in order to protect the older brother.[116]

Prosecutorial Misconduct

> "When a prosecutor plays by Machiavelli's rules and neither judge nor counsel for defense resists, our system and all hope for justice is destroyed."[117]

In a thoughtful and revealing book, Arthur Campbell, tells of convicting an innocent man as a young prosecutor. Defense counsel had failed to conduct an adequate investigation, the police had been inept, and Campbell candidly confessed that he perhaps had been overzealous in his prosecution of the hapless defendant because of "my warrior's will to win." The story corroborates Foltz's view that prosecutors, in the heat of an adversarial contest, can become caught up in, as Campbell puts it, "the fighter's lust

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where corrupt officers committed perjury and planted evidence causing numerous guilty pleas to be overturned. *See also* When the Innocent Plead Guilty, The Innocence Project, *available at* http://www.innocenceproject.org/Content/When_the_Innocent_Plead_Guilty.php.

[115] ABA Standards for Criminal Justice: Prosecution Function and Defense Function 126, Standard 4-1.3(3) (3d ed. 1992).

[116] *Systemic Factors*, *supra* note 61, at 289 n.49.

[117] Arthur W. Campbell, Trial & Error: The Education of a Freedom Lawyer, Volume Two: For the Prosecution, 123 (2010).

for victory" and lose sight of the "spirit of justice" which should properly guide their conduct.[118]

While intended to be a counterweight to correct this condition, underresourced and overburdened Public Defenders have not proven to be very successful in preventing the type of prosecutorial abuses Foltz sought to eliminate. Among the litany of unfair prosecutorial practices described by Foltz, many would not be unfamiliar to readers of California appellate court opinions today. A recent study of California appellate cases from 1997 to 2009 documented over 700 instances in which the court found that a prosecutor had committed misconduct.[119] In addition to the misconduct found in *People v. Wells*[120] (interjecting inadmissible evidence for the purpose of prejudicing the defendant), the types of misconduct found by the Misconduct Report ranged from intimidating witnesses to presenting false evidence.[121]

Also documented were constitutional violations that would not yet have been established as such in Foltz's time, including discriminatory jury selection, violating the defendant's Fifth Amendment right to remain silent and, perhaps most important of all, the failure to disclose exculpatory evidence.[122] The Fair Commission likewise found substantial evidence that prosecutors were not complying with their statutory and constitutional obligations to provide essential information to the defense through discovery procedures. An overwhelming majority (over 90%) of both defenders and experienced private criminal defense attorneys reported that prosecutors failed to turn over evidence favorable to the defendant (*Brady*

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118 *Id.* at 122. Campbell, after discovering evidence post-trial that exonerated the defendant, corrected the error. *Id.* at 105.

119 K. Ridolfi and M. Possley, Preventable Error: A Report on Prosecutorial Misconduct in California 1997–2009 [Misconduct Report], Northern California Innocence Project, Santa Clara University School of Law at 3.

120 Discussed *Id.* at 3.

121 *See also* Genzler v. Longanbach, 410 F.3d 630 (2005) detailing allegations in a civil rights case against a San Diego prosecutor for suborning perjury in a murder case. The lawsuit later settled out of court. Confirmed by conversation with Patrick L. Hosey, attorney for Genzler.

122 Misconduct Report, *supra* note 119, at 25. Prosecutors have a constitutional duty to disclose evidence favorable to the accused, including evidence that could be used to impeach a prosecution witness. Brady v. Maryland, 373 U.S. 83 (1963), United States v. Bagley, 473 U.S. 667 (1985).

evidence) and delayed providing even routine information the defense is statutorily entitled to receive in discovery.[123]

The Misconduct Report concluded:

> [P]rosecutors continue to engage in misconduct, sometimes multiple times, almost always without consequence. And the courts' reluctance to report prosecutorial misconduct and the State Bar's failure to discipline it empowers prosecutors to continue to commit misconduct. While the majority of California prosecutors do their jobs with integrity, the findings of the Misconduct Study demonstrate that the scope and persistence of the problem is alarming. Reform is critical.[124]

Professional Independence

> *Gideon v. Wainwright* established the right of state criminal defendants to the "'guiding hand of counsel at every step in the proceedings against [them].'" . . . Implicit in the concept of a "guiding hand" is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate.[125]

Clara Foltz thought the Public Defender should be elected to ensure the professional independence necessary to carry out the defense function in an adversary system and guarantee equal stature with the District Attorney. However, with the exception of San Francisco, today all Public Defenders are chosen by county government, sometimes with judicial approval required, and serve at the will of either the county board of supervisors or the county's chief executive officer.[126]

Reginald Heber Smith had been wary of local government control over the provision of civil legal aid and indigent defense services. In *Justice and the Poor,* he wrote: "It is commonplace that many American municipalities possess improper and inefficient governments in which politics play

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123 *Systemic Factors*, *supra* note 61, at 279-80.

124 Misconduct Report, *supra* note 117, at 5.

125 Polk County v. Dodson, 454 U.S. 312, 322 (1981).

126 *Systemic Factors*, *supra* note 61, at 299-300, Cal. Govt. Code § 27702 (West 2009).

an undue part. It is always a question whether it is safe to entrust an essential service such as legal aid to such a government."[127] Smith was here referring to the unfortunate experience he had witnessed with respect to publicly funded legal aid bureaus that were controlled by municipal governments. Initially there had been adequate funding and little political interference.[128] However, in 1917 several incidents made the dangers of politically controlled legal services manifest. After an election in Dallas, Texas, the new mayor dismissed the department head responsible for overseeing the Legal Aid Bureau and attempted to appoint his personal friend to the bureau. When this prompted a "storm of protest" the mayor abolished the Legal Aid Bureau.[129] Similarly, in Portland, Oregon, that same year, the attorney who headed the combined legal aid and defender office (established in 1915) had not supported the newly elected mayor. Because the attorney held a permanent civil service appointment and could not be fired, the new mayor simply had the city council abolish the legal aid and defender office.[130] Smith therefore concluded in 1919 that although the "ultimate goal" was for legal services for the poor to "become part of the state's administration of justice," whether they should be publicly or privately funded in the short term was a matter that depended upon local conditions.[131]

Smith's insight that funding and control at the local level makes the delivery of legal services for the poor vulnerable to political interference unfortunately still resonates today almost a century later.[132] California has

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127 Smith, *supra* note 24, at 184.

128 *Id*. at 185.

129 *Id*. at 185-86.

130 *Id*. at 186.

131 *Id*.

132 Although direct interference in the operation of a Public Defender office by county officials would seem unthinkable today, it does occur. Recently, Chief Public Defender Edwin Burnette of Cook County, Illinois, successfully sued the president of the Cook County Board of Commissioners to prevent such interference with management of the Public Defender Office in Chicago. The county board president had unilaterally selected thirty-four assistant public defenders for termination (called layoffs) and had ordered other staff to take unpaid furlough days. In a unanimous decision, the Illinois Appellate Court ruled that the county board president "lacked the authority to select whom to hire, fire or retain among the public defender's staff." Burnette v. Stroger, No. 1-08-2908, slip op. at 32 (Ill. App. Ct. Mar. 30, 2009). Unfortunately the

had a sad history of harassment and termination of chief Public Defenders who have had the courage to fight against excessive caseloads. Chief Public Defender Sheldon Portman of the Santa Clara County Public Defender Office, for example, was first reprimanded, then denied a pay raise and finally fired after persistently challenging excessive caseloads. His offense was stating at a public budget hearing that his staff attorneys would be violating their ethical duty to provide competent representation and could face professional disciplinary action if the board did not provide funding for additional lawyers. Although Portman was later vindicated by an ABA Ethics Opinion regarding the duties of defense counsel when faced with an excessive caseload,[133] he lost the legal battle over his vindictive firing.[134]

Unfortunately the Portman example is not an isolated incident. A chief Public Defender, who was a member of the Fair Commission, related that at the time they were offered the position, it was made very clear to them that they would be expected to do the job with the limited resources given to them and if they could not, then the board would find somebody else who would.[135] In research conducted for the Fair Commission, three fourths (73.1%) of the responding institutional Public Defenders reported that county board pressure to keep costs down was a significant problem

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courageous Chief Defender paid the ultimate price for this victory. While he was not an "at will" employee, having secured the protection of a contract for a term of years, he was nevertheless at the end of his contract, which was not renewed. *See* Hal Dardick, *Public Defender Wins Last Case Over Stroger; County Board Chief has Limited Control of Appointee's Office*, Chicago Tribune, Apr. 1, 2009, at C6. Clara Foltz, who believed in the democratic process, would perhaps not have been surprised to learn that county board President Stroger subsequently lost his bid for reelection. Patrick Boylan, *Stroger era ends in Cook County*, nwi.com, Dec 1, 2010, *available at* http://www.nwitimes.com/news/local/illinois/article_def 7c4be-8d14-502b-87e3-ee4366014780.html.

133 ABA Formal Opinion 06-441: Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation, May 13, 2006.

134 *See* Portman v. County of Santa Clara, 995 F.2d 898, 901 (9th Cir. 1993) holding that Portman had no standing to challenge the constitutionality of the "at will" statute on Sixth Amendment grounds, and had no due process rights concerning his termination because as an "at will" employee he had no property interest in his job. *See also* Wilson v. Superior Court, 240 Cal. Rptr. 131 (Cal. Ct. App. 1987) and Gail Diane Cox, *Public Defenders Find Independence Can Be Precarious*, L.A. Daily J., Feb. 21, 1986 (both describing other similar incidents).

135 *Systemic Factors*, *supra* note 61, at 300 n.82.

in their jurisdiction.[136] The American Bar Association has recommended that to safeguard professional independence, the oversight of a Public Defender system should be in the hands of a nonpartisan board of trustees.[137] However, none of the institutional Public Defenders in California appear to have the protection of such a board.[138]

WHAT WOULD CLARA FOLTZ THINK OF TODAY'S PUBLIC DEFENDER?

If Clara Foltz could return today to see how her concept for a Public Defender has evolved, she would no doubt be gratified to see how popular and widespread it has become. The majority of California's counties have adopted her basic idea, and for good reason. The institutional Public Defender office is, in theory, the most effective delivery system for providing quality representation in a cost-effective manner. Its capacity to develop and maintain skilled expertise, provide comprehensive training and supervision, and furnish the support services and supportive environment necessary for effective representation is without equal.

At the same time, however, she would undoubtedly be disappointed to find that California's Public Defenders have been denied the independence she sought to ensure. Imagine a district attorney or a judiciary that served at the will of the county board of supervisors. Why should an equally important component of the criminal justice system be treated differently? The lack of independence has been due in part to the failure to make the position of chief Public Defender an elected office as Foltz envisioned, or in the alternative, to insulate it from political pressure by having a governing board of trustees, as the ABA has recommended. The lack of independence has also been a result of the refusal to make the Public Defender available to all

136 *Id*. at 299-300.

137 ABA Standing Comm'n On Legal Aid And Indigent Defendants, Ten Principles Of a Public Defense Delivery System (2002) *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf. These standards, approved by the ABA House of Delegates in February 2002, were created to assist governmental officials and "constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney." *Id*.

138 *Systemic Factors*, *supra* note 61, at 299.

criminal defendants, as Foltz planned. These omissions have made it difficult for the Public Defender to marshal political support for the institution.

The failure to have a broad base of political support for the Public Defender has of course, as Foltz foresaw, made it more difficult to secure adequate resources. Yet the Public Defender today represents more than 85% of the defendants accused of serious crimes. While the average citizen probably never thinks about whether he or she could afford competent criminal defense representation, a staff attorney from the Public Defender's office is in fact the attorney upon whom innocent middle class citizens must rely for their defense if wrongfully accused of a crime.

Funding decisions for the indigent defense system, moreover, have been left in the hands of local officials who, chafing under an unfunded mandated imposed by the federal Constitution, understandably desire to spend only the bare minimum necessary to keep the system functioning. Most defendants plead guilty because of the pressures created by a system of plea bargaining in which no penalty is imposed upon a prosecutor who overcharges to increase the incentive to plead. Thus, only enough funding to process the "presumed guilty" is deemed necessary.

While Foltz would have been appalled at our current system of plea bargaining, she would have been equally disturbed at the tremendous imbalance between the resources allocated to the prosecution and the system for providing defense services. The fact that on average a Public Defender office receives only about half the resources granted to the District Attorney makes it exceedingly difficult, even given heroic efforts, for the Public Defender to serve as the counterweight that she envisioned would balance the scales of justice. Equally troubling is the glaring disparity *between* counties in their ability and in some cases their willingness to adequately fund indigent defense services.

Nevertheless, the Public Defender has been able to achieve one goal of both Clara Foltz and Reginald Heber Smith: the elimination of the incompetent assigned attorney and the unethical and greedy "shyster" lawyer who preyed upon criminal defendants with limited resources and corrupted the unregulated assigned counsel system. Institutional Public Defender offices have been successful in building a cadre of competent, professional, well-trained career defense attorneys in many jurisdictions across the state. But even here it would appear that the Public Defender has become

a victim of its own success. Making the Public Defender a career office at relative parity with the district attorney in terms of salary, health care and retirement benefits, has caused it to become increasingly expensive.

Efforts by county administrators to curb expenditures on indigent defense have thus taken two approaches. The first option has been to make budget cuts which reduce staff levels and increase the caseloads handled by the Public Defender office. Because Chief Defenders are "at will" employees they risk their jobs (and their healthcare and retirement benefits) if they resist. When courageous chief Public Defenders stand up to this pressure they can either be replaced or the county can move to the second option.

The second approach has been to contract indigent defense representation out to the lowest bidder. While properly regulated contract defenders can provide competent and cost effective services, this system is also open to abuses. The primary contractor winning the bid, can in turn subcontract indigent cases out in lots to individual private attorneys. In this way the entrepreneurial primary contractor can eliminate the overhead expenses necessarily incurred in having a career office. No healthcare or retirement benefits need be provided to subcontracting attorneys who may be just starting out and need the work to help pay their office overhead while they develop their practices. Because such contracts are unregulated, there are no minimum requirements regarding the training or experience levels of such subcontractors. Even where the primary contractor is qualified, at least in terms of experience, that is no guarantee a qualified attorney will actually perform the representation if there is no requirement that the county monitor who is providing the services.

Likewise, in the absence of any regulation, there is no requirement that the attorney providing the representation be currently trained, or supervised or provided with adequate investigative services. Where flat fee contracts are employed, there are built-in incentives to pocket the money that should be used to conduct an adequate investigation and obtain competent experts to assess forensic evidence that has increasingly been shown to be unreliable.[139] Our criminal justice system should not be reduced to

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[139] *See* Committee on Identifying the Needs of the Forensic Science Community, National Research Council of the National Academies of Science, Strengthening Forensic Science in the United States: A Path Forward (2009). *See also* Harry T. Edwards, *The National Academy of Sciences Report on Forensic*

the status of a bargain basement where unregulated contracting of constitutionally mandated legal services makes possible the return of the inept and the shyster lawyer whom Clara Foltz sought to eliminate by creating a public office that would attract career professionals.

As a result of making funding decisions based upon the presumption of guilt, many Public Defender offices operate under crushing caseloads while an increasing number of counties are cutting costs by providing indigent defense services through unregulated low bid contracts. The dangers existing under both approaches are clear. So are the consequences. During a 15-year period examined by a recent study, courts released more than 200 inmates from California prisons because they had been wrongfully convicted.[140] While this is an astonishing figure, it does not mean that the concept of the Public Defender has been a failure. Nor does it mean that contract defenders cannot provide competent representation. It does, however, mean that reforms are necessary to fulfill the potential of either system to provide the effective assistance of counsel guaranteed by the Constitution.

SOLUTIONS

> "I have been a public defender for over thirty years in three different counties. There is a great disparity in the quality of defender services throughout the state."[141]

What can be done? The fact that the members of the Fair Commission in 2008 were unable to agree on any recommendation to solve California's admitted funding crisis in indigent defense services speaks volumes about

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Sciences: What it Means for the Bench and Bar, paper presented at the Conference on The Role of the Court in an Age of Developing Science & Technology, Superior Court of the District of Columbia, May 6, 2010, *available at* http://www.cadc.uscourts.gov/internet/home.nsf/AttachmentsByTitle/NAS+Report+on+Forensic+Science/$FILE/Edwards,+The+NAS+Report+on+Forensic+Science.pdf.

140 Nina Martin, *Innocence Lost*, San Francisco Magazine, November 2004, *available at* http://www.deathpenalty.org/downloads/SFMag.pdf.

141 Comment made by a chief Public Defender from an urban Public Defender office. *Systemic Factors*, *supra* note 61, at 351.

how politically difficult the problem is to solve.[142] It was estimated in 2007 that to bring indigent defense services up to 85% of parity with the prosecution, funding would have to be increased by approximately $300 million.[143] The gap between prosecution and defense was widening then and has likely increased substantially since that estimate.[144]

A significant portion of the funds needed to improve California's indigent defense system could be found by simply rethinking how we spend our criminal justice dollars and redirecting the cost savings from some of California's current poor choices. There are a number of areas where cost savings could be achieved. These include: (1) abolishing the death penalty, (2) abolishing mandatory minimum sentences, and (3) decriminalizing some non-violent misdemeanor offenses by making them infractions. In addition, fines currently given exclusively to law enforcement should be shared so that an appropriate portion is given to the defense component of the criminal justice system. Finally, the bail system could be reformed so that defendants would pay 10% of the amount of bail to the state rather than a private bail bondsman.[145]

While some of these solutions can only be addressed by state legislation, local prosecutors can also exercise their discretion to reduce the number of cases in which the death penalty is sought, and to make appropriate charging decisions. It is clear, for example, that more than a third of the funding needed to improve indigent defense systems in California could be found by simply eliminating the death penalty. The Fair Commission estimated that it costs $137.7 million annually to maintain the present death penalty system in California. By contrast, only $11.5 million would be required to handle these same cases if a sentence of life without parole were imposed. Thus, $126.2 million in current expenditures could be employed to improve indigent defense in California.[146]

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142 The Fair Commission essentially punted on this issue by recommending that the California State Bar reconsider the issue by convening yet another commission. CCFAJ Final Report, *supra* note 62, at 99.

143 *Systemic Factors*, *supra* note 61, at 313.

144 The gap widened from fiscal year 2003–2004 to fiscal year 2007–2007 by 20 per cent. *Id*. at 317.

145 Illinois, for example, operates such a system. *See* 38 Ill. Comp. Stat. 110-7 (2009).

146 CCFAJ Final Report, *supra* note 62, at 156.

The Fair Commission also considered a proposal to establish at the state level an Indigent Defense Commission similar to those that exist in Texas, Virginia, Massachusetts and Indiana.[147] Such commissions are empowered to set minimum performance and caseload standards and provide reimbursement to counties for meeting those standards. This proposal has been objected to, however, by those who believe that California counties currently funding above such "minimum" standards would cut their funding in a "race to the bottom."[148] In any event, given the state's current economic condition (the current 2010 budget deficit is approximately $20 billion and is projected to rise to $25 billion by 2012[149]) it seems unrealistic to expect that funding for indigent defense services can be shifted to the state. A recent study by the federal Bureau of Justice Statistics of state funded and organized public defender systems, revealed that state funding was no guarantee that adequate resources would be provided. In 15 of the 22 statewide systems, felony and misdemeanor caseloads still exceeded national standards.[150]

For over thirty years there has also been a call for federal assistance and the creation of a national Center for Defense Services. In 1977 the ABA Standing Committee on Legal Aid and Indigent Defendants, together with the National Legal Aid & Defender Association (NLADA) and the National Clients Council, prepared a "Discussion Proposal" for such a Center.[151] The basic concept underlying this proposal was an

147 *Id*. at 99.

148 *Id*.

149 Anthony York, *Brown calls Sacramento budget meeting for Wednesday*, Los Angeles Times, December 2, 2010.

150 L. Langton, D. J. Farole, Jr., Bureau of Justice Statistics, Special Report: Census of Public Defender Offices, 2007: State Public Defender Programs, 2007, September, 2010, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/spdp07.pdf.

151 The Center for Defense Services: A Draft Discussion Proposal for the Establishment of a Nonprofit Corporation to Strengthen Indigent Defense Services, ABA Standing Committee on Legal Aid and Indigent Defendants, October, 1977. Copy #37 of the Discussion Draft is on file with the author, who as National Director of Defender Services of NLADA participated in drafting the proposal. In 1979, Senator Edward Kennedy became involved in sponsoring a bill to create a center for defense services. *Defense Services Bill Still in the Works*, 65 ABA Journal 1629, November 1979.

independent federally-funded granting entity constructed upon the following four principles:

(1) federal funding for the improvement of defense services must be structured so as to provide continuity and stability over a significant number of years,

(2) financial support should be instituted through a grant in aid program;

(3) the funding program should contain incentives for local communities to maintain and augment their current efforts; and

(4) the entity administering the program must be independent of any of the three branches of the federal government.[152]

Based upon these principles it would be possible for federal assistance grants to fund a Center for Indigent Defense Improvement in each state requesting such assistance. Recognizing that a one-size-fits-all approach to standards is neither accurate nor politically feasible in California, the Center's first task would be to conduct an audit of the indigent defense delivery systems of each county. The audit would determine the need for additional attorneys, investigators, and other support personnel by conducting a Workload Assessment. Using methodology similar to that designed by the National Center for State Courts to determine when additional judges are needed, time studies can be employed to create objective data upon which to make evidence-based decisions. Such time studies can translate raw caseload filings into actual workload by measuring real events that accurately reflect the unique practice environment in a particular jurisdiction, including logistical considerations and other operational characteristics that impact defense representation, such as prosecutorial charging policies and judicial sentencing practices. By learning how much time it actually takes to handle different types of cases given, on average, their various levels of complexity, it can be mathematically determined how many attorneys will be needed to handle a given mix of cases.

152 *Id*. at 53-54.

After determining appropriate staffing levels, the center would then certify that a county is in compliance when those staffing levels are met.[153] Certification would also be conditioned upon the professional independence of the Public Defender being assured either by making the office a nonpartisan elected position for a term of years, or by creating a nonpartisan board of trustees, independent from any of the branches of local government, to oversee the office. While provision would be made to retain the existing chief Public Defender, the board would thereafter be empowered to select the chief Public Defender and only the board would have the power to terminate the chief Public Defender for good cause. The Board would also be authorized to award contracts for indigent defense services that would be governed by the same standards created for institutional Public Defender offices.

Upon satisfaction of these requirements, the county would then be reimbursed for the amount needed to bring the county's indigent defense system into compliance with its own locally established standards. This amount would become an annual subsidy payment to the county. The center would also assist in providing training for new attorneys, investigators, and support personnel, and in rural areas would create regional backup service centers that would provide qualified investigators and sentencing mitigation specialists in death penalty and other appropriate cases.

A condition of continued reimbursement would be a requirement that the Center receive from each county basic statistical data sufficient to permit it to monitor the health of the indigent defense delivery system. In the event excessive caseloads reappeared and were not corrected within a reasonable period, the Center would have the power to revoke the county's certification and stop the annual subsidy payment. The negative publicity from de-certification, the legal impact this would have on ineffective assistance of counsel claims arising from that county (as well as providing a basis for a lawsuit to order compliance), and of course the financial impact of withdrawal of federal reimbursement, would provide strong incentives for voluntary compliance with the maximum workload levels established by the Center. Because this proposed hybrid system would provide each county its own unique workload standard, there would be no race to the bottom.

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153 The author is indebted to Marshall J. Hartman, former National Director of Defender Services for NLADA who originally proposed the idea that defender offices should be accredited the same as police departments and departments of correction.

The argument for federal assistance is compelling especially because it is the federal Constitution that requires the provision of effective assistance of counsel. However, waiting for a federal bailout may also not be feasible in the short term as action is needed now to correct currently existing conditions. In *Ligda v. Superior Court*,[154] the California Court of Appeal stated: "When a public defender reels under a staggering workload, he . . . should proceed to place the situation before the judge, who upon a satisfactory showing can relieve him."[155] Litigation may thus be the most immediate way to obtain a remedy. As New York's high court recently held in *Hurrell-Harring v. New York*, a civil action to obtain injunctive relief will lie where "systemic" deficiencies result in the denial of "core" assistance by counsel, despite the nominal appointment of counsel.[156] The complaint in *Hurrell-Harring* alleged that due to inadequate funding and staffing the indigent defense system was "structurally incapable" of providing legal representation at critical stages prior to trial as required by the Constitution.[157]

There are also a number of other systemic conditions that could be reformed such as bringing back the traditional preliminary hearing and improving the discovery rules to ensure prompt and meaningful discovery by the defense. But until we reduce the glaring disparity in resources both between counties and between the prosecution and defense functions, we destroy the promise of the Public Defender that Clara Foltz envisioned to ensure administration of criminal justice honestly and equally for all.

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154 Ligda v. Superior Court, 5 Cal.App.3d 811 (1970). The Court stated: "Such relief, of necessity, involves the constitutional injunction to afford a speedy trial to a defendant. Boards of supervisors face the choice of either funding the costs of assignment of private counsel and often, increasing the costs of feeding, housing and controlling a prisoner during postponement of trials; or of making provision of funds, facilities and personnel for a public defender's office adequate for the demands placed upon it." *Id*. at 828. The court was apparently not aware that county administrators would come up with a third option: low bid contracts.

155 *Id*. at 827-28.

156 15 N. Y. 3d, 8, at 22-24, 930 N.E. 2d 217 at 224-226 (2010).

157 Hurrell-Harring v. New York, Brief for Plaintiff Appellants, 8, 2009 WL 6409871 (N.Y.). A multitude of systemic deficiencies were asserted including the fact that in some circumstances misdemeanor defendants were not provided counsel at arraignment. The complaint alleged as an independent claim that attorneys did not have any meaningful contact with their clients nor were investigative services essential to preparing a defense provided.

EPILOGUE

On October 20, 2010, the County of Fresno took the first step toward deinstitutionalizing its primary Public Defender office by issuing the following Request for Proposal:

> The County of Fresno is soliciting proposals to provide appropriate and competent primary indigent defense services and associated criminal investigation services to financially eligible persons accused of crime in Fresno County, persons subject to the laws of the juvenile court, and to all those entitled to services of court-appointed counsel in other proceedings (services which have been historically provided by the Public Defender's Office in the Fresno County Superior Court).[158]

In fiscal year 2006–2007, the institutional Public Defender had 76 staff attorneys and 19 investigators and was handling both felony and misdemeanor caseloads twice the maximum allowed by national standards. For fiscal year 2010–2011, the office was cut to only 48 staff attorneys and 9 investigators. As a result of such severe budget cuts, the chief Public Defender felt he was ethically obligated to declare the office unavailable to accept new cases and began refusing some new cases, which had to be assigned to private counsel.[159] The County's response was to put all the primary indigent defense services up for sale to the lowest bidder.

Research conducted for the Fair Commission found that the gap in funding between indigent defense and prosecution was significantly larger in counties employing contract defenders and those having an institutional Public Defender office.[160] There was also a statistically significant relationship between the type of provider and the rate at which felony cases were taken to trial: institutional Public Defenders were twice as likely to take a case to jury trial as a contract defender.[161] If Clara Foltz were here today she would no doubt sound the alarm as she watched the dismantling of her legacy. ★

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158 County of Fresno, Request for Proposal Number 962-4878: Primary Indigent Defense, October 20, 2010.

159 Brad Brannon, *Fresno Co. public defender cuts may backfire*, Fresno Bee, September 25, 2010.

160 *Systemic Factors*, *supra* note 61, at 315.

161 *Id*. at 316.

THE CASE OF THE BLACK-GLOVED RAPIST:

Defining the Public Defender's Role in the California Courts, 1913–1948

SARA MAYEUX*

For seven months, an assailant that the San Francisco newspapers had nicknamed the "Black-Gloved Rapist" terrorized the city, breaking into his victims' homes at midnight wearing black gloves and carrying a pencil flashlight. Finally, the police nabbed their man. Frank Avilez was arrested on Saturday morning, July 12, 1947, "and for many hours questioned by police inspectors and assistant district attorneys" until he confessed to everything: fourteen rapes and attempted rapes.[1] Avilez was 24 years old — with a 17-year-old wife — but had, according to his psychiatric records, the "mental age" of a 10-year-old, an IQ in the 70s, and a possible

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* [Editor's note: Sara Mayeux is a JD Candidate at Stanford Law School and a PhD Candidate in American history at Stanford University. This article was the winning entry in the California Supreme Court Historical Society's 2010 Student Writing Competition.]

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[1] People v. Avilez, 86 Cal.App.2d 289, 292 (Cal.App. 1st Dist. 1948); *Rapist Confesses*, S. F. Chronicle, July 13, 1947, at 1.

diagnosis of "sexual psychopathy."[2] "My married life was all right," he told the *San Francisco Chronicle*, when asked about his motive. "I just didn't like staying home nights."[3]

After his bail hearing on Monday morning, July 14, Avilez's family sought the help of Melvin Belli, a young trial lawyer who would soon win national fame and fortune as the flamboyant "King of Torts."[4] Belli agreed to take the case, and contacted the district attorney's office to announce that he had been retained to represent Avilez. He also mentioned that the defendant's family was planning to attend the next day's arraignment, and asked that the case be held over until the family arrived.

The next morning in court, there was some confusion in the courtroom as to who was representing Avilez. The D.A. told the judge about his conversation with Belli, but no one told the defendant or the public defender about it. According to a police inspector, Avilez was unhappy because Belli had visited him in jail the night before and proposed an insanity plea; he said that "he was sane and guilty and wanted to get this over as soon as possible."[5] Meanwhile, not knowing the family had retained Belli, Avilez's wife had visited the public defender's office at some point to discuss the case.[6]

In light of all this, and since he was never told that Belli and Avilez's family were on the way, Gerald Kenny, the public defender, assumed Avilez to be his client. Kenny looked over the complaint, then went over to the cage and spent "a matter of seconds" conversing with Avilez through

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[2] Appellant's Opening Brief at 12-13, People v. Avilez, 1 Crim. 2506 (Cal.App. 1st Dist. 1948). Avilez's older brother had been committed to the Sonoma State Home for the Feeble-Minded since 1936. *Id.* All court documents related to *Avilez* cited in this essay are available at the California State Archives by requesting the file for California case number 1 Crim. 2506.

[3] *Confessed Rapist in Jail*, S. F. Chronicle, July 14, 1947, at 3.

[4] Belli was dubbed the "King of Torts" by *Time* magazine in 1954. In addition to being credited with pioneering modern products liability law, he grabbed headlines with his glamorous clientele, which included Mae West, Errol Flynn, the Rolling Stones, Jack Ruby, and Zsa Zsa Gabor. *See* Jim Herron Zamora, "'King of Torts' Belli dead at 88," S.F. Examiner, July 10, 1996. A somewhat fawning biography of Belli is Mark Shaw, Melvin Belli: King of the Courtroom (1976).

[5] *Avilez*, 86 Cal.App.2d at 292.

[6] Appellant's Opening Brief, *supra* note 2, at 19.

the bars.[7] "There are 32 charges against you," he began. Avilez responded, "I know; I have admitted them all; I want to plead guilty."[8] As Kenny saw it, once Avilez said those words, "there was nothing else I could do. I am not supposed to obstruct justice."[9] According to Avilez, Kenny told him "not to worry about nothing," just "to say whatever he told me" and "he would fix everything up."[10]

Shortly thereafter Avilez's case was called and the municipal court judge asked him to confirm that he wanted to be represented by the public defender. "Yes," Avilez responded. The public defender added, "He stated he has no funds. His wife visited the office and she has no funds to employ private counsel."[11] Satisfied with this brief colloquy, the judge appointed the public defender and accepted Avilez's guilty pleas to seven counts of rape, four counts of attempted rape, one assault, and ten counts each of burglary and robbery.[12] By the time Belli arrived in court, the hearing was over and Avilez had been bound over to the superior court for sentencing. As Kenny was leaving the courtroom, he ran into Belli in the courthouse hallway. That was the first he heard that Avilez's family had retained Belli's firm.[13]

Belli moved to withdraw Avilez's plea, but the superior court judge denied the motion and sentenced Avilez to 440 years in prison.[14] On appeal, the First District overturned the convictions on the grounds that Avilez had been denied "a fair opportunity to secure the aid of counsel" and that "the aid of counsel furnished was not effective and substantial."[15] The appellate court's central complaint about the proceedings below was that the judge and prosecutor had allowed Avilez to proceed with his guilty plea though knowing that his family, with private defense counsel, was on the

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7 *Id.* at 16 (quoting testimony of Frank Avilez).

8 *Avilez*, 86 Cal.App.2d at 292-93.

9 Appellant's Opening Brief, *supra* note 2, at 18 (quoting testimony of Gerald Kenny).

10 *Id.* at 16 (quoting testimony of Frank Avilez).

11 *Avilez*, 86 Cal.App.2d at 293.

12 *Gets 440 Years for Rape*, N. Y. Times, Aug. 7, 1947, at 18.

13 Appellant's Opening Brief, *supra* note 2, at 19.

14 *Gets 440 Years for Rape*, N. Y. Times, Aug. 7, 1947, at 18. According to press reports, when he heard the sentence Avilez "made a wild attempt to escape," kicking and flailing until six police officers "finally got [him] down and were able to hold him." *Id.*

15 *Avilez*, 86 Cal.App.2d at 295.

way. However, the appellate court also rejected the public defender's contention "that when [Avilez] declared to him that he wanted to plead guilty there was nothing else for him to do without obstructing justice."[16]

By the time of Avilez's hearing, public defenders would have been familiar figures in San Francisco courtrooms. San Francisco established its public defender's office in 1921; it was one of several California jurisdictions to establish such an office in the Progressive Era, beginning with Los Angeles in 1913, in an effort to replace corrupt "shyster lawyers" with well-funded public servants, while also ensuring that indigent defendants would receive adequate representation.[17] From the start, lawyers, judges, and reformers debated the proper role of this novel courtroom figure. The earliest public defender proposals, originated by California's pioneering woman lawyer Clara Shortridge Foltz, contemplated a skillful trial attorney who would provide the indigent accused with the same zealous representation that wealthy defendants could buy.[18] But many Progressive reformers envisioned the public defender as a partner to the public prosecutor, rather than an adversary. The Progressive public defender would collaborate with the district attorney to develop the facts of each case and propose a fair resolution, taking into account not just the defendant's interests but also the needs and safety of the community.[19]

As the *Avilez* case demonstrates, as late as 1948 this debate over the public defender's function and ethical duties was still ongoing. The case can thus be read as an encapsulation of these competing views of the public defender's proper role: Is he a state official akin to the public prosecutor, whose overriding duty is to the public? If so, when a defendant admits his guilt, then the public defender should not waste valuable court time contesting the charges. For San Francisco public defender Gerald Kenny,

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16 *Avilez*, 86 Cal.App.2d at 296.

17 The Los Angeles County Public Defender's website describes its history since 1913. Los Angeles County Public Defender, History of the office, http://pd.co.la.ca.us/History.html (last visited Aug. 31, 2009). *See generally* Barbara Allen Babcock, *Inventing the Public Defender*, 43 Am. Crim. L. Rev. 1267, 1270-77 (2006) [hereinafter *Inventing*] (describing the origins of the public defender idea and the rationales offered by its supporters).

18 *Inventing*, *supra* note 17, at 1275.

19 *See id.* at 1275-77 (contrasting Foltz's model with the Progressive model).

it would have been an "obstruct[ion of] justice"[20] not to allow the Black-Gloved Rapist to plead guilty right away. This approach apparently satisfied the judge who sentenced Avilez, who assured the defendant that the public defender "would not have proceeded" with the plea if there had been any available alternative, because in his experience lawyers from the public defender's office "[didn't] overlook anything when they appear[ed] in court." He even praised public defenders for avoiding "the tricks and methods used by some criminal attorneys" and instead representing their clients "properly" and "honestly."[21]

But in the competing view, the public defender is no different from a private defense attorney (apart from who signs his paychecks): His overriding duty is to provide each individual client with zealous advocacy. If so, it would be a violation of that duty to allow a defendant to plead guilty at an initial appearance. The appellate judge who decided *Avilez* sided with this latter view, holding that

> [t]he public defender stands in the same relation to the accused he is appointed to represent as an attorney regularly retained. It is his task to investigate carefully all defenses of fact and of law which may be available to the defendant and to confer with him about them before he permits his client to foreclose all possibility of defense and submit to conviction without a hearing by pleading guilty. . . . By giving his client such aid the attorney does not obstruct, but assists justice.[22]

This essay traces these two competing visions of the public defender in California from 1913 to 1948, and examines how and why the second view ultimately prevailed, at least doctrinally. On the ground, some public defenders may have continued to see themselves primarily as public servants, and some trial judges may have endorsed this view. But in the 1940s, California appellate judges rejected the Progressive ideal of the public defender. They constructed the public defender as an opponent of the state, leaving intact (at least in theory) the American adversary system of criminal justice.

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20 *Avilez*, 86 Cal.App.2d at 296.

21 Appellant's Opening Brief, *supra* note 2, at 25 (quoting transcript of judge's remarks).

22 *Avilez*, 86 Cal.App.2d at 296.

In so doing, they followed the direction of the United States Supreme Court, which had recently issued a robust defense of adversary process in the landmark right-to-counsel case of *Powell v. Alabama*.[23]

That California courts defined the public defender in this way, eschewing the Progressive vision of cooperative justice, was a landmark development in the history of California criminal law and procedure. Through decisions like *Avilez*, appellate judges provided definition and guidance for a still-developing institution that has since become a cornerstone of California criminal practice. Today, half of California counties operate full-time public defender's offices, including the ten most populous counties — Los Angeles, San Diego, Orange, Riverside, San Bernardino, Santa Clara, Alameda, Sacramento, Contra Costa, and Fresno — which are home to almost 75% of the state's population.[24] In some California jurisdictions, the public defender's office represents almost everyone charged with a crime.[25]

Yet historians have largely neglected the "little known" story of how and why public defenders came to occupy such a central place in California's criminal courtrooms.[26] The standard histories of Progressivism,

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[23] Powell v. Alabama, 287 U.S. 45 (1932). *See infra* Part II.

[24] Counties that do not run a full-time public defender contract out to private attorneys to provide indigent defense. Of California's 15 most populous counties, only San Mateo County employs a contract public defender. California Public Defenders Association, "California Federal, State, and Local Public Defender Office Directory," April 1, 2010, *available at* http://www.cpda.org (last visited June 29, 2010); State of California, Department of Finance, "Press Release: California Population Continues Slowed Growth, According to New State Demographic Report," Dec. 17, 2009, *available at* http://www.dof.ca.gov/research/demographic/reports/estimates/e-2/2000-09/ (last visited June 29, 2010).

[25] For instance, about 90% of defendants in the City and County of San Francisco qualify for the services of a public defender, as documented in "Presumed Guilty," a documentary on the office by KQED (San Francisco's PBS affiliate). *See* PBS, Presumed Guilty, http://www.pbs.org/kqed/presumedguilty/4.0.0.html (last visited Aug. 31, 2009).

[26] *Inventing*, *supra* note 17, at 1269. Standard histories of the American legal profession do not discuss the development of the public defender, and histories of crime and punishment mention it only briefly, if at all. *See, e.g.*, Lawrence Friedman, Crime & Punishment in American History 394 ("A twentieth-century innovation was the public defender."). A history that does discuss the early public defender movement in more detail is George Fisher, Plea Bargaining's Triumph 195-99 (2003).

even those that focus on California, do not mention the public defender movement.[27] Yet the public defender idea was "widely advocated" throughout the country in the 1910s and 1920s, attracted a great deal of scholarly attention, and was viewed by many jurists as crucial to the broader project of modernizing the legal system.[28] Fortunately, the history of California's public defenders has not gone entirely untold. In the course of her biographical work on Clara Shortridge Foltz, Barbara Babcock has excavated the forgotten origins of the public defender movement in Foltz's writings, speeches, and model legislation; framed the competing visions of the public defender among Progressive-era reformers; and outlined the constitutional and legal arguments that Foltz marshaled to bolster her proposal.[29]

Drawing on California court records, this essay builds on Babcock's work by following the story of the public defender further into the twentieth century, and by focusing more on how the idea was translated into practice and doctrine. How did California lawyers and judges conceive of this new player in the criminal justice system? How did they define the public defender's professional and ethical commitments? In Part I, I contrast Foltz's original vision of the public defender with the Progressive conception, which was embraced by the nation's first public defender, Walton J. Wood of Los Angeles. In part II, I analyze a key case in which the California Supreme Court embraced the adversary model, and suggest some broader constitutional and cultural developments that may explain this result.

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[27] Barbara Allen Babcock, *Inventing the Public Defender* 8 n. 35 (Stanford Public Law Working Paper No. 899993, 2006), *available at* http://www.law.stanford.edu/publications/details/3244/Inventing%20The%20Public%20Defender [hereinafter *Inventing* Working Paper].

[28] Elizabeth Kemper Adams, Women Professional Workers 74 (1921). For a bibliography of some 110 scholarly articles on the public defender between 1914 and 1924, see A. Mabel Barrow, *Public Defender: A Bibliography*, 14 J. Am. Inst. Crim. L. 556 (1924). On Progressive efforts to modernize the criminal justice system, see generally Jonathan Simon, *Visions of Self-Control: Fashioning a Liberal Approach to Crime and Punishment in the Twentieth Century*, *in* Looking Back at Law's Century (Austin Sarat et al., eds., 2002).

[29] *See generally Inventing*, *supra* note 17. Prof. Babcock has shared with the author that she is also planning to include some information on the early public defender movement in her forthcoming biography of Foltz.

PART I: COMPETING VISIONS OF THE PUBLIC DEFENDER

The public defender was the invention of Clara Shortridge Foltz, California's first woman lawyer.[30] Based on her 15 years of trial practice, Foltz observed that although courts usually appointed counsel for "pauper" defendants who requested it, the caliber of those lawyers was low. Typically "they [had] no money to spend in an investigation of the case, and [came] to trial wholly unequipped either in ability, skill or preparation to cope with the man hired by the State."[31] To level the field, Foltz envisioned replacing appointed counsel with salaried county officials, provided with public funds to maintain their offices — just as counties funded their district attorney's offices.[32] Although Foltz lobbied for the public defender nationwide,[33] her campaign's earliest successes came at home. In 1913 Los Angeles County established the nation's first public defender office, and in 1921, California became the first state to pass her model legislation, the Foltz Defender Bill.[34,35]

The public defender idea found sympathetic ears among elite jurists, who were horrified by the tawdry pageant of criminal law in general and by criminal defense attorneys in particular. Criminal defense had once been considered every lawyer's "sacred duty,"[36] and as late as 1900 it was

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30 *Inventing*, *supra* note 17, at 1271. Babcock has written several articles on Foltz's biography and pioneering achievements. *See* Barbara Allen Babcock, *Clara Shortridge Foltz: "First Woman,"* 30 Ariz. L. Rev. 673 (1988), *reprinted with a new introduction in* 28 Val. U.L. Rev. 1231 (1994); Barbara Allen Babcock, *Clara Shortridge Foltz: Constitution-Maker*, 66 Ind. L.J. 849 (1991); Barbara Allen Babcock, *Reconstructing the Person: The Case of Clara Shortridge Foltz*, *in* Revealing Lives 131 (Susan Groag Bell & Marilyn Yalom, eds., 1990).

31 *Inventing*, *supra* note 17, at 1271 (quoting Clara Foltz, *Public Defenders — Rights of Persons Accused of Crime — Abuses now Existing*, 48 Alb. L.J. 248 (1893)).

32 For the text of the bill, *see id.* at 1272 n.30.

33 *Id.* at 1273.

34 *Id.* For a bibliography of some 110 scholarly articles on the public defender between 1914–1924, see Barrow, *supra* note 28.

35 Cal. Stat. 245 § 5 (1921). The bill allowed for counties to establish and fund public defender's offices, but did not require it.

36 *See* Alan Rogers, *"A Sacred Duty": Court Appointed Attorneys in Massachusetts Capital Cases, 1780–1980*, 41 Am. J. Legal Hist. 440, 440-41 (1997). For representative nineteenth-century views of criminal defense as a duty lawyers owed in their

not uncommon for prominent lawyers to be generalists. But by the 1920s the bar had specialized and stratified, with criminal defenders joining the tort plaintiff's bar at the lowest stratum.[37] Surveys found that only a tiny minority of lawyers accepted criminal cases; most viewed the work as disreputable.[38] No longer a "sacred duty," neither did criminal practice offer much promise of earthly rewards, "since it is impossible to build up a clientele except among professional criminals."[39]

In the Prohibition years, with tableaux of "g-men" and "gangsters" dominating newsreels and headlines, elite jurists lamented the rise of a cadre of "habitual defenders" who gleefully exploited loopholes and technicalities to keep their well-paying patrons out of prison.[40] Procedural

capacity as officers of the court (which persisted into the 20th century at least in a few influential works), see Thomas Cooley, 1 Constitutional Limitations 697 (8th ed. 1927). However, by 1929 the American Bar Association's *Canons of Professional Ethics* had recast criminal defense from a "duty" to a "right" of the bar. *Compare* Canons of Prof'l Ethics (1908) ("I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice.") *with* Canons of Prof'l Ethics (1929) ("A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.").

37 Roscoe Pound observed, "The great achievements of the Bar were in the Forum and the most conspicuous success was before juries in the trial of criminal cases. . . . In the second stage leadership passed to the railroad lawyer. . . . Criminal law became the almost exclusive field of the lower stratum of the Bar." Sienna Delahunt, *Chapter IV: The Gentleman at the Bar*, *in* Raymond Moley, Our Criminal Courts 62 (1930). For historical analysis of the specialization and stratification of the bar, see, e.g., Robert W. Gordon, *The Legal Profession*, *in* Looking Back at Law's Century 287-336 (Austin Sarat et al., eds., 2002).

38 The influential *Cleveland Survey of Criminal Justice Survey* found that of 386 Cleveland lawyers, almost 40% accepted no criminal cases at all, and only 3% took them regularly. Delahunt, *supra* note 37, at 62. President Hoover's Wickersham Commission reported on polls showing that lawyers considered criminal work "unremunerative," disreputable because "it involves association with an undesirable element in the profession," and overly technical. U.S. Nat'l Comm'n on Law Observance and Enforcement, 4 U.S. Wickersham Comm'n Reports 27 (1931) [hereinafter Wickersham Comm'n].

39 Delahunt, *supra* note 37, at 63.

40 *E.g.* Wickersham Comm'n, *supra* note 38, at 19 ("Habitual defenders of criminals have learned to take advantage of [the prosecutor's nol pros power]."). On the cultural image of the "gangster" in the Prohibition years, see generally Dale E. Ruth, Inventing the Public Enemy: The Gangster in American Culture, 1918–1935 (1996)

safeguards designed to protect the innocent in rural pioneer communities had become, in chaotic urban courtrooms, "pieces to be played" by the guilty.[41] At the other end of the spectrum were a different but equally worrisome set of "habitual defenders," who, rather than helping wealthy clients exploit the system, busied themselves with exploitation of a more direct sort. For Progressive reformers concerned with the plight of the poor, the problem was not that there were not enough lawyers. Rather, the courthouses were overrun with lawyers — of the wrong kind. Whether labeled "'shysters,' . . . 'snitch lawyers,' 'jail lawyers,' 'vampires,' 'legal vermin,' 'harpies,'"[42] "'Tombs runners,'"[43] or "parasites,"[44] these "unofficial public defenders"[45] were all too eager to volunteer their services to a hapless defendant, only to extort the defendant's family for any payment they could muster and, if none was forthcoming, provide a perfunctory defense at best.

It is hard to know how many lawyers deserved the epithets.[46] As with criticisms of the plaintiff's bar, criticisms of the criminal defense bar were tinged with ethnic and class biases.[47] However, there is probably a great deal of truth to the seamy picture that emerges from the pages of these reports on the urban criminal courts. Clara Foltz would not have disagreed with elite complaints about jailhouse lawyers: it was precisely her experience with such characters that had inspired her public defender proposal. Relegated to criminal courtrooms because, as a woman, she had few

(analyzing constructions of the "gangster" in mass culture); Bryan Burrough, Public Enemies: America's Greatest Crime Wave and the Birth of the FBI, 1933–34 (2004) (tracking the lives and crimes of some of the era's most notorious real-life fugitive criminals and the FBI's much-publicized attempts to track them down).

41 Wickersham Comm'n, *supra* note 38, at 21.

42 Mayer Goldman, The Public Defender: A Necessary Factor in the Administration of Justice 19-20 (1917).

43 Carnegie Foundation, Justice and the Poor 113 (1919).

44 Delahunt, *supra* note 37, at 66. Delahunt was an editor of the *Columbia Law Review*.

45 *Id*. at 64.

46 *See* Gordon, *supra* note 37.

47 *Id*. at 295; *see also id*. at 297 (describing how bar association disciplinary mechanisms were used not for self-regulation of the bar generally but primarily to discipline immigrant personal injury lawyers).

professional choices, Foltz observed her counterparts with dismay, noting their "soiled linen" and "whiskey breath."[48]

But while Foltz proposed to solve the problem by using the public purse to attract higher-caliber lawyers to criminal defense, some Progressive reformers reimagined the public defender as a replacement for criminal lawyers altogether.[49] Their goal was not to provide poor defendants with the equivalent of the gladiator that the rich could afford, but to remake the system entirely so that gladiator-style defense was no longer welcome, or rewarded. The Progressive public defender promised to transform each criminal prosecution into "a cooperative search for corrective and preventive care" rather "than a contest of skill,"[50] with "officers on the state" on both sides, sharing "a singleness of purpose."[51] Although the public defender could and should zealously defend an innocent client, his only duty to the guilty was to "see that [he was] fairly punished — not overpunished."[52]

In 1913 Los Angeles County was the first jurisdiction to implement Clara Foltz's public defender proposal. But though Foltz took credit for the Los Angeles office, the office quickly departed from her vision.[53] The first public defender in Los Angeles and thus the nation, Walton J. Wood, adopted the Progressive model. In 1918 he wrote with pride that his young office had "worked harmoniously" with the prosecutor's office: "We have not felt that it was our duty to oppose the district attorney, but rather to cooperate with him in setting all the facts before the courts."[54] The district

48 *Inventing*, supra note 17, at 1282 (quoting Foltz).

49 *Id.* at 1275.

50 Delahunt, *supra* note 37, at 62. In some of the more extreme proposals, private practice would be eliminated altogether and every defendant would be required to submit to the representation of a public official — ensuring that high-paid lawyers on the payroll of organized crime could no longer run circles around DAs, even as the public defender would also solve the different problem of indigent defense. *See, e.g.*, Maurice Parmelee, *Public Defense in Criminal Trials*, 1 J. Crim. L. & Criminology 735-47 (July 1911).

51 Delahunt, *supra* note 37, at 71.

52 Goldman, *supra* note 42, at 8.

53 *Inventing*, *supra* note 17, at 1275.

54 Barrow, *supra* note 28, at 569 (quoting W. J. Wood, *Annual Report of the Public Defender of Los Angeles County, California*, 9 J. Crim. L. & Criminology 289-96 (1918)). Barbara Babcock provides two examples of cases in which the Los Angeles

attorney returned the sentiment, having written to Wood as early as 1914 that they shared a common goal: "You are performing a duty which this office has attempted to perform in safeguarding the rights of the defendant, but I believe under the circumstances your position gives you a better opportunity to perform that duty than the prosecutor has."[55] On the basis of these early reports, Progressive reformers around the country praised Wood's office as a model of their vision of public defense.[56]

By the time that the 1921 statewide public defender law passed, the pioneering Los Angeles public defender's office had achieved a high degree of respectability, overcoming any disrepute that the public and legal profession reserved for criminal lawyers generally. The office enjoyed weeks of favorable press when it handled the 1921 trial of Louise Peete, accused of defrauding and murdering the wealthy oil magnate James Denton. Peete was convicted, but spared the death sentence[57] — as a Progressive might have put it, "punished — not over-punished."[58] The trial "attracted headlines around the world and was the sensation of Los Angeles while it lasted," with some 147,000 onlookers attempting to crowd into the courtroom.[59] The case received favorable coverage throughout the state, with the public defender's

public defender's approach differed from that of a traditional defense attorney. In one case, the defender facilitated a guilty plea in exchange for a lenient sentence "by showing that his client was starving and seeking work when he stole." In contrast, Babcock suggests, "Clara Foltz's defender . . . might well take these appealing facts to a jury." *Inventing*, *supra* note 17, at 1277.

55 Goldman, *supra* note 42, at 38-39.

56 A 1924 bibliography of articles on the public defender lists several that favorably assess the Los Angeles office. *See* Barrow, *supra* note 28. Mayer Goldman, a New York attorney who became a leading crusader for the Progressive public defender, cited its successes approvingly in his 1917 book on public defense, quoting the 1914 letter. Goldman, *supra* note 42, at 38-39.

57 Later Peete worked for many years as a housekeeper, and one by one her employers met with suspicious ends, but apart from her conviction in the Denton case, the apparent serial killer managed to convince the authorities that all of the deaths were accidents until she was finally convicted and sentenced to death in a 1945 prosecution for the murder of Margaret Logan. *See Louise*, Time, June 11, 1945 (summarizing Peete's biography upon the occasion of her death sentence).

58 Goldman, *supra* note 42, at 8.

59 *Former S.J. Man Now L.A. Public Defender*, San Jose Mercury Herald, March 23, 1921, at C13.

participation meriting prominent mention.[60] When the deputy P.D. who conducted Peete's defense was promoted to the head of the office — replacing Walton Wood, who had recently been named to a judgeship — his hometown paper, the *San Jose Mercury Herald*, reported with pride on this "signal honor."[61] The extent to which the Los Angeles model had convinced California reformers of the merits of the public defender idea is also indicated by the 1920 recommendations of a San Francisco civil grand jury.[62] After sketching an image of the San Francisco justice system that would have been familiar to many Progressive reformers — "the absence of decorum, delinquences of judges, the prevalence of 'shysters'" — the grand jury recommended sweeping reforms, including the establishment of a public defender's office.[63]

PART II: JUDICIAL VISIONS OF THE PUBLIC DEFENDER — *IN RE HOUGH*

Throughout the 1920s, legal scholars debated whether the new public defenders should aspire to be "individual advocate[s]" or "Progressive public servant[s]."[64] As public defenders became fixtures in many counties, this debate moved from the pages of legal journals into courtrooms throughout California. In the 1940s, appellate judges stepped into the fray to provide an authoritative construction of the public defender's role. In California Supreme Court cases such as *In re Hough* and intermediate appellate cases

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60 *See, e.g.*, *Slaying Case Is Opened*, San Jose Mercury Herald, Jan. 20, 1921, at C20. The headlines read: "DENTON SLAYING CASE IS OPENED – Eleven Prospective Jurymen Are Selected in Los Angeles Court – Public Defender Acts as Attorney for Mrs. Louise M. Peete During Trial."

61 *Former S.J. Man Now L.A. Public Defender*, San Jose Mercury Herald, March 23, 1921, at C13.

62 California counties convene civil grand juries each year to scrutinize county government and propose reforms. *See* Calif. Pen. Code § 905; Calif. Const. art. I, § 23 (requiring counties to empanel a grand jury to serve during each fiscal year). California counties do also convene criminal grand juries for some cases, but the state does not require that every prosecution proceed by grand jury indictment. *See* Jon M. Van Dyke, *Trial Juries and Grand Juries*, *in* 2 Encyc. of the Am. Judicial System 738-39 (1987).

63 *Drive Shysters from S.F. Courts, Is Demand of Jury*, San Jose Mercury Herald, July 21, 1920, at 8. The grand jury also proposed that the city increase judges' compensation, eliminate private practice by judges, and extend judicial terms to six years, among other reforms. *Id.*

64 *Inventing*, *supra* note 17, at 1277.

like *Avilez*, the courts vindicated Foltz's model of the crusading trial lawyer — rejecting any suggestion that public defenders might have a different role than private defense attorneys.

Although California was unique in its early adoption of the public defender system, it took a confluence of legal-historical developments that were not unique to California to open the space for appellate judges to opine on the question. Beginning in the 1920s and '30s, state court judges across the country became increasingly willing to entertain prisoners' claims that their convictions should be overturned because they had suffered from ineffective or negligent defense at trial.[65] In some cases, judges familiar with the same courthouse conditions that so horrified Progressive reformers were sympathetic to young, uneducated, non-English-speaking prisoners who had been scammed by so-called jailhouse lawyers.[66] In such cases, it was difficult to maintain the legal fiction, carried over from the civil context, that attorney negligence must be imputed to the client, because the attorney was no more than the client's agent (i.e., the client had assumed the risk). The Supreme Court provided a constitutional imprimatur to this nascent line of cases with *Powell v. Alabama* in 1932, overturning the rape convictions of nine black teenagers who had effectively gone without counsel: a lawyer was appointed the morning of trial, leaving no time to investigate or prepare a defense.[67] Finally, the expansion of state and federal habeas corpus review beginning in the 1940s made it easier for prisoners to bring collateral appeals introducing new evidence. This last development was particularly important since it is often impossible to prove an attorney's negligence from the trial record alone.[68]

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65 The early development of the "ineffective assistance of counsel" claim as a grounds for criminal appeal is discussed briefly in James A. Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 Ariz. L. Rev. 443, 443-44, 447 n.17 (1977). *See also* D.F.M., Note, *Incompetency of Counsel as the Basis for a New Trial in Criminal Cases*, 71 U. Pa. L. Rev. 379, 379 (1923) (discussing early cases and observing that "[t]he not infrequent jeopardizing of a man's life in a criminal trial by the inefficiency or negligence of his attorney has given rise to a new doctrine which, in several jurisdictions, has permitted a letting down of the bars of strict legal procedure").

66 *E.g.* People v. Nitti, 312 Ill. 73 (Ill. 1924); Sanchez v. State, 199 Ind. 235 (1927).

67 Powell v. Alabama, 287 U.S. 45 (1932).

68 *See* Strazzella, *supra* note 65, at 444. IAC litigation exploded in the 1960s after a series of landmark Supreme Court cases expanded avenues for collateral attack of criminal convictions.

To be sure, successful cases of this type remained relatively rare until the 1960s and the complex jurisprudence of "ineffective assistance of counsel" that has developed since the 1984 case *Strickland v. Washington*, after which IAC claims became the most common type of criminal appeal, did not yet exist.[69] Well into the twentieth century, most state courts took for granted that it was "beyond the power of the court to set aside a verdict because of the inefficiency of counsel."[70] But whether or not his appeal was successful, every time a convicted prisoner pressed an attorney negligence claim he provided appellate judges with an occasion to opine on the proper role and duties of the defense attorney. It was through one such case, in 1944, that the California Supreme Court clarified the question of the public defender's duties to his client.

The case of William Leva Hough got to the California Supreme Court on a writ of habeas corpus. Hough was on death row at San Quentin for the 1942 murders at a Long Beach café of his estranged wife and a gentleman friend of hers.[71] Hough argued that his guilty pleas were void because he had been misled by the trial judge, prosecutor, and public defender to believe that if he pled guilty, he would be sentenced to life imprisonment.[72] The court rejected Hough's claims that the judge and prosecutor had misled him out of hand, finding no showing in the record of any promises to Hough.[73] Hough's claims against his counsel — Erling Hovden, a 12-year veteran of the Los Angeles County public defender's office — were no more

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69 Strickland v. Washington, 466 U.S. 688 (1984).

70 Commonwealth v. Dascalakis, 246 Mass. 12, 26 (1923).

71 In re Hough, 24 Cal.2d 522, 524 (Cal. 1944); Return to Writ of Habeas Corpus at 11, In re Hough, Crim. 4500 (Cal. Sup. Ct. 1944). At the time of the murders, the Houghs had initiated divorce proceedings and each had taken out a restraining order against the other. Return to Writ of Habeas Corpus at 11. All court documents cited in this essay relating to *In re Hough* are available at the California State Archives by requesting the file for California criminal case number Crim. 4500.

72 *Hough*, 24 Cal.2d at 525, 527-28, 533. Hough, who suffered from syphilis and various neuroses, also argued on appeal that he was mentally incompetent at the time of the plea. The California Supreme Court quickly dispatched with this claim, observing that of the three alienists appointed by the trial court, two had evaluated him as sane at both the time of the murders and the time of their examination, and the third had been inconclusive. As such, the trial judge did not abuse his discretion when he allowed the prosecution could proceed. *Id.* at 533-34.

73 *Id.* at 527.

successful, but in the course of rejecting them, the court took the opportunity to elaborate upon the public defender's role.

Hough's first contention (as construed by the court) was that "the public defender [was] an officer of the county, and represent[ed] the state in the prosecution of criminal actions, in the same light and to the same extent as the district attorney . . . ."[74] Echoing the Progressive reformers who imagined the public defender as a partner of the prosecutor, this position did have a certain logic: the public defender was on the county payroll.[75] But the California Supreme Court rejected it out of hand: "Petitioner cites no authority in support of his contention and none has come to our attention." Rather, under the Court's interpretation of the California public defender statute,

> when the public defender is appointed to represent a defendant accused of a crime, he becomes the attorney for said defendant for all purposes of the case and to the same extent as if regularly retained and employed by the defendant. The judge of the trial court has no more authority or control of him than he has of any other attorney practicing before his court.[76]

Thus the public defender was an agent of the client, not the county.[77]

But the court had overstated Hough's argument. Hough's appellate lawyer was Morris Lavine of Los Angeles, who apparently took the case *pro bono* at the urging of friends of Hough's.[78] Nowhere in his briefs or oral argument did Lavine argue, as the court claimed, that "the public defender . . . represents the state in the prosecution of criminal actions, in the

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74 *Id.* at 528.

75 Compare recent cases that have tried (mostly unsuccessfully) to frame the public defender as a state actor for the purposes of constitutional analysis. Vermont v. Brillon, 556 U.S. ___ (decided March 9, 2009) (no speedy trial violation if delay was public defender's fault); Polk County v. Dodson, 454 U.S. 312 (1981) (public defenders are not state actors for Section 1983 litigation). Many studies have found that clients perceive public defenders as part of the criminal justice bureaucracy, rather than individual advocate. *See* William Stuntz, *The Uneasy Relationship between Criminal Law and Criminal Procedure*, 107 YALE L.J. 1, 33 n.117 (1997).

76 *Hough*, 24 Cal.2d at 528-29.

77 *Id.* at 529.

78 Affidavit of Morris Lavine (January 17, 1944) at 2-3, In re Hough, Crim. 4500 (Cal. Sup. Ct. 1944).

same light and to the same extent as the district attorney . . . ."[79] Rather, Lavine's brief acknowledged that the public defender "acted on behalf of the defendant"; but it also made the common-sense observation that, as a public official, the public defender "was an officer of the state and county, just as much as the district attorney."[80] Thus far Lavine had not written anything controversial or even controvertible. His novel legal argument came at the next step, when he argued that "any representations made by the court to Mr. Hovden," and then conveyed by Hovden to Hough, were, by some transitive property of criminal law, direct representations from the state to the defendant. As such, Hough had a right to rely on them. For this proposition Lavine did indeed cite authority: a line of cases holding that public officials' promises are binding.[81] It is telling that the court did not distinguish these cases, instead implying that it was self-evident that public defenders were not public officials in a legal sense, even if they received a public salary.

But while a reasonable construction of the public defender statute, the court's reading is not self-evident. The statute simply provided that the public defender "shall defend, without expense to them, all persons who are not financially able to employ counsel and who are charged with the commission of any contempt, misdemeanor, felony or other offense."[82] The precise content of the verb "shall defend" was not specified. Nor did any provision in the statute clarify whether the fact that public defenders were salaried by the county transformed them into public officials for other legal purposes. Nonetheless, after *Hough* the authoritative judicial construction of the statute was clear: "shall defend" meant "shall defend just as retained counsel would do." The *Hough* court also elevated this statutory equivalence to a constitutional requirement:

> The public defender is free from any restraint or domination by the district attorney or of the prosecuting authorities. He is as free to act in behalf of his client as if he had been regularly employed and retained by the defendant whom he represents. Were it not so

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79 *Hough*, 24 Cal.2d at 528.

80 Petitioner's Brief at 10, In re Hough, Crim. 4500 (Cal. Sup. Ct. 1944).

81 *Id.* at 11-12 (citing cases).

82 *Hough*, 24 Cal.2d at 528 (quoting the statute as on the books at the time of *Hough*).

> his client would not be afforded the full right 'to have assistance of counsel for his defense' which the Constitutions, both state and federal, give to one accused of crime.[83]

Hough made a second argument that, even if Hovden's advice to plead guilty was attributed only to himself and not the county, it was still unconstitutionally coercive. In an affidavit, Hough testified that Hovden had told him, "I guarantee you that if you plead guilty you won't get gassed."[84] The *Hough* court did not reach the question of whether such a promise could ever be the basis for overturning a plea. Instead, the court rejected the factual predicate for the argument, finding it implausible that Hovden would have actually given such misleading advice. Not only did Hovden himself deny making any such assurances, the Court emphasized that he was an experienced public defender and that even Hough's appellate counsel admitted of his reputation as a "courageous" and "high class attorney."[85]

To reach this result, the court engaged in some remarkably creative misreading of Hough's briefing. Lavine had indeed praised Hovden as "courageous" at oral argument, but he was not referring to Hovden's general reputation. Rather, he was praising Hovden (and his supervisor at the P.D.'s office) for supporting Hough in his habeas petition. Hovden had sworn a lengthy affidavit with his account of the plea negotiations, even though given "the circumstances" (presumably, the risk that he would face opprobrium for his conduct of Hough's defense), other public defenders would have likely been "inclined to forget it and let the defendant defend himself."[86] Hovden did deny making the verbatim statement, "I guarantee you that if you plead guilty you won't get gassed," or any other "guarantee" of a particular punishment.[87] But he did so only in response to a letter from the clerk of the California Supreme Court, requesting that he clarify whether or not he had made that precise statement.[88] In this supplemental

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83 *Id.* at 529.

84 *Id.* at 529.

85 *Id.* at 530.

86 Oral Argument of Morris Lavine, Esq., on Behalf of Appellant (May 8, 1944), In re Hough, Crim. 4500 (Cal. Sup. Ct. 1944).

87 Supplemental Affidavit of Erling J. Hovden (April 21, 1944), In re Hough, Crim. 4500 (Cal. Sup. Ct. 1948).

88 Clerk of Supreme Court to Attorney General Robert W. Kenny and Morris Lavine, April 13, 1944, California State Archives, Crim. No. 4500.

affidavit filed at the court's request, Hovden remained quite clear that although he had made no guarantees, he had informed Hough that "in view of the repeated statements made to [him] by the trial court, [he] could not conceive of the imposition of the extreme penalty on a plea of guilty."[89] At oral argument, Lavine suggested that the issue was not Hovden's exact words but whether "it was a reasonable inference for Hough to conclude that the promise of a life sentence had been made."[90]

In Hovden's original affidavit, he was even more explicit. He described multiple conversations with both the young deputy district attorney assigned to the case and a senior deputy district attorney with whom he had a close working relationship, as well as the trial judge, Leslie Still. Although the D.A.'s office insisted upon officially recommending a sentence of death, Hovden testified that Judge Still had repeatedly indicated that he would not impose such a sentence if the defendant pled guilty to two counts of first-degree murder, and at least one deputy D.A. agreed that a life sentence would be appropriate. True, the day before trial Judge Still had cautioned Hovden that he might have to impose death after all, but Hovden interpreted that proviso merely

> as a statement by the court to defense counsel which would protect both the court and counsel from any criticism that a definite promise had been made as to the disposition of the case. . . . For many reasons trial judges are unwilling to make positive commitments but counsel is guided by and relies upon their expressed general impressions and act with complete confidence on tacit understandings as to the disposition of their cases. So in this instant case the court had on every occasion when he had expressed himself as to what he believed to be a proper punishment in the light of the facts of the case, he had agreed . . . that life imprisonment would serve the ends of justice. Furthermore, the court well knew that the sole and only reason for entering pleas of guilty would be to eliminate even the possibility of the death penalty. . . . Up to the very moment of the pronouncement of sentence there was no intimation by the court that such a penalty would be imposed.[91]

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89 *Id.*

90 Oral Argument, *supra* note 86, at 8-9.

91 Petition for Writ of Habeas Corpus and Supporting Affidavit of Erling J. Hovden (May 25, 1943) at 7-8, In re Hough, Crim. 4500 (Cal. Sup. Ct. 1944).

Hovden concluded that he "was misled by the comments of the court," that he had advised his client on that basis, and that Hough's guilty pleas "would not have been entered had counsel not been so misled by the trial court's remarks."[92]

Perhaps the California Supreme Court simply chose not to credit Hovden's testimony over the competing affidavits filed by the state, in which the prosecutors and Judge Still denied much of Hovden's account. But instead of saying so, the court misdescribed Hovden's testimony, as if Hovden had testified against his former client, rather than acknowledging that Hovden's affidavits, if credited, tended to support Hough's claims. In a curious way, the court's rewriting of Hovden's testimony reveals the high regard in which California judges held public defenders. The court's opinion portrays Hough as the typical disgruntled death row prisoner, turning his back on those who tried to help him, including Hovden, a veteran public defender and "high-class attorney" who would never have done what Hough had accused him of doing. Against the murderer stood the rule of law — judges and lawyers — and by ignoring Hovden's testimony on the murderer's behalf, the California Supreme Court welcomed him into that august circle. Perhaps the justices imagined themselves to be defending Hovden's reputation against the slander of an ungrateful former client. But Hough had never accused Hovden of intentionally harming him. In his briefings Hough had argued that if Hovden had misled him, it was only because he had been misled in turn.

In fact, William Hough described his public defender Erling Hovden as his only friend in the days after his arrest. But to establish an identity between public defenders and private defense attorneys, the California Supreme Court necessarily ignored Hough's descriptions of this relationship — a relationship quite different from that of wealthy defendants to their lawyers. A welder in the Long Beach shipyards, Hough could hardly afford

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92 *Id.* at 15-16. Compare the court's reasoning: The court acknowledged that Hovden had "filed a lengthy affidavit" and been "a most willing witness" in Hough's behalf, but concluded that as "Mr. Hovden emphatically denies making any such assertion as that attributed to him by petitioner, we are unable to give credence to petitioner's claim that he was misled in entering his pleas of guilty by any assurance or guarantee on the part of Mr. Hovden." *In re Hough*, 24 Cal.2d 522 (1944).

to retain counsel to defend a double murder trial. What else could he do besides rely on the assurances made to him by his public defender?

> You see I was a verry sick man all this time and I was trying to get money to Hire a Lawyer and it did look like I did not have a friend in the world and then Mr Houden come to me and told me. I have talked to Judge Still and he has led me to bee able to tell you if you will Change your Plee to Guilty and withdraw the Insanity Plee I can guarantiee that he wont give you the Extreame Pinalty . . . .[93]

Of course Hough had relied on Hovden's advice, he said: "I had no one else to rely on."[94]

PART IV: CONCLUSION

The California Supreme Court's explication of the public defender's role did nothing to help William Hough; in the end, Hough was spared execution, but by executive rather than judicial clemency.[95] In fact, perhaps it was the justices' inclination to uphold Hough's conviction that motivated them to construe the public defender statute the way they did in *Hough*. But the precedent had been set, and in 1948 this precedent would work in the favor of another California prisoner, Frank Avilez.

Avilez's experience with the San Francisco public defender in 1947 demonstrates that confusion persisted among lawyers and trial judges about the public defender's role. Avilez's public defender apparently believed that his role was to facilitate quick guilty pleas, at least in egregious cases.[96] As Melvin Belli described it in his appellate brief, the public defender "spent some *seconds* with the defendant before a plea of guilty was entered, which subjects the defendant to some four hundred fifty-three

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93 Lavine Affidavit, *supra* note 78, at 3 (quoting letter from Hough).

94 Traverse to the Return to Writ of Habeas Corpus and Affidavit of William Hough (July 5, 1943) at 6, In re Hough, Crim. 4500 (Cal. Sup. Ct. 1944).

95 In 1945 Hough's death sentence was commuted to a life sentence by acting Gov. Frederick F. Houser. *See* Austin Sarat, Mercy on Trial 223 (2005).

96 *But see Love Killer Spurns Test*, L. A. Times, June 21, 1936, at 3 (discussing a case in which Gerald Kenny did provide a vigorous defense, even though his client wanted to plead guilty).

years in prison!"[97] The Progressive reformers who imagined the public defender as a partner to the public prosecutor, with no interest in wasting the court's time defending an admittedly guilty client, may have seen nothing wrong with this behavior.[98]

But California's appellate judges rejected this approach wholesale, as a derogation of the defense attorney's duty. In overturning Avilez's convictions, the First District Court of Appeal confirmed that it was Clara Foltz's individual advocate, not the Progressive public servant, that a California public defender should aspire to be. As the California Supreme Court had held in *Hough*, "The public defender stands in the same relation to the accused he is appointed to represent as an attorney regularly retained."[99] To allow a client to plead before conducting any investigation of the facts and the law beyond the client's bare assertion of guilt was to risk overlooking meritorious defenses or mitigating evidence that the client might have, even if the client, unschooled in the law, did not dispute what he perceived to be the charges against him. For this proposition, the *Avilez* court quoted at length from the U.S. Supreme Court's decision in *Powell v. Alabama*, which had elevated to the status of constitutional law the defense attorney's central role in the American system of adjudicating criminal guilt:

> The right to be heard would be of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one.[100]

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97 Appellant's Opening Brief, *supra* note 2, at 5, 22. Belli claimed this sentence was "the longest ever meted out in the history of the State." *Id.* at 22.

98 Goldman, *supra* note 42, at 66-67. Mayer Goldman's book *The Public Defender* spelled out what a public defender should do when a client admitted guilt, and it was precisely what the San Francisco public defender had done with Avilez: plead the client guilty.

99 People v. Avilez, 86 Cal.App.2d 289, 296 (1948) (citing *Hough*).

100 Powell v. Alabama, at 68-69. *Powell* is cited repeatedly in *Avilez*, 86 Cal.App.2d at 296. It had also been quoted in Avilez's appellate brief. Appellant's Opening Brief, *supra* note 2, at 30-31 (quoting *Powell* excerpt from People v. McGarvy, 61 Cal.App.2d 557).

Barbara Babcock notes that Clara Foltz herself never addressed explicitly the difference between the two competing models of public defense, and suggests that perhaps they differed only in emphasis.[101] Even so, in cases at the margin, such as *Avilez*, which model the court adopted could mean the difference between upholding and reversing a conviction. And in the public defender's day-to-day work, any number of small decisions would come out differently depending on how the defender viewed himself: as a zealous advocate for each individual client, or a public servant helping the justice system as a whole run smoothly. By 1948 California courts had clearly established, doctrinally, the former view.

Although the appellate court used *Avilez* to make a point about public defenders, the subsequent story of Frank Avilez makes a different point: Sometimes there's only so much a defense attorney can do for a client — regardless of who signs his paychecks. After winning the appeal, Melvin Belli realized he "couldn't really put on a new trial, not one that would end up with any different verdict."[102] In addition to physical evidence and Avilez's own confessions, the state had five eyewitnesses. So Belli pled him guilty to ten counts, and 340 years.[103] Essentially it was still a life sentence. Nevertheless, as Belli recalled years later, "Avilez was grateful and sent me a telegram from San Quentin: THANK YOU FOR CUTTING MY SENTENCE IN HALF."[104] ✯

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101 *Inventing*, *supra* note 17, at 1279. The narrow width of any gap between the two ideals is also indicated by the fact that Walton Wood, though upheld as an ideal Progressive public defender, did not dispute that in some cases a public defender should not allow his client to plead guilty right away: "Often the defendant does not know whether he has in fact committed a crime." Walton J. Wood, The Place of the Public Defender in the Administration of Justice 17 (1914).

102 Melvin M. Belli & Robert Blair Kaiser, Melvin Belli 84 (1976).

103 *Prison Terms 340 Years*, L. A. Times, Dec. 4, 1948, at 4.

104 Belli, *supra* note 101, at 84. Belli likely embellished this account of Avilez's case for poetic effect, describing the sentence as having been halved from 440 to 220 years, but contemporary reports suggest it was only cut to 340 years. *See supra* text at note 102.

THE CALIFORNIA SUPREME COURT AND THE FELONY MURDER RULE:

A Sisyphean Challenge?

MIGUEL A. MÉNDEZ*

INTRODUCTION

This article examines the California Supreme Court's major encounters with the felony murder rule. In its unvarnished version, this rule allows a prosecutor to convict a defendant of murder without having to prove the mental states of murder as defined in the California Penal Code. The prosecutor, however, must prove that the homicide occurred during the commission or attempted commission of a felony. As will be explained, under California law the homicide will constitute first degree murder if the felony underlying the homicide is among the felonies enumerated in Section 189 of the Penal Code.[1] It will constitute second degree murder if the underlying felony is not among those felonies.

To appreciate the effects of the felony murder rule, it is necessary to understand how California law defines and punishes various homicides.

* Professor of Law and Martin Luther King. Jr. Scholar, UC Davis School of Law; Adelbert H. Sweet Professor of Law, Emeritus, Stanford University. I want to thank my colleagues, Floyd Feeney, Elizabeth Joh, Donna Shestowsky, and Robert Weisberg, for their helpful comments. I alone, however, am responsible for any errors.

[1] *See* California Penal Code § 189 (West's 2010 Desktop Edition) [hereinafter Cal. Penal Code].

Part A provides this overview. Differentiating among the various homicides in turn requires an understanding of different homicidal mental states. Part B presents the classification of different homicidal mental states. Part C introduces the core doctrine surrounding the felony murder rule in California. It is followed by Part D which describes the major limitations the California Supreme Court has imposed on the doctrine. Part E traces the statutory roots of the second degree felony murder rule, as described by the California Supreme Court. Part F examines potential problems with the Court's explanation of the rule's roots. Part G explores the Court's construction of the Penal Code provisions setting out the first degree felony murder rule and questions whether it was necessary for the Court to rely on legislative history in construing the provisions. Part H presents a critique of the Court's felony murder jurisprudence by examining the felony murder rule's place in California's law of murder. Part I attempts to shed some light on why the Court has taken extraordinary measures to preserve the felony murder rule and concludes with a call on the California Legislature to reconsider the wisdom of retaining the rule.

A. AN OVERVIEW OF HOMICIDE IN CALIFORNIA

As a review of any standard criminal law casebook will attest, homicide is considered the most "graded" offense. This means that both the Common Law and statutory treatment of homicide focuses on the circumstances that differentiate one form of homicide (e.g., murder) from another (e.g., negligent homicide). Since the harm is the same in all cases — the death of a human being — the judicial and statutory focus has been on the mental state of the offender. If the offender, for example, intended to bring about the death of the victim, the offender will be deemed guilty of murder;[2] if on the other hand, the offender did not even contemplate the death of the victim, the offender may be guilty only of negligent homicide.[3]

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[2] *See, e.g.,* California Penal Code §§ 187-188. That would be the case unless, of course, the offender acted within the parameters of such doctrines as self-defense or defense of others, s*ee, e.g.,* Cal. Penal Code § 197(1), or heat of passion. *See* Cal. Penal Code § 192(a).

[3] *See* Cal. Penal Code § 192(b).

The mental state is determinative not only of the kind of homicide of which the offender may be convicted, but also of the severity of the punishment imposed for that type of homicide. In California, where the crime of murder is divided into degrees, first degree murder is punishable by death, imprisonment for life without possibility of parole, or imprisonment for a term of twenty-five years.[4] Second degree murder, on the other hand, is generally punishable only by a term of fifteen years to life.[5] The lesser homicides are punished even less severely. Voluntary manslaughter is punishable by a term of three, six, or eleven years,[6] and involuntary manslaughter (California's equivalent of negligent homicide), by a term of two, three or four years.[7]

As these punishments suggest, blameworthiness plays a critical role in the definition of, and punishment for, a particular homicide. The greater the offender's indifference to the value of human life, the greater the likelihood that the offender will be charged with a more serious homicide. The most blameworthy are those who choose to kill after considering the "pros" and "cons" of taking human life. This position is reflected in California's first degree murder statute which defines a "willful, deliberate, and premeditated" killing as first degree murder.[8] As the standard instruction tells California jurors, a homicide is "deliberate" if it is the "result of careful thought and weighing of the considerations for and against the proposed [homicidal] course of action."[9]

Negligent homicide is at the other end of the blameworthiness spectrum. An offender can be convicted of this offense even if the offender was unaware that his or her course of conduct posed a substantial risk of death to others. Even if the offender, for example, mistakenly believed that the gun he or she fired was empty, the offender can still be convicted of negligent homicide if the jury believes that a reasonable person under similar circumstances would have been aware of a substantial risk that the gun might be loaded. As the standard instruction emphasizes to California

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4 *See id*. at § 190(a).

5 *Id*.

6 *Id*. at § 193(a).

7 *Id*. at § 193(b).

8 *Id*. at § 189.

9 Cal. Jury Instructions, Criminal 8.20 (Spring 2010 ed.) [hereinafter CALJIC].

jurors, the test is not "what the defendant actually intended, but what a person of reasonable and ordinary prudence would have expected likely to occur."[10]

In California, second degree murder embraces one of two mental states. As in the case of first degree murder, one is the desire to take the life of the victim but without the deliberation required for first degree murder.[11] The other mental state requires proof that the offender was at least aware that his or her conduct posed a substantial risk of death to others but despite that awareness chose to run the risk.[12] Evidence that the offender did not intend to kill does not excuse. The gravamen of the offense is the conscious creation of homicidal risks that lamentably materialize.[13] A classic example in California is the drunk driver who chooses to continue drinking even though he is aware of the homicidal risk he may pose to others if he attempts to drive home. Regrettably, he kills another driver on the way home, although at the time he chose to drink and drive he may have very much hoped that he would not.[14]

In California, voluntary manslaughter is defined as an unlawful killing without malice "upon a sudden quarrel or heat of passion."[15] Like second degree murder, it can embrace one of two mental states: a desire to bring about the death of the victim (purpose) or conscious creation and disregard of a homicidal risk (recklessness). As a doctrinal matter, however, the killing is not murder because killings committed under extenuating circumstances (upon a sudden quarrel or heat of passion) are not considered as having been committed with "malice aforethought," the mental state of murder.[16] Defendants charged with murder will be entitled to voluntary

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10 *Id*. at 8.46.

11 As stated in California Penal Code § 188, "a deliberate intention unlawfully to take away the life of a fellow creature." *See* Cal. Penal Code § 188. This is known in California as "express malice."

12 As stated in California Penal Code § 188, "when the circumstances attending the killing show an abandoned and malignant heart." *See id*. This is known in California as "implied malice."

13 *See id*.

14 *See, e.g.,* People v. Watson, 30 Cal.3d 290, 300, 637 P.2d 279, 285, 179 Cal.Rptr. 43, 49 (1981).

15 *See* Cal. Penal Code § 192(a).

16 A homicide committed upon a sudden quarrel or heat of passion is by definition not a malicious killing. *See id*.

manslaughter instructions if they introduce evidence from which a reasonable jury could find that at the time they killed, their reason, due to some provocation, was obscured to the degree that they acted rashly and without deliberation or reflection.[17] The classic example is the husband who admits killing his spouse upon learning about her infidelity.[18] But to convict the defendant of the lesser homicide, it is not enough for the jury to accept the defendant's explanation. To place limits on the offense of voluntary manslaughter, the jury must also find that the provocation would have moved a reasonable person of average disposition to lose his or her self-control and act rashly in similar circumstances.[19]

Although this overview of homicide in California omits important details, it suffices for our purpose. Homicide is a highly nuanced concept. Whether one who kills is guilty of a particular homicide depends on whether the offender harbored the mental state or states associated with that homicide. Moreover, whether one is sentenced to a term of years, life, or even death for the homicide is a function of the mental state. Mental states requiring proof of a greater indifference to the value of human life describe the most blameworthy offenders and call for the heaviest punishments. Indeed, the justification for imposing the most severe penalties rests squarely on the moral principle that those who show the least regard for the value of human life deserve the least mercy. As we shall see, this approach to moral accountability contrasts sharply with the justifications advanced for another form of murder: felony murder.

B. CLASSIFICATION OF HOMICIDAL MENTAL STATES

It was not until the advent of the American Law Institute's Model Penal Code that clarity was brought to American criminal mental states. Prior to the promulgation of the Model Penal Code by the American Law Institute

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17 *See* CALJIC 8.42.

18 *See, e.g.,* People v. Berry, 18 Cal.3d 509, 556 P.2d 777, 134 Cal.Rptr. 415 (1976).

19 *See* CALJIC 8.42. In addition, the jury must find that a reasonable person, even if provoked to kill, would not have "cooled off" by the time the defendant killed. If a reasonable person would have cooled off by then, the jury should return a murder conviction. *See* CALJIC 8.43.

in 1962, legislatures and especially courts struggled with the definition of such vague Common Law terms as "intent," "mens rea," "scienter," "recklessness," "willfulness," and "wantonness." All of these terms (as well as others) were designed to signal the existence of a discrete mental state, but none succeeded in defining the mental states with sufficient particularity to allow legislators and judges to distinguish one mental state from another.[20] States that have relied on the Model Penal Code to reform their Common Law penal codes have been able to eliminate much of the uncertainty and confusion engendered by the Common Law terms. Unfortunately, California is among a minority of states that have opted to retain the Common Law approach to culpable mental states.[21]

Although the current California Penal Code was enacted by the legislature in 1872,[22] it is nonetheless the product of Common Law jurisprudence. Strong evidence of its Common Law roots can be found in the provisions relating to homicide. The various homicides are not couched in the contemporary English associated with the Model Penal Code but with the terms first devised by the English Common Law judges. Murder, for example, is defined as "the unlawful killing of a human being, or a fetus, with malice aforethought."[23]

> Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.[24]

To the modern reader, the definition of malice — the mental state that sets murder apart from the lesser homicides — is not particularly helpful.

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20 For an extended discussion of how the Model Penal Code solves many of the problems stemming from the use of Common Law mens rea terms, *see* M. Méndez, *A Sisyphean Task: The Common Law Approach to Mens Rea*, 28 Davis L. Rev. 407 (Winter 1995).

21 According to Professor Phillip Johnson, about half of the states have revised their penal codes since 1962, and the Model Penal Code played a significant role in the drafting of the revised provisions. *See* P. Johnson, Criminal Law 69 (West 6th ed. 2000).

22 *See* Cal. Penal Code § 2.

23 *Id.* at § 187(a).

24 *Id.* at § 188.

Although express malice denotes a desire to take human life, the definition of implied malice is hopelessly obscure. In particular, a modern reader cannot fathom the mental state conjured by a killer who acts with "an abandoned and malignant heart." In *People v. Watson,*[25] the California Supreme Court brought some clarity to this aspect of implied malice:

> We have said that second degree murder based on implied malice has been committed when a person does " 'an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life . . . .' " (*People v. Sedeno*, supra, 10 Cal.3d at p. 719, quoting from *People v. Phillips,* supra, 64 Cal.2d 574, 587.) Phrased in a different way, malice may be implied when defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with a wanton disregard for human life. (*People v. Washington* (1965) 62 Cal.2d 777, 782 [44 Cal.Rptr. 442, 402 P.2d 130].)[26]

In Model Penal Code terms, the killer who acts with express malice acts purposely;[27] his conscious object is to kill the victim.[28] The killer who acts with implied malice acts recklessly;[29] he consciously disregards a substantial risk that his conduct might result in the death of another human.[30] He might also be acting knowingly if he is aware that it is practically certain that his conduct will result in the death of another human.[31]

The California Penal Code's reference to the absence of a considerable provocation can be understood only in relation to the crime of voluntary manslaughter. As has been noted, the Penal Code defines voluntary manslaughter as "the unlawful killing of a human being without malice . . . upon a sudden quarrel or heat of passion."[32] For many years, the

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25 30 Cal.3d 290, 637 P.2d 279, 179 Cal.Rptr. 43 (1981).

26 *Id*. at 300, 637 P.2d at 285, 179 Cal.Rptr. at 49.

27 *See* MPC § 2.02(2)(a).

28 *See id*.

29 *See* MPC § 2.02(2)(c).

30 *See id*.

31 *See* MPC § 2.02(2)(b).

32 Cal. Penal Code § 192(a).

California courts construed this provision as applying only to intentional killings where the accused claimed he was provoked to kill. In People v. Lasko,[33] the California Supreme Court extended the provision to include the provoked killer who kills only with a conscious disregard for the life of the deceased.[34] As the Court correctly noted, under the statutory scheme for murder and manslaughter, there is no malice — either express or implied — when the accused kills upon a sudden quarrel or in the heat of passion.[35] If as a doctrinal matter the presence of provocation necessarily displaces express malice when the killer kills intentionally, it necessarily displaces implied malice when the killer kills recklessly.

Of particular relevance to this article, the Court cited the anomalous result that would ensue if it held that the doctrine of provocation displaced only express malice:

> Under the Attorney General's approach, one who shoots and kills another in the heat of passion and with the intent to kill is guilty only of voluntary manslaughter, yet one who shoots and kills another in the heat of passion and with conscious disregard for life but with the intent merely to injure, a less culpable mental state than intent to kill, is guilty of murder. This cannot be, and is not, the law.[36]

Although California is a Common Law state, the Court's sensitivity to different degrees of culpability is the key to understanding the Model Penal Code's mental states. Under the Model Penal Code, criminal homicide can be murder, manslaughter, or negligent homicide.[37] Criminal homicide is murder when it is committed purposely or knowingly,[38] or recklessly under circumstances manifesting an extreme indifference to the value of human life.[39] Criminal homicide is manslaughter when it is committed merely recklessly,[40] or when a homicide that would otherwise be murder is

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33 23 Cal.4th 101, 999 P.2d 666, 96 Cal.Rptr.2d 441 (2000).

34 *See* i*d*. at 109, 999 P.2d at 671, 96 Cal.Rptr.2d at 446.

35 *See id*.

36 *Id*.

37 *See* MPC § 210.1.

38 *See* MPC § 210,2(1)(a),

39 *See* MPC § 210.2(1)(b).

40 *See* MPC § 210.3(1)(a).

committed under the influence of an extreme mental or emotional disturbance for which there is a reasonable explanation or excuse.[41] This is the Model Penal Code's equivalent of the California's voluntary manslaughter doctrine. Criminal homicide is negligent homicide when it is committed negligently.[42] In Common Law jurisdictions such as California, this offense is known as involuntary manslaughter.[43]

As one would expect, under the Model Penal Code murder is punished more heavily than manslaughter, and manslaughter is punished more heavily than negligent homicide.[44] This hierarchy stems from the Code's recognition that only the most blameworthy should be punished as murderers: those whose conscious object is to kill (purposeful killers);[45] those who are practically certain that their misconduct will result in death (knowing killers),[46] and those who persist in their misconduct even though they are substantially certain that it will result in death (extremely reckless killers).[47] What all three killers share is a mental state that evinces an extreme indifference to the value of human life. Those who merely disregard a substantial risk that death might ensue from their conduct are guilty only of manslaughter.[48] Those who fail to appreciate a homicidal risk that would have been apparent to reasonable persons are guilty only of negligent homicide.[49]

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41 *See* MPC § 210.3(1)(b).

42 *See* MPC § 210.4(1).

43 *See* Cal. Penal Code § 192(b).

44 Under the Model Penal Code, murder is a felony of the first degree, manslaughter is a felony of the second degree, and negligent homicide is a felony of the third degree. *See* MPC §§ 210.2(2), 210,3(2), and 210.4(2). Section 6.06 provides that a person who has been convicted of a felony may be sentenced to prison as follows: "(1) in the case of a felony of the first degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than ten years, and the maximum of which shall be life imprisonment; (2) in the case of a felony of the second degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than three years, and the maximum of which shall be ten years; (3) in the case of a felony of the third degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than two years, and the maximum of which shall be five years."

45 *See* MPC § 2.02.(2)(a)(i).

46 *See* MPC § 2.02.(2)(b)(ii).

47 *See* People v. Register, 60 N.Y.2d 270, 285, 457 N.E.2d 704, 712, 469 N.Y.S.2d 599, 607 (1983) (Jasen, J. dissenting).

48 *See* MPC § 2.02.(2(c).

49 *See* MPC § 2.02.(2)(d).

The Model Penal Code's mental state hierarchy has another important dimension, an evidential one, which is germane to this article.

> When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly, or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.[50]

Proof of a higher mental state, such as purpose, necessarily entails proof of a lower mental state, such as knowledge. With regard to murder, proof that the accused's conscious object was to kill the victim (purpose) necessarily proves that the accused was practically certain that his conduct would result in the victim's death (knowledge). Proof that the accused was practically certain that his conduct would result in the victim's death necessarily proves that he was substantially certain that death might result from his conduct (extreme recklessness). Whether all three mental states are sufficiently blameworthy to justify a murder conviction is, of course, a policy question for the legislature. The American Law Institute concluded that any of the three justify such a conviction. On the other hand, by adhering to the Common Law tradition, the California Legislature has declared that only one of two mental states justifies a murder conviction: express malice (purpose) or implied malice (a form of recklessness). In the absence of one of the necessary mental states, one would expect a defendant accused of murder to be acquitted. That, however, is not the case in California.

C. THE FELONY MURDER RULE: THE CORE DOCTRINE

One of the very few things that can be said with certainty about the felony murder rule is that it is mired in controversy. Even its origin has been questioned. In a landmark opinion abolishing the felony murder rule, the Michigan Supreme Court, after reviewing the authorities recounting the origin of the rule, concluded its examination by noting:

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50 MPC § 2.02(5).

> [T]he doctrine is of doubtful origin. Derived from the misinterpretation of case law, it went unchallenged because of circumstances which no longer exist. The doctrine was continuously modified and restricted in England, the country of its birth, until its ultimate rejection by Parliament in 1957.[51]

Two other observations can be made about the rule with confidence. First, most of the opposition to the rule has come from courts, not legislatures, which have imposed various limitations on the operation of the rule.[52] As we shall see, the California Supreme Court has been no exception. Second, the California felony murder rule, as construed by the courts, establishes a strict liability offense with respect to the death element. The clearest statement of the rule can perhaps be found in *People v. Stamp*.[53]

> Under the felony-murder rule of section 189 of the Penal Code, a killing committed in either the perpetration of or an attempt to perpetrate robbery is murder of the first degree. This is true whether the killing is willful, deliberate and premeditated, or merely accidental or unintentional, and whether or not the killing is planned as a part of the commission of the robbery. . . .
>
> The doctrine is not limited to those deaths which are foreseeable. . . . Rather a felon is held strictly liable for all killings committed by him or his accomplices in the course of the felony. . . . As long as the homicide is the direct causal result of the robbery, the felony-murder rule applies whether or not the death was a natural or probable consequence of the robbery. So long as a victim's predisposing physical condition, regardless of its cause, is not the only substantial factor bringing about his death, that condition, and the robber's ignorance of it, in no way destroys the robber's criminal responsibility for the death. . . . So long as life is shortened as a result of the felonious act, it does not matter that the victim might have died soon anyway. . . . In this respect, the robber takes his victim as he finds him.[54]

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51 People v. Aaron, 09 Mich. 672, 698, 299 N.W.2d 304, 312 (1980).

52 *See id.*

53 2 Cal.App.3d 203, 82 Cal.Rptr. 598 (1969).

54 *Id.* at 209-210, 82 Cal.Rptr. at 602-603.

The facts of *Stamp* are compelling. Stamp and an accomplice entered a business with the intent of robbing the employees. Stamp, who was armed with a gun, had the owner (Honeyman) lie down with the rest of the employees while Stamp and his accomplice took their money.

> As the robbers, who had been on the premises 10 to 15 minutes, were leaving, they told the victims to remain on the floor for five minutes so that no one would "get hurt."
>
> Honeyman, who had been lying next to the counter, had to use it to steady himself in getting up off the floor. Still pale, he was short of breath, sucking air, and pounding and rubbing his chest. As he walked down the hall, in an unsteady manner, still breathing hard and rubbing his chest, he said he was having trouble "keeping the pounding down inside" and that his heart was "pumping too fast for him." A few minutes later, although still looking very upset, shaking, wiping his forehead and rubbing his chest, he was able to walk in a steady manner into an employee's office. When the police arrived, almost immediately thereafter, he told them he was not feeling very well and that he had a pain in his chest. About two minutes later, which was 15 to 20 minutes after the robbery had occurred, he collapsed on the floor. At 11:25 he was pronounced dead on arrival at the hospital. The coroner's report listed the immediate cause of death as heart attack.
>
> The employees noted that during the hours before the robbery Honeyman had appeared to be in normal health and good spirits. The victim was an obese, sixty-year-old man, with a history of heart disease, who was under a great deal of pressure due to the intensely competitive nature of his business. Additionally, he did not take good care of his heart.
>
> Three doctors, including the autopsy surgeon, Honeyman's physician, and a professor of cardiology from U.C.L.A., testified that although Honeyman had an advanced case of atherosclerosis, a progressive and ultimately fatal disease, there must have been some immediate upset to his system which precipitated the attack. It was their conclusion in response to a hypothetical question that but for the robbery there would have been no fatal seizure at that time. The fright induced by the robbery was too much of a shock to

> Honeyman's system. There was opposing expert testimony to the effect that it could not be said with reasonable medical certainty that fright could ever be fatal.[55]

The court affirmed the first degree murder convictions of Stamp and his accomplice. The court also affirmed the first degree murder conviction of an additional accomplice, the getaway driver, who never entered the business. Setting aside the matter of accomplice liability, it is clear from an analysis of *Stamp* that (as the court pointed out) the death element of the offense is predicated on strict liability. To survive a defense motion for a directed verdict, all the prosecution needs to do is offer evidence from which a reasonable jury could find (1) the actus reus of the underlying felony plus a death, (2) the mens rea of the underlying felony, and (3) the most basic causal connection between the commission or attempted commission of the underlying felony and the death. If it discharges this production burden, the prosecution will be entitled to have the judge instruct the jury on felony murder even if it fails to offer any evidence of the mental states associated with the homicides that have been discussed (i.e., purpose, recklessness, or negligence). Thus, the availability of the rule allows the prosecution to dispense with the requirement of producing evidence of express or implied malice or even negligence with respect to the death element.

Such a dispensation for an offense as serious as murder is surprisng given our law's commitment to the principle that, as a rule, harms should not be punishable unless accompanied by a culpable mental state. As Justice Robert Jackson observed almost sixty years ago:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public

[55] *Id.* at 208, 82 Cal.Rptr. at 601.

> prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will."[56]

D. JUDICIAL LIMITATIONS

Divorcing harms from what otherwise would be the associated mental state undermines the moral basis (a blameworthy mental state) that justifies the imposition of punishment. Not surprisingly, some state courts have responded to this dilemma by imposing limitations on the felony murder rule. One is to elevate the death element from strict liability to negligence.[57] In these jurisdictions, prosecutors must convince the jurors that the accused either foresaw or should have foreseen the death. The California courts, however, have never imposed this limitation in their construction of the state's felony murder rule. Instead, the California Supreme Court has imposed two other limitations. One, known as the merger doctrine, originally applied to both the first and second degree felony murder rules. As will be explained, it now applies only to the second degree murder rule. The other limitation has applied only to the second degree murder rule. This limitation requires that the felony underlying the murder charge be dangerous to human life in the abstract.

The Dangerous in the Abstract Requirement

In *People v. Ford,*[58] the California Supreme Court restricted the felonies that could support a conviction of second degree murder to those that are "inherently dangerous to human life."[59] As the Court explained in *People v. Williams,*[60] the purpose of the felony-murder rule is to deter felons from killing negligently or accidentally. "This purpose may be well served with

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56 Morissette v. United States, 342 U.S. 246, 250-251 (1952) (footnotes omitted).

57 *See, e.g.,* State v. Hoang, 242 Kan. 40, 43, 755 P.3d 7, 9 (1988) ("A requirement of the felony murder rule is that the participants could reasonably foresee or expect that a life might be taken in the perpetration of the felony.").

58 60 Cal.2d 772, 388 P.2d 892, 36 Cal.Rptr. 620 (1964).

59 *Id*. at 795, 388 P.2d at 907, 36 Cal.Rptr. at 635.

60 63 Cal.2d 452, 406 P.2d 647, 47 Cal.Rptr. 7, 10 (1965).

respect to felonies such as robbery or burglary, but it has little relevance to a felony which is not inherently dangerous. If the felony is not inherently dangerous it is highly improbable that the potential felon will be deterred; he will not anticipate that any injury or death might arise solely from the fact that he will commit the felony."[61]

As defined by the statute, the felony must carry "a high probability" that death will result.[62] Whether a given felony is dangerous to human life in the abstract is a question of law,[63] and in reaching its decision the court may not take into account the facts giving rise to the felony.[64] The court is limited to a facial analysis of the statute defining the felony, unless the court needs expert help determining whether the commission of the felony as contemplated in the statute poses a high probability of death.[65]

Policy concerns led the California Supreme Court to adopt the "in the abstract" requirement. Allowing the court to consider the evidence giving rise to the felony would inevitably result in a finding that the felony is dangerous to human life. "[T]he existence of the dead victim might appear to lead inexorably to the conclusion that the underlying felony is exceptionally hazardous."[66] Such an analysis would extend the second degree felony murder rule beyond any rational purpose it serves and undermine the traditional requirement that the state prove malice when charging murder.

The Merger Doctrine

In *People v. Ireland*[67] the Court held that the underlying felony must be independent and not an integral part of the homicide.[68] Since most deaths result from some sort of assault, allowing the prosecution to use the assault as the predicate felony would relieve the prosecution from having to prove

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61 *Id.* at 457 n.4, 406 P.2d at 650 n.4, 47 Cal.Rptr. at 10 n.4.

62 *See* People v. Patterson, 49 Cal.3d 615, 626, 778 P.2d 549, 558, 262 Cal.Rptr. 195, 204 (1989).

63 *See* People v. Williams, 63 Cal.2d 452, 458 n.5, 406 P.2d 647, 650 n.5, 47 Cal. Rptr. 7, 10 n.5 (1965).

64 *See id.*

65 *See, e.g.*, People v. James, 62 Cal.App.4th 244, 259, 74 Cal.Rptr.2d 7, 15 (1998).

66 People v. Burroughs, 35 Cal.3d 824, 830, 678 P.2d 894, 898, 201 Cal.Rptr. 319, 323 (1984).

67 70 Cal.2d 522, 539, 450 P.2d 580, 590, 75 Cal.Rptr. 188, 198 (1969).

68 *Id.*

malice in most homicides.[69] That would undermine California's position, as reflected in the Penal Code, that only those killers who kill with malice aforethought should be treated as murderers. As the California Supreme Court emphasized in *Ireland,* "This kind of bootstrapping finds support neither in logic nor in law."[70]

Ireland involved the second degree felony murder rule because the underlying felony (assault with a deadly weapon) is not among the felonies enumerated in Section 189 of the California Penal Code. Section 189 provides that "[a]ll murder . . . which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206 [torture], 286 [sodomy], 288 [lewd and lascivious conduct], or 289 [forcible acts of sexual penetration] . . . is murder of the first degree."[71]

In *People v. Wilson*[72] the California Supreme Court faced the question whether the *Ireland* limitation should be imposed on one of the felonies (burglary) enumerated in Section 189. Citing *Ireland*, the Court held that a burglary that was committed simply because the defendant entered a building with the intent to assault the victim could not serve as the predicate felony under Section 189.[73] According to the Court, using the burglary as the basis for felony murder would serve no purpose; it would not deter a defendant who enters the structure with the intent to inflict a felonious assault, such as assault with a deadly weapon.[74]

> Here the prosecution sought to apply the felony-murder rule on the theory that the homicide occurred in the course of a burglary, but the only basis for finding a felonious entry is the intent to commit an assault with a deadly weapon. When, as here, the entry would be nonfelonious but for the intent to commit the assault, and the assault is an integral part of the homicide and is included in fact in the offense charged, utilization of the felony-murder rule extends

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69 *Id.*

70 *Id.*

71 *See* CAL. PENAL CODE § 189.

72 1 Cal.3d 431, 462 P.2d 22, 82 Cal.Rptr. 494 (1969) *overruled by* People v. Farley, 46 Cal.4th 1053, 210 P.3d 361, 96 Cal.Rptr.3d 191 (2009).

73 *Id.* at 440, 462 P.2d at 28, 82 Cal.Rptr. at 499.

74 *Id.*

> that doctrine "beyond any rational function that it is designed to serve." We have heretofore emphasized "that the felony-murder doctrine expresses a highly artificial concept that deserves no extension beyond its required application." (*People v. Phillips* (1966) *supra*, 64 Cal.2d 574, 582, 51 Cal.Rptr. 225, 232, 414 P.2d 353, 360.)
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> "The purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit." (*People v. Washington* (1965) 62 Cal.2d 777, 781, 44 Cal.Rptr. 442, 445, 402 P.2d 130, 133.) Where a person enters a building with an intent to assault his victim with a deadly weapon, he is not deterred by the felony-murder rule. That doctrine can serve its purpose only when applied to a felony independent of the homicide.[75]

In *People v. Farley*,[76] however, the Court overruled *Wilson*, holding that it could not ignore the legislature's clear intention to allow the use of burglary as a predicate felony, even if the defendant committed the burglary by entering the structure with the intent to assault the victim.[77] In sharp contrast to its position in *Ireland* and *Wilson*, the Court in *Farley* found that the felony murder rule serves a rational function after all even in these circumstances:

> First, a person who enters a building with the intent to assault, rather than to kill (in which case the felony-murder rule would be unnecessary), may be deterred by the circumstance that if the victim of the assault dies, the burglar "will be deemed guilty of first degree murder." Second, the circumstance that the degree to which the peril is heightened may vary, depending upon the particular structure in which the assault occurs, does not negate the purpose of deterring assaults and the heightened risks entailed by assaults that are committed within structures. Individuals within any type of structure are in greater peril from those entering the structure with the intent to commit an assault, than are individuals in a public location who are the target of an assault. . . . Victims

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75 *Id.* at 440, 462 P.2d at 28, 82 Cal.Rptr. at 499-500.

76 46 Cal.4th 1053, 210 P.3d 361, 96 Cal.Rptr.3d 191 (2009).

77 *Id.* at 1118-1120, 210 P.3d at 409-410, 96 Cal.Rptr.3d at 248-249.

> attacked in seclusion have fewer means to escape, and there is a diminished likelihood that the crimes committed against them will be observed or discovered. These risks are present regardless of whether the burglary and assault occur in a home, a tent, or a trailer coach. . . . For these reasons, we reject *Wilson*'s conclusion that no purpose is served by applying the felony-murder doctrine to a burglary premised upon an intent to assault.[78]

The question whether a felony that is not enumerated in Section 189 merges with the homicide has generated its own jurisprudence. An example is Section 246 which punishes discharging a firearm into an occupied dwelling.[79] In *People v. Wesley*[80] two codefendants were charged with murdering the occupant of a dwelling. The evidence showed that the victim was killed when each discharged a firearm at the dwelling. Since the evidence showed that "the homicide and the underlying felony . . . were committed by the same act,"[81] the California Court of Appeal held that *Ireland* barred the use of the underlying felony.

> The discharge of the firearms by the defendants was the means by which the homicide was committed and was in fact an "integral part"' and a "'necessary element"' of the homicide. Under the rule of Ireland and Wilson, the question as to whether the criminal act of committing the two lesser offenses was done with "malice aforethought" should have been left to the jury.[82]

In *People v. Hansen*,[83] however, the California Supreme Court overruled *Wesley*. As in *Wesley*, the defendant in *Hansen* was charged with murder. Also, as in *Wesley*, the evidence in *Hansen* showed that the death resulted from the defendant's discharging a firearm at an inhabited dwelling. The Court, however, rejected *Wesley*'s premise that *Ireland's* "integral part of

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78 *Id*.

79 Cal. Penal Code § 246.

80 10 Cal.App.3d 902, 89 Cal.Rptr. 377 (1970), *disapproved by* People v. Hansen, 9 Cal.4th 300, 885 P.2d 1022, 36 Cal.Rptr.2d 609 (1994), *overruled by* People v. Chun, 45 Cal.4th 1172, 203 P.3d 425, 91 Cal.Rptr.3d 106 (2009).

81 *Id*. at 907, 89 Cal.Rptr. at 380.

82 *Id*.

83 9 Cal.4th 300, 885 P.2d 1022, 36 Cal.Rptr.2d 609 (1994), *overruled by* People v. Chun, 45 Cal.4th 1172, 203 P.3d 425, 91 Cal.Rptr.3d 106 (2009).

the homicide" language constitutes the crucial test in determining the existence of merger.

> Such a test would be inconsistent with the underlying rule that only felonies "inherently dangerous to human life" are sufficiently indicative of a defendant's culpable mens rea to warrant application of the felony-murder rule. (See *People v. Satchell, supra,* 6 Cal.3d 28, 43, 98 Cal.Rptr. 33, 489 P.2d 1361.) The more dangerous the felony, the more likely it is that a death may result directly from the commission of the felony, but resort to the "integral part of the homicide" language would preclude application of the felony-murder rule for those felonies that are most likely to result in death and that are, consequently, the felonies as to which the felony-murder doctrine is most likely to act as a deterrent (because the perpetrator could foresee the great likelihood that death may result, negligently or accidentally).[84]

The Court stressed that permitting the use of Section 246 as the underlying felony would not subvert the legislative policy of insisting on proof of malice for murder in most other cases. "[U]nlike the situation in *People v. Ireland* . . . , application of the felony-murder doctrine in the present context will not have the effect of preclud[ing] the jury from considering the issue of malice aforethought. . . ."[85] The reason, explained the Court, is that "[m]ost homicides do not result from a violation of section 246."[86] In addition, the Court emphasized that allowing the use of Section 246 as the predicate felony would be consistent with the goal of the felony murder rule: "the deterrence of negligent or accidental killings that occur in the course of the commission of dangerous felonies."[87]

In *People v. Robertson,*[88] however, the Court took a different, seemingly inconsistent position. The issue was whether a related statute, Section 246.3, could serve as the predicate felony in applying the second degree felony murder rule. Section 246.3 makes it an offense to discharge a firearm

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84 *Id*. at 314, 885 P.2d at 1030, 36 Cal.Rptr.2d at 617.

85 *Id*. at 315, 885 P.2d at 1030, 36 Cal.Rptr.2d at 617.

86 *Id*.

87 *Id*.

88 34 Cal.4th 156, , 95 P.3d 872, 17 Cal.Rptr.3d 604 (2004), *overruled by* People v. Chun, 45 Cal.4th 1172, 203 P.3d 425, 91 Cal.Rptr.3d 106 (2009).

"in a grossly negligent manner which could result in injury or death to a person."[89] A facial analysis of the statute suggests that the use of this felony would be barred by *Ireland*. Any death resulting from the commission of the felony would appear to be the outcome of the assaultive conduct contemplated by the statute.[90] Nonetheless, the Court could have affirmed the felony murder conviction on the ground advanced in *Hansen*: most deaths simply do not occur as a result of violating such felonies as Sections 246 and 246.3. Instead, the Court chose to rely on another ground,[91] one the Court announced over thirty years earlier in *People v. Mattison*.[92]

Mattison held that an inherently dangerous felony that would otherwise be barred by *Ireland* can nevertheless qualify as the predicate felony if the offender does not commit the felony "with the intent to commit an injury which would cause death."[93] An example would be selling a beverage laced with methyl alcohol. Methyl alcohol is a poison, and Section 347 of the Penal Code makes it a felony to furnish beverages that contain poisons.[94] Since administering a poison is a form of assault, *Ireland* would preclude the use of Section 347 as the predicate felony. But under *Mattison* the felony can still be used if the offender furnishes the beverage not to cause the victim an injury that would cause death but to satisfy the victim's desire for an intoxicating beverage.[95]

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89 *See* CAL. PENAL CODE § 246.3.

90 The California Supreme Court has defined an assault as a crime of negligence. *See* People v. Williams, 26 Cal.4th 779, 786-787, 29 P.3d 197, 202-203, 111 Cal.Rptr.2d 114, 120-121 (2001). Accordingly, the fact that gross negligence suffices for liability under Section 246.3 appears to satisfy *Ireland*'s requirement that the conduct contemplated by the statute be assaultive in nature.

91 *See* People v. Robertson, 34 Cal.4th 156, 171, 95 P.3d 872, 881, 17 Cal.Rptr.3d 604, 610 (2004), *overruled by* People v. Chun, 45 Cal.4th 1172, 203 P.3d 425, 91 Cal. Rptr.3d 106 (2009).

92 4 Cal.3d 177, 481 P.2d 193, 93 Cal.Rptr. 185 (1971).

93 *Id.* at 185, 481 P.2d at 198, 93 Cal.Rptr. at 190.

94 *See* CAL. PENAL CODE § 347.

95 In *Mattison*, the defendant and the victim were inmates in a California prison. The defendant worked as a technician in the prison lab where methyl alcohol was kept. He was known for selling alcohol to inmates. The victim offered to buy the alcohol from him. *See* People v. Mattison, 4 Cal.3d 177, 180, 481 P.2d 193,195, 93 Cal.Rptr. 185, 187 (1971).

In *People v. Chun*[96] the issue was whether another provision of Section 246 could serve as the predicate felony under *Ireland*. Section 246 punishes discharging a firearm at occupied motor vehicles as well as at occupied dwellings.[97] The question in *Chun* was whether discharging a firearm at an occupied motor vehicle could serve as the predicate felony. The Court recognized that its merger jurisprudence had given rise to two tests to determine when *Ireland* does not apply when the commission of the underlying felony involves assaultive conduct: (1) when, as in *Hansen*, the violation of the felony rarely results in death or (2) when, as in *Robertson*, the felon did not intend to commit an injury that would result in death. As the Court acknowledged, the two tests cannot "apply at the same time."[98] Concluding that *Robertson* had implicitly overruled *Hansen*, the Court overruled *Hansen* explicitly.[99]

Determining whether the felon committed the underlying felony without the intent to commit an injury that would cause death requires a factual determination. Although the parties can be counted upon to present evidence on this issue, a crucial question is whether the issue is for the judge or jury to decide. Since the question whether the felony qualifies as a predicate felony has been viewed as one of law, it would seem that the judge, not the jury, would have to make this determination. On the other hand, determining the defendant's intention may require passing on the credibility of the witnesses called on this issue, and questions regarding credibility are generally reserved for the jurors. To avoid resolving these difficulties, including the need for an evidentiary hearing, the Court in *Chun* rewrote the rules for implementing the *Ireland* limitation.

> When the underlying felony is assaultive in nature, such as a violation of section 246 or 246.3, we now conclude that the felony merges with the homicide and cannot be the basis of a felony-murder instruction. An "assaultive" felony is one that involves a threat of immediate violent injury. (See *People v. Chance* (2008) 44 Cal.4th 1164, 1167-1168, 81 Cal.Rptr.3d 723, 189 P.3d 971.) In determining whether a crime merges, the court looks to its elements and not the

96 45 Cal.4th 1172, 203 P.3d 425, 91 Cal.Rptr.3d 106 (2009).

97 *See* Cal. Penal Code § 246.

98 *Id.* at 1198, 203 P.3d at 442, 91 Cal.Rptr.3d at 126.

99 *See id.* at 1199, 203 P.3d at 442, 91 Cal.Rptr.3d at, 126.

> facts of the case. Accordingly, if the elements of the crime have an assaultive aspect, the crime merges with the underlying homicide even if the elements also include conduct that is not assaultive.[100]

The Court's reference to "conduct that is not assaultive" is another example of the Court's efforts to clear some of the conceptual clutter that surrounds the felony murder rule. In making the merger determination, judges face a challenging task when the statute defines more than one offense, and one involves assaultive conduct but another does not. An example is the statute punishing child abuse by direct assault as well as by neglect.[101] Child abuse by direct assault clearly disqualifies the felony as the predicate under *Ireland*. Child abuse resulting from neglect (e.g., by withholding nutrition) may not. After *Chun*, the task of judges is simplified. They may not allow a prosecutor to use a felony that is inherently dangerous to human life as long as one of its provisions contemplates injury resulting from assaultive conduct.

Although the Court's efforts to simplify the tasks facing judges is commendable, uncertainty still surrounds even this aspect of the second degree felony murder rule. The Court left for another day the question of which "felonies are assaultive in nature, and hence may not form the basis of a felony-murder instruction, and which are inherently collateral to the resulting homicide and do not merge."[102]

Those who share the Court's skepticism about the value of the felony murder rule will applaud the Court's efforts to rein in the second degree felony murder rule. But a more intriguing question is whether California has such a rule in the first place. The Penal Code does not contain a provision explicitly referring to or defining second degree felony murder.

The only provision of the Penal Code that comes close to defining felony murder is Section 189. As has been stated, it provides in pertinent part that "[a]ll murder . . . which is committed in the perpetration of, or attempt to perpetrate, [enumerated felonies] is murder of the first degree."[103] But neither this section nor any other expressly refers to second degree felony

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100 *Id*. at 1200, 203 P.3d at 443, 91 Cal.Rptr.3d at 127.

101 *See* Cal. Penal Code § 273a(a).

102 *See* People v. Chun, 45 Cal.4th 1172, 1200, 203 P.3d 425, 443, 91 Cal.Rptr.3d 106, 128 (2009).

103 Cal. Penal Code § 189.

murder. Occasionally, the omission has led some members of the Court to question its authority to define second degree felony murder. Justice Panelli has been among the most forceful in questioning the Court's authority.

> There are, or at least should be, no nonstatutory crimes in this state. *(In re Brown* (1973) 9 Cal.3d 612, 624, 108 Cal.Rptr. 465, 510 P.2d 1017; see Pen.Code, § 6.) The second degree felony-murder rule, however, either creates a nonstatutory crime or increases the punishment for statutory crimes beyond that established by the Legislature. We derive such authority neither from the Constitution (see Cal. Const., art. III, § 3) nor from the Penal Code. (See Pen.Code, §§ 6, 12, 13, 15.)
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> My uneasiness with the second degree felony-murder rule is mirrored in the majority's adoption of the new "high probability of death" standard, which certainly will restrict the rule's future application. . . . It may also be reflected in how often the majority mentions that the Legislature has failed to act. . . . Today the majority expressly relies on that failure as a justification for continuing to "determine the scope" of this anomalous common law crime. . . . But in view of the Legislature's long-standing declaration that "[n]o act or omission . . . is criminal or punishable, except as prescribed or authorized by [the Penal Code]" (Pen.Code, § 6), I question whether subsequent legislative inaction is a sufficient justification.
>
> In short, I am not quite convinced that the second degree felony-murder rule stands on solid constitutional ground. Since the rule permits a court to increase the punishment for certain dangerous crimes, the temptation to invoke it is great when we are facing the type of social crisis that illegal drugs have brought upon us. While I am aware of the crisis, nevertheless, I respectfully suggest that it is the Legislature that has the resources and constitutional authority to determine and define what conduct is criminal and to set the punishment for such crimes.[104]

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[104] People v. Patterson, 49 Cal.3d 615, 641, 778 P.2d 549, 568, 262 Cal.Rptr. 195, 214 (1989) (Panelli, J. dissenting).

Twenty years after Justice Panelli's criticism, the Court responded to his concerns. In *People v. Chun*,[105] the Court held that it was the legislature's intent to embody the second degree felony murder doctrine in the term "abandoned and malignant heart."[106]

E. SECOND DEGREE FELONY MURDER: AN EXERCISE IN IMAGINATIVE STATUTORY CONSTRUCTION

A rich imagination helps when construing a statute that makes no express reference to the doctrine that is the focus of the inquiry. The fact is that the California Penal Code does not contain the term "felony murder," much less "second degree felony murder." The only reference to the felony murder doctrine is Section 189's specification that only murder committed in the perpetration or attempted perpetration of enumerated felonies is murder of the first degree.[107] But as we shall see, even with respect to first degree felony murder, it is questionable whether Section 189 creates the offense of felony murder as a matter of statutory interpretation.

The problem, however, is more acute with regard to second degree felony murder. As a matter of plain English, the term "abandoned and malignant heart" provides no hint whatever that it embodies the second degree felony murder rule. How, then, did the Court conclude that the term includes the rule? By taking full advantage of its very vagueness.

The term is unquestionably of Common Law origin and was adopted by the English judges to denote a mental state for murder where the killer did not intend to bring about the death of the victim.[108] If the offender intended to bring about the victim's death, then he was guilty of express malice murder. But if he did not intend to bring about the victim's death, he was guilty of implied malice murder.[109] In terms of punishment, however, whether one was guilty of express or implied malice murder was immaterial. The punishment for either form of murder was the same.

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105 45 Cal.4th 1172, 203 P.3d 425, 91 Cal.Rptr.3d 106 (2009).

106 *See id.* at 1184, 203 P.3d at 431, 91 Cal.Rptr.3d at 113-114.

107 *See* Cal. Penal Code § 189.

108 *See* W. Lafave & A. Scott, Criminal Law § 7.1 at 605-606 (West 2d. ed. 1986).

109 *See id.*

The debate at Common Law was whether the murderer who acts with implied malice had to be aware of the homicidal risk his conduct posed. "The English judge and criminal law historian Stephen took the view that one should not be guilty of murder of this type unless he was aware of the risk. Justice Holmes, on the other hand, thought he should be guilty of murder if a reasonable man would have realized the risk, regardless of whether he himself actually realized it."[110] The California Supreme Court sided with Stephen. In *People v. Watson*[111] it held that "malice may be implied when a person, knowing that his conduct endangers the life of another, nonetheless acts deliberately with conscious disregard for life."[112] Today, the standard jury instruction tells the jurors that malice may be implied when "1. The killing resulted from an intentional act; 2. The natural consequences of the act are dangerous to human life; and 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life."[113]

Since implied malice is concerned with the conscious creation of homicidal risks, how did the Court conclude that the term includes the second degree felony murder doctrine? By relying on a cryptic note by the commissioners who drafted the 1872 penal code and an early case of dubious authority.

The Court began with an analysis of Section 19 of California's first penal code enacted in 1850.[114] Section 19 defined murder "as the unlawful killing of a human being, with malice aforethought, either express or implied."[115] Section 21 provided that "[m]alice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart."[116]

As is evident, Sections 19 and 21 of the 1850 code are identical to Sections 187 and 188 of the current penal code. The 1850 code, however,

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110 *See id.* § 7.4 at 620 (West 2d. ed. 1986) (footnotes omitted).

111 30 Cal.3d 290, 637 P.2d 279, 179 Cal.Rptr. 43 (1989).

112 *Id.* at 296, 637 P.2d at 282, 179 Cal.Rptr. at 47.

113 *See* CALJIC 8.11.

114 People v. Chun, 45 Cal.4th 1172, at 1184, 203 P.3d 425, 432, 91 Cal.Rptr.3d 106, 114 (2009).

115 *Id.*

116 *Id.*

contained one provision that differs from the current penal code. Section 25 provided as follows:

> Involuntary manslaughter shall consist in the killing of a human being, without any intent so to do; in the commission of an unlawful act, which probably might produce such a consequence in an unlawful manner; *Provided* that where such involuntary killing shall happen in the commission of an unlawful act, which in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder.[117]

The current code's closest approximation to Section 25 is Section 192, which in pertinent part provides as follows:

> Manslaughter is the unlawful killing of a human being without malice. It is of three kinds: (a) Voluntary — upon a sudden quarrel or heat of passion. (b) Involuntary — in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.[118]

Both Section 21 and current Section 187 contain the language "when no considerable provocation appears."[119] As has been noted, the language of Section 187 should be read in connection with Section 192(a).[120] Such a reading reveals the legislature's intention to exempt some intentional and reckless homicides from the operation of the murder statutes. If these homicides are committed upon a sudden quarrel or in the heat of passion, they constitute the lesser homicide of voluntary manslaughter, not murder.[121]

Section 192(b) defines two offenses. The language "in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection" refers to negligent homicide, which in California is a form of involuntary manslaughter. The gravamen of the offense is that the accused is guilty even if he was unaware of the

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117 *Id.* at 1185, 203 P.3d at 432, 91 Cal.Rptr.3d at 114 (italics in the original).

118 Cal. Penal Code § 192(a)-(b).

119 *Compare* Section 21 *with* Cal. Penal Code § 188.

120 *See* text accompanying note 32 *supra*.

121 *See* Cal. Penal Code § 192(a).

homicidal risk if a reasonable person in similar circumstances would have been aware of it.[122]

The language "in the commission of an unlawful act, not amounting to felony" refers to the misdemeanor manslaughter rule, although in California it should be called the "the unlawful act manslaughter rule." Under this doctrine, defendants who kill while committing some misdemeanor or other unlawful act not amounting to felony are guilty of involuntary manslaughter even if they did not intend to kill the victim or were unaware that their conduct posed a homicidal risk.[123] Although no mental state attaches to the death element, the California Supreme Court requires the prosecution to prove that the accused committed the underlying unlawful act in a manner that endangers human life.[124]

Since both old Section 25 and current Section 192 embody the unlawful act manslaughter rule, the key difference between the two is that Section 25 defined as murder a homicide that "is committed in the prosecution of a felonious intent. . . ." As the California Supreme Court underscored in *Chun*, the most plausible construction of the language is that the legislature that enacted the 1850 code intended to include the felony murder doctrine.[125] The problem, however, is that the legislature that enacted the 1872 code omitted this language from Section 192 and failed to include it in the provisions defining murder (Sections 187 and 188). As previously discussed, the only reference to felony murder in the 1872 code appears in Section 189 which defines as first degree murder homicides occurring during the commission or attempted commission of enumerated felonies.[126] Limiting the felony murder rule to the commission or attempted commission of specified felonies suggests that the rule cannot be predicated on the commission or attempted commission of other felonies. In short, when the legislature adopted the 1872 penal code, it eliminated second degree felony murder.

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122 *See* CALJIC 8.45 – 8.46.

123 *See* People v. Cox, 23 Cal.4th 665, 670, 2 P.3d 1189, 1192, 97 Cal.Rptr.2d 647, 650 (2000) and cases cited therein.

124 *Id.*

125 *See* People v. Chun, 45 Cal.4th 1172, 1185, 203 P.3d 425, 432, 91 Cal.Rptr.3d 106, 114 (2009).

126 *See* Cal. Penal Code § 189.

In *Chun*, however, the Court refused to adopt this construction by relying principally on a note to Section 192 prepared by the commissioners who drew up the 1872 Code. The note states that "[t]his section embodies the material portions of Sections 22, 23, 24, and 25 of the Crimes and Punishment Act of 1850."[127] According to the California Supreme Court:

> This latter note strongly indicates that the language change from section 25 of the Act of 1850 to section 192 was not intended to change the law of manslaughter, much less to change the law of murder by abrogating the common law felony-murder rule. Any statute that "embodies the material portions" of predecessor statutes would not change the law in such a substantial manner.[128]

The difficulty with this construction of the note is that new Section 192 retained only the unlawful act manslaughter rule and negligent homicide provisions of old Section 25. It omitted Section 25's reference to felony murder. Moreover, the new sections of the 1872 code defining murder at most retain first degree felony murder and exclude second degree felony murder by omitting Section 25's reference to felony murder.[129]

To bolster its construction of the note, the Court cites felony murder cases decided after the enactment of the 1872 penal code that in turn cite *People v. Doyell*.[130] A felony murder case, *Doyell* arose under the 1850 penal code but was decided after the 1872 code was enacted.[131] It held that "[w]henever one, in doing an act with the design of committing a felony, takes the life of another, even accidentally, this is murder."[132] However, the Court's reliance on *Doyell* is problematical. As the Court itself admits, *Doyell* was construing Section 25.[133] Nonetheless, the Court concluded:

> [T]he Legislature's replacement of the proviso language of section 25 of the Act of 1850 with the shorthand language "not amounting

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127 *Reprinted* in People v. Chun, 45 Cal.4th 1172, 1187, 203 P.3d 425, 433, 91 Cal. Rptr.3d 106, 116 (2009).

128 *See* People v. Chun, 45 Cal.4th 1172, 1187, 203 P.3d 425, 433, 91 Cal.Rptr.3d 106, 116 (2009).

129 *See* Cal. Penal Code §§ 187-189.

130 48 Cal. 85 (1874).

131 *Id*. at 86.

132 *Id*. at 94.

133 *See id*.

> to a felony" in section 192 did not imply an abrogation of the common law felony-murder rule. The "abandoned and malignant heart" language of both the original 1850 law and today's section 188 contains within it the common law second degree felony-murder rule. The willingness to commit a felony inherently dangerous to life is a circumstance showing an abandoned and malignant heart. The second degree felony-murder rule is based on statute and, accordingly, stands on firm constitutional ground.[134]

As a federal matter, however, that ground may not be as firm as the Court thinks.

F. SECOND DEGREE FELONY MURDER: INFERENCE v. PRESUMPTION v. VALID EXERCISE OF THE POLICE POWER

As has been discussed, the Court has construed the term "an abandoned and malignant heart" as a mental state characterized by the conscious creation of homicidal risks. "[M]alice," the Court has held, "may be implied when a person, knowing that his conduct endangers the life of another, nonetheless acts deliberately with conscious disregard for life."[135] As an evidentiary matter, a jury can infer that a defendant acted with a conscious disregard for life from evidence that at the time he inflicted the fatal blow he was committing a felony that strikes jurors as inherently dangerous to human life. Take the case of a defendant who is prosecuted for murder because he furnished heroin of an unusually high strength to a victim who died of an overdose. A jury could legally convict him of implied malice murder if it found that he was aware of the substantial homicidal risk the heroin posed to the victim. Even if the prosecution lacked direct evidence that the defendant was aware of the strength of the heroin (through an admission, for example), a jury could infer his knowledge from other evidence, for example, his years dealing dangerous controlled substances, including heroin. Under the California Evidence Code, "An inference is

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134 People v. Chun, 45 Cal.4th 1172, 1187, 203 P.3d 425, 434, 91 Cal.Rptr.3d 106, 116 (2009).

135 People v. Watson, 30 Cal.3d 290, 296, 637 P.2d 279, 282, 179 Cal.Rptr. 43, 47 (1989).

a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action."[136] A jury convicting the defendant of implied malice murder would simply be deducing his mental state from the evidence that he was aware of the homicidal risks of using unusually strong heroin as a result of his experience as a drug dealer.

A California appellate court would not reverse the defendant's conviction on the ground that the evidence was insufficient to support the conviction for implied malice murder. In reviewing a sufficiency challenge, the appellate court must view the evidence in the light most favorable to the judgment.[137] If viewing the evidence in this light the court concludes that a reasonable jury could infer the defendant's mental state, the court would have to affirm the judgment.[138] The only federal constitutional limitation on the jury's fact finding in this respect was imposed by the United States Supreme Court in *Barnes v. United States*.[139] As a matter of due process, a judge should not instruct the jurors that they may draw an inference, unless the judge finds that the prosecution's evidence, if believed, could move reasonable jurors to draw the inference.[140] Since the federal constitutional test is the same as the state sufficiency test, the Constitution is hardly a bar to a jury's power to find criminal mental states from circumstantial evidence.

Federal due process concerns are elevated, however, when the jury's fact finding takes the form, not of inferences, but presumptions. This would be the case, for example, if in the case under consideration the judge were to instruct the jurors as follows:

> Evidence has been introduced that the defendant has been a dealer in heroin and other dangerous controlled substances for a number of years. If you find these facts to be true beyond a reasonable doubt, then you must find that the defendant consciously

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136 Cal. Evid. Code § 600(b).

137 *See*, e.g., People v. Johnson, 26 Cal.3d 557, 577-578, 606 P.2d 738, 750-751, 162 Cal.Rptr. 431, 433-444 (1980).

138 *Id*.

139 412 U.S. 837 (1973).

140 *See id*. at 843.

> disregarded the homicidal risk he posed by furnishing heroin to the victim.[141]

This instruction describes a conclusive presumption.[142] It tells the jurors that if they find one set of facts, they must find another. This kind of presumption violates due process because it relieves the prosecution from having to prove the presumed fact (the accused's mental state) beyond a reasonable doubt, it impermissibly withdraws the issue of the existence of the presumed fact from the jury, and it prevents the defendant from raising a reasonable doubt about the existence of the presumed fact.[143]

In light of these due process considerations, the California Supreme Court's language in *Chun* justifying the second degree felony murder rule is troubling. The Court emphasized that a defendant's "willingness to commit a felony inherently dangerous to life is a circumstance showing an abandoned and malignant heart."[144] Clearly, the Court did not have inferences in mind. If the judge merely instructed the jurors to convict the

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141 For purposes of this jury instruction, it is assumed that furnishing heroin is a felony inherently dangerous to human life in the abstract and that its use as the predicate felony is not barred by *Ireland*. For an extended discussion of these points, see text accompanying note 58 *supra*.

142 *See* Cal. Evidence Code § 600.

143 *See* Francis v. Franklin, 471 U.S. 307, 313 (1985). *See generally* M. Méndez, Evidence: The California Code and the Federal Rules — A Problem Approach § 18.07 at 707 (Thomson-West 4th ed. 2008).

144 People v. Chun, 45 Cal.4th 1172, 1187, 203 P.3d 425, 434, 91 Cal.Rptr.3d 106, 116 (2009). It is not absolutely clear, however, that the Court necessarily had recklessness with respect to the death element in mind when it observed that the defendant's "willingness to commit a felony inherently dangerous to life is a circumstance showing an abandoned and malignant heart." In its *Chun* opinion, the Court declined to equate the mental state of second degree felony murder with the kind of recklessness called for by the term "abandoned and malignant heart."

> We have said that the "felony-murder rule eliminates the need for proof of malice in connection with a charge of murder, thereby rendering irrelevant the presence or absence of actual malice, both with regard to first degree felony murder and second degree felony murder." [Citations omitted.] But analytically, this is not precisely correct. The felony-murder rule renders irrelevant *conscious-disregard-for-life* malice, but it does not render malice itself irrelevant. Instead, the felony-murder rule "acts as a substitute" for conscious-disregard-for-life malice. [Citations omitted.] It simply describes a different form of malice under section 188. "The felony-murder rule imputes the requisite malice for a murder conviction to those who commit a homicide during

accused of murder only if they found, among other matters, his reckless state of mind beyond a reasonable doubt, the conviction would not rest on the felony murder doctrine.

Instead, the Court appears to be saying that, if believed by the jury, evidence of a defendant's "willingness to commit a felony inherently dangerous to life" is conclusive proof of his awareness and conscious disregard of the homicidal risk.[145] An instruction directing the jurors to find this mental state if they find beyond a reasonable doubt that the defendant displayed a willingness to commit the felony would constitute an impermissible conclusive presumption. Such a dire outcome, if possible, should be avoided.

One way to do so is by returning to the felony murder model. Under the model, the death element at Common Law and in California is predicated on strict liability. It has no mental state.[146] Setting aside the distinction between first and second degree felony murder, to convict someone of felony murder a California prosecutor has to prove only the mens rea and actus reus of the underlying felony, a death, and the most basic ("but for") causal connection between the commission or attempted commission of the felony and the death.[147] Because the death element has no mental state,

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the perpetration of a felony inherently dangerous to life." (*Hansen, supra*, 9 Cal.4th at p. 308, 36 Cal.Rptr.2d 609, 885 P.2d 1022.)

People v. Chun, 45 Cal.4th 1172, 1184, 203 P.3d 425, 431-432, 91 Cal.Rptr.3d 106, 114 (2009) (italics in the original). The Court, however, fails to specify exactly what mental state is imputed.

145 This is apparently the view of Justice Baxter, who concurred in *Chun*: "Put in terms of the modern definition of implied malice, where one commits a felony inherently dangerous to human life without legal justification or defense, then under operation of the second degree felony-murder rule, a homicide resulting therefrom *is* a killing 'proximately result[ing] from an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.'" *See id*. at 45 Cal.4th at 1209, 203 P.3d at 449, 91 Cal.Rptr.3d 106 at 135. (Baxter, J. concurring and dissenting) (italics in the original; some internal quotation marks omitted).

146 Occasionally, the Court has recognized that no mental state attaches to the death element of the second degree felony murder rule. *See, e.g.,* People v. Patterson, 49 Cal.3d 615, 626, 778 P.2d 549, 557, 262 Cal.Rptr. 195, 203 (1989). The rule "eliminates the need for the prosecution to establish the *mental* component." *Id*. (italics in the original).

147 California has replaced the "but for" causation in fact concept with more elaborate wording, but substantively the concept remains the same, and in the standard jury instruction it is still entitled "The But For Test." *See* CALJIC 3.40.

there is no danger that applying the felony murder rule would relieve the prosecution of having to prove the defendant's recklessness or deprive the defendant of the opportunity to contest the existence of this mental state. The only question is whether California can convict someone of murder without having to prove at least recklessness.

The answer depends on whether California can do so in the exercise of its police powers under the federal Constitution. The answer is "yes." The United States Supreme Court has long held that under the Constitution it is the states, not the federal government, that have plenary power to regulate crime.[148] Unless a state's exercise of its power invades a right or interest protected by the Constitution (e.g., the right of unmarried adults to engage in consensual sex),[149] the Court will generally uphold the state statute.[150] Accordingly, if the California Legislature chooses to permit the mens rea of the underlying felony to suffice for felony murder, it is free to do so.

The only limitation that the United States Supreme Court has imposed on the use of felony murder relates not to conviction of this offense but to its punishment. Under the Eighth Amendment's proscription of cruel and unusual punishments, a state may not impose the death penalty upon a murderer convicted under its felony murder rule, unless it proves that the murderer was at least reckless with respect to the death.[151]

The murder statutes of some states allow for conviction even if the assailant did not intend to kill the victim (express malice) or consciously disregard the homicidal risk to the victim (implied malice), but merely wished to inflict serious bodily injury.[152] None of these statutes has been invalidated on the federal ground that they exceed the state's police powers. The California Supreme Court can thus avoid serious due process claims by jettisoning the fiction that those who commit felonies that are inherently dangerous to

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148 *See, e.g.,* Screws v. United States, 325 U.S. 91, 109 (1945) ("Our National government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States.").

149 *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

150 *See id*.

151 *See* Enmund v. Florida, 458 U.S. 782, 797 (1982); *see also* Tyson v. Arizona, 81 U.S. 137, 157 (1987).

152 *See, e.g.,* Section 9-1 of the Illinois Criminal Code, 720 ILCS 5/9-1; *see generally*, W. Lafave & A. Scott, Criminal Law § 7.4 at 620 (West 2d ed. 1986).

human life are necessarily aware of the homicidal risks they pose and, instead, emphasize the legislature's goal simply to punish as murderers those who kill while committing or attempting to commit felonies which as a matter of law are inherently dangerous to human life in the abstract.

G. FIRST DEGREE FELONY MURDER

The problem with first degree felony murder in California is not the absence but the *presence* of felony murder language in its penal code. After setting out the actus reus (Section 187) and mens rea (Section 188) of murder, the legislature in Section 189 declares that "[a]ll murder" that is committed in the perpetration or attempted perpetration of enumerated felonies is "murder of the first degree."[153] A plain reading of this provision reveals that it is simply a degree-fixing statute. Murders committed under the enumerated circumstances are murder of the first degree. Under this construction, it is obvious that the state has to prove that the defendant acted with express or implied malice. Unlike second degree felony murder, the death element is not predicated on strict liability — the element requires proof of malice.

A fundamental canon of statutory construction provides that in interpreting a statute a court should not resort to legislative history when the statute is free of any ambiguity and its meaning is plain.[154] Section 189 is neither ambiguous nor is its meaning unclear. Yet, the California Supreme Court declined to apply this most basic rule of statutory construction to this provision. In *People v. Dillon*[155] the Court in effect held that the legislature intended "homicides" not murder when it used the term "murder" in connection with the enumerated felonies. By so holding, the Court rejected the claim that Section 189 was simply a degree-fixing statute and preserved the state's first degree felony murder rule.

How the Court reached this surprising conclusion is worth recounting. The Court began by examining the legislative history of Section 189

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153 *See* CAL. PENAL CODE § 189.

154 *See, e.g.*, People v. Farley, 46 Cal.4th 1053, 1118, 210 P.3d 361, 408, 96 Cal. Rptr.3d 191, 248 (2009) (holding that where the statutory language is clear and free of any ambiguities, the court has no authority to impose its own interpretation).

155 34 Cal.3d 441, 668 P.2d 697, 194 Cal.Rptr. 390 (1983).

and explaining why its history showed that Section 189 appeared to be only a degree-fixing provision. The 1850 penal code did not divide murder into first and second degrees. All murder was punishable by death. In 1856 when the legislature amended the code to divide murder into degrees, the new provision provided that only those homicides resulting from the commission or attempted commission of the felonies specified in the amendment were murder of the first degree; homicides resulting from the commission or attempted commission of other felonies remained murder of the second degree. Thus, according to the *Dillon* Court, the 1856 amendment was designed to serve as a degree-fixing provision.[156]

When the legislature replaced the 1850 penal code with the 1872 code, it omitted that portion of Section 25 creating the felony murder rule. According the *Dillon* Court, when the legislature deletes an express provision of a statute, "it is ordinarily to be presumed" that the legislature "intended a substantial change in the law."[157] "Under this principle, the Legislature's decision not to reenact the felony-murder provision of section 25 in the 1872 codification implied an intent to abrogate the common law felony-murder rule that the section had embodied since 1850."[158] Such an abrogation, of course, supports the claim that Section 189 is only a degree-fixing provision.

The *Dillon* Court also noted that, aside from a few grammatical changes, the wording of Section 189 is identical to that of the 1856 amendment. "In these circumstances, the code itself decreed the proper construction of section 189: 'The provisions of this Code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments.' (Pen. Code, § 5.)"[159] In other words, the new code itself requires that Section 189 be given the same construction as that of its 1856 predecessor: that of being a degree-fixing provision.

In addition, the *Dillon* Court cited another rule of statutory construction. "[W]hen a statute defines the meaning to be given to one of its terms, that meaning is ordinarily binding on the courts. [Citations omitted.] It is presumed the word was used in the sense specified by the Legislature,

156 *See id.*

157 *Id.* at 467, 668 P.2d at 712, 194 Cal.Rptr. at 405.

158 *Id.*

159 *Id.*

and the statute will be construed accordingly."[160] According to the *Dillon* Court, this rule of statutory construction requires the Court to give to "murder" in Section 189 the meaning specified in Sections 187 and 188.[161] These define "murder" as the killing of a human with malice, either express or implied. To the *Dillon* Court, such a construction means that Section 189 is a degree-fixing provision.[162]

Finally, the *Dillon* Court cited a fourth rule of statutory construction to support the claim that Section 189 is a degree-fixing provision. "[I]t is generally presumed that when a word is used in a particular sense in one part of a statute, it is intended to have the same meaning if it appears in another part of the same statute. [Citations omitted]. This rule would seem to apply a fortiori to section 189, where in a single compound sentence the Legislature used the word 'murder' only once but with two referents . . . : the section defined first degree murder as all 'murder' (1) which is committed by certain listed methods or (2) which is committed during certain listed felonies. As noted above . . . , in the first half of this sentence the word 'murder' means an unlawful killing committed *with malice aforethought;* under the foregoing rule, the same word would have had the same meaning in the second half of the same sentence (i.e., murder during the listed felonies)."[163]

In light of these persuasive arguments, why did the Court nonetheless conclude that Section 189 retains the felony murder rule with regard to the enumerated felonies? By finding that in its note to Section 189 the commissioners who drafted the new penal code mistakenly assumed that its predecessor (the 1856 amendment) created a felony murder rule and not just a degree-fixing provision. According to the Court:

> It no longer matters that the commission may have misread pre-1872 law on this point; what matters is (1) the commission apparently *believed* that its version of section 189 codified the felony-murder rule as to the listed felonies, and (2) the Legislature adopted section 189 in the form proposed by the commission. "When a statute proposed by the California Code Commission for inclusion in the Penal Code of 1872 has been enacted by the

160 *Id.* at 468, 668 P.2d at 712, 194 Cal.Rptr. at 405.

161 *Id.* (italics in the original).

162 *Id.*

163 *Id.* at 468, 668 P.2d at 713, 194 Cal.Rptr. at 406 (italics in the original).

> Legislature without substantial change, the report of the commission is entitled to great weight in construing the statute and in determining the intent of the Legislature." [Citations omitted.] If we assume the 1872 Legislature drew the inferences that the Attorney General now asks us to draw regarding the intent of the commission, the quoted rule compels us to conclude that the Legislature acted with the same intent when it adopted section 189.
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> Nothing in the ensuing history of section 189 . . . suggests that the Legislature acted with any different intent when it subsequently amended the statute in various respects, most recently in 1981. We infer that the Legislature still believes, as the code commission apparently did in 1872, that section 189 codifies the first degree felony-murder rule. That belief is controlling, regardless of how shaky its historical foundation may be.[164]

In *Chun*, the California Supreme Court took advantage of the vagueness of a term ("abandoned and malignant heart") to infuse it with the second degree felony murder doctrine. In *Dillon*, the Court disregarded the plain meaning of an unambiguous term ("murder") to give it a meaning that not only contravenes its own rules of statutory construction but is based on an admittedly "shaky" historical foundation. In both instances, the Court obviously was trying to preserve the felony murder rule. An intriguing question is why the Court took these extraordinary measures when it has repeatedly expressed serious doubts about the utility and logic of the felony murder rule.[165] We will return to this question after examining the place of the felony murder rule in the California law of murder.

H. THE PLACE OF THE FELONY MURDER RULE IN THE LAW OF MURDER

In the absence of a felony murder rule, California prosecutors would have to prove malice in order to secure a murder conviction. Under California's murder formulation, prosecutors would have to prove express or implied

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164 *Id.* at 471, 668 P.2d at 715, 194 Cal.Rptr. 390, at 408 (italics in the original).

165 *See, e.g.*, People v. Phillips, 64 Cal.2d 574, 582-583, 414 P.2d 353, 360, 51 Cal. Rptr. 225, 232) (1966).

malice in connection with the death.[166] Express malice would require them to offer evidence that the accused's purpose was to kill the victim.[167] Implied malice would require them to offer evidence that the accused acted recklessly.[168] As pointed out earlier, recklessness is a compound concept. It involves the creation of substantial and unjustifiable homicidal risks. It also requires proof that the accused appreciated the existence of the risk but chose to disregard it.[169] Obviously, when a felon who does not seek to take human life is engaged in committing a felony that exposes others to a substantial homicidal risk, he will be reckless in the legal sense only if he appreciates and disregards the risk. It is immaterial that he sincerely hopes that no one will be injured, much less killed. He is being punished as a murderer because he engaged in conscious homicidal risk creation: he consciously created and disregarded a homicidal risk that, unfortunately for him and his victim, materialized.

From a moral perspective, a murder conviction is justified if the crime of murder is reserved for those who show an extreme indifference to the value of human life.[170] As has been explained, the killer who is most indifferent to the value of human life is the killer whose object is to take life, that is, the purposeful killer. A killer, who does not wish to take human life, but who persists in a course of conduct he believes is substantially or practically certain to result in death is likewise highly indifferent to the value of human life. This is why reckless killers are treated as murderers under the California Penal Code[171] and by the codes of many other states.[172]

The purpose of the felony murder rule is to extend this moral reprobation to felons who are neither purposeful nor reckless with respect to the death of their victims. The rule elevates what would otherwise be negligent homicides and even non-criminal homicides to murder. This is why

166 *See* Cal. Penal Code §§ 186-187.

167 *See id.*

168 *See id.*

169 *See* text accompanying note 26 *supra*.

170 This is the view of the California Legislature. Murder, depending on its degree, is punishable by a term of years, life imprisonment, and even death. *See* Cal. Penal Code §§ 190-190.2.

171 *See* Cal. Penal Code § 187.

172 *See generally* W. Lafave & A. Scott, Criminal Law § 7.4 at 617 (West 2d ed. 1986); *see also* MPC § 210.2(1).

the California courts have emphasized that the purpose of the rule is to condemn as murderers those who kill negligently or accidentally while committing or attempting to commit specified felonies.[173] It is precisely because the rule includes accidental killings that we can say that the death element is predicated on strict liability. This is why some California courts emphasize that, under the California formulation of the rule, felons who kill while committing or attempting to commit a felony are held strictly liable for the homicide.[174]

A California prosecutor can bypass the need to prove malice by relying on the felony murder rule. Setting aside the limitations that the California Supreme Court has imposed on the rule, all the prosecutor has to prove is the mens rea and actus reus of the underlying felony, a death, and a causal connection between the commission or attempted commission of the felony and the death.

Unfettered use of the felony murder rule would, of course, undermine the moral determination that only those who kill maliciously should be punished as murderers. As has been discussed, in the case of second degree felony murder, the California courts have responded to this danger by requiring the use only of felonies that are inherently dangerous to human life in the abstract.[175] Felons who engage in such dangerous conduct should be condemned as murderers even if they did not want to kill or were unaware of the homicidal risks posed by their misconduct. But a problem with this rationale is that felons who engage in misconduct that is dangerous to human life may well be aware of the homicidal risks inherent in their conduct. It is precisely in these situations where prosecutors may have access to circumstantial evidence of implied malice. Such access diminishes the need for the felony murder rule and explains why the California Supreme

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173 *See* People v. Washington 62 Cal.2d 777, 781, 44 Cal.Rptr. 442, 445, 402 P.2d 130, 133 (1965).

174 *See, e.g.,* People v. Stamp, 2 Cal.App.3d 203, 209-210, 82 Cal.Rptr. 598, 602-603 (1969).

175 *See, e.g.,* People v. Patterson, 49 Cal.3d 615, 621, 778 P.2d 549, 553, 262 Cal.Rptr. 195, 199 (1989), *citing* People v. Ford, 60 Cal.2d 772, 795, 388 P.2d 892, 907, 36 Cal.Rptr. 620, 635 (1964) and People v. Williams, 63 Cal.2d 452, 458, 406 P.2d 647, 650, 47 Cal. Rptr. 7, 10 (1965).

Court has observed that "in almost all cases in which [the felony murder rule] is applied it is unnecessary."[176]

As has also been discussed, the California courts have responded to the threat posed by an unfettered use of the felony murder rule by excluding assaults as the predicate felony.[177] Most deaths are the result of some kind of assault. If prosecutors were permitted to use the assault as the predicate felony, malice would play an insignificant role in identifying those killers meriting condemnation as murderers. From a moral perspective, *Farley* is thus a singularly unfortunate decision. By holding the *Ireland* limitation inapplicable to the felonies enumerated in Section 189, the California Supreme Court has opened the door wider to murder convictions without the need for the state to prove malice.

In its earlier *Wilson* decision, the Court had justified applying *Ireland* to first degree felony murder by observing that a rule designed to punish as murderers negligent and accidental killers would not deter a killer who entered a building for the purpose of assaulting his victim.[178] Killers intent on achieving their assaultive goal simply could not be deterred by a rule that would be triggered by their unlawful entry into the building.[179] But in exempting the enumerated felonies in Section 189 from the *Ireland* limitation, the *Farley* Court concluded that despite its earlier findings in *Wilson*, the first degree felony murder rule retained a deterrent effect.[180] According to the Court, a would-be burglar-batterer may be deterred from killing the victim if he knows that if he enters the building with the intent to assault

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176 *See* People v. Washington, 62 Cal.2d 777, 783, 402 P.2d 130, 134, 44 Cal.Rptr. 442, 446 (1965).

177 *See* text accompanying note 67 *supra*.

178 *See* People v. Wilson, 1 Cal.3d 431, 440, 462 P.2d 22, 28, 82 Cal.Rptr. 494, 499-500 (1969), *overruled by* People v. Farley, 46 Cal.4th 1053, 210 P.3d 361, 96 Cal.Rptr.3d 191 (2009).

179 This is why at one time the California courts held that under *Ireland* the homicide had to be independent of the felony, irrespective of whether the prosecution was relying on the second or first degree felony murder rule. *See, e.g.,* People v. Chun, 45 Cal.4th 1172, 1188, 203 P.3d 425, 434, 91 Cal.Rptr.3d 106, 117 (2009) and cases cited therein. Accordingly, felonious conduct (such as assaults or entries into buildings for the purpose of assaulting an occupant) that was integral to the homicide "merged" with the homicide and could not serve as the predicate felony. *See id.*

180 *See* People v. Farley, 46 Cal.4th 1053, 1118-1120, 210 P.3d 361, 409-410, 96 Cal. Rptr.3d 191, 248-249 (2009).

the victim he will be convicted of first degree burglary-murder if the victim dies.[181] This defense, however, overlooks a point the California courts have emphasized repeatedly. The primary purpose of the felony murder rule is not to deter the commission of the underlying felony but "to deter felons from killing negligently or accidentally by holding them strictly liable for killings they commit."[182]

But is this claim plausible? Accidental harms are not foreseeable. This is why the Penal Code exempts persons who commit harms "through misfortune or by accident" from the criminal sanction.[183] If even a reasonable felon could not have foreseen the death, how can the felony murder rule deter an accidental killing that occurs during the commission or attempted commission of the felony?

The negligence justification for the rule poses problems as well. Negligence is the failure to appreciate a risk that would have been apparent to reasonable persons in similar circumstances. How can one be deterred from committing a killing if one cannot appreciate the homicidal risk in the first place? Whether the availability of the criminal sanction deters the truly negligent has been questioned. The framers of the Model Penal Code expressed serious reservations about using negligence as a basis of culpability:

> Of the four kinds of culpability defined [purpose, knowledge, recklessness, and negligence], there is, of course, least to be said for treating negligence as a sufficient basis for imposing criminal liability. Since the actor is inadvertent by hypothesis, it has been argued that the "threat of punishment for negligence must pass him by, because he does not realize that it is addressed to him." So too it has been urged that education or corrective treatment not punishment is the proper social method for dealing with persons with inadequate awareness, since what is implied is not a moral defect. Hall, Principle of Criminal Law 245. We think, however, that this is to over-simplify the issue. Knowledge that conviction and sentence, not to speak of punishment, may follow conduct that inadvertently creates improper risk supplies men with an additional

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181 *See id.*

182 *See* People v. Washington 62 Cal.2d 777, 781, 44 Cal.Rptr. 442, 445, 402 P.2d 130, 133 (1965) and cases cited therein.

183 *See* Cal. Penal Code § 26(5).

> motive to take care before acting, to use their faculties and draw on their experience in gauging the potentialities of contemplated conduct. To some extent, at least, this motive may promote awareness and thus be effective as a measure of control. Certainly legislators act on this assumption in a host of situations and it seems to us dogmatic to assert that they are wholly wrong. Accordingly, we think that negligence, as here defined, cannot be wholly rejected as a ground of culpability which may suffice for purposes of penal law, though we agree that it should not be generally deemed sufficient in the definition of specific crimes, and it often will be right to differentiate such conduct for the purposes of sentence.[184]

The framers' skepticism of negligence as a sufficient basis for imposing criminal liability led them to adopt a rule disfavoring its use. Under the Model Penal Code, a court may not use negligence unless it is expressly prescribed by the legislature.[185]

The negligence rationale offered by the California Supreme Court poses other problems. Sometimes, the felons are not the killers. A resisting victim or a responding police officer may kill a felon (or even a bystander inadvertently). In its classic formulation, the surviving felons are still guilty of felony murder. But for their commission or attempted commission of the felony, the death would not have occurred. To prevent these outcomes, some jurisdictions apply an "agency" limitation.[186] The person delivering the fatal blow must have been acting on behalf of the felons. Resisting victims and responding police officers are clearly not their agents. California uses a different limitation. The homicide must have been committed to further the felony.[187] Because resisting victims and responding police officers are attempting to thwart, not further, the felony, the result is that in California the fatal blow must be inflicted by one of the felons.

Though this limitation is sensible, it fails to square with the rationale offered most often by the California Supreme Court to justify the felony

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184 MPC Commentary to § 2.02, Tent. Draft No. 4 at 126-127 (1955).

185 *See* MPC § 2.02(3).

186 *See, e.g.,* State v. Canola, 73 N.J. 206, 211, 374 A.2d 20, 23 (1977).

187 *See* People v. Washington, 62 Cal.2d 777, 781, 402 P.2d 130, 133, 44 Cal.Rptr. 442, 445 (1965).

murder rule — to deter felons from killing accidentally or negligently.[188] How can fatal actions designed to promote the commission of the felony be negligent or accidental? If the felon who inflicts the fatal blow did so to further the felony, most likely he will be guilty of express or implied malice murder and no need exists to resort to the felony murder rule. Whether his accomplices are also guilty of murder will be determined by California's rules governing accomplice liability. Under California's complicity rules, they will be guilty of murder if they either foresaw or should have foreseen their crime partner's fatal actions.[189] Under the rules pertaining to accomplice liability for conspirators, they too will be guilty of murder if their crime partner killed to further the conspiracy (commit the felony) and they either foresaw or should have foreseen his fatal actions.[190] In either case, resort to the felony murder rule would be unnecessary.[191]

To be sure, the Court emphasized in *Chun* that the felony murder rule serves another purpose — to deter the felons from committing the underlying felony.[192] Acknowledging that the rule has this secondary purpose makes the Court's defense of the rule more plausible. Although felons cannot be deterred from committing killings they cannot anticipate, they might be deterred from committing the felony in the first place if they know they can be charged with murder for any accidental or negligent homicides that might occur during the commission or attempted commission of the felony. But as has been pointed out, that is an empirical question, and in *Chun* the Court offered no such evidence to support its claim.[193] Moreover, the existence of another deterrence purpose does not dispel other doubts about the overall utility and logic of the rule.

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188 *See* People v. Chun, 45 Cal.4th 1172,1198, 203 P.3d 425,441, 91 Cal.Rptr.3d 106, 125 (2009).

189 *See* People v. Beeman, 35 Cal.3d 547, 560, 674 P.2d 1318, 1326, 199 Cal.Rptr. 60, 68 (1984).

190 *See* People v. Croy, 41 Cal.3d 1, 12 n.5, 710 P.2d 392, 398 n.5, 221 Cal.Rptr. 592, 597 n.5 (1985).

191 As must be apparent, accomplice rules that elevate negligent homicide to murder present problems similar to those presented by the felony murder rule.

192 *See* People v. Chun, 45 Cal.4th 1172,1198, 203 P.3d 425,441, 91 Cal.Rptr.3d 106, 125 (2009).

193 *See id.*

I. A FINAL MYSTERY (AND AN EXPLANATION AND A PLEA)

In light of the multiple problems attending the felony murder doctrine, one must wonder why it has survived. Part of the answer is that it has not escaped unscathed. Some jurisdictions have abolished the doctrine, including England where it originated.[194] Also, states that have adopted the approach elaborated by the American Law Institute have in essence abolished the doctrine. Under the Model Penal Code, criminal homicide is murder if it is committed recklessly under circumstances manifesting an extreme indifference to the value of human life.[195] "Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping, or felonious escape."[196] Although this language appears to use a conclusive presumption to create a felony murder rule, it must be read in conjunction with another provision of the Model Penal Code. Section 1.12(5) provides:

> When the Code establishes a presumption with respect to any fact which is an element of an offense, it has the following consequences: . . . (b) when the issue of the existence of the presumed fact is submitted to the jury, the Court shall charge that while the presumed fact must, on all the evidence, be proved beyond a reasonable doubt, the law declares that the jury may regard the facts giving rise to the presumption as sufficient evidence of the presumed fact.[197]

The effect of this provision is to convert what would otherwise be an unconstitutional conclusive presumption into a constitutional inference. A Model Penal Code judge would merely tell the jurors that they may, if they wish, take into account the evidence regarding the commission or attempted commission of the felony in determining whether the accused acted with an extreme indifference to the value of human life when he

194 *See, e.g.,* People v. Aaron, 409 Mich. 672, 698, 299 N.W.2d 304, 312 (1980).

195 *See* MPC § 210.2(1)(b).

196 *Id.*

197 MPC § 1.12(5).

engaged in conduct he was aware posed a substantial homicidal risk to human life. In California, that would be the equivalent of telling the jurors that they can consider the circumstances attending the felony in determining whether the accused acted with implied malice. In either case, resort to the felony murder rule would be unnecessary.

California, of course, has not abolished the rule. The California Supreme Court could have abolished the first degree felony murder rule in *Dillon* simply by applying the plain meaning canon of statutory construction. The Court chose not to do so, even though its review of the rule's legislative history disclosed serious flaws. With regard to the second degree felony murder rule, the Court could have abolished the rule in *Chun* on the ground that its creation was beyond its competence. In *Dillon*, which predates *Chun* by twenty-six years, the Court openly acknowledged that "the second degree felony-murder rule [had been], since 1872, a judge-made doctrine without any express basis in the Penal Code."[198] But in *Chun* the Court chose to find such a basis.

The Court's actions to preserve the second degree felony murder rule in *Chun* and the first degree felony murder rule in *Dillon* are even more surprising given its stinging criticism of the rule. The Court has acknowledged "that the felony murder doctrine expresses a highly artificial concept that deserves no extension beyond its required application" and that the rule "has been subjected to severe and sweeping criticism."[199] The Court is also aware that "in almost all cases in which [the rule] is applied it is unnecessary and that it erodes the relation between criminal liability and moral culpability."[200]

If in the Court's view the felony murder rule is of questionable utility and logical validity, why has the Court taken such extraordinary steps to preserve it? In the end, the answer lies in the Court's belief that it should not impose its policy preferences where the legislature has spoken. The Court believes that it has some latitude to impose restrictions on the second

198 People v. Dillon, 34 Cal.3d 441, 472 n.19, 668 P.2d 697, 715 n.19, 194 Cal.Rptr. 390, 408 n.19 (1983).

199 People v. Phillips, 64 Cal.2d 574, 582-583, 414 P.2d 353, 360, 51 Cal.Rptr. 225, 232) (1966).

200 People v. Washington, 62 Cal.2d 777, 783, 402 P.2d 130, 134, 44 Cal.Rptr. 442, 446 (1965).

degree murder rule because of its duty to clarify vague statutory terms (e.g., "an abandoned and malignant heart"). But in the case of the first degree felony murder rule, the Court believes that it has no authority to impose limitations where the legislature has spoken clearly. Whether California should retain the first or second degree felony murder rule is a matter the Court believes California law entrusts to the legislature.[201]

Sisyphus was a mythological king who, as punishment for his misdeeds, was ordered by the gods to roll a heavy stone up a hill. His punishment became eternal as each time Sisyphus approached the crest, the stone would roll back down. Twenty-six years have elapsed since the Court said that "[a] thorough legislative reconsideration of the whole [felony murder] subject would seem to be in order."[202] Until the legislature acts, the Court, like Sisyphus, will continue to face the seemingly endless task of trying to make sense of the contradictions, uncertainties, and other mysteries that surround the felony murder rule. ✯

201 *See* People v. Dillon, 34 Cal.3d 441, 472 n.19, 668 P.2d 697, 715 n.19, 194 Cal. Rptr. 390, 408 n.19 (1986).

202 *Id*. at 472 n.19, 668 P.2d at 715 n.19, 194 Cal.Rptr. at 408 n.19 (1986).

CALIFORNIA'S ROLE IN THE MID-TWENTIETH CENTURY CONTROVERSY OVER PAIN AND SUFFERING DAMAGES:

The NACCA, Melvin Belli, and the Crusade for "The Adequate Award"

PHILIP L. MERKEL*

INTRODUCTION

During a thirty-year period starting roughly at the end of World War II, California became the nation's most plaintiff-friendly state in personal injury cases. The California Supreme Court used its lawmaking power under the common law to revolutionize tort law. In a series of decisions, the Supreme Court created a strict liability cause of action in products liability cases,[1] replaced contributory negligence with pure comparative fault,[2] abolished the common law classifications for injuries caused by conditions on land,[3] loosened requirements for establishing causation,[4] expanded the application of res ipsa loquitur,[5] abrogated sovereign immunity

* Professor of Law, Western State University College of Law. The author thanks librarians Judy Andresen and Anne Rimmer for research assistance. He also thanks Christine and Quigley Loewe for their encouragement and support.

1 Greenman v. Yuba Power Products, 377 P.2d 897 (Cal. 1962).

2 Li v. Yellow Cab, 532 P.2d 1226 (Cal. 1975).

3 Rowland v. Christian, 443 P.2d 561 (Cal. 1968).

4 Summers v. Tice, 199 P.2d 1 (Cal. 1948).

5 Ybarra v. Spangard, 154 P.2d 687 (Cal. 1944); Escola v. Coca-Cola Bottling Co., 150 P.2d 436 (Cal. 1944).

for public entities,[6] created duties of care in new situations,[7] and allowed plaintiffs to recover for purely emotional injuries in new contexts.[8] For injured plaintiffs and their lawyers, this was the golden era of California tort law. The Supreme Court developed a national reputation as the leader in court-instigated changes to tort law.[9]

In the mid-1970s, California again took a leadership role in modifying tort law, but this time the Legislature was the instigator and the change was not plaintiff-friendly. In 1975, the governor called the Legislature into special session to address the problem of rising medical liability insurance costs.[10] Medical professionals and their insurers claimed that large judgments in medical malpractice cases were limiting the availability of liability insurance and driving health care providers from the state. The special session enacted a series of laws in 1975 known collectively as the Medical Injury Comprehensive Reform Act (MICRA). MICRA changed California tort law in medical negligence cases by limiting the contingent fees of plaintiffs' attorneys,[11] abolishing the collateral source rule,[12] and allowing for periodic payment of future damages.[13]

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6 Muskopf v. Corning Hospital District, 359 P.2d 457 (Cal. 1961). The case was overruled by statute.

7 Tarasoff v. Regents, 551 P.2d 334 (Cal. 1976) (duty of psychiatrist to warn potential victim of threat posed by patient); Vesely v. Sager, 486 P.2d 151 (Cal. 1971) (duty owed by dram shop owner to victim of intoxicated patron); Coulter v. Superior Court, 577 P.2d. 669 (Cal. 1978) (duty owed by host to victim of intoxicated guest). Vesely and Coulter were abrogated by legislation.

8 State Rubbish Collectors Association v. Siliznoff, 240 P.2d 282 (Cal. 1952); Dillon v. Legg, 441 P.2d 912 (Cal. 1968).

9 For a discussion of how California Supreme Court justices rationalized making significant changes to the common law during the period, see G. Edward White, The American Judicial Tradition 292-301 (1976). White focuses on the views of Roger Traynor, the Court's most influential member.

10 "The cost of medical malpractice insurance has risen to levels which many physicians and surgeons find intolerable. The inability of doctors to obtain such insurance at reasonable rates is endangering the health of the people of this State and threatens the closing of many hospitals. . . . It is critical that the Legislature enact laws which will change the relationship between the people and the medical profession, the legal profession and the insurance industry, and thereby reduce the costs which underlie these high insurance premiums." Proclamation by the Governor, 1975 Cal. Stat. 2d Ex. Sess. 3947.

11 Cal. Bus. & Prof. Code § 6146.

12 Cal. Civ. Code § 3333.1.

13 Cal. Civ. Proc. Code § 667.7.

But the most controversial MICRA provision was one limiting damages for noneconomic injuries in medical negligence cases to $250,000.[14] The principal noneconomic damage in a medical negligence suit is compensation for the plaintiff's physical pain and mental suffering. California's limit or "cap" on noneconomic damages is fixed, as it does not provide for adjustments to reflect increases in the cost of living. The cap has survived constitutional challenge,[15] and the Legislature has never raised the $250,000 limit.

California once again became a national trailblazer in tort law when it limited noneconomic damages. Over the years, numerous state legislatures followed suit by setting their own limits in medical malpractice cases.[16]

This article examines how pain and suffering damages in personal injury cases became controversial, ultimately leading California and other states to limit them. The focus is on the enormous growth in personal injury litigation along with higher jury verdicts during the 1950s and 1960s and the reasons for these phenomena. The article consists of six parts. Part I discusses early California law governing pain and suffering damages. It examines case law from the late nineteenth and early twentieth centuries. The section explains why pain and suffering awards initially were not very large or controversial. Part II describes how tort litigation increased after World War I, mainly due to auto accidents and the availability of liability insurance. It explains how the lure of a collectable judgment encouraged more lawyers to handle personal injury cases. At the same time, developments in the social sciences led the legal community to a new awareness of the debilitating effects of physical pain and, especially, mental suffering. The result was that courts were more sympathetic toward accident victims claiming pain and suffering damages.

Part III reveals how, shortly after World War II, the plaintiffs' bar organized into a group known as the National Association of Claimants' Compensation Attorneys (NACCA), the predecessor to today's American Association for Justice. The goal of the NACCA founders was to unite and

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14 Cal. Civ. Code § 3333.2.

15 Fein v. Permanente Medical Group, 695 P.2d 665 (Cal. 1985).

16 *See generally,* Carol A. Crocca, *Validity, Construction, and Application of State Statutory Provisions Limiting Amount of Recovery in Medical Malpractice Claims*, 26 A.L.R. 5th 245 (1995).

professionalize lawyers who handled personal injury cases. The organization grew rapidly in the late 1940s and early 1950s. Its leaders traveled the country to promote interest in personal injury cases and educate lawyers in the latest trial techniques. Part IV recounts how the NACCA and California lawyer Melvin M. Belli — the attorney *Life Magazine* dubbed "the King of Torts" — joined forces. Belli was a key figure in the NACCA's formative years. He served as the group's president, published tort-related books and articles, and spoke before bar associations and law schools. His dynamic personality captured the imagination of a generation of personal injury attorneys. This part includes an overview of Belli's early successes as a personal injury lawyer.

Part V examines Belli's influence in the growth of personal injury recoveries in the 1950s through his crusade for "the Adequate Award." Belli's message was that personal injury victims were not being compensated fairly by defendants and their insurance companies. He put much of the blame for the problem on the victims' lawyers. Belli believed that plaintiffs' lawyers could obtain higher jury verdicts for their clients by using creative trial techniques, especially with regard to pain and suffering damages. His use of one particular trial tactic, known as the "per diem" argument, a mathematical way of computing pain and suffering damages, generated a vigorous debate in legal circles that continued throughout the 1950s and 1960s. Part VI discusses how the widespread use of the per diem argument led to dozens of appellate court cases around the country challenging the tactic. Belli and the NACCA were vindicated when the majority of states, including California, allowed the practice.

The article concludes by showing how, in the short term, the NACCA and Melvin Belli succeeded in dramatically increasing personal injury judgments. In the long term, however, the unpredictability and arbitrariness of pain and suffering awards led to calls for restricting noneconomic damages. Having lost faith in the courts to address the problem, insurance companies and their lawyers turned to the legislatures for help. The result has been the enactment of statutes, like the MICRA, that place limits on pain and suffering damages and calls for other legislation to check jury awards.

I. EARLY CALIFORNIA LAW GOVERNING PAIN AND SUFFERING DAMAGES IN PERSONAL INJURY CASES

In the nineteenth century, the California Supreme Court used its power under the common law to establish the legal rules governing tort cases.[17] Early California law on pain and suffering damages in personal injury cases was not very remarkable, as it mirrored rules followed in many other American jurisdictions.[18] Pain and suffering damages were a part of the compensatory damages award. They were considered to be general damages "because they result naturally and directly from bodily harm."[19] In an early decision, *Fairchild v. California Stage Company* (1859), the Supreme Court affirmed a judgment in favor of a passenger who was injured in a stage coach accident.[20] It held that a jury instruction allowing for the recovery of "mental anguish" was proper, stating, "We cannot see why compensation should not as well be given for pain of mind as pain of body."[21] Other nineteenth-century decisions involving personal injury also mentioned pain and suffering damages, but gave no detailed discussion of these injuries.[22]

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17 The Civil Code of 1872 set the basic parameters for damages in tort cases. "For the breach of any obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." CAL. CIV. CODE § 3333. The courts interpreted the statute to create rules governing compensatory damages.

18 For a history of pain and suffering damages in the United States, see Jeffrey O'Connell & Theodore M. Bailey, *The History of Payment for Pain and Suffering, Appendix* to Jeffrey O'Connell & Rita James Simon, *Payment for Pain and Suffering: Who Wants What, When and Why?* 1972 U.ILL. L.F 1, 83.

19 Shatto v. Crocker, 25 P. 629, 630 (Cal. 1891). The Court made this statement when affirming a judgment that included damages for "injured feelings" in a malicious prosecution case.

20 13 Cal. 599 (1859).

21 *Id.* at 601.

22 For example, in Aldrich v. Parker, 24 Cal. 513 (1864), the Court upheld a personal injury judgment for $2,500 after the plaintiff lost two toes in a workplace injury. The Court noted that the plaintiff had medical treatment "attended with much suffering and pain . . . ." *Id.* at 516. In Malone v. Hawley, 46 Cal. 409, 414 (1873), *reversed on other grounds*, the Court stated that a jury instruction should include mention of compensation for "the physical and mental suffering he had sustained by reason of the injury . . . ." And in Karr v. Parks, 44 Cal. 46, 50 (1872) *reversed on other grounds*, the Court held that

After the turn of the twentieth century, Supreme Court opinions became more instructive on pain and suffering damages, especially regarding the meaning of mental suffering. One of the most important cases was *Merrill v. Los Angeles Gas and Electric Co.* (1911), where the plaintiff suffered serious injuries caused when leaking natural gas exploded.[23] The plaintiff won at trial, and the defendant challenged several jury instructions on appeal, including one that allowed the jury to compensate plaintiff for the "mental worry" he endured and would suffer in the future. The issue was whether future emotional injuries resulting from a personal injury were recoverable. After reviewing conflicting authorities from other jurisdictions, the Supreme Court held "[t]hat the grief, anxiety, worry, mortification, and humiliation which one suffers by reason of physical injuries are component parts of the 'mental suffering' for which, admittedly, damages may be awarded. . . . If the law contemplated an award of damages solely for physical pain, it is meaningless to say that recovery may also be had for mental suffering."[24] The Court found that mental suffering could take "numerous forms and phases" and could vary based on factors such as the individual's temperament, ability to stand shock, financial condition, whether the injury was temporary or permanent, and whether it was disfiguring and humiliating.[25] Two years later, the Court of Appeal amplified on the meaning of mental suffering in *Ryan v. Oakland Gas, Light, and Heat Co.*,[26] where a worker was left permanently disabled after an accident. The court held the plaintiff could recover as general damages for the mental anguish associated with knowing he could no longer work even after physical pain from the injury had ended.[27]

These decisions illustrated different ways in which a plaintiff could experience pain and suffering, but they also raised a very practical question:

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a girl who was gored by defendant's cow could recover for the discomfort caused by the injury as well as for the immediate pain and suffering caused by the wound.

23 111 P. 534 (Cal. 1910).

24 *Id.* at 540.

25 *Id.*

26 130 P. 693 (Cal.App. 1913).

27 Noting that the plaintiff had not been able to work for over six years, the court stated: "Thus handicapped, his outlook into the world before him could not be otherwise than accompanied by gloomy forebodings and more or less mental anxiety and suffering." *Id.* at 697-698.

How can money compensate for noneconomic injuries? The basic goal of damages in any personal injury case is to compensate the plaintiff for injuries caused by the defendant's tort. Most losses a plaintiff suffers are economic and can be measured by looking to the marketplace for their value. For example, if the victim incurs doctor bills or is hospitalized, she can recover the fair market value of these services. Likewise, if the plaintiff cannot work because of the injury, she can recover wages lost while incapacitated.[28] But it is not possible to objectively quantify noneconomic damages, as there is no marketplace for pain and suffering. Moreover, noneconomic damages are not really "compensatory," because money does not alleviate the pain and suffering.

The California Supreme Court identified this problem in *Zibbell v. Southern Pacific Co.* (1911),[29] a railroad accident case in which the defendant claimed the damages were excessive. The jury awarded the plaintiff $100,000 in damages for lost earning capacity and pain and suffering. The trial court remitted the judgment to $70,000, but the verdict was still one of the largest in state history.[30] In affirming the damages award, the Court first mentioned the claim for lost future earnings. Although these amounts could be difficult to prove, their extent, duration, and the plaintiff's earning capacity "may all be approximated with reasonable exactness."[31] The same was not true, however, for pain and suffering damages. The Court wrote: "But to put a monetary value upon the elements of physical pain and mental suffering, their nature, extent, and continuance, is a much more difficult and delicate matter."[32]

How then did the judicial system assign a money value for pain and suffering? The courts gave this responsibility to the jury, the traditional

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28 Plaintiff must meet her burden of proving pecuniary losses. This can be difficult in cases where a permanently disabled plaintiff seeks future medical expenses or loss of earning capacity, as one cannot prove with scientific certainty what these values will be down the road. California courts address this problem by allowing plaintiff to recover pecuniary damages reasonably certain to occur in the future.

29 116 P. 513 (Cal. 1911).

30 "And herein it is said that the verdict is twice the amount of the largest judgment ever rendered in the State of California in a similar case, and is the largest verdict ever presented to an appellate court for review." *Id.* at 520.

31 *Id.*

32 *Id.*

fact-finding body under the common law. In *Aldrich v. Palmer* (1864), an early personal injury case, the Supreme Court held, "the law does not fix any precise rules for the admeasurement of damages, but, from the necessity of the case, leaves their assessment to the good sense and unbiased judgment of the jury." [33] The Court acknowledged that determining what is fair compensation is a "judicial problem of difficult, if not impossible, solution," but stated that none "are more competent to its proper solution than the jury."[34] For this reason, jury instructions for pain and suffering damages were not really very instructive.[35]

California appellate courts gave the jury wide latitude to decide pain and suffering damages, but they also recognized that jurors could be biased or unduly swayed by their emotions when rendering verdicts. They created a number of rules to check "runaway" juries. The Supreme Court prohibited plaintiffs' lawyers from making the "golden rule" argument, whereby they asked jurors to award the amount of damages they would want if they were in the injured party's position.[36] Also, if the trial judge who heard the evidence and had the opportunity to assess the credibility of witnesses believed the damages were excessive, the judge could remit them or order a new trial.[37] A later decision referred to the trial judge as "the thirteenth juror."[38] The role of the appellate courts in reviewing verdicts, however, was much more limited. They were not to substitute their judgment for that of the jury and interfere with a verdict unless the evidence showed the

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[33] Aldrich, 24 Cal. at 516.

[34] *Id.*

[35] For example, in Wiley v. Young, 174 P. 316, 318 (Cal. 1918), the Court approved of the following instruction. "You are instructed, however, that with regard to pain and suffering the law prescribes no definite measure of damages, but the law leaves such damages to be fixed by you as your discretion dictates, and as under all the circumstances may be just and proper."

[36] "It is, of course, improper for the jury to attempt to measure the damage occasioned by the injury and the sufferings attendant upon it, by asking themselves what sum they would take to endure what the plaintiff has endured, and must endure." Zibbell, 116 P. at 520.

[37] A trial court had the discretion to decide whether to grant a new trial because the damages award was excessive. Appellate courts only overturned these decisions if the trial court abused its discretion. *See, e.g.*, Lee v. Southern Pacific Co., 35 P. 572 (Cal. 1894).

[38] Buswell v. San Francisco, 200 P.2d 115, 117 (Cal.App. 1948)

award "was not the result of the cool and dispassionate consideration of the jury."[39] The Supreme Court held: "We can reverse a judgment for excessive damages only when it appears that the amount allowed is so plainly unjust and oppressive as to suggest passion, prejudice, or corruption on the part of the jury."[40]

This review of early California law on pain and suffering damages leads to a number of conclusions. First, personal injury judgments generally were not very large and they were not very controversial. That the Supreme Court saw fit to comment on the $70,000 remitted judgment in *Zibbell* illustrates how unusual it was. Lawrence M. Friedman's study of personal injury judgments in Alameda County establishes that low awards were the rule.[41] The reported cases also show that pain and suffering damages were not specially identified by juries but rather were lumped with economic damages in general verdicts. Second, courts recognized that pain and suffering awards were inherently subjective because jurors had no real standard against which to measure them. Jurors were told to act "reasonably" and "without passion or prejudice," but this was of little practical guidance, as pain and suffering damages cannot be computed mathematically. Unlike economic damages which can be assessed objectively by reference to market values, there is no marketplace for pain and suffering. As a result, different jurors hearing the same facts might award wildly different amounts. Moreover, plaintiffs who suffered identical injuries could receive different awards because thresholds for physical pain and mental suffering vary among individuals. Despite these problems, the courts placed great faith in the jury and were confident that their verdicts would be fair. Third, judicial standards for review of pain and suffering awards were also subjective. Whether an award was "unjust" or "oppressive" depended on the viewpoint of the judge applying the standard. The trial judge, acting as the "thirteenth juror," was the major check on excessive verdicts. The appellate

39 "It is not a question of what damages this court would award or whether we would consider them high, but whether this court can say that the damages are so excessive as to suggest passion or prejudice." *Id.*

40 Shaw v. Southern Pacific Railroad Co., 107 P. 108, 111 (1910).

41 *See* Lawrence M. Friedman, *Civil Wrongs: Personal Injury Law in the Late 19th Century*, 1987 Am. B. Found. Res. J. 351. Friedman studied personal injuries filings in Alameda County from 1880–1900. He found that in the cases that went to trial, the average total award was $3,651. *Id.* at 365.

courts counted on them to police excessive verdicts by granting new trials or remitting judgments. The appellate courts saw their reviewing powers as being very limited. They only reversed awards where the award was so "grossly disproportionate" as to "shock" the court's sense of justice.[42]

II. THE POST-WORLD WAR I INCREASE IN PERSONAL INJURY LITIGATION AND A NEW RECOGNITION OF THE DEBILITATING EFFECTS OF PAIN AND SUFFERING[43]

Auto Accidents, the Availability of Liability Insurance, and the Changing World of Personal Injury Litigation

Before World War I, the defendants in most California personal injury lawsuits were corporations.[44] As the appellate cases discussed in Part I reveal, most lawsuits involved claims by persons injured in accidents caused by railroads or public utilities. After the war, this pattern changed. The number of tort cases nationwide rose dramatically, and the defendant was more likely to be an individual than a corporation. The reason for this development was the popularity of the automobile. As more people purchased cars and drove, the number of accidents increased. The carnage on the roads was substantial. In 1930, for example, over 30,000 persons were killed and another one million were injured in auto accidents in the United States.[45] Auto accidents were disturbing because of the personal tragedies they caused to victims and their loved ones, but they also confronted society with a new problem. Very often, careless drivers could not pay for the injuries they caused. Unlike corporations that had liability insurance or substantial assets, many defendants in auto accident suits were not financially responsible. Thus, even if the victim sued and won, the plaintiff might not be able to collect the award.

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42 Johnston v. Long, 181 P.2d 645, 658 (1947).

43 The author presented some of the ideas in this part in an earlier article. *See generally*, Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy's First Responses*, 34 Capital U. L. Rev. 545 (2006).

44 Friedman, *supra* note 41, at 360.

45 Young B. Smith, *Compensation for Automobile Accidents: A Symposium*, 32 Colum. L. Rev. 785, 786-787 (1932).

The legal community took notice of the growing crisis. In the late 1920s, the Columbia University Council for Research in the Social Sciences created a commission to study and report on legal issues surrounding auto accidents.[46] The commission's report, which was the subject of a 1932 symposium in the *Columbia Law Review*, concluded that the negligence system was failing, as most accident victims received no compensation.[47] It proposed major changes to the tort system for auto accident cases. The report recommended replacing negligence with a no-fault program similar to workmen's compensation.[48] Another proposal was that pain and suffering damages be abolished in auto accident cases. The commission believed that resources should be spent to fully compensate victims for economic losses rather than for noneconomic injuries.[49]

No state followed the Columbia commission's suggestions for a no-fault program and the abolition of pain and suffering damages, but the report led authorities to seriously consider the problem of the insolvent negligent motorist. A number of states enacted laws to encourage or require drivers to obtain liability insurance. The most common was the enactment of "security-responsibility laws," which required motorists involved in accidents causing losses over a certain dollar amount to post security.[50] Their effect was to induce drivers to purchase liability insurance. By 1949, many states had passed these laws,[51] including California which had a security-responsibility law as early as 1929.[52] The laws led to a dramatic rise in the percentage of motorists who were covered by liability insurance. The Columbia report found that only about 27 percent of registered vehicles were

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46 *Id.* at 785.

47 *Id.* at 793-794. The Columbia report findings are summarized in Smith's article. References are to his summary.

48 *Id.* at 786, 787.

49 *Id.* at 800-801.

50 Joseph P. Chamberlain, *Introduction* to Frank P. Grad, *Developments in Automobile Accident Compensation* 50 Colum. L. Rev. 300 (1950).

51 *Id.* at 309 n.30.

52 Note, *New Approach to Problem of Motorist Financial Responsibility Misses Mark*, 1 Stan. L. Rev. 263 (1949). The note criticized California's law because it required that a motorist deposit security only after an accident involving property damage and/or personal injury had occurred.

insured in 1929;[53] by the mid-1940s, some states reported that almost 85 percent were covered.[54]

The growth of liability insurance benefited auto accident victims as they now had a better chance of receiving some compensation for their injuries. This development also had a profound effect on the legal profession, as more lawyers were willing to represent clients in auto accident cases. The prospect of a settlement or collectable judgment provided an economic incentive for lawyers to take them.[55] Because the plaintiff was often unable to pay the attorney an hourly fee, the lawyer was usually retained on a contingent fee basis. This meant that the attorney's compensation was tied to the amount of the recovery; the higher the settlement or judgment, the larger the fee. Therefore, lawyers looked for ways to maximize payments from insurance companies.[56] The plaintiff's actual economic damages for losses such as medical expenses and lost earnings offered little opportunity for manipulation because they were set by marketplace measures. But pain and suffering damages were a different story, as the appellate cases gave the jury wide discretion in valuing them. A high pain and suffering damages award benefited both the client and the attorney. The client had to pay the lawyer's contingent fee if he won or settled, so if the pain and suffering damages were substantial, they could cover the fee and the client would still be left with enough money to compensate for economic losses.[57] It benefited the attorney because the amount of the fee rose with the settlement or award.

The Legal Community's New Recognition of the Debilitating Nature of Pain and Suffering

As the volume of personal injury cases was growing, judges, lawyers, and legal scholars were also learning more about the debilitating effects of physical pain and mental suffering. Law professors at some of the nation's leading schools took the lead in identifying the various ways physical pain

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53 Smith, *supra* note 45, at 787.

54 Grad, *supra* note 50, at 311.

55 Leon Green, Traffic Victims: Tort Law and Insurance 78-79 (1958).

56 Clarence Morris, Morris on Torts 349 (1953).

57 Clarence Morris, *Liability for Pain and Suffering*, 59 Colum. L. Rev. 476, 477 (1959).

can manifest itself and they gave special attention to mental suffering.[58] These developments coincided with the emergence of the Legal Realism movement at American law schools.[59] Some Legal Realists studied the law and legal institutions in light of advances in the behavioral sciences. They were fascinated with human psychology.[60] These scholars believed that mental disorders could be explained scientifically and that emotional injuries could be just as serious as the physical. They criticized the courts' limited knowledge about mental suffering and worked to expand liability in cases involving emotional harm. Until this time, mental suffering damages were available in most states only where the plaintiff suffered a physical impact. In the years following World War I, numerous articles on the topic of emotional injury appeared in the nation's law reviews. The legal academy pushed for the expansion of liability to cover cases where the only injury was mental anguish.[61]

For example, Herbert F. Goodrich relied on physiological studies to prove that fear was a genuine injury by looking at its physical manifestations.[62] He believed that the common law's hesitance to compensate for emotional injury stemmed from the courts' lack of scientific information on the subject. Science recognized the negative effects of emotional injuries, and he thought the law should do likewise.[63] Other scholars argued for the recognition of a "new tort" for the intentional infliction of emotional distress. William L. Prosser, one of the most influential tort scholars of the twentieth century who would later become dean of the University of California,

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58 Many leading torts scholars of the twentieth century participated in these discussions, including Francis H. Bohlen, Leon Green, Calvin Magruder, and William L. Prosser.

59 For a discussion of legal realism, see generally, G. Edward White, Tort Law in America: An Intellectual History 63-113 (expanded ed. 2003).

60 The Legal Realist most famous for viewing law in light of human behavior was Jerome Frank whose book *Law and the Modern Mind* was popular even with a lay audience. Jerome Frank, Law and the Modern Mind (1930).

61 *See, e.g.*, Archibald H. Throckmorton, *Damages for Fright,* 34 Harv. L. Rev. 260 (1921); Lyman P. Wilson, *The New York Rule as to Nervous Shock*, 11 Cornell L. Q. 512 (1926); Leon Green, *Fright Cases*, 27 Ill. L. Rev. 761 (1932); John E. Hallen, *Damages for Physical Injury Resulting from Fright or Shock*, 19 Va. L. Rev. 253 (1933).

62 Herbert F. Goodrich, *Emotional Disturbance as Legal Damage*, 20 Mich. L. Rev. 497 (1922).

63 *Id.* at 501.

Berkeley, School of Law, was a major proponent. He believed the law had failed to keep pace with science governing mental injury. Prosser wrote: "Medical science has long recognized that not only fright and shock, but also grief, anxiety, rage and shame, are in themselves 'physical' injuries producing well marked changes in the body, and symptoms of major importance which are readily visible to the professional eye."[64] Calvert Magruder of the Harvard Law School predicted that courts would go beyond protecting persons from intentionally inflicted emotional distress and create tort liability for those who cause mental suffering through negligence.[65]

This concentration on mental distress without physical impact carried over to personal injury cases where the plaintiff had physical injuries. Charles T. McCormick's *Handbook on the Law of Damages* (1935) revealed that appellate courts around the country were becoming more sympathetic to claims for physical pain and mental suffering. McCormick's review of appellate precedents showed that courts had little problem recognizing purely physical pain. It was "the immediate effect upon the nerves and brain of some lesion or injury to a part of the body."[66] This included any pain accompanying treatment of the injury.[67] The author even found a case involving what is now known as "phantom pain," where the court upheld a damages award to a man who lost an arm but still had the sensation of pain where the limb had been.[68] McCormick also found that courts considered mental suffering as the usual accompaniment to physical pain, but noted that they sometimes had trouble distinguishing between the two.[69] He found precedents for mental suffering in personal injury cases covering the victim's fright and terror at the time of injury, fear of how the injury might affect future health, apprehension of a pregnant woman for an injury to her child, anxiety over the inability to earn a living, fear of death

64 William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 Mich. L. Rev. 874, 876 (1939).

65 Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts,* 49 Harv. L. Rev. 1033, 1058-1059 (1936).

66 Charles T. Mccormick, Handbook on the Law of Damages 315 (1935).

67 *Id.* at 316.

68 *Id.*

69 *Id.*

or insanity, nervousness around cars after a collision, and the embarrassment, sadness, and humiliation caused by a disfiguring injury.[70]

Young B. Smith and William L. Prosser also noted the heightened attention to pain and suffering damages in the 1952 edition of their casebook, *Cases and Materials on Torts*. They listed various forms of pain and suffering recognized by American appellate courts, including "loss of sense of taste and smell, loss of fecundity, mental pain and suffering from a consciousness that capacity to labor has been diminished for life, mental suffering of a virgin of strict religious faith because her hymen was ruptured by a doctor during a physical examination, acquisition of bad moral habits because of a head injury, permanent incontinence of urine, loss of desire for sexual intercourse and impotency, shock, change of personality . . . fear of death, increased stuttering, nervousness, neurotic condition, insomnia and inability to drive a car, fear of paralysis, and fear of injury to an unborn child."[71]

But not everyone jumped on the band wagon of the movement to liberalize the law governing noneconomic damages, especially for mental suffering. Professor Clarence Morris of the University of Pennsylvania Law School was a leading critic. He believed that pain and suffering damages were arbitrary, could not be measured in dollars, and only led to more litigation and higher verdicts that society could not afford to pay. "Perhaps sufferers deserve special pocket money for books or television sets or other escapes from discomfort," he wrote, but "the wisdom of increasing automobile liability insurance premiums to compensate for the non-economic aspects of pain seems questionable."[72] Prosser's response to critics like Morris was that fear of more lawsuits and the possibility that judges would have to weed out fraudulent claims were not valid reasons for depriving injured parties of having justice: "It is the business of the law to remedy wrongs that deserve it, even at the expense of a "flood of litigation;" and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the court too much work to do."[73]

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70 *Id*. at 316-317.

71 Young B. Smith & William L. Prosser, Cases and Materials on Torts 617 (1952).

72 Morris, Morris On Torts, *supra* note 56, at 348-349.

73 Prosser, *supra* note 64, at 877.

Those who favored compensation for emotional injuries were confident that juries, guided by the usual instructions relating to pain and suffering damages, would be able to recognize genuine mental suffering claims and quantify them. They also believed that trial courts and appellate courts, using the traditional standards of review for pain and suffering damages, could police for excessive verdicts. As Prosser put it, "Just as a substantial verdict for personal injuries or for 'physical' pain will be reversed when the evidence of damage consists of purely subjective testimony on the part of the plaintiff . . . the court may refuse to permit recovery for 'mental' suffering unless there is some sufficient assurance of the genuineness of the claim . . . ."[74]

III. THE NATIONAL ASSOCIATION OF CLAIMANTS' COMPENSATION ATTORNEYS AND THE PROFESSIONALIZATION OF THE PERSONAL INJURY BAR

Before World War II, lawyers who worked in the personal injury field by handling tort cases and workmen's compensation claims were on the margins of the legal profession. They had virtually no role in the American Bar Association which was dominated by the large law firms. Unlike their counterparts on the defense side, they had no national organization. Personal injury lawyers also had a major image problem with the general public. Newspapers and magazine often portrayed them as "ambulance chasers" and "shysters" who were more interested in extorting a contingent fee from insurance companies than in helping their clients.[75]

Things began to change in 1946, when a handful of lawyers who represented clients in workmen's compensation cases attended a national conference of state industrial accident commissions in Portland, Oregon. Samuel B. Horovitz, a Boston attorney, law professor, and author of a practitioner's guide to workmen's compensation law, invited ten other lawyers who

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74 *Id.* at 877-878.

75 For a typical article criticizing personal injury lawyers as "ambulance chasers," see, e.g., Robert Monaghan, *The Liability Claim Racket*, 3 Law & Contemp. Probs. 491 (1936).

represented injured workers to meet in his hotel room.[76] Their discussions identified problems facing plaintiffs in workmen's compensation litigation. The main issue was that there was no professional group for lawyers specializing in the field. "There were patent lawyers, trade mark lawyers, lawyers trained in building, unbuilding and remodeling corporations, lawyers spending their lives in reducing the pain that comes from paying taxes, wills and estate lawyers, insurance company lawyers — all organized to the nines — but where was the organization to represent 9,000,000 people injured seriously enough every year to become statistics?"[77] The participants noted that employers and their insurers were represented by competent counsel, but there were not many knowledgeable lawyers for injured workers.[78] In many cases, workers were at an extreme disadvantage as they represented themselves in administrative hearings. Moreover, the insurance companies exerted their influence in the state legislatures to keep workmen's compensation benefits low.[79]

The meeting ended with the decision to create a new professional organization, the National Association of Claimants' Compensation Attorneys (NACCA). Over the years, the group changed names a number of times. Today it is called the American Association for Justice, the nation's largest and most powerful plaintiff-lawyer organization.[80] Initially, the NACCA devoted its attention exclusively to workmen's compensation law. Under Horovitz's leadership, the NACCA pursued an ambitious agenda on

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76 "*Editorial, NACCA — Rumor and Reflections,*" 18 NACCA L.J. 27 (1956).

77 *Id.*

78 For example, the International Association of Insurance Counsel was formed in 1920. It began publishing the *Insurance Counsel Journal* in 1933. 25 Ins. Counsel J. 9 (1958).

79 *Id.*

80 Originally, the group was called the National Association of Compensation Attorneys, but the name was soon changed to National Association of Claimants' Compensation Attorneys in 1948 in recognition that some members handled personal injury cases outside the workmen's compensation field. Thereafter, the organization had a number of name changes. It became the National Association of Claimants' Counsel 1n 1960. In 1964, it was renamed the American Trial Lawyers Association and, a short time later, it became the Association of Trial Lawyers of America. Richard S. Jacobson & Jeffrey R. White, David V. Goliath: ATLA and the Fight for Everyday Justice 163-164 (2004). The organization's current name, the American Association for Justice, was adopted in 2006.

a number of fronts. It developed an education program for lawyers who represented claimants. The goal was to professionalize claimant lawyers in workmen's compensation cases so as to match the expertise of their insurance-company-funded counterparts.[81] One of the first decisions was to create a journal devoted to workmen's compensation law. The *NACCA Law Journal* began publication in 1948. The *Journal* followed legal developments in the field and highlighted notable victories. It soon had an impressive volume of subscribers, including most law school libraries.[82] Within three years after it started publishing, the *Journal* was cited in appellate court decisions and law review articles.[83]

An important part of the education program was reaching workmen's compensation lawyers in their own communities. NACCA members traveled the country and spoke before bar groups about their area of practice and encouraged other lawyers to take worker injury cases.[84] They recommended the establishment of local NACCA branches. The group also urged law schools to offer courses in all facets of personal injury law. The NACCA established lectureships at leading law schools and recruited top professors as presenters.[85] The central office in Boston developed a library of books and briefs and served as a clearinghouse for information for members.[86]

The NACCA also had a legislative program. Because workmen's compensation law was created by statute, only the legislature could make changes. The group claimed that insurance and employer lobbyists had been successful in limiting recoveries to injured workers. The NACCA

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81 "From the discussions it soon became evident that there were yearly tens of thousands of *litigated* cases in workmen's compensation cases; that the insurers were *always* represented by *able* counsel and that about half the workers came unrepresented, to do battle with skilled insurance counsel, doctors and investigators.

"There was an urgent need for *plaintiff* representation in litigated cases, if our American justice was to be maintained." Samuel B. Horovitz, *Early Tribulations (1946–1951),* Trial, 23 (July–Aug. 1971) (emphasis in original).

82 *Editorial, NACCA — Rumor and Reflection* 18 NACCA L.J. 28 (1956).

83 *Editorial*, 8 NACCA L.J. 19 (1951).

84 In 1949, Horovitz traveled through the south and southwest in an Airstream trailer. He spoke before 32 groups about workmen's compensation issues. Jacobson & White, David And Goliath, *supra* note 80, at 16.

85 *Editorial*, 8 NACCA L.J. 17-18 (1951). The professors included Mark DeWolfe Howe at Harvard and Fleming James at Yale. 18 NACCA L.J. 24 (1956).

86 *Editorial,* 8 NACCA L.J. 17-18 (1951).

worked to level the playing field in the legislatures. Finally, the NACCA hoped to improve the image of lawyers who represented injured workers. It wanted the public to realize that plaintiff lawyers were friends of the working class and that the group's goal was justice for the poor as well as the rich.

NACCA membership grew at an impressive rate. Within six years, there were over 2,000 members.[87] Beginning in 1947, the group held annual national conventions.[88] Around the same time, it opened membership to lawyers who represented workers injured in railroad and shipping accidents. The *NACCA Law Journal* also expanded its coverage to include personal injury cases governed by federal railroad and admiralty laws.[89]

IV. "THE KING OF TORTS" AND HIS RELATIONSHIP WITH THE NACCA

Melvin Belli's Background and His Early Work in Personal Injury Cases

By the time the NACCA was formed, San Francisco lawyer Melvin Belli had already built a reputation as a successful personal injury attorney. Belli would go on to be one of the most famous trial lawyers of the twentieth century. His flamboyant behavior in and out of the courtroom made him a national celebrity. His record of success in personal injury cases led a reporter for *Life Magazine* to refer to him as "the King of Torts" in a 1954 article, a title Belli relished.[90] Over the course of a long career, Belli represented and sometimes developed friendships with the famous, including actors Errol Flynn, Lana Turner, and Mae West; boxers Muhammad Ali and George Foreman; comedian Lenny Bruce; televangelists Jim and Tammy Faye Baker; mobster Mickey Cohen; stuntman Evil Knievel; stripper Carol Doda; Washington socialite Martha Mitchell; and the Rolling Stones rock group.[91] Belli represented Jack Ruby at his trial for the murder of President

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87 By 1952, the NACCA had over 2,000 members. *Editorial*, 10 NACCA L.J. 20 (1952).

88 *Id.* at 21.

89 Jacobson & White, David and Goliath, *supra* note 80, at 13-14.

90 Robert Wallace, *The King of Torts*, Life Mag., 71-82 (Oct. 1954).

91 Mark Shaw, Melvin Belli: King of the Courtroom, xiv (2007).

John F. Kennedy's assassin, Lee Harvey Oswald.[92] He thrived in the public spotlight. Belli lived in a mansion, drove expensive cars, and wore the finest clothes. He bragged about his party life and trysts with numerous women.[93] His lifestyle took a toll on his family; he was married six times and his relationships with his children were sometimes rocky.[94] Belli's legal career ended on a tragic note when his law firm filed for bankruptcy in 1995, shortly before he died at age 88.[95] Even today, people have very different opinions of him. To some, he was a brilliant legal innovator and dedicated advocate for his clients, while to others Belli was a shameless self-promoter mainly interested in fame and financial enrichment.

Belli was born in 1907 in Sonora, California, in the western foothills of the Sierras. He attended college at the University of California, Berkeley, and received his law degree from Boalt Hall in 1933. His early practice was criminal law, including the defense of two inmates who were convicted and executed for escaping from prison and taking hostages.[96] Circumstances surrounding the death of his father in 1938 were a factor that drew Belli to have an interest in personal injury cases. His father died after taking a prescription medication. Belli claimed that the pharmacist who filled the prescription gave the wrong dosage or, as he put it, "the goddamned drugstore had made a mistake on the goddamned prescription."[97]

His first personal injury victory came in 1943, when he represented a worker who was hurt in a cable car accident. The trial gave him the opportunity to employ a tactic for which he would become famous: the use of demonstrative evidence. Belli had a craftsman build models of the accident site and the cable car. He also brought a blackboard into court to help the jury compute the damages award. The jury returned a $32,000 verdict, a large award for the time.[98] Belli found that the creative use of

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92 Ruby was convicted, but the conviction was reversed on appeal. He died before he could be retried. Melvin M. Belli, My Life On Trial, ch. 17 (1976).

93 *See generally,* Belli, My Life, *supra* note 92.

94 Shaw, Melvin Belli, *supra* note 91, at xiii, 225.

95 The bankruptcy was filed in December, 1995. Belli died at age 88 on July 9, 1996. *Id*. at 218, 227.

96 Belli, My Life, *supra* note 92, at 76-81.

97 *Id*. at 86-87.

98 *Id*. at 92-93. The judgment was affirmed on appeal. Bryant v. Market Street Railway, 163 P.2d 33 (Cal.App. 1945).

demonstrative evidence produced larger verdicts. In one of his famous cases, where a woman had lost a leg in an accident, he passed her artificial limb among the jurors. The jury returned a verdict of $100,000.[99]

In the late 1940s, Belli won three verdicts of over $100,000 in personal injury cases with significant pain and suffering damages. These awards were the highest in California history. The defendants appealed the judgments, but the appellate courts affirmed them.[100] In all three cases, the courts followed California's traditional rule that appellate courts do not overturn verdicts as excessive except in unusual circumstances. As one of the courts held, "if there is substantial evidence in the record supporting the damages awarded by the jury and it is inferentially approved by the trial judge by his denial of a motion for a new trial without reducing the damages, we are powerless to reduce them or to hold the award excessive."[101] The court also cited recent case authority affirming higher awards because the purchasing power of the dollar had declined.[102] In 1950, Belli's string of large awards continued when a jury awarded his client $225,000, the highest verdict ever in the state.[103]

The amount of these awards and Belli's success in defending them on appeal had an important influence on his thinking. He realized that if the victim's lawyer could convince the jury and the trial judge — the thirteenth juror — that a high verdict was justified, California's standard of appellate review made it unlikely that a higher court would reverse the judgment. Belli also understood that the California decisions could have persuasive precedential value elsewhere. Courts in other states could rely on them when upholding high awards. The decisions were also very useful during negotiations with insurance companies, as the fear of high verdicts could motivate them to agree to more generous settlements.

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99 The incident is described in Belli, My Life, *supra* note 92, at 107-109.

100 Gluckstein v. Lipsett, 209 P.2d 98 (Cal.App. 1949) (affirming judgment for $115,000); Sullivan v. San Francisco, 214 P.2d 82 (Cal.App. 1950) (affirming judgment for $125,000); Duvall v. T.W.A., 219 P.2d 463 (Cal.App. 1950) (affirming judgments of $35,000 for husband and $85,000 for wife).

101 Gluckstein, *supra* at 104.

102 "It is a matter of common knowledge, and of which judicial notice may be taken, that the purchasing power of the dollar has decreased to approximately one-half what it was prior to the present inflationary spiral." *Id*.

103 The defendant appealed the verdict, and the parties later settled for $187,500. Belli, My Life, *supra* note 92, at 117-123.

Belli Joins the NACCA

A major turning point in NACCA history was when Melvin Belli joined the organization in 1949. According to Belli, he was on vacation in Europe when a law partner contacted him and told him about Samuel Horovitz and the NACCA. After a telephone call to Horovitz, Belli interrupted his vacation, flew to Cleveland, and addressed the NACCA annual convention.[104] Belli wanted the group to expand its membership to include lawyers who took personal injury tort cases. Horovitz, who had never heard of Belli, told him that the group was only concerned with worker injuries. But after Belli spoke for over two hours about the use of demonstrative evidence and the inadequacy of awards for tort victims, he won the group over.[105] The immediate result was that the NACCA decided to admit tort lawyers to membership. The permanent consequence was that the NACCA quickly changed its focus from workmen's compensation law to personal injury tort litigation.[106]

Belli shared Horovitz's vision of making the NACCA a national professional organization for lawyers representing injury victims. He was elected vice-president for 1950 and was president in 1951.[107] He organized the 1951 annual convention in San Francisco. The week-long program included 43 sessions on torts and medical science.[108] For many years, NACCA annual conventions were preceded by the "Belli Seminar," a loosely organized program at which speakers could discuss their notable achievements in personal injury law. Belli acted as moderator for the sessions.[109] The format of the *NACCA Law Journal* was also changed to include a section on recent important tort cases. In 1949, Belli began editing a feature called "Verdicts or Awards Exceeding $50,000." Personal injury attorneys from around the country submitted information about their reported and unreported decisions and settlements. Belli used the feature to show "that juries and judges are taking into consideration the decreased value of the dollar, and the need, in cases of serious and permanent injury due to negligence,

104 *Id.* at 127-128.

105 Horovitz, *supra* note 81, at 44.

106 Jacobson & White, David and Goliath, *supra* note 80, at 21-22, 327.

107 *Id.* at 327.

108 *Id.* at 72.

109 *Id.* at 74-75.

of compensating injured persons for loss of wages, pain and suffering, humiliation, embarrassment, mortification, and for the psychological and psychic aspects, as well as other elements of damages."[110]

NACCA members organized numerous state and local branches during Belli's term. California had local groups in San Francisco, Los Angeles, and San Diego, more than any other state. The branches gave personal injury lawyers a forum for discussing common issues. The NACCA held a Western Regional Conference in Los Angeles in 1952, where Roscoe Pound, former dean of the Harvard Law School, spoke.[111] In the same year, lawyers from San Francisco and Los Angeles submitted an *amicus curiae* brief to the California Supreme Court on behalf of the NACCA in a personal injury case.[112]

Belli also played a major role in the NACCA's effort to reach out to personal injury lawyers in their own communities. In 1951, he did a "barnstorming" tour of the country, making numerous presentations on personal injury law to local bar groups. He wrote that his efforts to raise the caliber of plaintiff-lawyer practice made him feel "as good as a Maryknoller bringing hybrid wheat and hospitals to southeastern Brazil." He also spoke at major universities, including Princeton, Yale, Cornell, Columbia, Boston University, and Harvard.[113]

V. THE CRUSADE FOR "THE ADEQUATE AWARD"

Melvin Belli's missionary zeal was ignited by a belief that personal injury judgments and settlements around the country were too low. As president of the NACCA, he began a national crusade for what he called "the Adequate Award" in personal injury cases. The goal was to increase substantially the amount of personal injury awards. Throughout the 1950s, Belli wrote and lectured extensively about how injury victims were not receiving adequate compensation for their injuries. Belli believed the trial tactics he

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110 9 NACCA L.J. 244 (1952).

111 10 NACCA L.J. 26 nn.35, 39, 104 (1952). By 1971, California was the largest affiliate of the group, known then as the American Trial Lawyers Association. There were 2,225 California members in 21 local and state chapters. Richard S. Jacobson, *Groans, Growth and Maturity*, Trial, 26, 27 (July–Aug. 1971).

112 Lawyers from Belli's firm participated in writing the brief. 9 NACCA L.J. 277 (1952).

113 Belli, My Life, *supra* note 92, at 135.

employed in California to win higher verdicts would work in other states. He suggested techniques plaintiff lawyers could use to convince judges and juries to give higher awards. Among them was an innovative approach for proving pain and suffering damages.

The Problem of Inadequate Personal Injury Judgments

Belli's campaign began in 1951 with publication of an article entitled "The Adequate Award" in the *California Law Review*.[114] To write the article, Belli reviewed hundreds of awards in reported and unreported personal injury cases. The data came from published decisions and information about unreported cases and settlements provided by leading personal injury attorneys around the country.[115] Belli separated the data into two broad groups: cases from California and cases from other jurisdictions. He then divided each group into "reported cases" and "unreported cases." The final organization was a summary of "California Reported Cases Tending to be Adequate," "Reported Cases of Awards from Other Jurisdictions Tending to be Adequate," "Unreported Cases (California) — Awards Approaching Adequacy," and "Unreported Cases (Other Jurisdictions) — Awards Approaching Adequacy." Each entry included the case name, basic facts about the victim's injury, and the amount of the recovery.

Belli's review of the cases led him to conclude that personal injury awards had risen over the last fifty years, but not sufficiently to keep up with the cost of living. He cited recent California appellate court decisions recognizing that inflation had undercut the value of the dollar.[116] Belli's study showed that in some states, including California, awards were on the rise. He referred to these jurisdictions as "adequate verdict" states. But there were still many "low verdict" states where the recoveries were insufficient.[117] Because a personal injury is the most catastrophic event a person can suffer, Belli argued that the legal community "should not be appalled" by the prospect of higher awards. Instead, "[j]udges and lawyers should dignify by new standards with justiciable awards infringements upon man's right to live out his life free from pain and suffering, with his mind

114 39 Calif. L. Rev. 1 (1951).

115 *Id.* at 27.

116 *Id.* at 10 n.30.

117 *Id.* at 37.

and body intact." The only way to do this was with "dollars," the "money judgment."[118]

The article generated huge publicity for the NACCA. The group sold thousands of reprints to lawyers around the country. Belli followed the article with a pamphlet in 1952 titled, *The More Adequate Award*.[119] This publication updated the original article by mentioning over 300 new awards. Belli gave special attention to judgments in "high verdict centers," including San Francisco and Los Angeles.[120] He reported that the highest California jury verdict was for $358,000 in an Orange County case. Belli said the verdict was "the second Most Adequate Award" to be granted in the United States.[121] In subsequent years, Belli provided regular updates on high recoveries in the *NACCA Law Journal's* "Verdicts and Awards Exceeding $50,000" section. He continued editing this feature until 1964.[122] Belli also spotlighted substantial awards in *Modern Trials*, a three-volume practice manual that he published in 1954.[123]

Belli's Use of Demonstrative Evidence to Justify Higher Pain and Suffering Damages Awards

The adequate award was the main topic of Belli's speeches when he toured the country on behalf of the NACCA. Although he criticized trial and appellate courts for overturning jury verdicts, he placed the primary responsibility for low verdicts on the victims' lawyers. They were not using their imaginations when trying cases. Belli emphasized to his audiences the value of demonstrative evidence in swaying jurors.[124] He described how he used photographs and models to recreate accident scenes.[125] He also explained how he used demonstrative evidence to illustrate how personal injuries affected victims' lives. Belli often told the story of the client who received a $100,000 verdict after he passed her artificial leg among the jurors.[126]

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118 *Id.*

119 Melvin M. Belli, Sr., The More Adequate Award (1952).

120 *Id.* at 2.

121 *Id.* at 3-4.

122 The feature last appeared in volume 30 of the NACCA Law Journal.

123 Melvin M. Belli, Modern Trials (1954).

124 Melvin M. Belli, Sr., *Demonstrative Evidence*, 10 Wyo. L.J. 15 (1955).

125 *Id.* at 22-25.

126 *Id.* at 21-22.

But the key piece of demonstrative evidence in any jury trial was a blackboard. Belli called the blackboard "the most important instrument in legal surgery."[127] He said he never tried a case without having blackboards present. The reason was simple: Teachers used blackboards to educate students from grammar school through college. The trial lawyer's mission was to educate jurors about the client's case in a very limited time. The blackboard helped jurors understand and remember important information. It was most useful in proving damages. Belli said that as witnesses testified about a client's past and future economic losses, such as medical bills and lost wages, he listed them on the blackboard.[128] The list remained on the board throughout the trial, and he referred to it in closing argument.

Belli made the most original use of the blackboard in establishing pain and suffering damages. He explained to his audiences that putting a dollar amount on pain and suffering was a difficult but necessary task for the plaintiff's lawyer. The personal injury victim, her family, and acquaintances could explain how the injury had affected her life, and medical experts could testify that the pain and suffering was real and predict how long it was likely to last. But putting a dollar figure on pain and suffering was another story. Belli warned that if the lawyer were to just throw out a high figure without breaking it down, this would "frighten your trier of facts and your reviewer of facts."[129] His solution was to divide noneconomic damages into finite time periods and list them on the blackboard. He created a hypothetical case where the lawyer's goal was to recover $225,000 for pain and suffering expected to last for thirty years. "You must start at the beginning and show that pain is a continuous thing, second by second, minute by minute, hour by hour, year after year for thirty years," he said. "You must interpret one second, one minute, one hour, one year of pain and suffering into dollars and cents and then multiply to your absolute figure to show how you have achieved your result of an award approaching adequacy at $225,000."[130] Belli was instructing his listeners on what came to be known as the "per diem" argument for pain and suffering damages.

127 *Id.* at 28.
128 *Id.*
129 *Id.* at 34.
130 *Id.*

He later claimed that he and a lawyer from Florida "invented" the per diem argument.[131]

Belli's lectures on demonstrative evidence and the per diem argument excited personal injury lawyers around the country. If California juries were giving large verdicts and the state's appellate courts were sustaining them, then Belli must be on to something. Plaintiffs' lawyers in many states adopted his tactics, and won higher awards as a result.

Reactions against the Adequate Award Movement

The crusade for the adequate award energized personal injury lawyers, but it had a very different effect on insurance companies and their lawyers. They were surprised at the NACCA's success in organizing plaintiff lawyers and stunned that personal injury awards were rising so rapidly. They fought against the adequate award movement, claiming that it was enriching personal injury lawyers while raising premium costs for the average insurance purchaser. Insurance defense lawyers were especially concerned about the growing use of the per diem argument around the country. They believed the tactic was a major contributor to high jury verdicts. One of their main goals was to convince courts to ban its use.

Insurance companies and their attorneys did not have to deal with a national plaintiff-lawyers organization before the NACCA. But after Melvin Belli became NACCA president in 1951, they realized they were facing a formidable opponent. At the 1952 meeting of the International Association of Insurance Counsel, the NACCA was a major topic. President Joseph A. Stray presented data from Los Angeles showing that the highest personal injury verdict had risen from $33,000 in 1940 to $185,000 in 1951. He blamed the NACCA for "arousing public interest in what they call 'adequate awards' but what we call excessive awards."[132] He recommended that insurers start a public relations campaign "to educate the public that they are the ones who are paying."[133]

The group devoted a full afternoon of the annual meeting to the NACCA. E.D. Bronson of San Francisco told how he attended the 1951

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131 The other lawyer was Perry Nichols of Miami, Florida. Melvin M. Belli, 2 The Law Revolt, 431 (1968).

132 *Report of the President*, 19 Ins. Couns. J. 250 (1952).

133 *Id.* at 252.

NACCA annual meeting, and he reported to his insurance defense colleagues what he had learned. He gave detailed information about the NACCA's goals, organization, membership, and educational activities.[134] Bronson described Melvin Belli's adequate award theory and how Belli encouraged use of the per diem argument to prove pain and suffering damages. "He argues too for the copious use of colored crayons . . . particularly for visualizing numbers in arguing damages. It is proposed that the factor of pain be reduced to some finite medium, such as the day, hour and minute and to attach a money value to some small unit of time and then to resort to another method of 'blowing up' by multiplication."[135] Another speaker mentioned a presentation on demonstrative evidence that Belli made to the Iowa State Bar Association: "You can well appreciate that the attorneys from rural communities and smaller towns all over the state resolved to use the same means to secure high verdicts in their courts."[136] He suggested that insurance company representatives also tour the country and teach better methods of defense: "We must be ready to meet demonstrative evidence with demonstrative evidence, meet blackboard with blackboard . . . ."[137] The discussion of the NACCA and rising awards was sobering. One speaker quipped that the mood in the room was so downcast "it might be appropriate at the close of this meeting to request the sergeant-at-arms to hang a black wreath from the door of this auditorium."[138]

It was not long, however, before insurance companies and their lawyers launched a counterattack to the adequate award movement. Some of their efforts were directed at plaintiffs' lawyers. Articles in legal publications warned that if awards continued to rise, insurance companies would push for legislation replacing tort cases with no-fault insurance. A 1954 article in the *Insurance Counsel Journal* charged that the NACCA "wants its full pound of flesh and then some without regard to the foundations

134 E.D. Bronson, *Activities and Objectives of Plaintiffs' Attorneys Who Foster the Adequate Award*, 19 Ins. Couns. J. 359-360 (1952).

135 *Id.* at 361.

136 Rupert G. Morse, *The Reinsurance Companies' Viewpoint of the Recent Trend Toward Higher Verdicts*, 19 Ins. Couns. J. 362, 363 (1952).

137 *Id.* at 364.

138 Comment of Gordon M. Snow. *Id.*

that are being undermined."[139] Lawyers who deceived juries into awarding excessive and unreasonable verdicts were laying the groundwork for no-fault insurance. Unreasonable lawyers would destroy their own practices and "kill the goose that lays the golden egg."[140] A new industry-friendly publication called the *Defense Law Journal* appeared in 1957. It mirrored the format of the *NACCA Law Journal* by covering developments in personal injury law, only from the defense perspective. Its editor charged the NACCA with preaching "adequacy" but fomenting "excessiveness." He predicted that "in its relentless straining for ever-mounting verdicts and awards, it is only procreating a Frankenstein which one day will take the form of legislation similar in concept to the Workmen's Compensation statutes."[141]

Many attacks on the adequate award movement and the NACCA were intended to provoke outrage in the general public. Writers in newspapers and popular magazines warned that only lawyers were profiting from higher judgments. For example, a *Reader's Digest* article accused plaintiff attorneys of collecting large fees and leaving their injury victims with little compensation.[142] Other articles described personal injury lawyers as "shysters" and blamed the NACCA for higher insurance premiums.[143] A story in the Pasadena *Independent* compared personal injury lawyers to modern-day highwaymen who rob by bringing fraudulent claims.[144]

Legal scholars also criticized the adequate award movement. Ironically, one of the most biting attacks was made by William L. Prosser who, as we have seen, was a major advocate of expanded liability for emotional injuries. Prosser wrote a review of Belli's *Modern Trials* for the *California Law Review.*[145] Prosser called the book "an exposition in three volumes of how to wring from an impressed and sympathetic jury every last possible

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139 H. Beale Rollins, *The Industry's Answer to "The More Adequate Award,"* 21 Ins. Couns. J. 455 (1954).

140 *Id.* at 459.

141 Welcome D. Pierson, *The True Adequate Award*, 1 Def. L.J. 275, 276 (1957).

142 *The Personal Injury Racket,* Reader's Digest (January, 1955).

143 Belli claimed that the insurance industry sponsored the media campaign against the NACCA. *See generally,* Melvin Belli, Ready for the Plaintiff ch. 27 (1956).

144 *Id.* at 293.

145 William L. Prosser, *Book Review of Modern Trials,* 43 Calif. L. Rev. 556 (1955).

nickel that can be obtained for the plaintiff, and how to build up and magnify whatever case he may have until the recovery reaches or exceeds the absolute maximum which any court can conceivably allow to stand."[146] Prosser called Belli's approach "the Hollywood type of trial" designed to manipulate jurors into making excessive awards.[147]

VI. THE PER DIEM ARGUMENT OVER PAIN AND SUFFERING DAMAGES IN THE APPELLATE COURTS

The controversy over rising personal injury verdicts moved to the nation's appellate courts when a host of cases involving the per diem argument for pain and suffering damages became ripe for decision. In a ten-year period beginning roughly in 1958, appellate courts in over thirty states considered whether to allow the tactic. The NACCA and defense counsel groups tracked the cases closely. They were especially interested in how state courts with reputations for liberalizing tort law would decide. Insurance companies and their lawyers believed that the defeat of the per diem argument would be a major step in checking the rise in jury awards. For the NACCA and plaintiffs' lawyers, vindication of the per diem argument would be a boost to the adequate award movement.

Opponents of the per diem argument presented the appellate courts with a variety of reasons for banning the practice. They claimed that there was no evidentiary basis for converting pain and suffering into monetary terms, so it was inappropriate for a plaintiff's lawyer to suggest a per diem amount. In making a per diem argument, the attorney was really giving testimony and expressing opinions on matters not disclosed by the evidence. This could only mislead juries into giving excessive awards. Moreover, the defendant's lawyer was put in the position of having to rebut an argument with no basis in fact, and if the lawyer responded in kind, he would imply approval of the per diem argument.[148]

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146 *Id.* at 557.

147 *Id.* at 559.

148 The arguments are taken from Ratner v. Arrington, 111 So. 2d 82, 88-89 (Fla. App. 1959), a case often cited for objectively presenting the arguments of both sides of the per diem argument controversy.

Supporters had their own list of reasons why the per diem argument should be allowed. They claimed that the per diem argument assisted juries in making reasonable decisions. Without some guidance, the trier of fact would have to determine pain and suffering damages in the abstract and make a blind guess. The plaintiff's lawyer's suggestion that the evidence justified a certain amount, in total or by per diem, was a way of reaching a reasonable conclusion that the jury could find useful. Per diem arguments were not evidence, but are only used for illustration and suggestion. Any alleged problems with the per diem argument were exaggerated and could be cured by proper jury instructions. Defense counsel also had the opportunity to suggest a proper recovery and could draw inferences from the evidence.[149]

The first state supreme court to decide the issue was New Jersey's, a state Belli listed as an "inadequate verdict" center in *The More Adequate Award*.[150] In *Botta v. Brunner* (1958),[151] the New Jersey Supreme Court rejected the per diem argument. The court held that a plaintiff lawyer's suggestion that pain and suffering could be measured at so many dollars per day had no foundation in the evidence and could lead jurors to rely on "unproven, speculative and fanciful standards of evaluation for evidence."[152] *Botta* was a major victory for insurers and their lawyers. Many expected that other states would follow New Jersey's lead and help bring a halt to large pain and suffering awards. The NACCA was quick to condemn the decision. By prohibiting plaintiff lawyers from using mathematical guides to help the jury compute pain and suffering damages, the jury was left "wrapped in a Grand Banks of fog," forced to use the "by guess and by golly" method of measuring noneconomic damages.[153] By 1966, ten other states had followed *Botta* in banning the per diem argument. Significantly only one, Illinois, was a state with a large urban center.[154]

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149 *Id.*

150 Belli, More Adequate Award, *supra* note 119, at 2.

151 138 A.2d 713 (N.J. 1958).

152 *Id.* at 725.

153 28 NACCA L.J. 280-281 (1961-1962).

154 The other states were Delaware, Hawaii, Kansas, Missouri, New Hampshire, Virginia, West Virginia, Wisconsin, and Wyoming.

Botta and the other decisions that mirrored its reasoning ended up being the high water mark for the insurance industry, as many subsequent state appellate court decisions authorized use of the per diem argument or left it to the trial judge's discretion to permit it in individual cases. By 1966, appellate court decisions in eighteen states followed this plaintiff-friendly trend. While the courts sometimes acknowledged that unit-of-time arguments could lead to larger pain and suffering awards, they found the guidance they provided to the jury outweighed their danger.[155]

While appellate courts in many states were tackling the per diem argument issue, one remained conspicuously silent: the California Supreme Court. Ironically, the state where Melvin Belli first used the per diem argument with great success and the one that topped his list of "most adequate verdict centers" did not play a leadership role. The California Supreme Court passed up an opportunity to examine the issue in *Seffert v. Los Angeles Transit Lines* (1961).[156] In *Seffert,* the defendant appealed a judgment that included a substantial sum for past and future pain and suffering damages. The trial judge had allowed the plaintiff's lawyer to make a per diem argument to the jury. The Court affirmed the judgment but refused to consider the per diem argument issue because the defense attorney failed to preserve it for appeal.[157]

Five years later, the Supreme Court finally addressed whether the per diem argument was permissible in *Beagle v. Vasold* (1966).[158] At the outset of the legal discussion, the Court noted that few issues in tort law had evoked more controversy in the last decade.[159] It tallied the number of jurisdictions permitting the argument and those prohibiting it, finding that the trend was toward allowing it. The Court also examined a large number of law reviews and found that a substantial majority of authors believed it was desirable to permit the per diem argument.[160] The Court sided with these majority positions when it found in favor of the per diem argument. It held

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155 Appellate court decisions on the issue are described in James O. Pearson, *Per Diem or Similar Mathematical Basis for Fixing Damages for Pain and Suffering,* 3 A.L.R. 4th 940. The annotation includes rules currently followed in the states.

156 364 P.2d 337 (1961).

157 *Id.* at 344.

158 *Id.* 417 P.2d 673 (1966).

159 *Id.* at 676.

160 *Id.* at 677.

that an attorney who suggests pain and suffering damages be computed on a unit-of-time basis was not presenting evidence but rather merely drawing inferences from the testimony of plaintiff, experts, and other witnesses.[161] The Court rejected a suggestion by defendant's counsel that the trial judge be given the discretion to decide whether the per diem argument should be allowed or not in individual cases.[162] The end result was there would be no obstacle to California lawyers using the tactic. The Court acknowledged the argument of critics who claimed that the per diem argument resulted in higher verdicts, but concluded the existing standards of judicial review were adequate to check the problem. The trial judge, sitting as "the thirteenth juror," and appellate courts, using the state's traditional standards for appellate review, could police excessive awards.[163]

Interestingly, the California Supreme Court justice who wrote or joined in many of the plaintiff-friendly tort opinions listed at the beginning of this article opposed the per diem argument. Roger Traynor, the justice whom many saw as the leader of the movement for expanding tort liability, filed a strong dissent in *Seffert*, arguing the pain and suffering damages were excessive and should be reversed. Traynor was very critical of the per diem argument. He agreed with those who claimed it misleads jurors into thinking they can compute pain and suffering damages by a mathematical formula. Traynor wrote that the truth is not served by the use of "sophistic arguments."[164] He then went a step further by questioning whether personal injury plaintiffs should receive any damages for pain and suffering. He cited a number of law review articles criticizing these awards. However, once having raised the issue of abolishing pain and suffering damages, Traynor quickly backed away from it. He wrote, "any change in this regard must await reexamination of the problem by the Legislature."[165] When *Beagle* was decided, Traynor, who by then was chief justice, renewed his criticism of the per diem argument in a concurring opinion, stating, "an argument that damages for pain and suffering should be computed as so much per unit of time is so misleading that it

161 *Id*. at 678.
162 *Id*. at 682.
163 Seffert, *supra* note 156, at 680.
164 *Id*. at 347.
165 *Id*. at 345.

should never be allowed."[166] One observer who was surprised by Traynor's views on the per diem argument was Melvin Belli. He wrote that Traynor "seems to have Frankfurterized, i.e., 'trended conservative' — or at least become more social planning and economically 'cautious.'"[167]

CONCLUSION

The individuals who founded the NACCA in 1946 could not have imagined how successful the group would be in organizing the personal injury bar. When the group, now named the American Trial Lawyers Association, celebrated its twenty-fifth anniversary in 1971, it had more than 25,000 members in affiliates, branches, and chapters around the country.[168] The campaign for the adequate award had also produced stunning results. Writing in 1968, Melvin Belli said that $100,000 was once a "spectacular" verdict; now there were awards exceeding $1 million.[169] Belli's lectures and writings on the use of demonstrative evidence and his techniques for increasing pain and suffering awards helped account for the larger judgments.

But the success of the plaintiffs' lawyers also had a down side. The increase in personal injury litigation in the 1950s and 1960s and the rise in awards raised questions about whether injury costs were getting out of hand. Critics identified pain and suffering damages, which are inherently arbitrary and unpredictable, as a special concern. Many articles focusing on problems with pain and suffering damages appeared in the nation's law reviews.[170] Some authors lost faith in the ability of the courts to address the issue. They believed that judges lacked the will to make meaningful changes in the rules governing noneconomic damages.[171] Judicial standards of

166 Beagle *supra* note 158, at 683.

167 Belli, 2 The Law Revolt, *supra* note 131, at 433. The comment makes reference to U.S. Supreme Court Justice Felix Frankfurter. Proponents of judicial activism criticized Frankfurter for his philosophy of judicial restraint. *See generally,* Philip B. Kurland, Mr. Justice Frankfurter and the Constitution (1971).

168 Richard S. Jacobson, *Groans, Growth and Maturity*, Trial, 26, 27 (July–August 1971). California was the largest affiliate, with 2,225 members.

169 Belli, 2 The Law Revolt, *supra* note 131, at 400-401.

170 *See, e.g.,* Morris, *supra* note 57; Marcus L. Plant, *Damages for Pain and Suffering,* 19 Ohio St. L.J. 200 (1958); William Zelermyer, *Damages for Pain and Suffering*, 6 Syracuse L. Rev. 27 (1955).

171 *See, e.g.,* Morris, *supra* note 57, at 482-484.

review governing excessive verdicts did little to check the dramatic rise in personal injury awards. Indeed, the courts appeared to have exacerbated the problem in states like California by permitting the per diem argument.

Many critics believed that change would only come if the legislatures acted. They suggested different proposals for legislative intervention. One author suggested a law creating a system similar to workmen's compensation where there would be a schedule for pain and suffering awards based on the type and severity of the injury.[172] Another argued for limiting pain and suffering damages to 50 percent of medical expenses.[173] These proposals would retain pain and suffering damages, but lower their amount and make them more predictable. Other writers called for the abolition of pain and suffering damages because society could not afford them. They linked pain and suffering awards to the rising cost of insurance premiums and consumer goods. A debate over no-fault insurance in auto accident cases had already been ongoing since the late 1950s. No-fault schemes often called for the elimination of pain and sufferings damages so that resources could be spent to fully compensate for economic losses.[174] However, the movement for no-fault insurance, which defense attorneys had warned plaintiff lawyers would "kill the goose that lays the golden egg," fizzled out.

Insurance companies and their lawyers ultimately had some success in fighting pain and suffering damages awards in medical malpractice cases where liability policy limits are high and the chances for catastrophic injuries are great. The California Legislature's decision to enact MICRA in 1975 and place a cap on noneconomic damages in medical negligence cases was their first major victory, and they have repeated it elsewhere. Efforts to limit pain and suffering damages are not surprising when viewed in the context of the spectacularly rising jury verdicts described in this article. The question whether pain and suffering damages should be limited or even abolished is still being debated today, and noneconomic damages are a main target of those who would reform personal injury law. ✯

172 Zelermyer, *supra* note 170, at 41.

173 Plant, *supra* note 170, at 211.

174 Leon Green, Traffic Victims: Tort Law and Insurance 88 (1958); Fleming James, Jr., *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge,* 59 Colum. L. Rev. 408, 418 (1959).

CALIFORNIA LEGAL HISTORY MANUSCRIPTS IN THE HUNTINGTON LIBRARY:

An Update

PETER L. REICH*

INTRODUCTION

The Huntington Library in San Marino, California, is one of the two primary repositories of California history manuscripts, along with UC Berkeley's Bancroft Library.[1] A key component of the Huntington collection is its materials on California legal history, which have been used for numerous scholarly publications.[2] In 1989, the Huntington published

* Professor of Law and Sumner Scholar, Whittier Law School; J.D., UC Berkeley, Ph.D, UCLA; past chair of the Legal History Section of the Association of American Law Schools; and past vice-chair of the California State Bar Committee on History of Law in California. This survey could not have been completed without the assistance of the wonderful Huntington Library staff, particularly Bill Frank, Curator of Hispanic, Cartographic, and Western Historical Manuscripts, Associate Curator Jennifer Goldman, and Chief Cataloger Brooke Black. The author dedicates the essay to the memory of Martin Ridge, late Director of Research at the Huntington and tireless supporter of California legal historical scholarship.

1 *See* John C. Parish, *California Books and Manuscripts in the Huntington Library,* 7 Huntington Libr. Bull. 1 (1935); Archibald Hanna, *Western Americana Collectors and Collections,* 2 W. Hist. Q. 401 (1971).

2 *See* Gordon M. Bakken, Practicing Law in Frontier California (1991); Miroslava Chávez-García, Negotiating Conquest: Gender and Power in California, 1770s to 1880s (2004); David J. Langum, Law and Community on the

California Legal History Manuscripts in the Huntington Library: A Guide, compiled and edited by legal historian Gordon M. Bakken (hereinafter *Guide*). The current essay updates the *Guide* by including materials catalogued or acquired since its production, as well as some that were omitted due to the definition of "legal history" it employed.

Before discussing specific materials, a few words regarding the role of legal historical theory and organization are in order. A recent study of legal history's disciplinary development divides the field into "classical," "liberal," and "critical" approaches.[3] The first focuses on the intellectual history of doctrine and institutions, the second emphasizes the integration of law with society and the economy, and the third asserts law's contingency and inconsistency over time.[4] Assuming that scholars applying such different methodologies may conduct research in the Huntington, I did not want to restrict excessively the parameters of legal historical materials, and have thus attempted to capture as broad a range of sources as might conceivably be useful.

In terms of organization, the *Guide* categorized manuscripts into twenty-six subject areas, with additional subdivisions, and summarized the collections in alphabetical order. Many of the categories were extremely narrow, and some then-extant collections were omitted, such as the Frank Latta materials, because they were "not specifically law related."[5] In the interests of inclusiveness, as well as of providing latitude for a wider use of documents, I have created six groupings: Business Enterprises, Courts and Judges, Government Offices, Land, Natural Resources (mining, oil, and water), and Law Firms and Lawyers. Each entry includes a brief description of the person(s) or institution generating the manuscripts, the types of materials included, their quantity, and whether there is a finding aid. It should be noted that a number of these collections are only semi-catalogued; for further information the researcher should consult one of the Huntington's superlative curators.

Mexican California Frontier: Anglo-American Expatriates and the Clash of Legal Traditions, 1821–1846 (1987); John Phillip Reid, Law for the Elephant: Property and Social Behavior on the Overland Trail (1997). *See also* the author's modest contribution to this literature, Peter L. Reich, *Dismantling the Pueblo: Hispanic Municipal Land Rights in California Since 1850*, 45 Amer. J. Legal Hist. 353 (2001).

[3] Jonathan Rose, *Studying the Past: The Nature and Development of Legal History as an Academic Discipline*, 31 J. Legal Hist. 101, 117 (2010).

[4] *Id. a*t 118, 120, 121.

[5] Guide at 2.

BUSINESS ENTERPRISES

BANNING COMPANY RECORDS, 1859–1948. Transportation business instrumental in developing Los Angeles, Wilmington, and Santa Catalina Island. Includes legal papers, correspondence, letter books, ledgers, and account books. 12,104 items, with finding aid.

BERNAL FAMILY PAPERS, 1849–1896. Landowning family in San Francisco Bay area. Includes legal contracts, mortgages, title deeds, and promissory notes. 67 items, with finding aid.

THOMAS ANTHONY "TONY" FORSTER COLLECTION OF FORSTER FAMILY PAPERS, 1849–1921. 1833 British immigrant to California, John Forster, married into *Californio* Pico family, engaged in multi-year litigation over Santa Margarita land grant. Includes correspondence, business, and legal papers. 147 items, negatives and microfilms of 11 diary volumes.

GUERRA FAMILY COLLECTION, 1752–1955. Prominent *Californio* family, particularly in Santa Barbara. José Antonio de la Guerra y Noriega commanded the Santa Barbara Presidio, 1815–42. Includes facsimile copies of land, legal, personal, and political papers; originals in Santa Barbara Mission Archive Library. 4,179 items, with finding aid.

LOS ANGELES TIMES COMPANY RECORDS, LEGAL DEPARTMENT, 1911–1980. Newspaper and business and politics during the twentieth century. Legal documents regarding 1911 Los Angeles Times bombing trial, antitrust, labor, and tax cases. 6 boxes, oversize scrapbook, with finding aid.

OREÑA FAMILY PAPERS, 1838–1955. *Californio* landowning family linked to the de la Guerras of Santa Barbara through marriage of Spanish immigrant Gaspar Oreña. Includes land claims, land grants, title deeds, and litigation documents. 65 items, with finding aid.

PROTEST FILED ON BEHALF OF PALMER, COOK, & COMPANY, BANKERS, 1854. San Francisco notary public's official protest filed for creditor bank against defaulting debtor, and original loan agreement. 2 pages.

STONEMAN FAMILY PAPERS, 1891–1920. Henry Stoneman, Civil War general and California governor, 1883–87, led family involved in various financial and real estate matters. Includes legal, financial, and transactional documents. 72 items, with finding aid.

CALIFORNIA GRAND JURY (NEVADA COUNTY). Indictment of Julia Moore, Sept. 19, 1859. Charge that defendant Moore murdered pregnant victim Lucy Nuttall by causing her to "miscarry, abort, and bring forth the said child . . . ." 7 pages.

COURTS AND JUDGES

WALTER ELY PAPERS, 1944–1984. Judge of U.S. Ninth Circuit Court of Appeals, 1964–84, who decided cases on censorship, education, feminism, immigration, labor relations, offshore drilling, and racial discrimination. Includes case files, internal court memoranda, county, state, and national documents. 68 cartons, uncatalogued.

PEIRSON M. HALL PAPERS, 1925–1979. Judge of U.S. District Court, Southern and Central Districts of California, 1942–79; who also served as U.S. attorney, 1933–37; in U.S. Reparations Mission to Japan, 1945; and on Uniform Air Crash Legislation Committee, 1968–75. Includes correspondence, documents relating to opinions and air crash legislation, litigation in Southern California, 1920s. 16 boxes, 15 scrapbooks, semi-catalogued.

IRVING HILL PAPERS, C. 1950s–1998. Judge of U.S. District Court, Southern and Central Districts of California, 1965–98. Includes correspondence, documents relating to opinions, trial notes, attorney discipline, judicial committee work, community activities. 51 boxes, 2 sacks, semi-catalogued.

HOFFMAN, OGDEN, LETTER TO OGDEN HOFFMAN, SR., FEB. 15, 1851. U.S. district judge, Northern District of California and District of California, 1851–91, prominent in deciding land grant cases. Letter to father describing cases and scenery in San Francisco. 1 letter, photocopy.

LOS ANGELES AREA COURT RECORDS, 1850–1899. Trial-level local courts in Southern California after the American takeover. Includes cases and case files dealing with civil, criminal, and probate matters, as well as those of justices of the peace and county justices, registers of actions, minutes, dockets, and miscellaneous records. 2,159 boxes, 295 bound volumes, with finding aid.

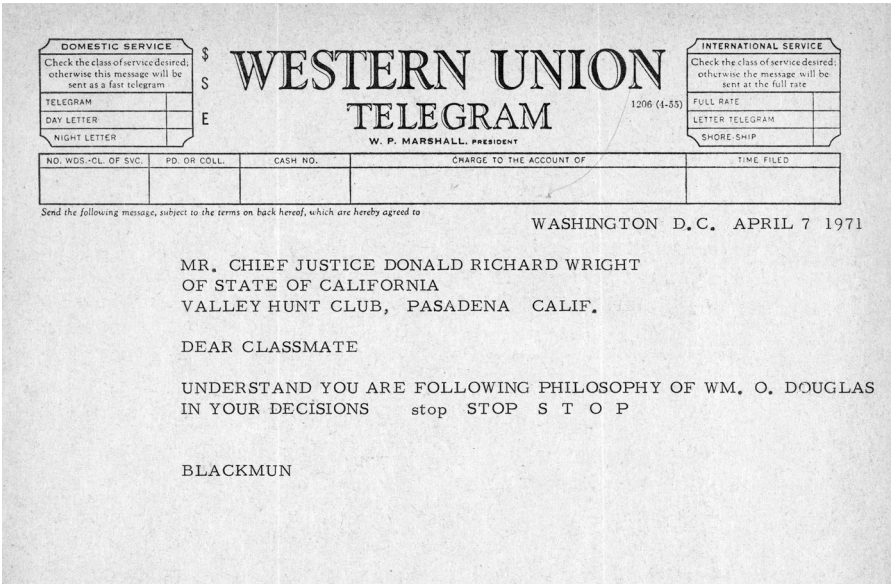
TUOLUMNE COUNTY (CALIFORNIA) JUSTICE OF THE PEACE DOCKET, 1855–1857. Court of local jurisdiction in gold country. Includes docket listing

information for each case heard by justices of the peace in Tuolumne County. 202 pages.

PAPERS OF DONALD R. WRIGHT, 1933–1977. Chief Justice of California, 1970–77, known for twice striking down death penalty. Includes correspondence with jurists and politicians, including Harry Blackmun, Warren Burger, William O. Douglas, and Ronald Reagan, meeting minutes, scrapbooks. 87 items, with finding aid. Includes message from Blackmun to Wright (see photo this page). The message reads:

> UNDERSTAND YOU ARE FOLLOWING PHILOSOPHY OF WM. O. DOUGLAS IN YOUR DECISIONS stop STOP S T O P

Note that the message was not actually transmitted via the Western Union Company, but was typewritten on an order blank to borrow the context of a telegram. In telegram usage, the word "STOP" indicated the end of a sentence because punctuation was not used. Here, the word "STOP" was borrowed by Justice Blackmun as a device to indicate the increasing vehemence of his disapproval.



DOMESTIC SERVICE
Check the class of service desired; otherwise this message will be sent as a fast telegram
TELEGRAM
DAY LETTER
NIGHT LETTER

$ S E

WESTERN UNION
TELEGRAM
W. P. MARSHALL, PRESIDENT
1206 (4-55)

INTERNATIONAL SERVICE
Check the class of service desired; otherwise the message will be sent at the full rate
FULL RATE
LETTER TELEGRAM
SHORE-SHIP

NO. WDS.-CL. OF SVC.	PD. OR COLL.	CASH NO.	CHARGE TO THE ACCOUNT OF	TIME FILED

Send the following message, subject to the terms on back hereof, which are hereby agreed to

WASHINGTON D.C. APRIL 7 1971

MR. CHIEF JUSTICE DONALD RICHARD WRIGHT
OF STATE OF CALIFORNIA
VALLEY HUNT CLUB, PASADENA CALIF.

DEAR CLASSMATE

UNDERSTAND YOU ARE FOLLOWING PHILOSOPHY OF WM. O. DOUGLAS IN YOUR DECISIONS stop STOP S T O P

BLACKMUN

Message from Associate Justice Harry Blackmun of the U.S. Supreme Court to California Chief Justice Donald R. Wright on a Western Union order blank. See above for description.

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GOVERNMENT OFFICES

LETTERS OF JESSE WASHINGTON CARTER, 1941–1942. Letters from Associate Justice Jesse Carter of the California Supreme Court to Superior Court Judge Herbert S. Gans and Ernest Besig, executive director of the ACLU of Northern California, dealing with beatings and harassment of Jehovah's Witnesses. 5 letters.

PAPERS OF EDMUND D. EDELMAN, 1953–1994. Los Angeles County supervisor, 1975–94. Correspondence regarding county government, public welfare, urban transportation. 1,118 boxes, with finding aid.

PAPERS OF LEWIS GRANGER, 1851–1874. Lawyer and politician who moved to Los Angeles in 1849, and to Oroville in 1857. Elected to California Assembly, later U.S. Land Office receiver. Includes business receipts, deeds, leases, litigation documents. 24 items.

PAPERS OF ALEXANDER POPE, 1932–2000. Los Angeles lawyer and public administrator who held offices of Legislative Secretary to Governor Edmund G. "Pat" Brown, 1959–61, Los Angeles Airport commissioner, 1973–77, Los Angeles County assessor, 1977–86. Includes administrative letters, memoranda, reports, and litigation documents. 369 boxes, with finding aid.

SAN LUIS OBISPO HISTORICAL DOCUMENTS, 1844–1861. Documents (some in Spanish) regarding development and history of San Luis Obispo County. Includes land appraisals, Committee of Vigilance materials, letters from prisoner and County Sheriff. 18 items, facsimiles of documents in San Luis Obispo Historical Society.

LAND

(Note: Many collections overlap with those in NATURAL RESOURCES*)*

PAPERS OF ALAMITOS LAND COMPANY, 1885–1907. Land sale company organized during real estate boom of 1880s in Southern California, operated in Long Beach and Signal Hill areas. Includes business records, ledgers, and legal documents. 95 boxes, 95 maps, with finding aid.

BRADBURY LAND PAPERS, 1855–1933. Family and related company involved in land and water development in Southern California cities of Du-

arte and Monrovia. Includes correspondence, certificates of title, deeds, and contractual agreements relating to land sales and mortgages, leases, and water rights. 54 items, with finding aid.

CROSBY, ELISHA OSCAR, LETTER TO J. WILCOXSON, MARCH 24, 1857, SAN FRANCISCO, CALIFORNIA. Gold Rush pioneer, delegate to 1849 state constitutional convention, state senator. Letter refers to land grant litigation in late 1850s California, and to prominent figures such as landowner John A. Sutter and attorney Henry W. Halleck. 1 page.

DERBY, GEORGE HORATIO, QUITCLAIM DEED FOR BEACH LOTS AT LA PLAYA, SAN DIEGO, CALIFORNIA, DEC. 10, 1853. Prominent humorist and U.S. Army topographical engineer who mapped San Diego River. 2 pages.

GRAHAME HARDY COLLECTION, 1849–1909. Various legal, administrative, municipal and real estate transactions of railroad and mining interests, businessmen and cities in San Francisco Bay area, Northern California, Western Nevada. Includes legal proceedings, title deeds, mining reports, claims, construction of Nicaragua Canal. 85 items, with finding aid.

HEARD, JOHN, LETTER FROM JOHN HEARD TO PETER H. BURNETT, 1850. Sacramento resident's report to California's first governor on August 14, 1850, "squatter riots." Litigation over claims to Sutter land grant led to gunfight and attack on prison ship in Sacramento River. 3 pages.

RECORDS OF KERCKHOFF-CUZNER MILL AND LUMBER COMPANY, 1883–1933. Company owned mills and yards throughout Southern California, involved in legal dispute regarding purchase and division of Boschke's Island (or Smith Island) in San Pedro Bay. Includes business records, correspondence, maps. 113 items, 15 oversize folders, with finding aid.

KROESEN, J. L., LAND CLAIM IN TRINITY COUNTY, CALIFORNIA, JUNE 16, 1851. Claim for land near Eel River. 2 pages.

LAND AND WATER TITLES AND AGREEMENTS: FACSIMILES, 1896–1907. Agreements between various individuals and companies regarding land titles and water rights in Imperial and Mexicali valleys in California and Baja California, Mexico. 13 items, facsimiles of documents in San Diego County Recorder's Office.

LOS ANGELES LAND PAPERS, 1850–1889. Documents certifying sale, purchase, pre-emption, or surveying of land by Los Angeles County officials,

many referring to transfers from *Californios* to Americans. Some involve significant individuals such as Ignacio del Valle, Pio Pico, and Abel Stearns. Includes inventories of women's separate property, mortgage agreements, inheritances, wills, certificates of sale due to taxes owed, lawsuits, foreclosures, pre-emption claims, lease agreements, and miscellaneous legal documents. 237 items, with finding aid.

MELLUS, FRANCIS, INDENTURE BETWEEN MANUELA AVILA AND FRANCIS MELLUS FOR LAND IN LOS ANGELES COUNTY, MAY 28, 1857. Salem, Massachusetts, merchant arrived in San Francisco, 1840, Los Angeles, 1850s, became state assemblyman, Los Angeles County supervisor. Deed for property, part of Rancho de Los Cuervos, including adobe house. 1 item.

MILLS, MINNIE TIBBETS, THE MAN AND THE TREE: EPIC OF THE NAVEL ORANGE AND LUTHER C. TIBBETS, 1942. Daughter of Luther C. Tibbets, who planted first navel orange tree in Southern California and was president of Riverside Land and Irrigating Company. Includes unpublished monograph on crops, land company, and legal troubles causing property loss, and two volumes of court transcripts. 3 typescripts.

PAPERS RELATED TO THE DEVELOPMENT OF PINTO BASIN, CALIFORNIA, 1924–1932. Real estate development of Pinto Basin, Riverside County, by several development companies. Includes correspondence discussing litigation between business entities. 16 items.

LAND CLAIM OF EDWARD POTTER, MAY 3, 1854. Claim made before Judge K. H. Limmish in Los Angeles, describing boundaries and bordering ranch belonging to Los Angeles County District Attorney Lewis Granger. 1 page.

COLLECTION OF RANCHO SESPE, 1829–1944. Mexican land grant in Santa Clara Valley, Ventura County, subject of claim before California Land Commission, and against various squatters. Includes copies of legal documents submitted by Carrillo family to Commission in order to prove title. 412 items, with finding aid.

COLLECTION OF HISTORICAL DOCUMENTS CONCERNING RED BLUFF, CALIFORNIA, 1856–1864. Related to lawsuits over confusion in land titles in Red Bluff, Tehama County. Includes letters, lawyers' arguments, citizens' petitions, 1859 map of city showing various land titles. 12 items, facsimiles.

SAN FRANCISCO (CALIF.) DISTRICT, BLOTTER B: DISTRICT RECORD OF LAND GRANTS AND DEEDS IN THE CITY OF SAN FRANCISCO, 1847–1849. Includes grants and deeds signed by various San Francisco *alcaldes* in early American period. 63-page bound volume.

SANTA CLARA LAND PAPERS, 1849–1890. Estates and land transactions of prominent *Californio* citizens, including Pablo de la Guerra, Juan Sepúlveda, Robert Stockton. Includes depositions, powers of attorney, wills, leases, indentures, and plats. 136 items, with finding aid.

TAYS, GEORGE, CALIFORNIA LAND GRANT RESEARCH MATERIALS FOR WILLIAM W. CLARY, 1938. Independent researcher hired by Clary, an O'Melveny & Myers partner, to investigate Mexican land grants in Bancroft Library. Includes letters and notes on land acquisition in pre-Conquest Southern California boundary litigation in 1820s. Example of legal historian at work: Tays complains that a document copyist, "leaving out all the details . . . left me in a state of futile rage." 5 items.

NATURAL RESOURCES (MINING, OIL, AND WATER)

PAPERS OF JAMES B. AND KATHERINE M. CLOVER, 1855–1990. James B. Clover owned Mono County land, defended against Los Angeles's eminent domain case to condemn land and accompanying water rights for city use. Los Angeles eventually won its suit. Includes correspondence, legal documents, reports, publications, and clippings. 5,941 items, 102 oversize folders, with finding aid.

RECORDS OF THE CONSERVATIVE WATER COMPANY, 1900–1967. Water supply company in Watts, Los Angeles area. Includes correspondence regarding public health, financial, legal issues. 310 items, with finding aid.

PAPERS OF O. S. DAWSON, 1873–1911. Relates to three mining companies, two in California (Bodie and Sonora) and one in Nevada. Includes correspondence and documents regarding mine management, debts, purchases. 146 items, with finding aid.

A HISTORY OF ESCONDIDO AND ITS WATER AND POWER DEVELOPMENT, SEPT. 1932. Unpublished manuscript focuses on irrigation and development

of hydro-electric energy, discussing reservoirs, disputes with neighboring localities, and legal battles over water supply. 16 pages.

CONTRACT WITH ELIAS G. GRANGER, LOS ANGELES, CALIFORNIA, MARCH 10, 1856. Contract between various parties concerning sale and transfer of Los Angeles water canal property. 1 item.

PAPERS OF JOHN R. HEINLEN, 1864–1907. Lemoore, California, landowner involved in property disputes with irrigation companies and individuals over river boundaries and water rights. 79 items, with finding aid.

FRANK F. LATTA COLLECTION: SKYFARMING, 1802–1982. Historian, curator of Kern County Museum, researched San Joaquin Valley development and dry farming ("skyfarming"). Includes documents on irrigation, canals, water rights. 17, 230 items, with finding aid.

FRANK F. LATTA COLLECTION: MILLER & LUX PAPERS, 1869–1939. Landowning company involved in litigation over San Joaquin Valley riparian rights. Includes agreements, correspondence with irrigation companies, lists of lawsuits, receipts, maps, ledgers. 78 boxes, 51 maps, 185 bound volumes, with finding aid. Several hundred boxes are unprocessed.

NORTH BLOOMFIELD GRAVEL MINING CO. RECORDS, 1890–1891. California company pioneered hydraulic gold mining, Nevada County, 1870s. Court-imposed restrictions forced monitoring of water-borne debris to protect downstream farmers. Includes correspondence discussing accounts of field superintendents and efforts to control runoff. 96 items, with finding aid.

ROE, JAMES H., NOTES ON THE EARLY HISTORY OF RIVERSIDE, CALIFORNIA, 1900. Notes on development of Riverside Valley water systems. 91-page typescript copy of original in Riverside Public Library.

ROJAS, JOSÉ MIGUEL, LAWS OF THE CORSO MINING DISTRICT, INYO COUNTY, CALIFORNIA, AUGUST 3, 1869. Translation (from Spanish?) of miners' laws, including claims and sales from district. 1 item.

FINANCIAL RECORDS OF HARRY F. SINCLAIR, 1905–1960. Oil tycoon involved in 1920s Teapot Dome Scandal, awarded non-competitive bids to California and Wyoming petroleum fields by Secretary of the Interior Albert B. Fall. (Fall papers also in Huntington.) Includes contractual agreements, affidavits, and other information related to legal claims, documents

related to Teapot Dome, tax records submitted in trials against Sinclair. 2,176 items, with finding aid.

PAPERS OF THE VIRGINIA AND TRUCKEE RAILROAD, 1865–1906. Railroad, built in late 1860s, connected Comstock Lode mines with quartz reduction mills and lumberyards. Includes business correspondence regarding mines and minerals in Nevada and California, pumping machinery, and water rights in Inyo County, California, and in Nevada. 40 items.

WRIGHTWOOD PAPERS, 1922–1929. Wright Ranch in San Gabriel Mountains converted from struggling cattle ranch and apple orchard to Los Angeles area vacation destination in 1920s. Includes correspondence of business associates and development consultants, legal and business documents, photographs of landscape and environment. 1922 Superior Court judgment allows water diversion by second user on any day when water was insufficient to reach crops on first user's land by six o'clock. 30 items, with finding aid.

LAW FIRMS AND LAWYERS

PAPERS OF JOHN DUSTIN BICKNELL, 1872–1914. Counsel for Southern Pacific Railroad, and Los Angeles practitioner of land patent law. His firm merged in 1903 with Los Angeles lawyers Dunn & Crutcher, later Gibson, Dunn, & Crutcher. Includes correspondence regarding rights of way with Colis P. and Henry E. Huntington. 9,802 items, 51 bound volumes, 6 rolls, with finding aid.

LAW OFFICES OF CHOW & SING COLLECTION, 1949–1998. San Francisco firm handling immigration cases and other matters of interest to Chinese immigrant and Chinese-American community. Founder William Jack Chow was first Chinese deputy district attorney for San Francisco, and president of Asian American Bar Association. Includes firm's business records (open), and case files (closed under rolling 75-year hold until 2024). 300 boxes, semi-catalogued, with brief summary.

HOMER DANIEL CROTTY PAPERS, C. 1930–1972. Partner, Los Angeles firm Gibson, Dunn, & Crutcher, represented Ventura Land and Water Company, active in Los Angeles Bar Association, Huntington Library. Semi-catalogued, with biographical information sheet.

DEPOSITION OF JOHN THOMAS DOYLE ON THE PIOUS FUND, 1903. Attorney for archbishop of San Francisco and bishop of Monterey in successful case to recover Jesuits' Baja California mission fund from Mexico, decided by Permanent Court of Arbitration at Hague, 1902. Document concerns fee dispute between Doyle and Catholic Church. 35 pages.

PAPERS OF WILLIAM I. FOLEY, C. 1903–1920. Attorney in Los Angeles law firm with Henry T. Gage, California governor, 1899–1903. Includes legal documents and correspondence concerning, among other matters, a lawsuit by Aguirre family against San Francisco archbishop claiming interest in Pious Fund, and financial litigation. 84 items, with finding aid.

HONG FAMILY PAPERS, 1764–2006. Immigration firm founded by You Chung Hong, first Chinese American to pass California bar exam, advocate for repeal of Chinese Exclusion Acts, founder of Los Angeles's New Chinatown. Eldest son Nowland Hong served as deputy city attorney of Los Angeles; chief counsel, Los Angeles Board of Harbor Commissioners; and private practitioner. Includes documents on business and community activities, immigration case files (some open on rolling 75-year hold), coaching books, political activities. 350 boxes, with finding aid.

LOCKWOOD, P. A., LAW LICENSE AND LETTERS, 1833–1860. San Francisco attorney in 1850s, represented John C. Frémont and Biddle Boggs in subsurface rights litigation against Merced Mining Company. Includes letters regarding Merced case, Governor John G. Downey, and title request. 3 items.

PAPERS OF LOREN MILLER, 1876–1903. African-American journalist, civil rights activist, attorney, and judge in Los Angeles. Assisted Thurgood Marshall with 1954 case *Brown v. Board of Education* in U.S. Supreme Court, Los Angeles Municipal Court judge, 1964–67. Includes briefs and other legal documents regarding racially restrictive real estate covenants, correspondence with Tom Bradley, Edmund G. "Pat" Brown, Langston Hughes, John F. Kennedy, Robert F. Kennedy, Thurgood Marshall, ACLU, NAACP, National Urban League. 10,454 items, with finding aid.

COLLECTION OF HENRY WILLIAM O'MELVENY, 1885–1940. Co-founder of oldest Los Angeles law firm with Jackson Graves, which later became O'Melveny & Myers, litigated land title and electric power cases, president

of various civic boards. Includes correspondence, business files, financial documents, and journals. Some missing years are in Graves Collection listed in *Guide*. 51 boxes, 52 volumes, 4 rolls, oversize items, with preliminary inventory.

ROBINSON-FARRAND PAPERS, 1905–1958. Lawyers representing Southern California banks and other institutions. Henry M. Robinson practiced in Los Angeles, George E. Farrand in Ventura, and both were involved with merger of First National and Security Pacific Banks. Includes correspondence, legal files, judicial opinions, legal documents, and research memoranda. 3,504 items, with finding aid.

ROCKWELL COLLECTION, 1791–1871. John A. Rockwell, attorney and land developer, Connecticut Whig politician who practiced law in that state, was county judge, congressman, and moved to Washington, D.C., where he litigated before U.S. Court of Claims. Treatise *Spanish and Mexican Law in Relation to Mines and Titles to Real Estate* (1851) was cited by parties and judges in numerous California and Southwestern land, mining, and water cases. Represented claimants in Fossat and New Almaden, California land grant cases. Includes correspondence and memoranda regarding various legal matters, real estate investments, and political issues. Approximately 3,000 items, with finding aid.

PAPERS OF FRANK WHEAT, C. 1950–2000. Los Angeles securities lawyer at Gibson, Dunn, & Crutcher, political activist, and major proponent of 1994 California Desert Protection Act. Includes documents regarding legal career, presidency of Los Angeles County Bar Association, SEC commissioner under Lyndon Johnson, involvement in environmental issues. 154 boxes, with finding aid.

CONCLUSION

Without question the Huntington Library's vast collections constitute an almost inexhaustible resource for writing California legal history. These materials await the patient researcher, whether he or she takes a doctrinal, institutional, contextual, or revisionist approach. John Phillip Reid, perhaps the most prolific of Huntington legal historians, recognized the Library's potential when he commented, "Were we to stop guessing and look

at the evidence, it could well reveal a source of social behavior previously unsuspected or deliberately ignored by historians."[6] Using Overland Trail journals, Reid soundly rebutted the traditional stereotype that California Gold Rush pioneers had no respect for property rights.[7]

This brief survey is only a way station on the long (and perhaps never-ending) journey to archival illumination. But if it inspires and assists future scholarship of the caliber of John Reid's, it will have served its purpose. ✯

[6] Reid, *supra* note 2, at 10.

[7] *Id.* at 363-64.