ARTICLES

IN SEARCH OF CALIFORNIA'S LEGAL HISTORY:

A Bibliography of Sources

BY SCOTT HAMILTON DEWEY*

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Yes, wonderful things."[6]

SPECIAL HONORS & COMMEMORATIONS

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

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

IN MEMORIAM: GORDON M. BAKKEN

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

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

LAWRENCE M. FRIEDMAN

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

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

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

SUBJECT HEADINGS IN ALPHABETICAL ORDER

ADMIRALTY

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

AFRICAN AMERICANS

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

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

AGRICULTURE

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

ARCHIVAL/BIBLIOGRAPHIC/HISTORIOGRAPHICAL

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

ART LAW

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

ASIAN AMERICANS, GENERALLY

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

BORDER

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

CALIFORNIA CONSTITUTION

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

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

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

CATHOLICS & CATHOLICISM

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

CHILDREN/JUVENILES

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

CHINESE AMERICANS

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

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

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

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

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

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

CODIFICATION

See Early Anglo California.

COURTS

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

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

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

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

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

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

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

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

CRIME

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

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

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

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

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

EARLY ANGLO CALIFORNIA

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

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

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

EDUCATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FAMILY LAW

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

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

GAMBLING/GAMING

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

GAYS, LESBIANS & ALTERNATE SEXUALITY

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

GOLD RUSH (AND LAW & ECONOMICS)

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

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

HOLLYWOOD & THE ENTERTAINMENT INDUSTRY

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

HOUSING & URBAN PLANNING

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

HUMBOLDT COUNTY (LOCAL HISTORY)

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

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

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

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

INDIANS (INDIGENOUS AMERICANS)

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

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

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

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

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

INSURANCE

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

ITALIAN INTERNMENT

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

JAPANESE AMERICANS

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

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

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

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

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

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

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

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

JEWS

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

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

JUDGES

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

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

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

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

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

LABOR (AGRICULTURAL)

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

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

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

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

LAND (AND REAL PROPERTY)

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

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

LATINOS

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

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

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

LAW & ECONOMICS

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

LAW FIRMS

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

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

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

LAW LIBRARIES

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

LAW SCHOOLS

See Education.

LAWYERS & THE LEGAL PROFESSION

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

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

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

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

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

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

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

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

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

LEGAL DOCTRINE & THEORY, ODDS & ENDS

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

LOCAL GOVERNMENT

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

LOS ANGELES

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

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

MEDICAL

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

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

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

MINING

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

MONETARY POLICY & ALTERNATIVE CURRENCY

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

NONLAWYER POLITICIANS

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

NOTORIOUS CASES

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

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

OKIES

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

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

ORAL HISTORIES

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

POLICE & LAW ENFORCEMENT

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

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

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

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

PRISONS & PAROLE

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

PROGRESSIVE ERA & PROGRESSIVISM

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

PROPOSITIONS/INITIATIVE, REFERENDUM & RECALL

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

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

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

RACE, RACIAL LAW & POLITICS, GENERALLY

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

RADICALISM, ANTIRADICALISM & THE FIRST AMENDMENT

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

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

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

RAILROADS

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

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

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

REAPPORTIONMENT

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

REGULATION & ADMINISTRATIVE LAW

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

RELIGION & THE FIRST AMENDMENT

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

SAN DIEGO COUNTY (LOCAL HISTORY)

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

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

SAN FRANCISCO

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

SPANISH/MEXICAN (& RUSSIAN) CALIFORNIA

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

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

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

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

TAX

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

WATER

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

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

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

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

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

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

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

WOMEN

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

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

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

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

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

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

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

RESEARCH NOTES AND CONCLUDING COMMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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THE LOEB FIRM

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

MOLLY SELVIN*

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

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

II. EARLY LIFE AND EDUCATION

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

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

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

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

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

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

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

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

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

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

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

Joseph Loeb
Courtesy The Huntington Library.

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

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

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

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

17 Ibid., 5.

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

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

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

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

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

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

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

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

III. BEGINNING IN PRACTICE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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34 See account in text at note 3 above.

35 Friedman Interview.

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

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

38 Gabler, *Empire*, 221.

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

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

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

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

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39 Loeb History, 7.

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

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

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

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

IV. EARLY ENTERTAINMENT PRACTICE (1908–1940)

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

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

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

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

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

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

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

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

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

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

A. MPPC CHALLENGES

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

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

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

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

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

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

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

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

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

51 Aberdeen, "The Edison Movie Monopoly."

52 Gil, "Breaking the Studios," 94.

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

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

LOEB & LOEB — EDWIN (LEFT) AND JOSEPH ON THE OCCASION OF EDWIN'S 75TH BIRTHDAY, 1961.

Courtesy Loeb & Loeb LLP

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

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

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

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

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

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

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

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

B NEW THREAT: CENSORSHIP

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

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

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

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

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

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

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

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

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

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

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

62 Yagoda, "Hollywood Cleans Up its Act."

63 Ibid.

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

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

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

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

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

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

66 Loeb History, 12; Holtzman interview.

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

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

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

C. UNION EFFORTS AND THE FOUNDING OF THE ACADEMY

1. Craft workers

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

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

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

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

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

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

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

71 Ibid., 435.

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

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

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

2. Talent guilds

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

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

[74] Ibid., 323–25.

[75] Ibid., 326.

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

Courtesy AMPAS.

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

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

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

[76] Ibid., 338.

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

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

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

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

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

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

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

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

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

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

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80 Ibid., 342.

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

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

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

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

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

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

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

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

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

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

V. THE ROLE OF JEWISH IDENTITY

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

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

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

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

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

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

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

89 Parikh and Garth, "Philip Corboy."

90 Ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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99 Gabler, *Empire*.

LAURA'S LAW:

Concerns, Effectiveness, and Implementation

JORGIO CASTRO*

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

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* Member of the California Bar; J.D. 2015, UC Hastings College of the Law. I would like to thank Professors Lisa Faigman, Robert Schwartz, Jaime King, and Lois Weithorn, who have provided tremendous support, assistance, and feedback in the creation of this paper. Thanks to my parents, extended family, and friends for the support they have provided me. This paper is dedicated to those suffering from severe mental illness, the family and friends who love them and are struggling to help today, and a humane, compassionate, and real future for all.

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

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

HOW LAURA'S LAW HELPS

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

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

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

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

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

[6] Cal. Welf. Inst. Code § 5345.

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

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

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

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

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

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

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

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

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

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

[12] *See infra* note 53.

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

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

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

BACKGROUND ON LAURA'S LAW

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

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

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

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

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

IMPLEMENTATION OF LAURA'S LAW BY COUNTY

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

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

[18] Cal. Welf. Inst. Code § 5349.5.

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

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

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

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

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

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

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

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

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

LAURA'S LAW ELEMENTS AND PROCEDURES

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

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[24] Cal. Welf. Inst. Code § 5349.

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

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

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

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

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

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

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

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

32 Cal. Welf. Inst. Code § 5346(c).

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

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

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

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

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

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

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

38 *Id.*

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

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

41 *Id.*

42 *Id.* at (f).

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

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

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

OPPONENTS' ARGUMENTS

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

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

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

PROPONENTS' ARGUMENTS

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

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

53 Divide, *supra* note 52.

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

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

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

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

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

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

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

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

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

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

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

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

EVALUATION OF ARGUMENTS

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

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

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

63 *Id*.

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

65 *In re* K.L., 1 N.Y. 3d at 368–69.

66 *Id*. at 369–70.

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

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

power to provide care to its citizens who are unable to care for themselves,"[69] and "authority under the police power to protect the community from the dangerous tendencies of some who are mentally ill," recognized by the Supreme Court.[70] In balancing, the court found that Kendra's Law's impingement on liberty was light, and the state interests weighty. The court found that "the restriction on a patient's freedom effected by a court order authorizing assisted outpatient treatment is minimal, inasmuch as the coercive force of the order lies solely in the compulsion generally felt by law-abiding citizens to comply with court directives."[71] The court then also found that, in any event, the patient's right to refuse treatment generally is outweighed here "by the state's compelling interest in both its police and parens patriae powers."[72] It emphasized that the statutory requirement of finding by clear and convincing evidence that the patient would either become a danger to themselves or others, or deteriorate, "properly invoked" the state's interests in its police and parens patriae powers.[73]

The patient also alleged an equal protection violation because of the lack of a finding of incapacity for him to be subject to court order under Kendra's Law. He claimed that the law treated those subject to court orders under Kendra's Law differently from those subject to guardianship proceedings or involuntary commitment statutes who still needed to be found incompetent

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69 *In re* K.L., 1 N.Y. 3d at 370.

70 *Id., citing* Addington v. Texas, 441 U.S. 418, 426 (1979).

71 *In re* K.L., 1 N.Y. 3d at 370.

72 *Id*. What is interesting is that patients subject to AOT still have the right to refuse treatment. There is no forcible medication authorized as part of the court order, and the penalty for non-compliance with the court order is merely transportation to an appropriate facility for an evaluation for an involuntary civil commitment.

73 *Id*. at 371–72. Specifically, the court listed several required elements for treatment under Kendra's Law:

> the patient is in need of assisted outpatient treatment in order to prevent a relapse or deterioration which would be likely to result in serious harm to self or others . . . the patient is unlikely to survive safely in the community without supervision; the patient has a history of lack of compliance with treatment that has either necessitated hospitalization or resulted in acts of serious violent behavior or threats of, or attempts at, serious physical harm; the patient is unlikely to voluntarily participate in the recommended treatment plan; the patient is in need of assisted outpatient treatment in order to prevent a relapse or deterioration which would be likely to result in serious harm to the patient or others; and it is likely that the patient will benefit from assisted outpatient treatment.

to receive forced medication.[74] The court again emphasized that a court-ordered assisted outpatient treatment plan "simply does not authorize forcible medical treatment."[75] Thus Kendra's Law did not treat its assisted outpatients differently from those in guardianship proceedings or involuntary commitment. They were treated equally with regard to forced medication.

Next, the Court of Appeal analyzed the patient's claim that Kendra's Law's failure, post court order, to "provide for notice and a hearing prior to the temporary removal of a noncompliant patient to a hospital violates due process."[76] Here the court undertook a straightforward application of the *Mathews* balancing test and "conclude[d] that the patient's significant liberty interest is outweighed by the other *Mathews* factors."[77] The risk of erroneous deprivation of liberty is minimal because of judicial findings by the clear and convincing evidence standard prior to the court order.[78] And since the court is "not . . . better situated than a physician to determine whether the grounds for detention . . . have been met[, a] preremoval hearing would not reduce the risk of erroneous deprivation."[79] The court then found that the third part of *Mathews* balancing also weighed for the state because of the state's strong interests in both "removing from the streets noncompliant patients previously found to be, as a result of their non-compliance, at risk of a relapse or deterioration likely to result in serious harm to themselves or others," and "warding off long periods of hospitalization" that "tend to accompany relapse or deterioration."[80] Requiring another hearing would unnecessarily delay treatment and thus would be detrimental to the patient. And, as a matter of statutory functionality, the removal provision was critical as the "mechanism by which to force a noncompliant patient to attend a judicial hearing in the first place."[81] Thus, the Court of Appeal found that the removal provision met due process requirements.

Finally, the patient alleged a violation of the Fourth Amendment prohibition against unreasonable searches and seizures because of the "lack of

74 *Id*.
75 *Id*.
76 *Id*.
77 *Id*. at 373.
78 *Id*.
79 *Id*.
80 *Id*.
81 *Id*. at 374.

requirement that [a] physician have probable cause or reasonable grounds to believe a noncompliant assisted outpatient is in need of involuntary hospitalization" before removal.[82] But the court pointed out that the requirement that the determination be made in the "clinical judgment" of a physician already "necessarily contemplates that the determination will be made on the physician's reasonable belief."[83] Thus, the Court of Appeals found no constitutional violation there, or anywhere else in the statute.

Because Laura's Law is almost entirely modeled on Kendra's Law, and retains the same elements relied upon by the Court of Appeals in *In re K.L.,* there is no reason to believe it would not successfully withstand a federal constitutional challenge in California.[84] While it is true that the California Constitution's right to privacy has been interpreted by the California Court of Appeal to confer upon the "individual the freedom to choose to reject, or refuse to consent to, intrusions of his bodily integrity,"[85] the reasoning from the New York Court of Appeals is relevant just the same.[86] There is no forced medication under either Kendra's Law or Laura's Law,

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[82] *Id.*

[83] *Id.*

[84] *See also,* John K. Cornwell & Raymond Deeney, *Preventive Outpatient Treatment For Persons With Serious Mental Illness: Exposing the Myths Surrounding Preventive Outpatient Commitment for Individuals with Chronic Mental Illness,* 9 Psychol. Pub. Pol'y & L. 209, 219–25 (2003) (discussing arguments that AOT statutes satisfy Equal Protection, Substantive Due Process, and Procedural Due Process constitutional concerns.).

[85] Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 1137 (1986). The California Supreme Court has not yet taken up the precise question. In *Bouvia,* the Second District Court of Appeal found that the right to refuse treatment for a competent adult allowed plaintiff Bouvia to remove a nasogastric feeding tube that was providing life-sustaining treatment. Scholars view *Bouvia* principally as a "right to die" case. However, the court focused on her unbearably painful circumstances in commenting, "we cannot conceive it to be the policy of this state to inflict such an ordeal upon anyone." *Id.* 1143–44. As this paper has discussed only in brief, people with severe mental illness are subject to incredible rates of revolving involuntary hospitalization, incarceration, and homelessness; alarming increased rates of victimization including violent assault and rape; and the subjective terror of persecutory delusions, hallucinations and psychotic depression driving many to suicide, all while often their very serious illnesses prevent them from recognizing the need for and availability of medical care. This author too cannot conceive it to be the policy of the state to inflict such an ordeal upon anyone.

[86] California's case law analogous to New York's case law recognizing the right of a patient not adjudicated incompetent to refuse psychiatric medication in non-

and thus there is no intrusion of bodily integrity. Quite simply, patients do have the right under Laura's Law to refuse treatment.[87] Indeed, the patient works with the treatment team in tailoring the treatment plan. Thus the patients are exercising control over the course of treatment. Laura's Law, like Kendra's Law, is facially constitutional.

Supporters also argue that AOT enhances civil liberty. They argue that AOT prevents "trans-institutionalization" of people with mental illness to prisons and further loss of liberties by preventing deterioration — avoiding locks, restraints, seclusion, or actual forced medication. A successful Laura's Law intervention avoids the further impingement on individual freedom and autonomy inherent in incarceration. It also avoids the increased likelihood of victimization in prison.[88] In addition, the threshold for forcible administration of medication is actually lower for an individual in prison, given that the state has a compelling interest in meeting its affirmative duty to treat its prisoners and maintain a safe prison environment.[89] In prison, the requirements are that the inmate be a danger to himself or others, and that treatment is in the inmate's medical interests.[90] There is no need for either a finding of incompetence or an emergency situation, as is required during a civil commitment.[91] To the extent that AOT seeks, as

emergency situations, *Riese v. St. Mary's Hospital & Medical Center,* relies heavily on that New York case, *Rivers*.

87 Furthermore, *Addington* still requires a balancing of the patient's right to refuse treatment against compelling state interests. *See supra* note 70.

88 *See* Cynthia L. Blitz, et al., *Physical Victimization in Prison: The Role of Mental Illness,* 31 Int'l J.L. & Psychiatry 385, 385 (2008); *see also* David Mills et al., *When did prisons become acceptable mental health care facilities?,* Stanford Law School Three Strikes Project, https://www.law.stanford.edu/sites/default/files/child-page/632655/doc/slspublic/Report_v12.pdf ("[F]or example, they are much more likely to be sexually assaulted than other prisoners. Some prisoners react to the extreme psychic stresses of imprisonment by taking their own lives. Tragically, rates of suicide inside prisons and jails are much higher among the mentally ill."). There is also evidence that people who are more symptomatic and sicker generally are victimized at greater rates. *See* E. Fuller Torrey, The Insanity Offense: How America's Failure to Treat the Seriously Mentally Ill Endangers its Citizens 138 (2008). "The corollary to this fact is that if you treat them and reduce their symptoms, you reduce their chances of being victimized." *Id*.

89 *See* Washington v. Harper, 494 U.S. 210 (1990).

90 *Id*. at 227.

91 *See* Riese v. St. Mary's Hospital & Medical Center, 209 Cal. App. 3d 1303 (Cal. App. 1st Dist. 1987).

a matter of public policy, to prevent people with severe mental illness from landing in jails and prisons, it seeks to prevent more severe curtailment of an individual's civil liberties and thus protects them.[92]

LAURA'S LAW DOES NOT TARGET PEOPLE BASED ON MENTAL ILLNESS ALONE

While "data shows it is simplistic as well as inaccurate to say the cause of violence among mentally ill individuals is the mental illness itself," mental illness "is clearly relevant to violence risk," but "its causal roles are complex, indirect, and embedded in a web of other arguably more important individual and situational cofactors to consider."[93] A recent study found that future violence was more closely associated with other particular factors such as past violent acts, substance abuse, and environmental factors.[94] In analyzing the MacArthur Study from 1999 in light of continued research and literature, the authors state, "the relationship between diagnosis and violence, we believe, is still an open question . . . ."[95] Those authors did find that the predictors of violence for people with mental illness "are more similar than different" to the predictions of violence in the population as a whole.[96] Those predictors also included alcohol and substance abuse.

It should be noted that there are studies which still show an indication that violence is more prevalent within certain diagnoses and symptoms of mental illness. A national study of patients with schizophrenia found that patients with particular clusters of positive psychotic symptoms, such as persecutory ideations, were more likely to be violent.[97] A recent Australian study found

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92 For a more thorough discussion on the concept of autonomy, *see* Dora W. Klein, *Autonomy and Acute Psychosis: When Choices Collide,* 15 Va. J. Soc. Pol'y & L. 355, 388–89 (author argues that mental illness itself limits autonomy more than involuntary treatment).

93 Eric B. Elbogin, Sally C. Johnson, *The Intricate Link Between Violence and Mental Disorder,* 66 Arch. Gen. Psychiatry 2 (February 2009).

94 *Id*.

95 E. Fuller Torrey et al., *The MacArthur Violence Risk Assessment Study Revisited: Two Views Ten Years After Its Initial Publication,* 59 Psychiatric Services 2 (Feb. 2008).

96 *Id*. at Conclusion.

97 Jeffrey Swanson et al., *A National Study of Violent Behavior in Persons with Schizophrenia,* 63 Arch. Gen. Psych 490 (May 2006). Part of the study's conclusion was that "violence risk management must include a focus on the whole person in the community environment" which is what Laura's Law does.

those diagnosed with schizophrenia, while overwhelmingly not violent, were still more likely to be violent than a control group of people without schizophrenia.[98] These studies suggest that, while it is erroneous and an oversimplification to say that people with mental illness are violent or at a higher risk of violence, it is equally erroneous to conclude that there are not subsets of the population of people with mental illness who do present an increased risk of violence. Laura's Law, with its requirements of an act of serious violence or involuntary hospitalization (resulting from serious violence) aims to reach such subpopulations and reduce acts of violence, among other negative outcomes.

STUDIES OF AOT DEMONSTRATE ITS EFFECTIVENESS

Multiple studies have shown that AOT is effective in reducing negative outcomes as well as increasing the subjective well-being of the individuals subject to the process. The New York State Office of Mental Health's Final Report on the status of Kendra's Law found that people subject to that AOT program had generally good subjective experiences of the programs. Although about half reported feeling angry or embarrassed by the experience, 62% considered the court-ordered treatment "good for them."[99] The large majority of people reported that the pressures exerted on them helped them get well and stay well (81%) and gain control over their lives (75%), and the pressures made them more likely to keep appointments and take medication (90%).[100] This report strongly suggests that the informally coercive effect of AOT provides benefits to the person that the person subjectively appreciates. In fact, whether an individual subjectively feels coerced depends more on the participants in the process than on the process itself.[101] Specifically, the patient's view depends on her belief that others acted out of concern, treated her respectfully and in good faith, and afforded the patient an opportunity to tell her side of the story.[102] Results

98 T. Short et al., *comparing violence in schizophrenia with and without comorbid substance-use abuse disorders to community controls,* Acta Psychiatrica Scandinavica, 1–1 (2013).

99 Final Report 20–21.

100 *Id.*

101 *See generally* J. Monahan, *Coercion in the Provision of Mental Health Services: The MacArthur Studies,* 10 Research in Community & Mental Health 13, 26–67 (1999).

102 *Id.*

from the Final Report showing that the vast majority feel confident in their case manager's ability to help them (87%), and that they both "agree on what's important" (88%),[103] coupled with the structure of AOT (representative attorney listening and representing the person, judge engaging directly with the person, individualized treatment team working with the person) strongly suggest that a person subject to AOT will subjectively feel less coercion than opponents contend. Another study suggested that multiple stakeholder groups, including individuals with psychoses, were willing to accept the perceived coerciveness of outpatient commitment in order to gain improved outcomes.[104]

The Final Report also found an enormous reduction in several negative significant event categories. The report found large reductions in incarceration (87%), arrest (83%), psychiatric hospitalization (77%), and homelessness (74%) for those individuals in AOT compared to those same individuals before AOT.[105] Further, they were less likely to threaten suicide or harm others (47%), physically harm themselves (55%), or threaten to harm others (43%).[106] These numbers suggest strong support for the claim that AOT achieves its goals.

One independent analysis of the effectiveness of Kendra's Law in New York (the Community Outcomes of Assisted Outpatient Treatment, or "COAOT study") found that people under court-ordered AOT experienced improvements compared to a control group in areas of serious violence perpetration, suicide risk, and illness-related social functioning.[107] Specifically, there was a 4.31 times greater likelihood of perpetration of serious violence for those not under AOT. The study also found that the AOT group reported "marginally less stigma and coercion than the control group."[108]

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103 Final Report, 21.

104 Jeffrey Swanson et al., *Assessment of Four Stakeholder Groups' Preferences Concerning Outpatient Commitment for Persons With Schizophrenia,* 160 Am. J. Psychiatry 1139, 1139 (June 2003).

105 *Id*. at 17–18.

106 *Id*. at 16.

107 Phelan et al., *Effectiveness and Outcomes of Assisted Outpatient Treatment in New York State,* 61 Psychiatric Services 2 (2010), http://www.ncbi.nlm.nih.gov/pubmed/20123818 [hereinafter COAOT].

108 *Id.; cf.* Bruce Link et al., *Stigma and coercion in the context of outpatient treatment for people with mental illnesses,* 67 Social Science and Medicine, 3, 408–19

Most studies of outpatient commitment "have been naturalistic or quasi-experimental" and "subject to bias from selection and confounding."[109] Thus, many of the objective studies designed to offer empirical data on the results of AOT suffer from shortcomings, but those shortcomings generally apply across all studies. Indeed, there are serious ethical problems in creating a true experiment that would randomly assign individuals to either AOT or not when they all meet the criteria of AOT. In the case of the COAOT study, the study designers "used a propensity score analysis to achieve the strongest possible causal inference without a randomized experimental design."[110] The COAOT study should be viewed as a valuable empirical study that supports the adoption of AOT. In addition, a "study of studies" published in 2004 found that "on balance, empirical studies support the view that [AOT] is effective under certain conditions" while acknowledging the fact that controversial views continue to permeate the field.[111]

Studies of Kendra's Law generally have displayed results indicating its effectiveness.[112] In particular, a 2011 quasi-experimental study indicated that outpatient commitment under Kendra's Law is associated with a reduced risk of arrest for patients under AOT orders compared to patients not under AOT orders, and for patients under AOT orders compared to

(Aug. 2008) ("We found that improvements in symptoms lead to improvements in social functioning. Also consistent with this perspective, assignment to mandated outpatient treatment is associated with better functioning and, at a trend level, to improvements in quality of life. At the same time . . . findings showing that self-reported coercion increases felt stigma (perceived devaluation-discrimination), erodes quality of life and through stigma leads to lower self-esteem.") The authors recommend that "future policy needs not only to find ways to insure that people who need treatment receive it, but to achieve such an outcome in a manner that minimizes circumstances that induce perceptions of coercion." *Id*. The importance of the participants' working with the individual so as to reduce this feeling of coercion appears to be of strong importance.

109 COAOT, *supra* note 107.

110 *Id*.

111 Marvin S. Schwartz & Jeffrey W. Swanson, *Involuntary Outpatient Commitment, Community Treatment Orders, and Assisted Outpatient Treatment: What's in the Data?,* 49 Cal. J. of Psychiatry 585–91 (2004), *available at* https://ww1.cpa-apc.org/Publications/Archives/CJP/2004/september/swartz.pdf.

112 *Kendra's Story: Her Killer Speaks for the First Time,* aired Feb. 1, 2013, http://archive.wgrz.com/news/article/198510/13/Kendras-Story-Her-Killer-Speaks-For-The-First-Time.

those same patients before AOT.[113] These studies, while not ideal research, are still valuable and reliable and show data indicating that AOT is associated with better outcomes for patients.

Critics of AOT cite the Oxford Community Treatment Order Evaluation Trial (OCTET) study published in April 2013 as contradicting claims of effectiveness from an AOT program.[114] In that study, participating patients leaving psychiatric discharge were either randomized to "community treatment orders" and were subject to clinical monitoring and rapid recall assessment, or they were randomized to "§ 17 leave" and were subject to recall for assessment but received significantly less extensive monitoring and for shorter times.[115] The study authors interpreted their results as showing "in well coordinated mental health services, the imposition of compulsory supervision does not reduce the rate of readmission of psychotic patients."[116] Here, proponents of AOT distinguish this study as inapplicable to AOT, because the CTO is a "purely administrative order" issued by a clinician and not a judge.[117] As such, it lacks the critical "black robe effect."

> The theory behind the black-robe effect is that a judicial process and a judge's imprimatur increase the likelihood that the patient will take to heart the need to adhere to prescribed treatment. It is not a single factor but a host of related ones that combine to send a potent message: the ritual of being summoned to court and taking part in a hearing, the recognition that a fair-minded third party has listened to both sides and ultimately agreed with clinicians that assisted treatment is warranted, the cultural perception of the

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113 B.G. Link et al., *Arrest outcome associated with outpatient commitment in New York State,* Psychiatric Services 2011; 62:504–08, http://ps.psychiatryonline.org/article.aspx?articleid=116189.

114 T. Burns et al., *Community treatment orders for patients with psychosis (OCTET): a randomised controlled trial,* Lancet 381:1627–33, 2013

115 *Id*. *See also* Michael Rowe, *Alternatives to Outpatient Treatment,* Journal of the American Academy of Law and Psychiatry Online, Sept. 2013, http://www.jaapl.org/content/41/3/332.full.

116 OCTET *supra* note 114, at Interpretation.

117 Treatment Advocacy Center, *No Relevance to Assisted Outpatient Treatment (AOT) in the OCTET Study of English Compulsory Treatment,* May 2013, http://treatmentadvocacycenter.org/storage/documents/Research/may2013-octet-study.pdf [hereinafter No Relevance].

> judge as an authority figure, and the inclination of many judges to use their bench as a sort of civic pulpit.[118]

There are other reasons to discount the validity of the study. The OCTET study compares groups undergoing different forms of mandatory treatment, with neither a court order nor judicial administration. It does not compare court-ordered treatment to voluntary treatment. Additionally, the study included a substantial number of subjects who had not refused treatment.[119] However, non-compliance with treatment is a requirement under AOT. Further, patients whose families felt very strongly that their loved one needed treatment were excluded because of an unwillingness to risk her assignment to the non-CTO group, and a substantial number of patients who were eligible for the study refused to participate in the initial interviews.[120] Both of these groups, which self-selected out of the study, are likely to be among those subject to AOT orders — in the first case because of an indication of the seriousness of the illness, and in the second because of their non-compliance with the study program. Their exclusion casts further doubt on OCTET's applicability to AOT programs that require serious mental illness and non-compliance with treatment. Thus, the study lacks the external validity to compare it to AOT. It offers few or no generalizable results.

LAURA'S LAW'S EFFECTIVENESS

Nevada County, the only county to have fully implemented Laura's Law, currently provides the only Laura's Law test jurisdiction in California for evaluation. The county showed results that indicate the effectiveness of Laura's Law in a California county. Looking at the twelve months pre-treatment versus twelve months post-treatment for patients via AOT/ACT,[121] Nevada

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118 *Id*.

119 *Id*. at 3 (sample of 200 patients found 30% had "no history of non-compliance or disengagement from treatment.") (*citing* J. Williams, *Are community treatment orders being overused?,* The Guardian, Oct 27, 2010).

120 No Relevance, *supra* note 117, at 3 (*citing* T. Burns et al., *Community treatment orders for patients with psychosis (OCTET): a randomized controlled trial,* The Lancet, April 2013).

121 The numbers reflect both those using ACT through AOT and those using it voluntarily. The study found that AOT outcomes are similar to ACT outcomes. Further,

County found decreases in the number of psychiatric hospital days (46.7%), incarceration days (65.1%), homeless days (61.9%), and emergency interventions (44.1%).[122] Those significant decreases indicate that Laura's Law has a significant effect in preventing adverse outcomes, and the institutionalization and accompanying loss of liberty of those patients.[123]

IMPLEMENTATION CHALLENGES

THE POLITICS OF MENTAL HEALTH

Just as there were political challenges faced and compromises made to pass Laura's Law in the state legislature,[124] there are serious political challenges to passing Laura's Law county by county.[125] Often, opponents or those ambivalent about AOT will cite concerns regarding racial disparities in enforcement or cultural competency of assessment and treatment, and the nature of the hearings provided to individual patients as reasons to deny or delay opting in. While those are serious concerns, the evidence strongly suggests that enforcement of Laura's Law does not unfairly discriminate based on race, employs cultural competency in its implementation, and handles hearings in an appropriate manner for the individuals.

AOT is used to engage those patients who will not engage in ACT voluntarily, which is a separate population. *See supra,* note 57.

122 Michael Heggerty, Assisted Outpatient Treatment (W&I Code 5345) (AB 1421) "Laura's Law": The Nevada County Experience 31, Nov. 15, 2011, *available at* http://mentalillnesspolicy.org/states/california/nevada-aot-heggarty-8.pptx.pdf.

123 Laura's Law 2015 Annual Report indicated a decrease in psychiatric hospital days of 77.6%, in incarceration days of 100%, and in homeless days of 79.5%. A consumer satisfaction survey rated overall satisfaction with the AOT Program at 78.3%. *See* Friday Memo for 4/17/2015, "Laura's Law 2015 Annual Report," MyNevadaCounty.com (Apr. 17, 2015 2:25 PM), http://www.mynevadacounty.com/nc/ceo/Pages/FridayMemo-20150417.aspx#id-879.

124 *See generally,* Paul Applebaum, *Law & Psychiatry: Ambivalence Codified: California's New Outpatient Commitment Statute,* 54 Psych Servs. 1, 26–28 (Jan. 2003).

125 A full discussion of the politics of enacting AOT is outside of the scope of this paper. For more information, *see, e.g.,* Amy Yannello, *The case for Laura's Law: An Open Letter to Citizens and Elected Officials,* https://www.beaconreader.com/amy-yannello/the-case-for-lauras-law-an-open-letter-to-citizens-and-elected-officials (describing Contra Costa county's political battle).

LAURA'S LAW DOES NOT RACIALLY DISCRIMINATE

There has been concern that African Americans and other minority groups have been over-represented in the AOT program in New York.[126] Partly in response, the New York State Office of Mental Health commissioned an independent evaluation of Kendra's Law that found "no evidence that the AOT Program is disproportionately selecting African Americans for court orders, nor [] evidence of a disproportionate effect on other minority populations . . . . Our interviews with key stakeholders across the state corroborate these findings."[127] The study's authors concluded that, at first glance, African Americans appeared to be overrepresented in relation to the total population.[128] However, when conducting a deeper statistical multivariable analysis, the results showed that "differences are dependent on context," and that when the most relevant populations for AOT are analyzed, there was *no appreciable racial disparity*.[129] From this the authors infer that the seeming overrepresentation of African Americans compared to the total population "is influenced by a number of 'upstream' social and systemic variables such as poverty that may correlate with race," but saw "no evidence suggesting racial bias in the application of AOT to individuals."[130]

In another publication, the authors of the same independent study noted that to the extent that selection is based on clinical appropriateness and need, and not on "systemic, legal, and regulatory factors that treat minorities differently than their nonminority counterparts; or [] discrimination, bias, stereotyping, and clinical uncertainty within the system," a *difference* should not be considered a negative *disparity*.[131] Given the results of the

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126 *See* New York Lawyers for the Public Interest, Inc., *Implementation of 'Kendra's Law' is Severely Biased,* 2–5 (April 7, 2005), *available at* http://www.prisonpolicy.org/scans/Kendras_Law_04-07-05.pdf.

127 John Monahan et al., New York State Assisted Outpatient Treatment Program Evaluation vii, Duke University School of Medicine, Durham, NC (June 2009).

128 *Id*. at 13.

129 *Id*. at 14.

130 *Id*. at 14–15.

131 Jeffrey Swanson et al., *Racial Disparities In Involuntary Outpatient Commitment: Are They Real?,* 28 Health Affairs 3, 816–18, Exhibit 1 (2009) [hereinafter "Racial Disparities"] (adopting a 2002 Institute of Medicine report which "argues that 'disparity' should be reserved for that portion of the difference in health care quality that is attributable to (1) systemic, legal, and regulatory factors that treat minorities

program evaluation, it does not appear that those systemic or discriminatory problems are present. The more closely the study analyzed individuals who would actually be subject to AOT, the closer those individuals' proportional representation in AOT matched their ratios relative to the general population.[132]

In that same publication, the authors of the independent study opined that "whether this overrepresentation under court-ordered outpatient treatment is unfair depends on one's view: is it access to treatment and a less restrictive alternative to hospitalization, or a coercive deprivation of personal liberty?"[133] Thus, to the extent there even is a *disparity* in the ratio of African Americans and other minority groups treated compared to the total population, whether one views that disparity negatively (as discriminatory) depends on whether one views AOT negatively. Opponents of AOT have, not surprisingly, attempted to cast that difference as a negative.[134] As a corollary, even if proponents of AOT were to believe that there was a disparity in AOT's application, it is unclear that they would view that as negatively "unfair" for African-Americans with severe mental illness. It is entirely possible to see that from their point of view, that disparity favors a group with the advantage of appropriate AOT treatment. Whether this point continues to be a source of contention in the future may simply be in the eye of the beholder. As the success of AOT programs becomes clearer, the concern that the effect of the programs is negative and unfair will likely dissipate.

A lot of the concern regarding racial disparities in the AOT population in New York's experience can be attributed to a longstanding distrust of

differently than their nonminority counterparts; or (2) discrimination, bias, stereotyping, and clinical uncertainty within the system.").

132 *See supra* note 126.

133 Racial Disparities, 816.

134 *See, e.g.,* Jennifer Friedenbach, *Laura's Law a looming disaster for mentally ill,* SF Examiner, June 8, 2014 ("This law was implemented in New York, and studies found *disturbing disparities* among people of color — African-Americans and Latinos were *forcibly* treated at much higher rates.") (emphasis added); Jasenn Zaejian, *Current Research on Outpatient Commitment Laws,* Mad in America, *available at* http://www.madinamerica.com/2014/02/current-research-outpatient-commitment-laws-lauras-law-california%E2%80%8E/ (summarily dismissing the Swanson study's conclusions and asserting that the data "clearly indicates prima facie racial discrimination").

law enforcement among minority racial groups generally and legitimate concern that certain elements of law enforcement act prejudicially in their enforcement discretion.[135] These are certainly important concerns. However, the AOT process is not controlled by law enforcement. Law enforcement officers are only one of a number of categories of reporters who can petition the county mental health director to conduct an investigation and subsequently petition the court for AOT proceedings.[136] Indeed, police are one of the primary sources of referrals. However, the decision as to whether an individual qualifies for AOT ultimately depends on professional psychiatric health judgments using objective medical standards for diagnosis, and then an independent judge's finding of all of the requisite statutory elements by clear and convincing evidence. The decision to initiate the AOT process and the decision to issue a court order are not made by law enforcement. While that is a key distinction, there can still be legitimate concerns regarding those who are making treatment decisions.[137]

CONCERNS ABOUT CULTURAL COMPETENCY

Cultural competency is key to effective implementation of Laura's Law. Cultural competency is defined by the U.S. Department of Health and Human Services as "a set of values, behaviors, attitudes, and practices within a system that enables people to work effectively across cultures" and "refers to the ability to honor and respect the beliefs, language, interpersonal styles, and

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135 This is putting it mildly. The recent fatal police officer shooting of Michael Brown and fatal choking of Eric Garner, and subsequent non-indictments have fueled nationwide protests and brought the national spotlight to problems between law enforcement and the African-American community. *See* Natalie DiBlasio & Yamiche Alcindor, *'Justice for All,' 'Millions March' draw tens of thousands of protestors,* USA Today, Dec. 14, 2014; Meagan Clark, *More Protests Planned This Week For Eric Garner, Tamir Rice, Mike Brown,* International Business Times, http://www.ibtimes.com/more-protests-planned-week-eric-garner-tamir-rice-mike-brown-1740395. As of a recent update to this paper, the in-police-custody death of Freddie Gray has ignited protests in Baltimore. *See* Sheryl Gay Stolberg & Stephen Babcock, *Scenes of Chaos in Baltimore as Thousands Protest Freddie Gray's Death,* NY Times, April 25, 2015, *available at* http://www.nytimes.com/2015/04/26/us/baltimore-crowd-swells-in-protest-of-freddie-grays-death.html?_r=0.

136 Cal. Welf. Inst. Code § 5346(a).

137 *See generally* Jonathan Metzi, The Protest Psychosis: How Schizophrenia Became a Black Disease (2010).

behaviors of individuals and families receiving services, as well as staff who are providing such services."[138] Cultural competency is critical because

> [c]ulture counts when it comes to diagnosis and treatment of mental disorders. How people manifest their diseases, how they cope, the type of stresses they experience, and whether they are willing to seek treatment are all impacted by culture. Stigma also is greatly influenced by culture. . . . Professionals also are influenced by culture. Our culture impacts upon how we hear things when we talk to patients. It can interfere with our ability to make accurate diagnoses and can even impact our judgment about treatment. This is a major component of disparities in quality of care.[139]

Indeed, the President's New Commission on Mental Health in 2003 found that there were many challenges that needed to be addressed for minority groups to gain both better diagnosis and better access to treatment.[140] To address those challenges, there are federal laws that mandate non-discrimination in availability of services for programs receiving federal funds.[141] At the state level, the California Department of Health has ordered all county mental health departments to create cultural competency programs.[142]

Laura's Law itself mandates that counties that opt in must have a service planning and delivery process that considers "cultural, linguistic, gender, age, and special needs of minorities" and must provide "staff with the cultural background and linguistic skills necessary to remove barriers to mental health

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138 National Alliance on Mental Illness, Multicultural Action Center, http://www.nami.org/Content/NavigationMenu/Find_Support/Multicultural_Support/Cultural_Competence/Cultural_Competence.htm (last visited May 12, 2015).

139 David Satcher, *The Connection Between Mental Health and General Health, in* The President's New Freedom Commission on Mental Health: Transforming the Vision, 11 (The Carter Ctr. ed., Nov. 5–6, 2003), *available at* http://www.carter-center.org/documents/1701.pdf.

140 President's New Freedom Commission on Mental Health 49 (July 22, 2003), *available at* http://govinfo.library.unt.edu/mentalhealthcommission/reports/FinalReport/downloads/FinalReport.pdf.

141 California Department of Mental Health, *Cultural Competence Plan Requirements CCPR Modification* 27–28, http://www.dhcs.ca.gov/services/MH/Documents/CCPR10-17Enclosure1.pdf.

142 California Department of Mental Health, *Cultural Competence,* http://www.dhcs.ca.gov/services/mh/pages/culturalcompetenceplanrequirements.aspx (last visited May 12, 2015).

services as a result of having limited English-speaking ability and cultural differences."[143] They also must provide "services [that] reflect special need[s] of women from diverse cultural backgrounds."[144] The statute also requires that "individual personal services plans shall ensure . . . age-appropriate, gender-appropriate, and culturally-appropriate services" designed to enable a number of positive psychosocial outcomes for the individual.[145] Thus there are substantial cultural competency requirements for the provision of mental health treatment and associated services built into the mandate of the statute. Their effective implementation presumably will provide necessary cultural competency in the treatment that Laura's Law aims to provide.

PRIVACY OF LAURA'S LAW HEARINGS

Another possible concern with the implementation of Laura's Law is the privacy of its hearings. In order to gauge how the court should decide this issue, we should analyze how current conservatorship court hearings under the Lanterman–Petris–Short Act (also known as "LPS," codified in the California Welfare and Institutions Code) are structured. In the leading case on the privacy of court hearings under LPS, the California Court of Appeal for the Sixth Appellate District granted a writ of mandate in *Sorenson* commanding the Superior Court of Monterey County to vacate and issue a new order denying two newspapers access to the trial records of Christopher Sorenson's LPS conservatorship jury trials.[146] The newspapers' interest emerged after Sorenson was charged with killing his mother, her death occurring eight days after the conclusion of his second LPS trial.[147] The appellate court held that Section 5118 of the Welfare and Institutions Code makes LPS jury trials presumptively non-public.[148] This finding constitutes an exception to California Code of Civil Procedure 124, which states that the sittings of every court must be public.[149]

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143 Cal. Welf. Inst. Code § 5348(a)(2)(B).

144 *Id*. at (a)(2)(I).

145 *Id*. at (a)(4). Such services are qualified "to the extent feasible." *Id*.

146 Sorenson v. Superior Court, 219 Cal. App. 4th 409, 415 (2013).

147 *Id*.

148 *Id*. at 416 ("[T]hey are not special proceedings for which there is a qualified First Amendment right of public access.").

149 Cal. Code Civ. Proc. § 124. There is an exception for family law matters. Cal. Fam. Code § 214.

In *Sorenson,* which applies to LPS court trials,[150] the court reasoned that an LPS jury trial is "not an ordinary civil proceeding," and so the right of access recognized by the California Supreme Court in ordinary civil proceedings did not apply.[151] Further, the court noted, "there is not such a tradition of openness or utility associated with having the proceedings public to support a finding of a constitutional right of access."[152] The lack of historical right of access, added to the plain language of the statute, the fact that the state mandates that all records be confidential, and the fact that the LPS Act itself specified a right to privacy, suggested to the court that there was no public right of access to LPS trials, and that closed proceedings were favored.[153] Utility concerns of "enhancing the conduct, accuracy, and truth-finding function of trials" by making them public were found substantially weaker in the situation where the purpose of the proceeding is the mental health of the individual.[154] Likewise, the therapeutic value of open proceedings regarding criminal matters did not apply here for the appellate court.[155] The court reasoned that although openness would serve the purpose of preventing abuse of judicial power, it could theoretically apply to *any* proceeding, and because Section 5118 allowed for any party to demand that the proceeding be public, it had an "escape valve" that would facilitate that goal if needed.[156] The court buttressed its holding by citing a patient's constitutional right to privacy under the California Constitution, and the protections of the psychotherapist–patient privilege.[157] Finally, and perhaps most strongly, the court noted, "a conclusion that LPS trials are presumptively public proceedings would cause proposed involuntary conservatees to suffer the embarrassment and stigma of public scrutiny to their alleged mental difficulties and to their personal psychiatric records."[158]

All of the court's analysis in *Sorenson* applies directly for Laura's Law hearings. Given that AOT proceedings are relatively recent and are

150 *Sorenson,* 219 Cal. App. 4th at 443.
151 *Id*. at 430–31.
152 *Id*.
153 *Id*. at 433–34.
154 *Id*. at 434–35.
155 *Id*. at 436.
156 *Id*.
157 *Id*. at 444.
158 *Id*. at 448.

decidedly different from an "ordinary civil proceeding," the same analysis should apply here. The fact that Laura's Law is contained, along with the Lanterman–Petris–Short Act provisions, in the California Welfare and Institutions Code argues more strongly for applying the same reasoning. The legal analysis supports finding that Laura's Law hearings should be presumptively private. And as the *Sorenson* court pointed out, privacy of proceedings makes sense as a policy matter. Privacy of proceedings protects the individual from public scrutiny and embarrassment during a time when their illness will be highlighted in detail. The focus during the Laura's Law hearing should be on providing the individual with the needed support and therapeutic coercion to maximize the potential for successful treatment. Outside observers will not add anything toward that goal.

COUNTY SAVINGS FROM IMPLEMENTATION SHOULD BE USED FOR OTHER MENTAL HEALTH SERVICES

One thing on which all sides can agree is that mental health services are currently underfunded. For example, the Behavioral Health Court in San Francisco (a diversionary court that seeks to place people with mental illness who have been arrested for crimes in needed treatment facilities and programs) often faces a lack of currently available space in those programs and facilities. Lack of adequate funding for psychiatric hospital beds, residential treatment facilities, community clinics and other community-based resources is a challenge to both voluntary and involuntary users of such resources.[159] Since 2008, $4.5 billion has been cut from mental health care

[159] Bernard J. Wolfson, *Psych patients pack emergency rooms,* Orange County Register (Oct. 25, 2014), *available at* http://www.ocregister.com/articles/psychiatric-639758-patients-emergency.html ("A severe shortage of psychiatric hospital beds, tight space at residential facilities and less help at community clinics has turned E.R.s into virtual boarding houses for psych patients."); *see also,* E. Fuller Torrey et al., The Shortage of Hospital Beds for Mentally Ill Persons 2, http://www.treatmentadvocacycenter.org/storage/documents/the_shortage_of_publichospital_beds.pdf ("The total estimated shortfall of public psychiatric beds needed to achieve a minimum level of psychiatric care is 95,820 beds."). The California Hospital Association in Sacramento reported, "California's bed rate is an appalling one bed for every 5,975 people, as of 2011, worse than the rest of the nation's average of one bed for every 4,758 people." Joanne Williams, *Feature: Beds of Unbalance,* Pacific Sun, *available at*http://www.calhospital.org/news-headlines-article/feature-beds-unbalance (last visited May 12, 2015).

funding.[160] Currently, nearly half of California counties have no psychiatric inpatient beds available.[161] Given the potential for Laura's Law to save county funds that can be diverted to providing more resources overall,[162] and its ability to bring treatment of severe mental illness further to the forefront of public discourse, it is an important policy that should continue to be carefully implemented.

Overall, successful implementation of Laura's Law will often depend on a strong and sustained good-faith collaboration among the county mental health director, the judge presiding, the treatment team, and local community groups of interest, such as the National Alliance on Mental Illness. Their effective cooperation and coordination is needed to assure that counties implement Laura's Law in a just, fair, and therapeutic manner.

CONCLUSION — IMPLEMENT LAURA'S LAW/AOT

Assisted outpatient treatment offers more than hope. Multiple studies have provided evidence of its effectiveness. Laura's Law, as a version of assisted outpatient treatment, retains all the necessary elements of AOT. The evidence on Laura's Law in particular directly points toward its success in California. There is every reason to believe that Laura's Law has and will work for the small population of people with severe mental illness it targets for treatment. AOT has passed legal muster, and Laura's Law is constitutional as well. Beyond legal tests, Laura's Law is sound public policy that will help reduce the worst outcomes for people with severe mental illness, and provide support and treatment for those who need it most. It is a policy proposal that offers a desperately needed option for families and communities crushed under the heavy financial weight and profoundly heavier emotional and psychological toll of untreated and poorly treated severe mental illness. There are implementation challenges and concerns, as there are with every piece of legislation. But they should not be and are

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160 60 Minutes, *Nowhere to Go: Mentally Ill Youth in Crisis,* Jan. 26, 2014, *available at* http://www.cbsnews.com/news/mentally-ill-youth-in-crisis/.

161 California Healthline, *Report: Calif. Hospitals Lack Beds for Those With Mental Illnesses,* http://www.californiahealthline.org/articles/2014/4/15/report-calif-hospitals-lack-beds--for-those-with-mental-illnesses.

162 Jeffrey Swanson et al., *The Cost of Assisted Outpatient Treatment: Can It Save States Money?,* Am. J. Psychiatry, AIA 1–10 (July 2013).

not a barrier to adopting Laura's Law. It is true that Laura's Law is not a silver bullet that will solve all the challenges faced by people with mental illness and our communities, but it is another tool in the toolbox for our communities to use in fixing our broken mental health system.

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INVERSE CONDEMNATION:

California's Widening Loophole

DAVID LIGTENBERG*

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This paper was awarded second place in the California Supreme Court Historical Society's 2015 CSCHS Selma Moidel Smith Law Student Writing Competition in California Legal History.

* J.D. Candidate, Class of 2016, UC Davis School of Law. Thanks to John Ormonde for his insight and editing thoughtfulness; Toussaint S. Bailey for his introduction to a fascinating legal issue; and my wife, August, for allowing me the hours for research and writing.

INTRODUCTION

In 1789, directly influenced by Thomas Jefferson, France's Declaration of the Rights of Man stated:

> Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights.[1]

Known as the "harm principle" and formalized in 1859 by John Stuart Mill in his seminal work, *On Liberty,* this principle contends that "[t]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[2] Much of civil law, springing from English courts of equity, adheres to this principle: when someone causes another harm, the law should provide a remedy.[3]

It was under color of this principle, in 1879, that California constitutional delegates included a progressive damages clause as a supplement to the takings clause of California's constitution.[4] In the event that a government did not proactively and intentionally "take" private land, but indirectly caused it to be damaged or unusable, the California constitutional delegates felt that

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[1] DECLARATION OF THE RIGHTS OF MAN art. 4 (Fr. 1789); *see also* GREGORY FREMONT-BARNES, ENCYCLOPEDIA OF THE AGE OF POLITICAL REVOLUTIONS AND NEW IDEOLOGIES, 1760–1815, at 190 (2007).

[2] JOHN STUART MILL, ON LIBERTY I.9 (1859), *available at* http://www.econlib.org/library/Mill/mlLbty1.html; *see also* Richard Warner, *Liberalism and the Criminal Law,* 1 S. CAL. INTERDISC. L.J. 39, 39 (1992).

[3] *See* John J. Farley, III, *Robin Hood Jurisprudence: The Triumph of Equity in American Tort Law,* 65 ST. JOHN'S L. REV. 997, 1000–01 (1991).

[4] *See* CAL. CONST. art. I, § 19 (2014).

the interests of private owners warranted a remedy.[5] Perhaps today, this looks like a strange remedy for a situation that appears to fall squarely under the umbrella of tort law. In 1879, however, the doctrine of sovereign immunity shielded the State of California from tort liability — a privilege not waived until 1963 with the enactment of The California Tort Claims Act.[6]

Since its inception, the damages clause has taken on a life of its own through inverse condemnation claims, creating something of a quasi-tort.[7] While possibly appropriate at the time of ratification, such a broad interpretation is inconsistent with California's modern statutory scheme.[8] Furthermore, the modern application of the damages clause has eviscerated what remained of the traditional concept of sovereign immunity doctrine without a clear legislative directive.[9]

If the doctrine of sovereign immunity is to act as a bar for claims against the state, it cannot have the quasi-tort of inverse condemnation drilling a hole directly through its center. When California waived sovereign immunity in 1963 with the passage of the Tort Claims Act, the Legislature struck the proper balance of public accountability and sovereign immunity.[10]

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[5] *See* 3 E.B. Willis & P.K. Stockton, Debates and Proceedings of the Constitutional Convention of the State of California 1190 (1881).

[6] California Tort Claims Act, Cal. Gov't Code §§ 810 *et seq.* (Lexis 2014); *see* Austen L. Parrish, *Avoiding the Mistakes of Terrell R.: The Undoing of the California Tort Claims Act and the Move to Absolute Governmental Immunity in Foster Care Placement and Supervision,* 15 Stan. L. & Pol'y Rev. 267, 281 (2004).

[7] *See, e.g.,* City of Pasadena v. Superior Court, 228 Cal. App. 4th 1228 (2014) (using language from *Albers, Holz, Customer Co.,* and *Regency* to determine an inverse condemnation claim); Regency Outdoor Adver., Inc. v. City of Los Angeles, 39 Cal. 4th 507 (2006) (holding that damage as part of the construction of a public improvement satisfies an inverse condemnation claim); Customer Co. v. City of Sacramento, 10 Cal. 4th 368, 376–80 (1995) (clarifying that just compensation "encompasses special and direct damage to adjacent property resulting from the construction of public improvements"); Holz v. Superior Court, 3 Cal. 3d 296 (1970) (adequately stating a claim for inverse condemnation for damages from construction of a rapid transit system); Albers v. Cnty. of Los Angeles, 62 Cal. 2d 250, 263 (1965) (defining public use as "improvement as deliberately designed and constructed").

[8] *See generally* California Tort Claims Act (allowing tort claims against the government based on legislature-defined parameters).

[9] *See, e.g., Pasadena,* 228 Cal. App. 4th (allowing the possibility of strict liability against the city for damage from a falling tree); *Albers,* 62 Cal. 2d (finding a county liable for property damage resulting from a landslide caused by the construction of a road).

[10] *See* Parrish, *supra* note 6, at 283–87.

Inverse condemnation, on the other hand, provides a remedy that amounts to strict liability against the government without any benefit of legislative gravity or deliberation.[11] Because of the presumption against the waiver of sovereign immunity, courts must be cautious in extending strict liability without a clear directive from the Legislature.[12]

In *City of Pasadena v. Superior Court*,[13] the extremes of inverse condemnation appear writ large, i.e., full-fledged strict liability against the government.[14] That means liability without any need to prove carelessness or fault, a standard usually reserved for "hazardous" activities.[15] Such an extreme standard is an indication that it is time to end the damages clause experiment[16] and to reformulate an appropriate eminent domain standard.

Part I of this article explores the history of eminent domain and how and why California introduced a damages clause to its constitution.[17] Part II tracks and analyzes the modern case law, showing that the current doctrine of inverse condemnation is exactly what the enactors of the damages clause feared that it would become — broad to the point of excess.[18] Part III contrasts the damages clause with the California Tort Claims Act, which is sufficient to render inverse condemnation no longer necessary.[19] Part IV explores the possible legislative and judicial solutions to remedy the loophole in California's sovereign immunity — abolition of the damages clause, judicial overruling of the overbroad case law, or specifying *intentional* damage in application of the damages clause.[20]

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[11] *See Pasadena,* 228 Cal. App 4th at 1234; *Albers,* 62 Cal. 2d at 262.

[12] *Cf.* Peter M. Gerhart, *The Death of Strict Liability,* 56 Buff. L. Rev. 245, 246 (2008) (arguing that strict liability is a "superfluous doctrinal container for addressing non-intentional harms," and "a doctrinal shadow" that should be done away with).

[13] *See generally Pasadena,* 228 Cal. App. 4th (considering whether a street tree, maintained by the city, that fell on a private house during a windstorm may create an action in inverse condemnation).

[14] *See id.*

[15] *See Strict Liability Definition,* BusinessDictionary.com, http://www.businessdictionary.com/definition/strict-liability.html (last visited Jan. 27, 2015).

[16] *See infra* Part II.B.

[17] *See* discussion *infra* Part I.

[18] *See* discussion *infra* Part II.

[19] *See* discussion *infra* Part III.

[20] *See* discussion *infra* Part IV.

I. THE "DAMAGES CLAUSE"

Any child can describe the rank unfairness of having something taken away. And we all know that as one matures, "takings" don't get any sweeter, even when provided with some compensation. Perhaps that explains why eminent domain tends to draw public scrutiny and, often, public ire.[21] The furious legislative scrambling after *Kelo v. City of New London,*[22] probably the most attention-grabbing, modern eminent domain case from the U.S. Supreme Court, evinced the population's demand in this area for transparency and protection.[23] *Kelo* held broadly that so long as a government has a legitimate public purpose, it may exercise its eminent domain power.[24] The Court referenced the "hardship that condemnations may entail," but it also recognized that a state's citizens are free to place further restrictions on the power of their state to "take" property.[25]

As recognized in *Kelo,* states can go beyond the protection of the federal constitution by "carefully limit[ing] the grounds upon which takings may be exercised."[26] In 1870, Illinois did exactly that — providing in the Illinois Constitution that "property could not be taken *or damaged* for public use without just compensation."[27] The State of Illinois thereby enacted the nation's first damages clause.[28] California, along with about half of the other states, soon followed suit.[29] Since then, California's damages clause has blazed a trail of case law leading to the vast expansion of inverse condemnation claims and an unjustified and unintended infringement on the State's sovereign immunity.[30]

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[21] *See, e.g.,* Thomas J. Miletic, Comment, *One Step Forward, Two Steps Back: How California's 2008 Constitutional Amendment Changed the State's Eminent Domain Power,* 39 Sw. L. Rev. 209, 211 (2009) (pointing out how an eminent domain case drew anger and political reaction).

[22] Kelo v. City of New London, 545 U.S. 469 (2005).

[23] *See* Miletic, *supra* note 21, at 211.

[24] *See Kelo,* 545 U.S. at 488–89.

[25] *See id.* at 489.

[26] *Id.*

[27] Ill. Const. Art. I § 15 (2014) (emphasis added).

[28] *See* David Schultz, *Taking of Private Property for Public Use, in* 2A Nichols on Eminent Domain § 6.01 (2014); *see also* Ill. Const. art. II, § 13 (1870).

[29] *Id.*

[30] *E.g.,* City of Pasadena v. Superior Court, 228 Cal. App. 4th 1228, 1234 (2014); Regency Outdoor Adver., Inc. v. City of Los Angeles, 39 Cal. 4th 507, 515–16 (2006);

A. THE HISTORY OF EMINENT DOMAIN

Dutch natural law philosopher Hugo Grotius coined the phrase "eminent domain" in the early 1600s to describe the inherent power of governments to take property.[31] British common law firmly established this power, which immigrated to the United States with the colonists.[32] Well before ratification of the Constitution, colonial governments routinely took private property.[33]

As ratified, the Fifth Amendment states, "nor shall private property be taken for public use, without just compensation."[34] This "just compensation requirement," which goes hand in hand with the modern understanding of eminent domain, was practically nonexistent in colonial America.[35] In fact, no state pursued the requirement's inclusion in the ratified Bill of Rights.[36] The just compensation requirement was proposed by James Madison in order to hinder the ability of the national government to take property wantonly, as was routinely done throughout the colonies.[37] "The rights of property," he wrote, "are committed into the same hands with the personal rights. Some attention ought, therefore, to be paid to property in the choice of those hands."[38] Thus, given the common law background, the Fifth Amendment does not create or grant the power of eminent domain — an inherent power of government — but limits such power by requiring just compensation.[39]

In the following century, the courts applied the just compensation clause restrictively and for the most part limited it to straightforward eminent domain proceedings.[40] The concept of inverse condemnation,

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Customer Co. v. City of Sacramento, 10 Cal. 4th 368, 376–77 (1995).

31 Daniel P. Dalton, *A History of Eminent Domain,* Pub. Corp. L.Q., Fall 2006 1, 1.

32 *Id.*

33 *Id.* at 3.

34 U.S. Const. amend. V.

35 *Id.*

36 William M. Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment,* 94 Yale L.J. 694, 708 (1985).

37 *See* Dalton, *supra* note 31, at 4.

38 The Federalist No. 54 (James Madison).

39 *See* Peter J. Kulick, *Rolling the Dice: Determining Public Use in Order to Effectuate a "Public-Private Taking" — A Proposal to Redefine "Public Use",* 2000 L. Rev. Mich. St. U. Det. C.L. 639, 644 (2000).

40 *See* Jed Rubenfeld, *Usings,* 102 Yale L.J. 1077, 1082 (1993).

however, was created to allow compensation under a unique situation: when the government took property but failed to initiate the proper proceedings.[41] Through the nineteenth century, inverse condemnation suits arose occasionally, but courts decided them narrowly along strict principles, namely limiting a "taking" to "the actual physical appropriation of property or a divesting of title."[42]

B. THE PURPOSE OF THE "DAMAGES CLAUSE"

In 1879, just compensation for the governmental taking of land in California, as at common law, was restricted to a physical invasion of property.[43] The Fourteenth Amendment incorporates the Fifth Amendment protections under the takings clause and applies them to the states.[44] As mentioned, however, states can go beyond the federal protections.[45] The California Constitutional Convention of 1878–1879 did exactly that by broadening the reach of the just compensation clause, enacting article 1 section 19 of the California Constitution which reads in relevant part: "Private property may be taken or damaged for a public use and only when just compensation . . . has first been paid to . . . the owner."[46] The addition is referred to as the "damages clause."[47]

At the time of the damages clause's enactment in 1879, there were concerns among the legislators regarding its potential application.[48] Delegate Samuel M. Wilson of San Francisco pointed out that the Committee of the Whole had thoroughly discussed the question and rejected the addition.[49] Unfortunately, the records of the Committee of the Whole's debate (and

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41 *See id.*

42 *Id.*

43 Customer Co. v. City of Sacramento, 10 Cal. 4th 368, 379 (1995).

44 *See, e.g.,* Agins v. Tiburon, 447 U.S. 255, 257 (1980); Dolan v. City of Tigard, 512 U.S. 374, 406 (1994).

45 *See* Kelo v. City of New London, 545 U.S. 469, 489 (2005).

46 CAL. CONST. art. I § 19 (2014).

47 *See Customer Co.,* 10 Cal. 4th at 379; *see also* Schultz, *supra* note 28.

48 WILLIS & STOCKTON, *supra* note 5, at 1190 (debating the merits of including "or damaged" in the eminent domain provision).

49 *Id.; see generally Inventory of the Working Papers of the 1878–1879 Constitutional Convention,* CAL. STATE ARCHIVES 53 app. (1993), https://www.sos.ca.gov/archives/collections/1879/archive/1879-finding-aid.pdf (listing the full names of the constitutional delegates).

therefore the exact rationale for that conclusion) do not exist, as the Constitutional Convention voted on the sixth day of the convention against employing a shorthand reporter.[50]

Some of the indicated reasons for enacting a damages clause included protecting citizens against situations where state action might damage a home by public use or economic change rather than physical damage.[51] Delegate Wilson recognized the danger of a broad interpretation of the damages clause:

> Now, to add this element of damage is to enter into a new subject. It is opening up a new question which has no limit. You take the case of street improvement, and this question of damage will open up a very wide field for discussion. . . . I regard it as very dangerous to undertake to enter into a new field.[52]

These delegates clearly recognized that inclusion of a damages clause could open up a new and sweeping area of law far beyond the justice that they could hope to bring about.[53]

Delegate John S. Hager, a proponent of the damages clause, cited a particular situation in San Francisco where the Legislature authorized the cutting of a street immediately adjacent to and between houses.[54] The construction project left houses on either side of the street high above the street level and in danger of sliding off those newly made cliffs.[55] Delegate Morris M. Estee further explained that the houses were "absolutely destroyed, and yet not a foot taken."[56] In light of this example, Delegate Estee concluded: "when a

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[50] *See Constitutional Convention: Sixth Day,* The Sacramento Bee, Oct. 4, 1878, (Second Edition) (While some delegates stood up "manfully" for the reporters and printers, others refused to "rob the people by having a mass of useless trash written and printed." Delegate Dowling of San Francisco, "in a fiery, energetic manner," added that he would not want to "fan[] the vanity of some long-winded and eloquent members by having their speeches printed.")

[51] Willis & Stockton, *supra* note 5, at 1190.

[52] *Id.*

[53] *See id.*

[54] *Id.; see generally Inventory of the Working Papers, supra* note 49 (listing the full names of the constitutional delegates).

[55] Willis & Stockton, *supra* note 5, at 1190.

[56] *Id.; see generally Inventory of the Working Papers, supra* note 49 (listing the full names of the constitutional delegates).

man's property is damaged it ought to be paid for. . . . I think it is the best we can get."[57] At a time when no other options for compensation existed, that might very well have been true. Hence, the amendment passed 62 to 28.[58]

In opposition, Delegate Wilson pointed out that the proponents' intentions were totally unfounded on any hard evidence and their damages clause would be little more than an experiment,[59] an experiment that other states were already trying with, as yet, no conclusive results.[60] It would take time to see whether such an addition brought about the justice hoped for or whether it opened the doors for something totally unintended.[61] Delegate Wilson concluded ominously, "In twenty years from now our children can refer to them and if they have worked well, that will be an argument."[62]

As the damages clause's effect on inverse condemnation actions has grown, it is time to consider which side was correct in 1879. As Justice Brandeis stated in 1932, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[63] As far as the coupling of inverse condemnation and the damages clause, it is time to end the experiment.

II. GROWTH OF A LOOPHOLE: THE CURRENT STATE OF INVERSE CONDEMNATION IN CALIFORNIA

Six years after the ratification of the damages clause, the Supreme Court of California considered it for the first time in *Reardon v. San Francisco*.[64] The court began by considering the case's outcome without applying the new constitutional amendment.[65] They remarked that the law was "well settled,"

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[57] Willis & Stockton, *supra* note 5, at 1190.

[58] *Id.*

[59] *See id.*

[60] *See id.*

[61] *See id.*

[62] *Id.*

[63] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

[64] Reardon v. San Francisco, 66 Cal. 492, 501 (1885).

[65] *Id.* at 497–98.

and that municipal work done lawfully incurs no liability.[66] The Court posited that the traditional doctrine, while appearing unjust, "rests upon the soundest legal reason."[67] While improvements are ultimately the responsibility of the state when made for the public trust, "it is the prerogative of the state to be exempt from coercion by suit, except by its own consent."[68] *Reardon* recognized that any recovery in such a situation would be, by definition, a direct contradiction of sovereign immunity.[69] In sum, the Court determined that the new damages clause presented such a waiver.[70]

The Court then shifted focus to determine what exactly the delegates intended the new "damages" to include.[71] After all, it must mean something more than what the takings clause had already protected: "it will occur to any one reflecting on the import of the clause, that if it is not an additional guaranty to the common and usual one, its insertion was idle and unmeaning."[72] At common law, there was a high burden on the complaining party because the property owner yields his right "to the promotion and advancement of the public good."[73] California's damages clause, however, failed to define the causal requirement.[74] In addition, if the standard were to mirror that of recovery from private parties at common law, it would only allow recovery for negligence — damage done with "usual care and skill" being "*damnum absque injuria*," or damage that does not violate a legal right.[75] The court determined that the damages clause does not simply mirror private rights of recovery at common law.[76] It found that the clause provides compensation for an owner "where the damage is directly inflicted, or inflicted by want of care and skill, as where the damages

66 *Id.* at 497.
67 *Id.* at 498.
68 *Id.*
69 *See id.*
70 *See id.* at 500–01.
71 *Id.* at 501.
72 *Id.* at 502.
73 *Id.* at 504.
74 *See id.*
75 *Id.; see Damnum Absque Injuria Definition,* Merriam–Webster, http://www.merriam-webster.com/dictionary/damnum%20absque%20injuria (last visited Oct. 19, 2014).
76 *Reardon,* 66 Cal. at 501.

are consequential, and for which damages he had no right of recovery at the common law."[77]

The rule set forth in *Reardon* proved the most prolific interpretation of the new damages provision in the following years.[78] In 1965, *Albers v. County of Los Angeles*[79] cited *Reardon* in a holding that would affect inverse condemnation suits in California to the present day.[80] Discussing the construction of public improvements, the Court held that any physical injury to real property "proximately caused by the improvement as deliberately designed and constructed" warranted liability, no matter whether it was foreseeable.[81] The Court minimized reasons for opposing this formulation and decided that our system does not give enough deference to individuals as opposed to communities.[82] For their sake, the government should pay for property "which it destroys or impairs the value."[83] Thus, *Albers* created a general rule of strict liability that continues to persist for inverse condemnation damages.[84] Interestingly, while *Albers* provides the applicable rule, the case itself never rises to naming it "strict liability."[85] Rather, in *Akins v. State,*[86] the court introduces the term by closely analyzing the rule set forth in *Albers* and referring to it as "a general rule of strict liability."[87]

In 1941, an important and controversial exception to this strict liability rule originated in *Archer v. Los Angeles*.[88] *Archer* narrowed the *Reardon* rule, finding that the damages clause did not create an open bill to recover

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77 *Id.* at 505.

78 *See* Albers v. Cnty. of Los Angeles, 62 Cal. 2d 250, 257 (1965). For cases between *Reardon* and *Albers* that followed *Reardon's* rule, see also, e.g., *Youngblood v. Los Angeles Cnty. Flood Control Dist.,* 56 Cal. 2d 603, 608 (1961); *People v. Symons,* 54 Cal. 2d 855, 862 (1960); *Bauer v. Cnty. of Ventura,* 45 Cal. 2d 276, 283 (1955); *Clement v. State Reclamation Bd.,* 35 Cal. 2d 628, 636 (1950).

79 *Albers,* 62 Cal. 2d. 250.

80 *Id.* at 257.

81 *Id.* at 263–64.

82 *See id.* at 263.

83 *Id.*

84 *See* Akins v. State, 61 Cal. App. 4th 1, 20 (1998).

85 *See generally Albers,* 62 Cal. 2d (abstaining from use of the term "strict liability" in the entirety of the opinion).

86 61 Cal. App. 4th 1.

87 *Id.* at 20.

88 19 Cal. 2d 19 (1941).

from the government.[89] The Court reasoned that the damages clause did not create a new cause of action "but [gave] a remedy for a cause of action that would otherwise exist,"[90] meaning, the Court would assess the state's liability in the same manner as the liability of a similarly situated private person.[91] Thus, under *Archer,* parties suing government entities "have no right to compensation under article I, section 14, if the injury is one that a private party would have the right to inflict without incurring liability."[92] Later, *Belair v. Riverside County Flood Control Dist.* pointed out that *Archer* was little more than a narrow exception to the *Albers* rule.[93] The Court recognized that "different policy considerations . . . inform the public and the private spheres."[94] It held that within *Archer*'s exception for "privileged activity," the government entity "must at least act reasonably and non-negligently" to avoid liability — seemingly disregarding the strict liability standard.[95]

Modern cases have further broadened the recovery rights under the doctrine of inverse condemnation. Considering the judicial history of the damages clause in inverse condemnation actions, courts have summarized that it "encompasses special and direct damage to adjacent property resulting from the construction of public improvements."[96] When the incidental consequence of deliberate government action is physical injury, the damaged or destroyed property can be considered "appropriated for 'public use.'"[97] In order to recover in such a situation, the defendant government must have participated in "planning, approval, construction, or operation of a *public project or improvement* which proximately caused injury to plaintiff's property."[98]

This standard presents a substantial open issue in modern inverse condemnation proceedings: What exactly is a "public project"?[99] In 2006, in

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89 *See id.* at 24.

90 *Id.*

91 *See id.*

92 *Id.*

93 *See* Belair v. Riverside Cnty. Flood Control Dist., 47 Cal. 3d 550, 563 (1988).

94 *Id.* at 565.

95 *Id.*

96 Customer Co. v. City of Sacramento, 10 Cal. 4th 368, 380 (1995).

97 *Id.* at 415 n.7 (Baxter, J., dissenting) (emphasis added).

98 Wildensten v. E. Bay Reg'l Park Dist. 231 Cal. App. 3d 976, 979–80 (1991) (emphasis added).

99 *E.g.,* City of Pasadena v. Superior Court, 228 Cal. App. 4th 1228, 1235 (2014); Regency Outdoor Adver., Inc. v. City of Los Angeles, 39 Cal. 4th 507, 522 (2006).

Regency Outdoor Advertising, Inc. v. City of Los Angeles,[100] the Court's ruling depended on whether trees planted by the city along a public road were a "public Project."[101] Regency, an owner of roadside billboards, brought an inverse condemnation action against Los Angeles after the city planted palm trees that blocked the view of some of its billboards.[102] The Ccourt found that "[i]f [a] street is improved so as to be more useful, or ornamented so as to be more beautiful, the public is benefited generally."[103] Further, it found that "[t]he planting of trees along a road is, in general, fully 'consistent with [the road's] use as an open public street,' and in fact may enhance both travel and commerce along the street."[104] The Court concluded that the city was not liable because Regency had no right to visibility, but it found that the planting of trees still amounted to a public work.[105]

As mentioned, *City of Pasadena v. Superior Court* demonstrates what has become a broad and problematic interpretation of the damages clause.[106] In *Pasadena,* a severe windstorm toppled a tree lining a public street, damaging the home of James O'Halloran.[107] His insurance company brought an inverse condemnation action, requiring proof that the tree was part of a public improvement and that it proximately caused the damage.[108] *Pasadena* relied heavily on those statements in *Regency* where the Court found that city-planted trees were part of a public improvement.[109] In light of *Regency,* the *Pasadena* court concluded that whether trees are a public improvement was a triable issue of fact.[110]

After determining that the tree could amount to a public improvement, the court turned its attention to proximate cause and decided that it was not relevant to their review because the appellant failed to preserve the issue.[111]

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100 *Regency,* 39 Cal. 4th 507.
101 *Id.* at 522.
102 *Id.* at 512.
103 *Id.* at 522.
104 *Id.*
105 *See id.*
106 *See supra* notes 13–14 and accompanying text.
107 *Id.* at 1231.
108 *Id.* at 1236.
109 City of Pasadena v. Superior Court, 228 Cal. App. 4th 1228, 1235 (2014).
110 *Id.* at 1232, 1235.
111 *Id.*

Nonetheless, the court took the opportunity to clarify the *Albers* test, stating that "injury . . . proximately caused by the improvement as deliberately designed and constructed" is sufficient for recovery.[112] Under the test, if a public improvement is "deliberately designed," it is the proximate cause of all damage incident to its existence.[113]

Through this progression of the case law, inverse condemnation has grown to strict liability against government entities for any damage caused by a public work.[114] Society should encourage cities to make safe and non-negligent public improvements; currently the law is doing otherwise. In sum, under the current law, cities should think twice before planting reasonably safe trees.

III. INVERSE CONDEMNATION VERSUS THE CALIFORNIA GOVERNMENT TORT CLAIMS ACT

The enactment of the damages clause clearly indicates the value that the delegates of the 1878–79 California Constitutional Convention attached to private property.[115] Because there was no possibility for a tort claim at the time, this seemed an appropriate and narrow way to mete out justice.[116] Since *Albers,* however, far from simply providing landowners the right to recover for governmentally damaged property (as Delegate Hager's San Francisco example suggested), the damages clause has reached beyond the traditional bounds of tort law.[117] The negligence principle dominates tort law and does the work of asking questions of reasonability.[118] Those questions function as a safeguard for defendants — after all, it makes sense that a person should not be liable in a situation in which

112 *Id.* (quoting Albers v. Cnty. of Los Angeles, 62 Cal. 2d 250, 263 (1965)).

113 *Id.*

114 *See id.;* Akins v. State, 61 Cal. App. 4th 1, 20 (1998); *Albers,* 62 Cal. 2d at 263.

115 *See supra* Part I.B.

116 *See* Willis & Stockton, *supra* note 5, at 1190.

117 *See generally supra* notes 54–55 and accompanying text (summarizing Delegate Hager's point); *Albers,* 62 Cal. 2d (broadening inverse condemnation claims to strict liability).

118 *See* Gerhart, *supra* note 12, at 246.

they acted without malice or without carelessness.[119] Within the realm of inverse condemnation, strict liability robs governmental defendants of those safeguards.[120]

Even more glaring is the issue of justice. While justice demanded a remedy for property owners in 1879, this was largely because no other option existed and the value of personal property was great enough to create one.[121] Today, another remedy does exist, and its contours are more reasonably measured (by standard negligence principles) to ensure just recovery.[122]

A. SOVEREIGN IMMUNITY

Whether recovery comes by tort or by inverse condemnation, the traditional obstacle for such claims was the state's sovereign immunity. The doctrine of sovereign immunity derives from the British prohibition on suits against the crown.[123] While the colonies differed in their adoption of the doctrine, the issue was of enough concern that it sparked extensive debate concerning its inclusion in the Constitution.[124] At the framing, the degree to which the Constitution, specifically article III, acknowledged sovereign immunity remained uncertain.[125] The Supreme Court's 1793 decision in *Chisholm v. Georgia*[126] resolved some of the uncertainty.[127] In *Chisholm,* drawing from language of article III, the Court allowed a South Carolina citizen to file suit against the State of Georgia.[128] The decision provoked outrage in Congress — it overturned the result with passage of the Eleventh Amendment less than three weeks later.[129]

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119 *See generally* William L. Prosser, Handbook of the Law of Torts 4 (1941) (pointing out that torts include direct interferences with the person and various forms of negligence).

120 *See supra* Part II.

121 *See* Willis & Stockton, *supra* note 5, at 1190.

122 *See* California Tort Claims Act, Cal. Gov't. Code § 810 (2014).

123 *See* William Blackstone, Commentaries *244.

124 Katherine Florey, *Insufficiently Jurisdictional: The Case Against Treating State Sovereign Immunity as an Article III Doctrine,* 92 Calif. L. Rev. 1375, 1385–86 (2004) [hereinafter *Insufficiently Jurisdictional*].

125 *See id.* at 1386.

126 2 U.S. 419 (1793).

127 *See* Florey, *Insufficiently Jurisdictional, supra* note 124, at 1386.

128 *See id.*

129 *See id.* at 1386–87.

The Supreme Court had little occasion to consider the Eleventh Amendment's language, "that no state shall be liable to be made a party defendant in any of the judicial courts . . . at the suit of any person or persons," until the late nineteenth century.[130] In the definitive case of the time, and since, *Hans v. Louisiana*[131] held in 1890 that the doctrine of sovereign immunity completely barred suits by private citizens against states.[132] While some authority has eroded the absolute nature of the *Hans* decision,[133] *Seminole Tribe v. Florida* reaffirmed its formulation of state sovereign immunity in 1996.[134] The Supreme Court has thus repeatedly affirmed, in some form or another since the adoption of the Constitution, that states have inherent immunity from suit by private citizens.[135] In a situation where the government damaged the property of a private owner, sovereign immunity would allow absolutely no recourse.[136]

The ideals of democracy do not seem to fit well with that exclusion, based heavily on the conception that the state, like the British king, was technically incapable of doing any wrong.[137] Called the "sovereign-essentialist" view of sovereign immunity, this is an open admission that this doctrine, in many respects, is basically equivalent to the conceit that the sovereign is above the law.[138] While this axiom as a historical justification

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130 *See id*. at 1387 (quoting U.S. Const. amend. XI).

131 Hans v. Louisiana 134 U.S. 1 (1890).

132 *See* Florey, *Insufficiently Jurisdictional, supra* note 124, at 1388–89.

133 *See generally* Ex parte Young, 209 U.S. 123 (1908) (holding that state officials may be sued in federal court for injunctive relief in order to prevent a continuing violation of federal law).

134 *See* Florey, *Insufficiently Jurisdictional, supra* note 124, at 1389 (citing Seminole Tribe v. Florida, 517 U.S. 44 (1996)).

135 *E.g., Seminole Tribe,* 517 U.S. at 54; *Hans,* 134 U.S. at 10; Chisholm v. Georgia, 2 U.S. 419, 452 (1793) (holding that states have such immunity but have waived it as a concession to the federal government).

136 *See, e.g.,* U.S. Const. amend. XI ("no state shall be liable . . . at the suit of any person or persons"; *Seminole Tribe,* 517 U.S. (affirming that suits against unconsenting states are barred by the Constitution); *Hans,* 134 U.S. (holding that the Supreme Court cannot exercise jurisdiction over any case in which a state is sued).

137 *See* William Blackstone, Commentaries *237; Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine,* 43 Wake Forest L. Rev. 765, 785 (2008) [hereinafter *Penumbras*].

138 *See* Florey, *Penumbras, supra* note 137, at 786.

for sovereign immunity seems to have been generally accepted, its transition from king's prerogative to the American state is without "adequate explanation."[139]

A second explanation for the necessity of state sovereign immunity is that the state, the authority that creates the law, cannot be subject to that same law.[140] This theory is attributed to Justice Holmes who advocated its practical rationale.[141] However, commentators have claimed that the rationale is "legally and historically unsound," not to mention inappropriate "when every civilized community . . . should by statute consent to be sued and to admit its pecuniary responsibility for the torts of its agents."[142]

In that vein, while "[t]he Government is not liable to suit unless it consents thereto,"[143] the ideals of justice and democracy allow (and possibly encourage) government consent. For example, people will want a possibility of recovery if the government damages their property and are therefore more likely to vote in favor of candidates and measures that allow that recovery. As the logic goes, government exists for the benefit of the whole public and it is reasonable to expect that the whole public bear some of the burden of the injuries wrongly inflicted by the government.[144] Thus, it might be reasonable to expect the government to waive its sovereign immunity in situations of great public interest — like the damage of private property.[145] Of course, like much of the law, the manner in which this is accomplished spans a broad spectrum of possibilities, some more problematic and unjust than others.

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139 Edwin M. Borchard, *Governmental Responsibility in Tort, IV,* 36 Yale L.J. 1, 33 (1926).

140 *See id.* at 17.

141 *See* Edwin M. Borchard, *Governmental Responsibility in Tort, V,* 36 Yale L.J. 757, 757 (1927).

142 *Id.* at 757–58.

143 Price v. United States, 174 U.S. 373, 375–76 (1899).

144 *See* Parrish, *supra* note 6, at 282. Ironically, *Pasadena v. Superior Court*'s original plaintiff was the insurance company covering the damaged home. *See* 228 Cal. App. 4th 1228, 1228 (2014). So the argument for the spreading of the burden of the injuries is something of a moot point when insurance exists to cover them. While this argument would carry more weight for an uninsured homeowner, the reality that the insurance company can wield this strict liability against governments is significantly more ominous.

145 *E.g.,* California Tort Claims Act, Cal. Gov't. Code §§ 810 *et seq.* (Lexis 2014).

B. CALIFORNIA GOVERNMENT TORT CLAIMS ACT

The California delegates clearly considered private property important enough in 1879 for California to waive sovereign immunity in favor of recovery for intentional takings and damage.[146] Other types of injuries were not within the waiver; for example, personal injuries caused by the state such as medical negligence in a state hospital or defamation by public school district employees.[147] It was not until 1963 that the state formally recognized that other harms caused by the government merited similar protections to property.[148]

Two separate California Supreme Court decisions in 1961 paved the way for this change by effectively abolishing sovereign immunity by judicial decision.[149] *Muskopf v. Corning Hospital District*[150] addressed the question of sovereign immunity head-on when the plaintiff argued that the doctrine should be discarded.[151] The plaintiff filed suit against the hospital district, claiming that the hospital's negligence resulted in further injury of her already injured hip.[152] The hospital district demurred on the ground that it was immune as a state agency exercising a governmental function.[153] The trial court sustained the demurrer.[154] Finding injustice, the California Supreme Court discarded the traditional sovereign immunity doctrine, calling it "an anachronism, without rational basis, [that] has existed only by the force of inertia."[155]

In *Lipman v. Brisbane Elementary School District,*[156] the Court made a similar holding.[157] Following *Lipman,* the California Legislature enacted a moratorium statute suspending the effects of both decisions while they

146 *See* Willis & Stockton, *supra* note 5, at 1190.

147 *See* Lipman v. Brisbane Elementary Sch. Dist., 11 Cal. Rptr. 97, 98 (1961); Muskopf v. Corning Hosp. Dist., 11 Cal. Rptr. 89, 90 (1961).

148 *See* Parrish, *supra* note 6, at 281.

149 *See id.* at 281–82.

150 *Muskopf*, 11 Cal. Rptr. 89.

151 *See id.* at 90.

152 *See id.*

153 *See id.*

154 *See id.*

155 *Id.* at 92.

156 11 Cal. Rptr. 97, 98 (1961).

157 *See id.* at 101.

studied whether the government should indeed waive sovereign immunity in the context of valid tortious injury caused by the state.[158] The Legislature appointed a Law Revision Commission and, while the Commission acknowledged the need to limit governmental liability, it recognized the harshness and injustice of absolute immunity.[159] It offered that justice demanded compensation for injuries that were the result of wrongful or negligent acts or omissions, regardless of whether the government was responsible for such actions.[160] Accordingly, they recommended the Legislature follow the lead of the California Supreme Court in *Muskopf* and *Lipman* and abolish sovereign immunity.[161]

The abolition and resulting structural change of this decree stirred up significant policy debates.[162] Arguments against liability for tort focused on separation of powers and the handicapping of governmental actors for fear of liability.[163] On the other side, liability could also deter negligent activity and "manifestly" create fairness by eliminating a governmental "license to harm."[164] The Legislature balanced these considerations with the passage of the California Tort Claims Act,[165] though favoring liability over immunity.[166] The Act provides that "liability for resulting harm is the rule, and immunity is the exception,"[167] and it advances two theories of liability.[168] Government actors may be either directly liable for failing to discharge a mandatory duty or derivatively liable for the acts or omissions of their employees.[169]

Recalling the initial question — to what extent does the California Tort Claims Act provide relief for damage to private property? — The government entity does not damage property by failing to discharge a mandatory

158 *See* Parrish, *supra* note 6, at 282.
159 *See id.*
160 *See id.*
161 *See id.* at 282–83.
162 *See id.* at 283.
163 *See id.* at 285–86.
164 *See id.* at 286–87.
165 Cal. Gov't Code §§ 810 *et seq.* (Lexis 2014).
166 *See id.* at 287.
167 *Id.* (quoting Scott v. Cnty. of Los Angeles, 32 Cal. Rptr. 2d 643, 652 (1994))
168 *Id.* at 288.
169 *Id.*

duty, and one cannot assert a negligence cause of action directly against a government entity.[170] Instead, one can only sue the government by way of the negligent acts or omissions of governmental employees.[171] The Act provides that their government employers are liable under the doctrine of *respondeat superior* for negligent action within the scope of their employment.[172] Thus, general tort law considerations such as the duty of care — which contains the requirement of foreseeability — define liability under the California Tort Claims Act.[173]

C. COMPARISON OF INVERSE CONDEMNATION AND GOVERNMENT TORT CLAIMS

Liability differs under the laws of inverse condemnation and Government Tort Claims. The first difference comes in the form of governmental protections in the California Tort Claims Act.[174] After weighing the policy concerns surrounding the waiver of sovereign immunity, the Legislature allowed suit against the government for tortious acts but reserved certain immunities and protections for the state.[175] In this way, maintaining some thoughtful immunity seeks to protect government's ability to pursue public works without the chilling effect of possible strict liability.[176] Comparatively, courts ruling on inverse condemnation actions need not consider such immunities because it supersedes them.[177]

A second difference comes from the fact that one remedy is grounded in a statute and the other in the California Constitution. Addressing the Constitutional right directly, *Rose v. State* points out that it is "elementary that the legislature by statutory enactment may not abrogate or deny

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170 *See* Arvo Van Alstyne updated by John P. Devine, *General Principles of Public Entity and Public Employee Liability, in* California Government Tort Liability § 9.50 (4th ed. 2014) [hereinafter *Public Liability*].

171 *See id.*

172 *See id.* at § 9.7; *see also* Gov't § 815.2(a).

173 *See* Van Alstyne, *Public Liability, supra* note 170,at § 9.50.

174 *See* Van Alstyne updated by John P. Devine, *General Immunities of Public Entities and Employees, in* California Government Tort Liability § 10.1 (4th ed. 2014).

175 *See, e.g.,* Parrish, *supra* note 6, at 287–88 (mentioning public employee discretionary immunity and alluding to other "strictly construed" governmental immunities).

176 *See id.* at 285.

177 *See* Van Alstyne, *Public Liability, supra* note 170, at § 9.62.

a right granted by the Constitution."[178] In that vein, "the framers of the Constitution did not intend to grant a right which the legislature by its refusal or neglect to enact proper remedial machinery therefor might take away or deny."[179]

As far as similarities, both causes of action require "proximate causation" as one of their elements.[180] However, inverse condemnation has no requirement for breach of a standard of care or foreseeability.[181] "Thus *any* actual physical injury to real property proximately caused by a public improvement as deliberately designed and constructed is compensable [in inverse condemnation]."[182]

Inverse condemnation actions apply to considerably more specific situations than Government Tort Claims, yet policy considerations behind them are practically indistinguishable.[183] Nevertheless, courts are careful to distinguish between them in their decisions. *Pac. Bell v. City of San Diego*[184] points out the "public use" language in the Constitution as the major difference,[185] that is, "if the injury is a result of dangers *inherent in the construction of the public improvement* as distinguished from dangers *arising from the negligent operation of the improvement*."[186] The Court provides an example from a case involving flooded property.[187] If an act like forgetting to close a sluice gate damaged the property, that act would amount to negligence.[188] If a deliberate act carried out with the purpose of fulfilling a public object or project, like raising a ditch bank, caused

178 123 P.2d 505, 513 (1942).

179 *Id.*

180 Van Alstyne, *Public Liability, supra* note 170, at § 9.62.

181 *See* Aetna Life & Cas. Co. v. City of Los Angeles, 216 Cal. Rptr. 831, 835 (1985) (citing *Albers*).

182 *Id.*

183 *See, e.g.,* Albers v. Cnty. of Los Angeles, 62 Cal. 2d 250, 263–64 (1965) (applying inverse condemnation analysis to public works as deliberately designed and constructed); Van Alstyne, *Public Liability, supra* note 170, at § 9.50 (indicating that the Act applies to situations of governmental employee negligence).

184 96 Cal. Rptr. 2d 897 (Cal. Ct. App. 2000).

185 *Id.* at 905.

186 *Id.* (quoting *House v. L.A. Cnty. Flood Control Dist.,* 153 P.2d 950, 956 (Cal. 1944) (Traynor, J., concurring) (italics in original)).

187 *Id.*

188 *Id.*

the damage, that act would fit the scope of inverse condemnation.[189] "The damage to property [in the flood scenario] resulted not from immediate carelessness but from a failure to appreciate the probability that, functioning as deliberately conceived, the public improvement as altered and maintained would result in some damage to private property."[190] In other words, inverse condemnation only applies to situations where public works damage private property without any negligence.

1. Discarding Mens Rea

A fair counterargument points out that these two legal avenues necessarily address distinct legal situations. If inverse condemnation and Government Tort Claims actually perform two distinct functions, it still begs the question whether the older protection (inverse condemnation) is still necessary in a society that allows tort claims against the government. Even if these two methods for recovery occupy their own unique situations, the problem is that inverse condemnation has run amok with strict liability. *Pac. Bell's* reasoning points to inverse condemnation's appropriateness because it functions in situations of "a failure to appreciate the probability that, functioning as deliberately conceived, the public improvement as altered and maintained would result in some damage to private property."[191] According to the Court, damage resulting from negligence has no place in an inverse condemnation proceeding.[192]

This distinction only makes sense as long as the inverse condemnation occurs as "a deliberate act."[193] The government must have intended to do or create something and then gone about its implementation, thus fulfilling both "deliberate" and "act." Similarly, the 1879 delegates referenced a deliberate act — the grading of a street that rendered adjacent property worthless — as impetus for the damages clause in the first place.[194] However, in inverse condemnation, this deliberate act is not the same as a *mens rea* —

189 *See id.*

190 *Id.* (italics omitted).

191 *Id.* (quoting *Customer Co. v. City of Sacramento,* 10 Cal. 4th 368, 382 (1995)).

192 *See id.*

193 *See id.*

194 *See* Willis & Stockton, *supra* note 5, at 1190.

the intention to do wrong or to knowingly cause harm.[195] In contrast, some courts find that the *mens rea* required for a valid inverse condemnation action is "a failure to appreciate the probability that [the action] would result in some damage."[196] Thus, whenever the government acts intentionally, although non-negligently, it runs the risk of incurring strict liability under inverse condemnation.

Interpreting the cause of action to dispense with a *mens rea* requirement runs contrary to much of the legal system.[197] "[*Mens rea*] is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."[198] Courts should dispense with the requirement of *mens rea* only when there is "a clear legislative intention to do so."[199]

Such disregard of any *mens rea* requirement remains problematic in an inverse condemnation setting because, while those interpretive standards apply specifically to situations of strict liability, they also confine themselves to criminal law.[200] Not to mention, while exceptions are rare, they are restricted to " 'public welfare offenses', i.e., statutes whose purpose is regulation of 'industries, trades, properties or activities that affect public health, safety or welfare.' "[201] Thus, while inverse condemnation now amounts to strict liability, its being a civil cause of action means that *mens rea* is not necessarily an assumption of its construction. Even if that were the case, it would likely fall under the exception of "public welfare offenses," considering its strong public motive to protect private property.

2. The Effect of Strict Liability

Another counterargument reasons that the delegates intended whatever strong and broad protection for private property that arose from the damages clause. Whether or not the framers intended strict liability with no *mens rea* is a hard argument to make, given the little history left to attest

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195 *See Mens Rea Definition,* Merriam–Webster, http://www.merriam-webster.com/dictionary/mens%20rea (last visited Dec. 17, 2014).

196 *Pac. Bell,* 96 Cal. Rptr. 2d at 905 (quoting *Customer Co.,* 10 Cal. 4th at 382).

197 *See* United States v. Launder, 743 F.2d 686, 689 (9th Cir. 1984).

198 Morissette v. United States, 342 U.S. 246, 250 (1952).

199 *Launder,* 743 F.2d at 689.

200 *See id.*

201 *Id.*

to their intentions. That still leaves the question of whether a negligence regime would better support the justice they had in mind.[202] After all, the only intention that remaining history leaves for certain is that delegates seemed to find the social value of private property high enough to suspend sovereign immunity to protect it.[203]

Strict liability casts a wider net than ordinary negligence because it makes the actor responsible for all harm it proximately causes.[204] Even when the actor achieves a reasonable amount of care in the action, resulting damage falls within the scope of liability.[205] The goal in administering this type of liability is to impose an economic incentive to encourage safety through responsibility.[206] For the most part, the law confines strict liability torts to "ultrahazardous activities."[207]

Similarly, under the current law, inverse condemnation protects citizens of the state from property damage caused by non-negligent government actions.[208] Granted, if the government is engaging in inherently dangerous activities, perhaps it should be subject to a strict liability standard — but inverse condemnation proceedings can result for liability far beyond actions that are inherently dangerous.[209]

Even avoiding that implication, strict liability applies to situations where the risks created are so great that no reasonable care could make them unavoidable.[210] In such cases, residual risk amounts to little more than bad luck and lacks a clear rationale for why the cost of damage should fall on the injurer rather than the victim.[211] "If we are to give human agency a central role in our theory of torts . . . then we would want to think carefully about how we allocate the losses from risk that is beyond human agency."[212] Further, strict

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202 *See* Gerhart, *supra* note 12, at 246 (arguing that a negligence regime sufficiently accomplishes all the legitimate "work" that might be attributed to strict liability).

203 *See supra* Part I.B.

204 *See* Gerhart, *supra* note 12, at 251.

205 *See id.*

206 *See id.*

207 *Id.* at 247.

208 *See supra* Part III.C.1.

209 *E.g.,* City of Pasadena v. Superior Court, 228 Cal. App. 4th 1228, 1235 (2014); Regency Outdoor Adver. Inc. v. City of Los Angeles, 39 Cal. 4th 507, 522 (2006).

210 *See* Gerhart, *supra* note 12, at 264.

211 *See id.*

212 *Id.* at 269.

liability applies even in situations where an actor has made reasonable non-negligent decisions.[213] This is dangerous because it is "impossible to force people to make more than reasonable decisions."[214] Thus, the rule imposes a cost for activity but cannot make actors behave more than reasonably.[215] "[O]nce a reasonableness decision is made the expected harm is less than the cost of more precautions. To penalize the reasonable act runs the risk of losing the benefits of action without reducing the cost of the action."[216] In other words, applying this to inverse condemnation, strict liability could actually incentivize governments to provide less care in the construction of public works than under a standard of reasonableness.

IV. SOLUTIONS

One solution to the impropriety of strict liability inverse condemnation is to abolish it and allow property owners to recover as best they can with a government tort claim. The negligence standard rather than strict liability and the remnant possibilities of immunity would limit its application.[217] Additionally, it would avoid all the policy pitfalls and absurd incentives that the current strict liability scheme produces.[218] Cities could once again plant trees and build bridges without the concerns of strict liability.

Alternatively, the damages clause could operate under a modified negligence standard, either by some clarification to the amendment or by judicial ruling overturning *Albers* (which introduced strict liability to inverse condemnation).[219] If, indeed, the sanctity of private property remains a valid rationale for the damages clause, then a modified negligence standard would keep its constitutional status (avoiding the potential for legislative change[220]) while dealing with it more specifically than the broader California Tort

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213 *Id.* at 271.

214 *Id.* at 272.

215 *See id.*

216 *Id.* at 272–73.

217 *See* Van Alstyne, *Public Liability, supra* note 170,at § 9.50; *see, e.g.,* Parrish, *supra* note 6, at 287–88 (mentioning public employee discretionary immunity and alluding to other "strictly construed" governmental immunities).

218 *See supra* Part III.C.2.

219 *See supra* notes 79–87 and accompanying text.

220 *See supra* Part III.C.

Claims Act could. Such a standard, as advocated by Professor Gerhart, would not only consider traditional reasonableness but also activity-based reasonableness.[221] That additional consideration would ask "whether the defendant's activity-based decisions were reasonable."[222] Such a question could avoid the problem in the Tort Claims Act of no direct liability for government agencies.[223] By not simply confining recovery to injurious actions but broadening it to governmental decisions that brought those actions about, governments could be held liable for decisions that proximately damaged private property — so long as their reasonableness was weighed.[224]

A third option, and the one that seemingly conforms to the intent of the creators of the damages clause, is that only intentional damage be covered.[225] The example discussed by the 1879 delegates supports such an interpretation. There, as discussed above, the city cut a road between two rows of houses, suddenly setting them on ad hoc cliffs and destroying their utility and value.[226] The harm in their example was not attenuated — they based the damages clause on a situation foreseeable to the point of being intentional.[227] The courts have long recognized that such a high degree of certainty is equivalent to intentionality.[228] Based on the example and the presumption against the waiver of sovereign immunity, it is likely that the delegates only intended liability for governmental actions that knowingly caused harm to private property. Accordingly, limiting inverse condemnation to intentional or highly foreseeable damage would also effectively fix the problem.

V. CONCLUSION

California enacted a damages clause in order to fulfill a major function of the law — to prevent harm. However, years of inverse condemnation lawsuits and occasional overzealous judicial legislation have created a loophole in sovereign immunity. Inside that loophole, actions in inverse

221 *See* Gerhart, *supra* note 12, at 246.
222 *Id.*
223 *See id.*
224 *See supra* Part II.
225 *See* Willis & Stockton, *supra* note 5, at 1190.
226 *See supra* notes 54–58 and accompanying text.
227 *See supra* notes 54–58 and accompanying text.
228 *See* Model Penal Code § 2.02(2)(b)(ii) (2015).

condemnation are subject to a regime of strict liability with little functional rationale for its severity. The definition of "public work" applies so broadly that roadside trees falling can trigger this strict liability. Observers are left to wonder how far this ability to recover will extend. With no negligence at all, could governments be strictly liable for freak city bus accidents or levee breaks? For a bridge collapse during an earthquake? Without the traditional standards for negligence guiding these cases, governments could easily be on the hook for ever more outlandish damages, simply because damage was "proximately caused" by a public work.[229] A more appropriate way around the shield of sovereign immunity exists in modern law with the benefits of legislative gravity, standards of reasonableness, and occasional well-considered immunities.[230]

While the damages clause sought to protect the sanctity of private property, as an experiment in justice it went awry when it grew to liability on any government act that might damage property, whether foreseen or unforeseen, negligent or reasonable. Delegate Wilson argued that only time would be able to tell if the damages clause would grow into something unintended. Now, with the benefit of that time and hindsight, we see that it outgrew the intentions of the 1878–1879 delegates. It is time to close the loophole.

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229 *See* City of Pasadena v. Superior Court, 228 Cal. App. 4th 1228, 1235 (2014); Akins v. State, 61 Cal. App. 4th 2, 20 (1998); Albers v. Cnty. of Los Angeles, 62 Cal. 2d 250, 263 (1965).

230 California Tort Claims Act, Cal. Gov't. Code §§ 810 *et seq.* (Lexis 2014).